Neutral Citation Number: [2022] EWHC 2515 (Admin)

Case Nos: CO/1652/2022 & CO/2327/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 October 2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

THE KING **(on the application of**	**Claimant**
(1) TAX RETURNED LIMITED **(2) TAX REBATES LIMITED** **(3) ONLINE TAX REBATES LIMITED)** **- and -** **THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**	**Defendant**

- -
- -

Joanne Clement KC and **Zac Sammour** (instructed by **Hill Dickinson**) for the **Claimants**
Adam Tolley KC and Marika Lemos (instructed by **HMRC Solicitor's Office**) for the **Defendant**

Hearing date: 15 September 2022

- -

Approved Judgment

.....

Mrs Justice Heather Williams DBE:

Introduction

1. The Claimants apply to judicially review the following decisions of The Commissioners for His Majesty's Revenue and Customs ("HMRC"): (1) to introduce a mandatory form, P87, for claiming tax relief on PAYE employment income under Chapter 2 of Part 5 of the Income Tax (Earnings and Pensions) Act 2003 ("the 2003 Act") with effect from 7 May 2022; (2) to include within this P87 form a field for applicants to provide an employer's PAYE reference number, without indicating that completion of this field is not a mandatory requirement for submitting a valid claim for tax relief; and (3) an alleged threat to suspend the processing of claims for tax relief submitted by each of the Claimants if a "high level" of forms are considered by HMRC to be incomplete, as set out in the letter of 11 April 2022. The requirement to use the P87 form was contained in para 2 of the Commissioners' direction which was made on 6 May 2022 ("the Direction"), in the exercise of powers conferred by the Income Tax (Pay as Your Earn) and the Income Tax (Construction Industry Scheme) (Amendment) Regulations 2022, SI 2022/227 ("the 2022 Regulations").

2. When referring to them individually, I will term the Claimants, "C1", "C2" and "C3". They are High Volume Agents ("HVAs"), who submit a high volume of tax relief claims on behalf of taxpayers. They have each operated for at least eight years. Their business models have relied upon the submission of the tax relief claims via bespoke online forms, based on information that taxpayers provide via their websites. The HVAs have marketed their services as a simple method of making these claims with a user-friendly form. The Claimants operate on a "no win, no fee" basis; taxpayers only pay for their services if they are successful in securing a tax refund. As the Direction mandates the use of the P87 form, the Claimants are no longer able to submit claims on their own bespoke forms. They say that this poses a threat to the viability of their business operations, in particular when allied to the fact that many taxpayers who use their services do not know their employer's PAYE reference number and in light of the threat made to suspend the processing of their claims if incomplete forms are submitted.

3. The Claimants rely on the following grounds in support of their claim:

    i) HMRC acted unlawfully in failing to consult HVAs before making the Direction and mandating the use of the new P87 form. The duty to consult arose as: (a) the Claimants had a legitimate expectation of consultation arising from past practice and/or from the removal of a benefit (namely the previous submission of claims via their bespoke forms); (b) the failure to consult was conspicuously unfair; and/or (c) objectively viewed, HMRC had embarked upon a consultation with the HVAs and having embarked upon such a consultation, the Defendant was required to carry it out lawfully ("Ground 1");

    ii) Paragraphs 2 and 7 of the Direction are irrational. It was irrational to give HVAs only a matter of weeks to implement the far reaching changes to their business operations, when they had informed HMRC that a change of this magnitude would take many months to implement ("Ground 2A"); and/or

iii) It is irrational for HMRC to include a field for the employer's PAYE reference number in the new mandatory form in circumstances where: (a) it is common ground that they have no power to require taxpayers to provide this information; and (b) neither the P87 form nor the guidance notes inform taxpayers that this is the case ("Ground 2B");

iv) The threat to suspend the processing of notifications of claims for tax relief submitted by the Claimants in the event that a "high level" of forms do not contain PAYE reference numbers is ultra vires. HMRC are required to process all valid notifications for tax relief (i.e. those notifications which comply with the Direction). The Commissioners are not entitled to use their ancillary powers to achieve a result indirectly (provision of PAYE reference numbers) that they have no power to achieve directly ("Ground 3").

