Neutral Citation Number: [2024] EWCA Civ 1554

Case No: CA-2023-002140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING

S BENCH DIVISION
Karen Ridge (Sitting as a Deputy High Court Judge)
[2023] EWHC 2528 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2024

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE COULSON
and
LORD JUSTICE BIRSS

- -

Between:

Secretary of State for Levelling Up, Housing and Communities	**Appellant**
- and -	
Mr Bryan Rogers	**Respondent**

- -
- -

Michael Fry (instructed by **Government Legal Dept**) for the **Appellant**
Michael Rudd (instructed by **Tedstone, George and Tedstone**) for the **Respondent**

Hearing Date: 19 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

Introduction

1 This appeal concerns the jurisdiction to extend time for the service of a claim form where the underlying claim is a planning statutory review under s.288 of the Town and Country Planning Act 1990 ("TCPA"). This has become a contested issue in recent times, with as many as six first instance decisions on the point in the last 18 months. The appeal also raises wider questions concerning the operation of CPR 7.6(3), and in particular the proper approach to delays by a court office in issuing a sealed claim form.

2 Karen Ridge, sitting as a Deputy High Court Judge ("the judge"), concluded that the failure to serve a sealed claim form in the statutory period of 6 weeks was due to the delays by the Manchester Administrative Court Office ("the court office"), and therefore "outside the control" of the respondent and his solicitors. She extended time for service of the sealed claim form up to and including the last date on which they were served upon the appellant and the other defendant, which was 69 days after the expiry of the deadline. She dismissed the appellant's application, pursuant to CPR Part 11, for a declaration that the court had no jurisdiction to hear the claim. The appellant now challenges those decisions.

The Relevant Chronology

3 The respondent sought to appeal an enforcement notice issued by South Staffordshire District Council ("SSDC") and their linked refusal to grant planning permission in respect of land off Micklewood Lane, Penkridge, in South Staffordshire. On 23 March 2023, an Inspector appointed by the appellant dismissed the respondent's appeal.

4 The respondent brought two challenges in respect of the Inspector's decision: a planning statutory review under s.288 and an appeal against the enforcement notice under s.289 of the TCPA. The time limit for the service of the s.289 appeal was 28 days from the decision, and therefore expired on 20 April 2023. The time limit for the service of the Part 8 claim form in respect of the s.288 statutory review was six weeks from the decision, and therefore expired on 4 May 2023.

5 On 18 April 2023, the respondent filed with the court office a claim form, an appellant's notice and a statement of facts and grounds. The covering email referred to both the appeal (under s.289) and the planning statutory review (under s.288), and said that they "are inextricably linked as they both relate to the same planning decision and need to be listed together". The email was marked with 'high importance'. No mention was made of the expiry dates of 20 April 2023 or 4 May 2023. It was not made clear which of the documents related to the appeal, which to the review, and which to both. To confuse matters further, the Part 8 claim form on its face only referred to the appeal against the enforcement notice: in fact, the claim form was or should have been the vehicle for the s.288 planning statutory review. It was the appellant's notice which related to the appeal in respect of the enforcement notice.

6 The 20 April expiry date for the appeal in respect of the enforcement notice under s.289 came and went without any further action. On 2 May 2023, again in an email marked with 'high importance', the respondent's solicitor referred to the email of 18

April and said that he would be "grateful if the court could kindly acknowledge receipt of our claim". There was no mention of the 4 May 2023 deadline, or the fact that the claim form needed to be issued immediately if the claim form was to be served within the six week deadline.

7 After the expiry of the 4 May 2023 deadline, there were further exchanges between the respondent's solicitors and the court office as follows:

(a) A telephone conversation on 11 May 2023. The attendance note completed by the respondent's solicitors referred to the filing of the documents and went on to say "but we have not heard anything and we were waiting to hear it was being processed". There was no reference in the note of any mention of the relevant deadlines. 'Michael' at the court office told the respondent's solicitor that "he would get this done after lunch". He also said to the solicitors that they were not to worry about the date "as it would still be registered as of 18 April, the date we sent it to them."

(b) Nothing happened for a week, so there was a further email from the respondent's solicitors on 18 May. This referred, for the first time, to the fact that it was an application for review so "there is some urgency". There was another telephone conversation on 22 May in which the court office said that the person dealing with it "would call me back when he was free". In a further conversation on the same day, the court office said that Michael was not in, and that they "needed to get it checked by the court lawyer…they could not just issue it without it being checked".

(c) There was another conversation on 25 May with someone else at the court office who said that they were understaffed and that "whatever his colleague Michael said, he can't go with that because the court lawyer needs to check it."

(d) During another conversation on 30 May, it was suggested that there was some concern at the court office that, because there were two claims in one, there should therefore be two fees payable. The attendance note records the court office saying that "they don't come across this very often so they had had to check." They said that were checking it with the Administrative Court in Leeds.

(e) Further conversations on 7 and 9 June made no progress. There were further emails from the solicitors on 14 June.

8 On 15 June 2023, the court office issued the s.289 appellant's notice. That was served on 21 June 2023. It appears that, on the same day, the court office sealed the Part 8 claim form. They did not, however, issue it. That the court office was confused by the two applications, and the failure clearly to delineate between them, can be seen by the text of its email of 15 June, which read:

> "I have issued both matters in the meantime. The references are as follows:
>
> CO/2201/2023-s.289 Statutory Review
>
> CO/2203/2023-s.288 TCP appeal
>
> I have attached the sealed appellant's notice for the statutory review. You won't receive anything on the appeal yet as I can

> only seal the claim form once the appeal has been granted permission. Once the PCPF244 form is filed, I can seal this instead as directed by the Administrative Court Lawyer. In the meantime, please accept this email as proof of issue from the Administrative Court."

9 Much of that email was incorrect. The appellant's notice had been sealed and issued, but that was not for the statutory review under s.288, but the appeal in respect of the enforcement notice under s.289. The 2201 number said to have been assigned to the s.289 appeal was actually the number put on the Part 8 claim form, which concerned the s.288 review. It was wrong to say that the claim form could only be issued once permission to appeal had been granted: the Part 8 claim form had nothing to do with the appeal, despite what it said on its face. All these errors stemmed from the confusion between the two applications; none of them were identified or challenged by the respondent's solicitors.

10 On 21 June, the unsealed claim form was served on the appellant. That was therefore the first time that the appellant became aware of the s.288 claim. It is accepted that that was not good service: see *Ideal Shopping Direct Ltd v Mastercard Incorporated* [2022] EWCA Civ 14 at [144]. The appellant's response to the service of the unsealed claim form came on 4 July 2023, when they said that service of the sealed claim form "would be significantly out of time".

11 On 6 July, the court office contacted the respondent's solicitors to say that they could deal with the two claims at a hearing on 26 July because of the last-minute availability of a High Court judge. The respondent's solicitors did not reply until 10 July, and then only to point out that they had still not received a copy of the sealed papers. On 11 July, the respondent's solicitors wrote to the court office again, repeating the point that they had not received a copy of the sealed Part 8 application and papers so, had not been able to serve the appellant and SSDC. They went on to say "this is of course causing issues regarding our compliance with the time limits of service." This was their first express reference to time limits, and appears to have been prompted by the appellant's response to the service of the unsealed claim form on 4 July 2023.

12 At 10.17am on 11 July, the Part 8 claim form was issued. The covering email from the court office noted that "this claim form states that the appeal is sought from that form, not a statutory review. There is also no indication which is for the s.288 and which is for the s.289 which has caused some confusion." The sealed claim form was served on SSDC that day, and served the following day on the appellant.

13 On 13 July 2023, the respondent filed an application notice seeking to extend time for service of the claim form. On 4 August, the appellant filed and served an acknowledgment of service, and an application notice pursuant to Part 11 seeking a declaration that the court had no jurisdiction to deal with the s.288 statutory review because time for service had expired on 4 May 2023. On 17 August, the respondent formally confirmed that the s.289 appeal was being withdrawn. The hearing before the judge took place on 24 August 2023.

The Judgment Below

14 The judge's judgment is dated 13 October 2023 and can be found at [2023] EWHC 2528 (Admin). She referred to CPR r.3.1(2)(a) and to the decision of this court in *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355 ("*Good Law*"). She did not refer expressly to CPR 7.6(3). Having set out the chronology, her conclusions were as follows:

> "12. In these circumstances I am entirely satisfied that the failure to serve a sealed claim form in time was due to matters outside the control of the Claimant and his representatives. The behaviour of the legal representative in continuing to chase the Court for a sealed claim form was reasonable. The delay did not stem from the use of an incorrect form. The representative had marked the email with the Claim form of 'high importance' and they continued to chase matters which spoke of the sense of urgency in obtaining a sealed form. It is difficult not to have sympathy with the Claimant in such circumstances.
>
> 13. Unlike in the *Good Law* case, the Claimant did not choose to serve an unsealed claim form on the Defendants. However, that is unsurprising considering the assurances given by the Court that the matter was about to be dealt with. Likewise issue of the application for extension of time came after the expiry of the deadline but again, given the focus on obtaining a sealed form and the assurances given, this is unsurprising.
>
> 14. Whilst service took place significantly out of time, having regard to all the unusual facts of this case, I conclude that the Claimant took reasonable steps to effect valid service but due to matters outside his control and for good reason, his representatives were unable to do so. I therefore exercise the Court's discretion in extending the time for service of the sealed claim form up to and including the last date on which the sealed claim forms were served upon the Defendants."

15 Having extended time for service, the judge went on to consider the grounds of the statutory review under s.288. She regarded ground 1 as plainly arguable. She rejected ground 2.

The Issues on Appeal

16 There are two grounds of appeal raised by the appellant. First, it is said that the judge erred in concluding that the failure to serve the claim form in time was due to matters outside of the control of the respondent. In particular, it is said that the judge's conclusions relied on irrelevant matters, all of which post-dated the 4 May 2023 deadline, when time to serve the sealed claim form had already expired. Secondly, it is said that the judge erred in failing to consider properly or at all: i) the prejudice to the appellant caused by the loss of a limitation defence; and ii) the lack of promptitude by the respondent in making the application to extend time.

17 As we shall see, the particular rule that governs this situation, albeit by analogy, is r.7.6(3). Under that rule, the respondent had to show, first, that he had taken all reasonable steps to serve the claim form by 4 May but had been unable to do so; and,

secondly, that he had acted promptly in making the application for an extension of time. In my view, for the reasons that I explain below, the judge erred in failing to approach the issues in that way. Had she done so, I am in no doubt that she would have concluded that the respondent had failed to satisfy either of those requirements.