4. The Defendant explains that it introduced the new mandatory P87 form to speed up the processing of claims and in due course enable automation of this process. Prior to this, use of a similar, albeit not identical, P87 form was voluntary. HMRC says that it has encountered significant problems in the past with the HVAs' bespoke claim forms as there has been a high rate of ineligible claims and also of incomplete claims, meaning that the Defendant has had to expend time and resources in obtaining the information. HMRC denies that there was any duty to consult with the Claimants. The Defendant also denies that the challenged decisions are irrational; it is said that the choice of date for the introduction of the mandatory form was rational as a large number of claims tend to be submitted in May – September each year. Furthermore, it is rational to ask taxpayers to provide information that is relevant to the accurate and efficient processing of their claims. It is denied that the relevant part of the 11 April 2022 letter amounted to a threat and denied that the indications there given involved an ultra vires act. It is also said that Ground 3 is speculative, premature and academic.

5. The Defendant also contends that the challenges raised by Grounds 1, 2A and 2B were not brought in compliance with the time limit prescribed by CPR 54.5, as the grounds to first make these claims arose on 17, 18 or 24 February 2022. The Claimants, on the other hand, submit that time ran from 7 May 2022 when the Direction came into effect. It is agreed that time ran from 11 April 2022 in respect of Ground 3.

6. The procedural history is relatively complex. There are two claims brought by the same Claimants, challenging the same decisions and relying on the same grounds and, in effect, the same Statement of Facts and Grounds ("SFG"). The first claim was filed on 10 May 2022 and issued on 11 May 2022 ("JR1"). The Claimants contend that it was validly served by email on 11 May 2022 or by delivery of a hard copy on the following day. The Defendant disputes that valid service occurred within the prescribed seven day period from the day of issue. On 26 May 2022 the Defendants raised the service issue and in consequence the Claimants filed a second claim on 27 May 2022 ("JR2"), contending that this was still within the CPR 54.5 time limit.

7. In the meantime and in consequence of the Claimants' application for expedited consideration of JR1, Foster J made directions in an order dated 13 May 2022. By application notice dated 26 May 2022, the Defendant applied to vary the case management directions made by Foster J ("Application 1").

8. By a further application notice dated 1 June 2022, the Defendants applied to set aside the Claim Form in JR1 on the ground that the Claim Form had not been validly served ("Application 2"). It is accepted that the Claim Form in JR2 was validly served. On the same date, the Defendant filed an Acknowledgment of Service ("AoS") and Summary Grounds of Resistance ("SGR") in JR1, without prejudice to the contention that the claim had not been validly served.

9. By application notice dated 13 June 2022 the Claimants applied for: (i) a declaration that the Claim Form in JR1 had been validly served; or (ii) an order for alternative service ("Application 3"). On the same date the Claimants filed a Reply to the SGR.

10. The Defendant filed an AoS and SGR in JR2 on 26 July 2022. The SGR were in substantially the same terms as the document served in JR1, save for some updating.

11. Applications 1, 2 and 3 are all contested. JR1 has not been discontinued and currently both sets of proceedings are before the Court. In the absence of any agreement between the parties as to how to resolve this procedural situation, it is necessary for the Court to rule on the validity of the service of the Claim Form in JR1. By order dated 28 June 2022, HHJ Auerbach, sitting as a Deputy High Court Judge, listed a one day hearing to determine the three applications and, provided time allowed, to determine the application for permission to apply for judicial review.

12. The Claimants' application for judicial review is supported by witness statements made by the founders and directors of each of the companies, specifically: Bradley Jonathan Sacher (for C1), Sanjay Soni (for C2) and Anthony William Mills (for C3). The Defendant has filed three witness statements from Ronald Kelly, Senior Solicitor in the Personal Tax Team of HMRC's Solicitor's Office in support of the Defendant's applications (which I will refer to as "Kelly 1" and so forth). The Claimants rely on the statement of Stephen Barnfield, solicitor at Hill Dickinson ("Barnfield 1"), responding to Kelly 1 and supporting Application 3.

13. In the event, it was necessary for me to reserve judgment in order to allow sufficient time for the parties to complete their submissions on the contested applications and on permission to apply for judicial review and to avoid the question of permission having to be adjourned to a future date. This is my judgment in relation to Applications 1 – 3 and the application for permission. I explain the material chronology of events and the legal framework. I then address Applications 2 and 3 as they both concern the validity of service of the Claim Form in JR1. Application 1 has largely been superseded by subsequent events, but I turn to it briefly after having addressed Applications 2 and 3. Resolution of the application for alternative service involves (amongst other considerations) analysing the time limits position pursuant to CPR 54.5 in respect of JR1 and JR2. Having addressed those matters, I consider whether permission to apply for judicial review should be granted.