The Applicable Procedural Regime

18 A s.288 application must be made within six weeks of the decision: see s.288(4B) of the TCPA. Pursuant to paragraphs 1.2 and 4.11 of Practice Direction 54D, a claim form setting out the grounds for the statutory review must be *served* on the defendant(s) within that time limit. That requirement reflected the position from 2016, as noted in (the now superseded) Practice Direction 8C. The court can extend time for service of the claim form under CPR 3.1(2)(a).

19 In *Good Law*, an issue arose as to what rules or guidance were applicable to an application for an extension of time to serve a claim form in judicial review proceedings arising out of the Public Contracts Regulations 2015. The time limit was 30 days for issue, with seven days thereafter for service. The claim form was issued in time but served one day late. This court concluded that, whilst r.7.6 did not apply directly to extensions of time for serving a judicial review claim form, the rule did apply by analogy. Carr LJ (as she then was) explained at [45], [48]-[53] and [80] that:

(a) Rule 7.6 was not disapplied in respect of Part 8 proceedings.

(b) Rule 54.1(2)(e) indicated that the judicial review procedure comprised the Part 8 procedure as modified by Part 54. There was no equivalent to r.7.6 in Part 54.

(c) Rule 7.6 expressly referred to rule 7.5 but made no mention of rule 54.7. Rule 8.2, however, did expressly refer to rule 7.5.

(d) There was no good reason why the requirements under CPR 7.6 "should not apply equally to a claim for judicial review, and every reason why they should…promptness is an essential requirement in any judicial review claim" [80].

20 Carr LJ also made plain at [79] that the principles in respect of relief from sanctions, and the well-known authority of *Denton v TH White Limited* [2014] 1 WLR 3926, were not engaged in any consideration of r.7.6: what might be called the *Denton* principles did not apply to the service of an originating process. Amongst other things, that meant that, when considering the application of r.7.6, the court will not have any regard to the merits or otherwise of the case in question (often an element of the third stage in the application of the *Denton* principles), another point separately flagged by Carr LJ at [17] and [70].

21 CPR 7.6 provides as follows:

> "Extension of time for serving a claim form
> **7.6**
> (1) The claimant may apply for an order extending the period for compliance with rule 7.5.
> (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

> (a) within the period specified by rule 7.5; or
> (b) where an order has been made under this rule, within the period for service specified by that order.
> (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –
> (a) the court has failed to serve the claim form; or
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
> (c) in either case, the claimant has acted promptly in making the application.
> (4) An application for an order extending the time for compliance with rule 7.5 –
> (a) must be supported by evidence; and
> (b) may be made without notice."

22 The approach in *Good Law* has been followed in six recent planning cases at first instance. In chronological order, they are: *Halton Borough Council v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 293 ("*Halton BC"*); *Telford and Wrekin Council v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2439 ("*Telford*"); *Home Farm Land Ltd v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2566 ("*Home Farm"*); *Aurora Properties (UK) Ltd v Welwyn Hatfield BC* [2024] EWHC 1213 (Admin) ("*Aurora*"); *R (Merrills) v Secretary of State for Levelling Up, Housing and Communities*[2024] EWHC 1219 (Admin) ("*Merrills*"); and *Farnham Town Council v Secretary of State for Levelling up, Housing and Communities* [2024] EWHC 2458 (Admin) ("*Farnham TC*").

23 Although I address briefly each of those authorities in turn below, I attach as Appendix 1 a table showing the chronology in each one. This shows a number of similar features: documents were all filed with the court either very close to or at the expiry of the relevant deadline and, save in two of the cases (*Telford* and *Merrills*), the claim forms were sealed and issued promptly by the court. There was a variety of delays (from a few days to many months) in the making of the extension of time application. In each of the six cases, even where the delays in service and in seeking an extension could together be measured in a handful of days, an extension of time under r.7.6 was refused.

24 *Halton BC* was a judicial review case. HHJ Stephen Davies, sitting as a High Court Judge, followed the *Good Law* approach (see [52]), although he highlighted at the outset of his judgment a possible discrepancy between *Good Law* and an earlier decision of this court in *Corus UK Ltd v Erewash Borough Council* [2007] 1P & CR22. However, he accepted that any difference between the two approaches was likely to be "more apparent then real" [55]. In that case, the claim form was sealed and issued before the deadline expired on 8 September (at the latest), but was not served until 9 September, the day after expiry. The application to extend time was made on 12 September. The result in *Halton BC* bears out Judge Davies's view that there was little or no practical difference between the two approaches, because the application to extend time failed whichever approach was adopted.

25 *Telford* was a s.288 statutory review case. Before Eyre J it was agreed that the principles in *Good Law* applied equally to applications to extend time in planning

statutory reviews under s.288: see [29]. On the facts of that case, Eyre J noted that the six week time limit expired on Tuesday 9 May. The documents had been filed with the court on Thursday 4 May and, after the intervening weekend, Monday 8 May was a Bank Holiday. The claim form was issued by the court office on 15 May, a week outside the six week period. It was served on 19 May. The application to extend time was not issued until 26 July.

26 The claimant argued that there was a lacuna in the CPR because there was no provision for the court failing to issue a claim form in time. It was also said that the court should have systems for promptly issuing claim forms, regardless of whether urgency had been indicated to the court office by the person filing the claim form. Those arguments were rejected by Eyre J. He said that Parliament had set out a clear time limit and, although harsh consequences may flow from requiring the filing and serving of a claim form within a six week period, the limit was clear and the requirement was not unworkable: [50]-[52]. Uncertainty would arise if departures were allowed from the six week period and it was unrealistic to expect the court office to appreciate the urgency if none had been flagged: [53]-[54].

27 Eyre J went on to make two particular points at [56]-[65] of his judgment, namely that:

(a) It was for a claimant to chase up the issue of the claim form, and that failing to do so gave rise to a risk that it would be found that not all reasonable steps had been taken. On the other hand, a claimant who acted energetically would be likely to be found to have taken all reasonable steps to have the claim form served in time. At [57] he said:

> "57.A claimant which has filed a claim form in good time and/or has acted energetically to alert the court to the urgency of the matter and to the need for urgent treatment of the application is very likely to have been found to have taken all reasonable steps, certainly in the former instance, and in those circumstances would have a good prospect of getting an extension of time. The fact that a claimant has six weeks to file does not mean that the claimant can escape the risk of being out of time to serve if that claimant waits until the end of the six week period and does so knowing that the six week period is the period for service as well as filing."

(b) In assessing whether reasonable steps were taken to have the claim form served in time, the relevant steps were those taken before the deadline expired. Steps taken after the expiry could be relevant to the court's discretion to grant an extension, but that discretion only arose after the reasonable steps and promptness had been established by the claimant under r.7.6(3).

28 On the facts in *Telford*, Eyre J noted that, at the start of business on 9 May, the claimant should have realised that the six week period had expired and that the claim form had not been issued. An application for an extension should have been made then. However the application for an extension was not made for another two and a half months, on 26 July. For all these reasons, the claimant's application for an extension of time was refused.

29 In *Home Farm*, another s.288 statutory review case, the claimant had filed the documents with the court on 3 November 2022, the very day that the time limit expired, but after the drop box had been cleared for that day, unless alerted by email to an urgency. There had been no such email. Furthermore, the claim form required amendment before it could be issued by the court. It was issued on 4 November, a day late, and was not properly served until 25 November. The application for an extension was made on 2 December. Lang J held that, in the circumstances, the claimant had filed out of time and that it had not taken all reasonable steps to serve in time or apply promptly for an extension of time.

30 In addition, Lang J held that, to the extent that there was a difference of approach between *Good Law* and *Corus*, *Good Law* should be preferred. She held that r.7.6 was to be applied, directly or indirectly, to a claim for planning statutory review under Part 8. She also said that "the loss of a limitation defence was palpable prejudice".

31 In *Aurora*, another planning statutory review case, the six week period expired on 23 November 2023. The claim form was filed on the afternoon of 23 November and was issued on 24 November. The court office erroneously said that the claimant had seven days in which to serve the claim form. The claimant, who was a litigant in person, served the claim form on the Secretary of State on 1 December, the last of those seven days. An application for an extension of time was not made until 28 February 2024. The extension was refused. Mould J held that the claimant had not taken all reasonable steps to serve within the period and had not acted promptly in making its application to extend time.

32 In *Merrills*, another s.288 case (and a case dealt with by the same judge as in the present appeal), the claim form was filed the day before the time expired on 15 June 2023. The papers were not sealed and issued until after the deadline on 21 June and served the same day. The application for an extension was made on 5 July.

33 The judge noted the claimant's solicitors' failure to point out the impending deadline to the court staff [23] and accepted the submission that "it may have been advisable for the representatives to have said to the court staff in terms 'we require a sealed claim form prior to 4pm on 15 June to enable us to serve the other parties'" [29]. She concluded that the claimant had failed to take all reasonable steps to effect service: the impending deadline meant that the claimant's representative should have attended the claim office in person, and the emails did not impress upon the court the urgency and importance of the receipt of a sealed claim form in order to enable good serve by the relevant deadline. She also concluded that the delay in making the application to extend time (two weeks from the late service of the sealed claim form and 20 days after the statutory deadline) meant that it had not been made promptly.

34 Finally, *Farnham TC* was a s.288 case where the claimant's solicitors left it to the very last day of the six week period before filing the claim form on 14 August 2023. Despite that, the claim form was sealed and issued by the court office on the same day. Service was attempted on 16 August but was defective; effective service did not take place until 18 August 2023. An application to extend time was made on 16 August. The Deputy High Court Judge followed *Good Law* and the authorities to which I have referred, and said that, because this was a s.288 planning statutory

review, the need for certainty and finality regarding planning decisions[1] meant that the claimant had to be held to a higher standard than in other judicial review cases (see [100]-[102], and [128]-[134]). He therefore refused an extension of time. I should make clear that I cite *Farnham TC* because of the principles it sets out and follows so clearly; I should not be taken necessarily to be endorsing the particular result in that case.