Facts and circumstances

Substantive events

14. In 2018 HMRC initiated discussions on the creation of a standardised paper online agent P87 form. By invitation some of the HVAs attended a workshop on 25 May 2018

and provided views. After the workshop there were some further communications of view, but this ceased by November 2018 and nothing came of the initiative at that stage.

15. The Defendant says that the decision to introduce a mandatory form was made on 23 December 2021. On that date an email sent to the Second Permanent Secretary indicated an intention to send a submission to the Financial Secretary to the Treasury ("FST") on 5 January 2022. The submission was duly sent, asking for her agreement to the recommendation that an amendment be made to the PAYE Regulations to allow HMRC to prescribe the format of specific tax relief claims, including claims for employment related expenses. The submission indicated:

> "…despite previous engagement with RAs [repayment agents] on this, no consensus has been reached. Prescription is a logical and reasonable next step and unlikely to come as a complete shock to the RAs as we have previously engaged with them to create a standard claims form. Given this previous engagement, we do not believe that consultation on whether to prescribe a standardised form is likely to be productive. However, in order to ensure that the measure lands as well as possible with RAs, we would prefer to engage with them ahead of any announcement, to explain our approach and signal that we wish to explore with them (1) how a standard form would be designed to meet both our requirements and their objectives; and (2) how best to manage the transition."

16. The FST gave her agreement. I do not know the specific date of this.

17. On 17 February 2022 HMRC contacted two HVAs, including Mr Sacher of C1. An email was sent inviting attendance on a 30 minute call to discuss changes that the Defendant was due to implement at the beginning of the new tax year. It said: "We want to have a discussion about how this will impact your business and give you an early heads up to this change". Mr Sacher says that this came as a surprise. It led to a telephone call between Mr Sacher and Denise Beat of HMRC during which he says he was informed of changes that were going to be introduced from the start of the next tax year in April 2022. The following day, Mr Sacher had a telephone conversation with Mr Manship (of HMRC). He says that he was informed that the decision to introduce a mandatory form had already been taken at director level.

18. On 18 February the Claimants received an email to a MS Teams meeting to "discuss new regulations that HMRC are introducing with effect from 6 April, relating to the form P87…This will mean that all P87 based information must be made in a standard prescribed format". Representatives of 12 HVAs were invited to the meeting and representatives of each of the Claimants attended. Mr Soni recorded the meeting (without seeking permission to do so).

19. It appears to be common ground that the Claimants were told during the meeting that a standardised P87 form would become mandatory from 7 May 2022 and that the form would be very similar to the current voluntary form. It is agreed that a draft of the prescribed form was not available at that stage. The Claimants were familiar with the form that had been in use up to that point and raised a number of concerns about its contents. Concerns were also raised over the 7 May 2022 commencement date. In their

statements, the Claimants say that they all made clear that this would present very considerable difficulties for them as they could not re-organise their business models and the forms to be used through their websites within that timescale. They also emphasised that a mandatory field involving provision of the employer's PAYE reference number would present practical difficulties. HMRC personnel indicated that they would think about the points raised.

20. On the same day a further submission was made to the FST seeking her approval for the laying of the attached draft Statutory Instrument. The text explained that it was now intended that use of the new prescribed form would be mandatory from 7 May 2022. The FST gave her approval. I do not know the date on which she did so.

21. On 4 March 2022, the Commissioners made the 2022 Regulations, which conferred a power on the Defendant to specify the form and the manner in which specified information was to be provided. On 7 March 2022 the 2022 Regulations were laid before the House of Commons.

22. Correspondence between the Claimants and HMRC occurred through late February 2022 and early March 2022. In a letter dated 11 March 2022 from Gary Newman of HMRC to Mr Sacher, Mr Newman indicated that the introduction of the mandatory form had been deferred to 6 May 2022; that a draft of the Commissioners' Direction and the final version of the new P87 form would be published on 21 March 2022; and that on 14 March 2022 HVAs would be provided with details of the data fields appearing on the new form.

23. Draft P87 forms were duly provided to the Claimants on 14 March 2022. The P87 form was published on 21 March 2022, together with associated guidance notes. A draft of the Direction was published on 22 March 2022.