35 For completeness, I should also refer to the case of *Walton v Pickerings Solicitors* [2022] EWHC 2073 (Ch). That was an unusual case only because the court office lost the claim form, and then backdated the sealed version to the date that it had originally been filed. This action (doubtless intended to help the claimant) actually meant that the claim form was not served within 4 months of issue, pursuant to r.7.5. When dealing with the taking of all reasonable steps under r.7.6(3)(b), the deputy high court judge said at [51] that those steps had to be judged only once the sealed claim form was in the possession of the claimant. That would appear on its face to be inconsistent with the subsequent cases summarised in Appendix 1, and in particular what Eyre J said in *Telford*.

36 But on analysis, there is no inconsistency. In a standard service case such as *Walton*, the four month period for service does not *start* until the issue of the sealed claim form by the relevant court office. So in that situation it is perhaps easy to see why the deputy judge focussed exclusively on the steps taken following issue[2]. But the position in a planning statutory review case is different, because there the relevant period for service has been started, not by the action of the court in issuing the claim form, but by a statutory provision which applies whatever the court does or does not do. So in a case like this, where the time for service is already running when the documents are first filed with the court, the focus has to be on what happens prior to the expiry of the deadline, regardless of when the sealed claim form is in the claimant's possession. It is an adjustment of focus that is necessary because r.7.6 applies by analogy; the factual assessment required in cases where the period for service is already running prior to issue may be different to those where the period for service only starts with issue.

37 It should also be noted that (although not referred to in the 2024 White Book) the decision at first instance in *Walton* was overturned by this court ([2023] 1 WLR 3545) on the basis that the court had no power to seal a claim form with a date other than the date on which the claim form was in fact issued and sealed. On that basis, the claim form had been served in time in any event.

38 In my judgment, the relevant principles discernible from *Good Law*, and the subsequent authorities to which I have referred, can be distilled as follows:

(a) The approach in *Good Law* sets out the principles applicable to extending time for service of judicial review claim forms. To the extent that it makes any difference, it has superseded the approach in *Corus* (see in particular *Halton BC* and *Home Farm*).

[1] See *Croke v Secretary of State for Communities and Local Government* [2019] EWCA Civ 54.

[2] I am not sure, however, that this conclusion is necessarily right: the judge at [49] said that it was difficult to see why there would be any policy reason to prevent an application for an extension of time being made where the sealed claim form was not in the claimant's possession. I agree with that.

Amongst other things, that means that neither what might be called the *Denton* principles, nor the merits of the underlying case, are relevant.

(b) There is a six week period for the service of a claim for a planning statutory review under s.288. That period is "precise, unambiguous and unqualified": see *Croke* at [31]. The approach in *Good Law* therefore governs any application to extend that six week period (see, for example, *Telford, Home Farm, Merrills*, and *Farnham TC*).

(c) Following *Good Law*, CPR 7.6 applies to such applications, albeit by analogy. The most obvious area where r.7.6 is not a complete 'fit' reflects the point that I have made at paragraph 36 above in respect of the *Walton* case: when considering the application of r.7.6 in a statutory planning review case, the court needs to be aware of – and, if appropriate, to make some allowance for - the fact that the time for service expires automatically, which may be before the claim form has been issued by the court.

(d) Under CPR 7.6(3) a claimant has to show, first, that it has taken all reasonable steps to serve the claim form within the relevant period. Where, as here, that period started to run before the claim form had been issued, the court must consider all the steps taken up to the expiry of that period. Events after the expiry of the period are strictly irrelevant to the issue of whether a claimant took all reasonable steps to serve within the period: see Smith LJ in *Carnegie v Drury* [2007] EWCA Civ 497 at [36], and [60] of the judgment of Eyre J in *Telford*). However later events may shed light on what happened or did not happen during the six week period, and could be relevant to the overall exercise of the court's discretion.

(d) The second step under r.7.6(3) is for a claimant to show that an application for an extension of time made after the expiry of the relevant period has been made promptly. For a case like this, where the expiry of the period in which to serve the claim form is automatic and unconnected with the issue of any documents by the court, the period under consideration starts with the date that the six week period expires, and runs to the making of the application for an extension of time.

Issue 1: Did The Respondent Take All Reasonable Steps to Serve Within the Six Week Period?

39 The first point to make is that, unlike the position in all the other reported cases summarised in Appendix 1, the respondent in the present case filed the s.288 documents with the court office in good time. I would expect a competent and properly staffed court office to seal and issue the claim form within two working days. That is borne out by the fact that, in four of the six cases summarised in Appendix 1, the claim form issued on the day of filing or the day after. However, the s.289 documents here are not in the same category. They were filed just two days before the 28 day period expired.

40 No substantive reasons for the court office's wholesale failure to seal and issue the s.288 claim form within that sort of period has been provided. A promise to do it 'after lunch' in mid-May was slowly replaced with an unexplained further delay of two months. Whilst I understand that there will have been confusion caused by the issuing of the s.288 statutory review and the s.289 appeal at the same time, with a concomitant lack of clarity as to which documents related to which application, that

could and should have been resolved in one conversation with the respondent's solicitors. I do not accept that anything had to be checked with a lawyer before the simple task of issuing the claim form was completed. The court office's reference to backdating was misconceived (see *Walton*). The email that referred to the possibility of two fees being due rather than one can hardly justify the delay either.

41 To that extent, therefore, Mr Rudd was quite right to emphasise that, at least in respect of the s.288 claim form, this was not a case in which the respondent's solicitors had waited until the very last moment before filing the documents with the court. The difficulties created by leaving it so late, as discussed in *Halton BC*, *Telford* and *Merrills*, should not therefore have arisen. But Mr Rudd submitted that, in consequence, the respondent had taken all reasonable steps by filing the documents in good time and nothing else was necessary to satisfy the test of 'all reasonable steps' at r.7.3(b). To that extent, he relied on [57] of the judgment of Eyre J in *Telford* set out at paragraph 27(a) above. The first question for us, therefore, is whether the fact that the documents were filed with the court in good time demonstrates that the respondent must have taken all reasonable steps to serve the claim form by 4 May. For the reasons set out below, I am unable to accept that submission.

42 As Eyre J noted at [56] of *Telford*, a claimant who sits back "is deliberately leaving matters in the hands of the court in circumstances where it is open to the claimant to seek to prevent delay or to encourage expedition on the part of the court by flagging up the urgency of an application or by chasing the court". I do not read [57] as suggesting that none of that is relevant merely because the documents were filed in good time; indeed it would be contrary to the whole thrust of Eyre J's judgment to read [57] as saying that. But to the extent that, by his comment about filing in good time (which was in any event *obiter* because that had not happened in *Telford*) and his use of the "and/or", Eyre J did intend to suggest otherwise, he was wrong to do so. A claimant can never safely sit back and do no more, no matter how early the documents are filed.

43 Amongst other things, taking all reasonable steps seems to me to require:

(a) Alerting the court at the outset to when the documents must be issued and why, explaining the expiry of any relevant deadline (a point expressly made in both *Telford* and *Merrills*);

(b) Chasing by email and telephone if there had been no sign of the documents after two or three working days;

(c) As any deadline loomed, reiterating clearly, by personal attendance (if possible) at the court office, telephone or email, when precisely the relevant time period for service expired and the consequences of failure to issue in time.

44 In the present case, the respondent's solicitors did not do any of these things. When they filed the documents electronically on 18 April, they did not indicate that the documents needed to be served by 4 May. That was, with respect, a basic error, particularly as the deadline for the s.289 appeal was due to expire on 20 April. It does not matter how early the documents are filed: a solicitor who fails to notify the court of the particular urgency of the case and the need for service by a particular date runs the obvious risk that he has not taken all reasonable steps to effect service in time.

45 In my view, not only did the respondent's solicitors fail to flag up the respective deadlines, but they exacerbated the problem by not making clear which documents related to which application. That there was confusion cannot be doubted: see paragraphs 7-12 above. It has resulted in a Part 8 claim form with the wrong action number and a reference on its face to the wrong claim. I do not criticise the respondent's solicitors for the decision to use a single statement of facts and grounds to cover both the appeal and the statutory planning review, but I consider that the claim form was positively misleading. A simple, one paragraph explanation as to which document related to which claim should also have been provided in the email of 18 April.

46 Moving forward, the respondent's solicitors then failed to chase the court office from 20 or 21 April onwards. They allowed the s.289 deadline to expire without taking any action at all. A telephone call at that time with the court office would also have given them the opportunity to endeavour to sort out the confusion caused by the overlap between the s.288 and the s.289 applications.

47 Even if we assume that Mr Rudd was right to say that the early filing of the s.288 review documents was, at the very least, a very good start in demonstrating that the respondent had taken all reasonable steps to serve the claim form in time, this was always a fluid situation. Whatever expectation or reliance the respondent's solicitors may have placed upon the court office at the time of filing on 18 April, they must have realised by 2 May at the latest that those expectations had not been fulfilled. By that date they were, for all practical purposes, in the same position as those claimants in the cases summarised in Appendix 1, who had chosen to file their documents very close to the expiry of the relevant deadline.

48 On that basis, therefore, it might be said that the most significant failure occurred on 2 May 2023. The respondent's solicitors needed to have the sealed claim form issued that day, in order to be sure that they could serve it by 4 May. They had the claim form very much in mind because they emailed the court office about it that day. But the email of 2 May made no reference to the deadline at all, and instead simply asked that the court acknowledge receipt of the original application (which suffered from the same defects).

49 Although any events after the expiry of the deadline are not strictly relevant to the 'all reasonable steps' test at r.7.6(3)(b), I am bound to note that, on a proper analysis, those events only serve to weaken the respondent's position even further. For example, the respondent's solicitors not only allowed the 4 May deadline to expire without further contacting the court office, but they waited a full week after the expiry until contacting the court again. Moreover, when they rang the court office on 11 May, it was simply to say that they were "waiting to hear it [the claim form] was being processed". The attendance note does not suggest that the deadline of 4 May was even raised during that call. Both the delay to 11 May, and the content of the attendance note, strongly suggest that the solicitors had failed to realise the importance of the need to serve the claim form within the six week period. That impression is confirmed by the later exchanges to which I have referred at paragraphs 7-12 above. That can only underline the failure to take all reasonable steps to ensure service within the six week period.

50 It is a sad but unavoidable fact of life that court offices do not always act promptly or get things right on their own. They are staffed by civil servants, not judges, and there are rarely lawyers involved. The staff will not necessarily know what time limits apply to which claims. They will need help from the claimant's solicitors to know which documents are a priority and why. On occasion, they will need to be energetically chased (to borrow Eyre J's phrase). They can only be chased by a claimant or their representatives: the defendant is probably unaware of the claim. If a claimant does not set out clearly to the court office at the outset what the time limits are, and then compounds that error by failing to react to the inactivity of the court office by energetically chasing the issue of the claim form, they are almost certainly not taking all reasonable steps to serve the claim form in the six week period. In the present case, the respondent took no steps at all to comply with the relevant service rule, other than filing the documents in good time on 18 April and sending the bland email of 2 May. On any view, that was not nearly enough.