24. The alleged threat that Ground 3 is based upon was contained in the letter dated 11 April 2022 from HMRC to the Claimants' solicitors. The material passage said:

> "14. In the event that a notification submitted on the new P87 form is nonetheless incomplete in a material respect, such as in relation to the Employer PAYE Reference, HMRC will deal with the matter appropriately and reasonably. HMRC will continue (as they currently do) to obtain any missing information and process the notification based on the information which HMRC holds, provided that this can be matched to the person providing the notification…
>
> 15. ….
>
> 16. HMRC intends to monitor the quality of notifications made by each repayment agent. If there are high levels of incomplete and/or inaccurate notifications, HMRC will engage with such agents in an attempt to understand any genuine difficulties in providing complete and accurate information. If appropriate and reasonable, HMRC may use their powers of good management and administration (under section 9(1) of the Commissioners for Revenue and Customs Act 2005) to suspend

> the processing of notifications submitted by any particular agent or agents where there are no or no good reasons for the levels of incompleteness and/or inaccuracy."

25. The material part of the 2022 Regulations came into force on 6 May 2022. Regulation 3 inserted a new reg. 65A into the PAYE Regulations, which conferred power on the Commissioners to make a direction as to how employees may notify HMRC of deductible expenses. Regulation 65A(3) provides that employees may notify HMRC of deductible expenses by "providing specified information relating to those expenses to HMRC in accordance with this regulation". The specified information is defined as being: "the nature and amount of each of the deductible expenses incurred in respect of each of the employee's employments" (reg. 65A(4)). The Claimants emphasise that the specified information does not include an employer's PAYE reference number. Pursuant to reg. 65A(5), the "specified information" must be provided "in the form and manner given in a direction made by the Commissioners".

26. On 6 May 2022, the Commissioners made the Direction. Paragraph 2 provides that an employee who wishes to notify HMRC of deductible expenses must provide the specified information using the format set out on the P87 form. Paragraph 7 provided that the Direction was to come into force on 7 May 2022.

27. In the first section headed "About this form", the P87 form says: "We will need to return any incomplete or incorrect forms and this will delay your claim". Section 2 of the form is headed "Employment details". The text includes: "To avoid delays in processing your form, complete every box that is appropriate to your claim". One of the boxes seeks the employer's PAYE reference number. The Guidance notes indicate that to "avoid delay in processing your form, complete every box that is appropriate to your claim". The notes say that the employer's PAYE number is available on the taxpayer's on-line Personal Tax Account ("PTA"). It is accepted that this was not in fact the case from 7 May 2022 but has been so since 6 July 2022. The Claimants say that a substantial proportion of PAYE taxpayers do not have a PTA or the necessary identification documents to set one up, whereas the Defendant says that the difficulties of setting up a PTA have been exaggerated by the Claimants.

28. At the time of preparing the SFG in JR1, the Claimants' estimates as to the amount of time that it would take them to adapt their business model to use the prescribed form were: C1 – 4 months; C2 – 5 months; and C3 – 3 months or longer if difficulties were encountered. An update on the Claimants' position is provided in Ms Clement's Skeleton Argument. C1 completed its development work in the first week of August and has started to send a small number of claims to HMRC. However, it is said that it is unable to afford to advertise at full capacity, given the relatively small number of claims it has been able to submit to HMRC, which, in turn, is because it has been unable to obtain employer PAYE reference numbers for many of the potential claimants and cannot run the risk of being suspended by submitting incomplete forms. C2 has now completed its development work and has started to submit claims. It is attempting to obtain PAYE reference numbers where possible but it is said that it is forced to operate on a reduced scale because of the threat of suspension. C3 has not yet completed its development work and is not yet in a position to submit claims.

The procedural chronology

29. The first pre-action protocol letter was sent on 18 March 2022 and the second on 28 March 2022. The Defendant's response to the first letter was dated 1 April 2022. Under the heading "Address for further correspondence and service of court documents" the letter said that: "service of further correspondence is to be made via email to" and then the email address was given for Wasif Sheikh, who was the solicitor who had conduct of the case on behalf of HMRC (para 45). The letter then continued at para 46 that "Service of new legal proceedings is to be made via email to newproceedings@hmrc.gov.uk and [Mr Sheikh's email address was given]". The text then continued: "or by post to General Counsel and Solicitor to HM Revenue and Customs, HM Revenue and Customs, 14 Westfield Avenue, London E20 1HZ" ("the London address"). The response to the second pre-action protocol letter was dated 11 April 2022. At para 18 it said that the information provided in paras 45 – 46 of the letter dated 1 April 2022 remained correct.

30. On 20 April 2022 Mr Sheikh commenced a period of special leave as he had suffered two sudden family bereavements. On 25 April 2022 Mr Kelly took over conduct of the matter. On 9 May 2022 there was a telephone call between Mr Kelly and Mr Barnfield. Mr Kelly has provided an attendance note of the call. His note records that he explained that Mr Sheikh was absent from work and he "asked if he could be copied into emails going forward given WS's absence. SB agreed, RK said he would email SB so that SB had his email address". The same day Mr Kelly emailed Mr Barnfield giving his email address and asking: "Please copy me in to any further correspondence related to this claim".