51 I consider that, in sharp contrast to her judgment in the *Merrills* case, the judge failed here to address the requirements of r.7.6(3)(b), to which she made no express reference. She allowed her (unsurprising) sympathy for the respondent, and the failure of the court office, to obscure the relevant test. She compounded that error by relying almost exclusively on the events after 4 May 2023. And whilst what matters most are the steps, if any, taken prior to the expiry of the relevant service deadline, I consider that, on a proper analysis, the events thereafter further weaken the respondent's case. Until the appellant took the delay point on 4 July, no reference was made by the respondent's solicitors about the potential consequences of missing the relevant deadline.

52 Accordingly, whilst I too have sympathy for the respondent's position, I consider that, on a proper application of the relevant principles, the respondent failed to take all reasonable steps to serve within the six week time limit. For these reasons, therefore, I conclude that the respondent has failed to satisfy the test in r.7.6(3)(b). In those circumstances, if my Lords agree, that would be sufficient to allow the appeal. However I go on to deal with the second hurdle under r.7.6(3)(c), namely whether or not the respondent acted promptly in applying to extend time, because, in my view, the respondent's difficulties on that aspect of the appeal are even more stark.

Issue 2: Was The Application Made Promptly?

53 In my view, there can be no doubt that the respondent's application to extend time was not made promptly.

54 As r.7.6(2) makes clear, the general rule is that a claimant must make its application to extend time *during* the relevant period, not after it has expired. Accordingly, in the present case, it might be said that the respondent should have made an application to extend time no later than 2 or 3 May 2023, when it became apparent that service was not going to be effected by the deadline the following day. Once the deadline had expired, whilst an application could still be made under r.7.6(3), the court would have wanted to know why the application had not been made in accordance with the general rule. In the present case, there is no satisfactory explanation for that omission. I deal below with the making of an application in the absence of a sealed and issued claim form.

55 Turning to r.7.6(3), and the consideration of whether the respondent acted 'promptly', there is a straightforward analysis. Parliament has decided on a tight timetable for planning statutory reviews. That explains why a claim form has to be served within six weeks. But in the present case, the period between the expiry of that six week deadline and the date when the respondent made the application to extend time was one of ten weeks, from 4 May to 13 July 2023. In this way, the period which was allowed to elapse before an extension of time was even sought was nearly twice as long as the period in which Parliament has said that the claim form must be served. On that basis alone, it seems to me that it cannot be said that the application to extend time was made promptly.

56 Again, there is no explanation as to why the application was not made for so long. In my view, even assuming that it was justified to allow the deadline of 4 May to expire without an application, there was no reason why the application could not have been made on 5 May or shortly thereafter. This was a straightforward case, where every day after the expiry of the relevant deadline in which an application was not made would automatically decrease the prospect of the respondent persuading a court that he had acted promptly.

57 The judge did not address this issue, save for the last sentence of [13], where she said, in respect of the delay in making the application, that "given the focus on obtaining a sealed form and the assurances given, this is unsurprising." The suggestion appears to be that the respondent's representatives were entitled to focus on their dealings with the court office rather than issuing the application to extend time.

58 I consider that reasoning to be flawed. It assumes that the respondent's representatives had a binary choice, of either chasing the court office or making the application to extend time for service, and that they were entitled to do the former, and let the application wait until after the claim form had finally been sealed and issued. But that is wrong, as Mr Rudd fairly accepted during oral submissions. Of course they had to continue to chase the court office but, once the deadline expired on 4 May, they always needed to apply for an extension of time as well. The court office had failed to act as it should have done: the only proper response was to issue an application to extend time either before the period expired or immediately after it had expired. That would have at least alerted the appellant to the fact of the claim. In fact, the appellant was not to find out about the existence of a claim for another 5 weeks. That seems to me to be precisely what r.7.6(3)(c) was designed to avoid.

59 Mr Rudd's argument really relied on the fact that the application to extend time was made just two days after the sealed claim form had finally been issued. But as discussed during the hearing, there is no necessary or automatic link between those two events. Contrary to a suggestion in the papers, it is not necessary to wait to make an application for an extension of time until you know precisely how long an extension you require. It is not uncommon for a claimant to apply for a prospective extension, seeking to serve, say, four working days after receipt of the sealed claim form from the court office.

60 Nor is it necessary to wait for the claim form to be issued before an application to extend time is made: it is quite possible for an extension to be sought even if there is no claim form. A claim number will be provided by the court office on the making of an application for an extension (and the making of such an application might itself act

as a spur to the court office to issue the claim form). In any event, there is no evidence that in some way the respondent's solicitors in the present case waited to make the application to extend time because there was, for example, no claim number[3].

61 The appellant is also right to say that the judge did not take into account the potential accrual to the appellant of a limitation defence. However, I am not persuaded that this was as significant a point as Mr Fry submitted. There are two reasons for that.

62 First, any application made under 7.6(3) in these particular circumstances pre-supposes that a claim form will have been served out of time, and that a limitation defence will therefore have accrued. That accrual may be a factor to be taken into account, although in *Good Law* the discussion concerning limitation at [71] and [84] is limited to a consideration of r.6.15, which does not arise here. So whilst in *Home Farm* at [55], Lang J repeats the point about "palpable prejudice", she does not explain that the reference comes from a discussion in *Good Law* that is unconnected to r.7.6. Nor does she consider the relevance of a limitation defence to the test of promptness, in circumstances where the period for service is running automatically. In my view, in the circumstances that arise in a case where an extension of time for service is required, the accrual of a limitation defence may be a relevant consideration. But it can never be a trump card; otherwise, no extension of time under r.7.6(3) in this sort of case – where the deadline for service expires automatically, regardless of issue of the claim form - would ever be granted.

63 Secondly, on the particular facts of the present case, I would be very reluctant to give the point very much weight. On one view, put at its highest, it might be said that the potential limitation defence has only accrued to one Department of State (the appellant) because of the incompetence of another Department of State (the Ministry of Justice, responsible for the court office). In my judgment, assuming that all other factors were in the respondent's favour and that he had acted promptly, the accrual of a limitation defence in these circumstances would not be a satisfactory reason for refusing the extension of time.

64 However, on the facts here, the accrual of a limitation defence argument is an irrelevant consideration. That is because, on a proper application of r.7.6(3)(c), it is plain that the respondent failed to act promptly in making the application. The respondent has therefore failed to clear the second hurdle under r.7.6(3)(c).

65 Finally, I reject Mr Rudd's submission that it would be artificial to ignore the merits of the claim (where the judge thought the first ground of the review was arguable) or that a failure to extend time would be contrary to the overriding objective (because the underlying claim was concerned with people's homes). The application of the approach in *Good Law* and r.7.6 to the unqualified and automatic six week period leaves no room for consideration of either factor.

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[3] In the event, by 15 June a claim number had been provided for the s.288 statutory planning review (see paragraph 8 above) but that still did not prompt the respondent into making an application for an extension of time.

Conclusions

66 As Mr Rudd pointed out, all the recent reported cases on this issue involved something which was missing here, namely a last-minute rush to file the documents at court. And yet in all those cases, service took place much closer to the expiry of the deadline than happened here, and in four of the six cases, the delay in making the application to extend time was considerably shorter than the delay here. The overall delays here were significant and, in many respects, longer than in the cases summarised in Appendix 1. In each of those cases, the extensions were refused. So too, in my view, should the extension be refused here. Whilst the delays by the court office were one factor, they do not get the claimant across either, let alone both, of the hurdles posed by r.7.6(3).

67 For the reasons that I have given, the respondent has failed to demonstrate either that he took all reasonable steps to serve the claim form within the six weeks, or that he acted promptly in making the application for an extension of time. The judge failed to address either of those points head-on and therefore failed to consider all the relevant factors. In those circumstances, if my Lords agree, I would allow this appeal and rule that the court had no jurisdiction to consider the planning statutory review under s.288.

LORD JUSTICE BIRSS:

68 I agree.

SENIOR PRESIDENT OF TRIBUNALS:

69 I agree that the appeal must be allowed, for the reasons given by Coulson L.J.

70 I would add only this. As Coulson L.J.'s analysis has shown, in an application for planning statutory review under section 288 of the Town and Country Planning Act 1990 a failure to comply with the six-week time limit for service is likely to have significant practical consequences. The interests of finality in planning decisions, including decisions made by the Secretary of State or an inspector on a section 78 appeal, are of vital importance. I emphasised this point, though in a different context and on different facts, in *Croke*. That case was about the operation of the fixed statutory time limit in section 288(4B). In that context I said (in paragraph 34 of my judgment) that "[in] proceedings of this kind, certainty and consistency in the operation of fixed statutory time limits are particularly important", and that "[such] time limits enable all potential parties to the proceedings, including those who have objected to a proposed development as well as the applicant for planning permission and the local planning authority whose decision has been upheld or overturned, to know where they stand, and to act – or refrain from acting – accordingly". Those observations are relevant, I think, in the context of the procedural regime relating to service as it bears on applications for planning statutory review. In any event I agree with Coulson L.J. that, at least in circumstances of the kind we have seen here, a failure on the part of claimants in such cases, and their legal representatives, to take proactive and timely steps to effect service can be fatal for the court's jurisdiction to consider the challenge. And in this case it was.

Appendix 1: The Recently Reported Cases Applying *Good Law*

"CF" means claim form; "EoT" means extension of time for service; "LP" means limitation period

Case	LP expired	CF filed	CF issued	CF served	EoT Application
Farnham TC	14 August	14 August	14 August	18 August Defective service 16 August	16 August
Aurora	23 November 2023	23 November 2023 "before 4 o'clock in the afternoon"	24 November 2023	1 December 2023	28 February 2024
Merrills	15 June	14 June	21 June (Following chasing of the court office)	21 June	5 July
Home Farm	3 November	4 November	4 November	25 November	2 December
Telford	Tuesday 9 May (Monday 8th was a bank holiday)	Thursday, 4 May	Monday, 15 May	19 May By email at 19:22 on 18 May	26 July
Halton BC	7/8 September	6 September	6 September	9 September	12 September