31. On 10 May 2022 at 09:41 hours Mr Barnfield emailed Mr Kelly, copying in Mr Sheikh, saying that he was writing as a courtesy to indicate that he would be forwarding a copy of the application to seek permission to apply for judicial review which had been lodged the previous evening.

32. On the same day at 11:59 hours Mr Barnfield emailed Mr Sheikh and Mr Kelly saying that he attached correspondence, the Claim Form, accompanying documents and a reading list. He said that a further email would follow attaching the full permission application bundle as it was a large file. He asked for an acknowledgement of receipt of each email. It is accepted that the Claim Form had not been issued at this stage.

33. On 10 May at 12:22 hours Mr Barnfield sent a further email to the same email addresses indicating that the bundle had not made it through the filters and that he was sharing access to a folder that would allow for the files to be downloaded.

34. On 11 May 2022 Tauseef Issa of HMRC emailed Mr Barnfield (copying in Mr Kelly and Mr Sheikh) indicating that HMRC were moving to a new system, the Secure Data Exchange Service ("SDES").

35. On 11 May 2022 at 14:17 hours the Court provided Mr Barnfield with a sealed copy of the Claim Form. At 14:28 hours the same day Mr Barnfield emailed Mr Kelly, copying in Mr Sheikh, attaching the issued Claim Form and saying:

> "Please find attached the issued copy of N461.
>
> I have received a request into which you were both cc'd for me to create some form of HMRC 'account' to allow transfer of large files. I would be grateful if you would kindly confirm which (if any) of my emails of yesterday was received."

36. At 14:49 hours on 11 May 2022 Mr Barnfield emailed Mr Issa (copying in Mr Kelly and Mr Sheikh) indicating that he had been unable to progress the SDES registration and kept receiving an error message. At 15:12 hours he was emailed by Mr Issa (with Mr Kelly and Mr Sheikh copied in). This email said:

> "We are happy to receive a hard copy bundle to the following address:
>
> FAO: RONALD KELLY
>
> HMRC Solicitor's Office and Legal Services
>
> 4th Floor West
>
> Ralli Quays
>
> 3 Stanley Street
>
> Salford
>
> M60 9LB…"

I will refer to the address given in this email as "the Salford address".

37. On 12 May 2022 at 13:26 hours Mr Kelly emailed Mr Barnfield saying that he had received the email attaching the sealed N461 and the email of 10 May attaching the unsealed Claim Form. The email also noted that Mr Barnfield now intended to post the bundle and he was asked to provide an update on this. Mr Kelly also suggested that the bundle could be sent by email if it was split into two or more parts and he asked for this to be attempted. The latter was not attempted.

38. On the afternoon of 12 May 2022 a hard copy of the bundle was sent and received at the Salford address. The covering letter said:

> "Please find enclosed a hard copy of the Permission Bundle sent by email (and by download link) on 10 May 2022. Service was effected by means instructed in pre-action correspondence on 10 May; this hard copy bundle has been supplied as a courtesy to assist with effective management of the case."

39. The issued Claim Form was not emailed to the "new proceedings" email address supplied in the 1 April 2022 letter and a hard copy was not sent to the London address.

40. The Claimants had sought expedition in respect of their application for judicial review, relying on the impact on their businesses. By order dated 13 May 2022, Foster J

dispensed with the obligation to file an AoS; directed that the Defendant file and serve Grounds of Defence by 4pm on 27 May 2022; and that the papers be put before a Judge as soon as practicable thereafter for permission to be considered as a matter of urgency. Liberty to apply on 24 hours written notice was granted.

41. The same day the Court sent the order by email to Mr Sheikh's email addresses. This had been provided by Mr Barnfield as the address for service on the Claim Form. The order did not come to Mr Sheikh's attention in light of his ongoing absence from work. It appears from Kelly 1 that a paralegal had been given responsibility for checking Mr Sheikh's inbox in his absence but this email was not noted and Mr Kelly was not alerted. Mr Sheikh resumed work on 18 May 2022. He was working from home and on strong painkillers as he had suffered an injury whilst on special leave. Accordingly, he was not working to his full capacity and he also missed the email from the Court.

42. As a result of an email sent by Mr Barnfield on 26 May 2022, Mr Kelly first realised that there was a Court order that he had not seen. Inquiries were then made and Foster J's order was located. Mr Kelly made Application 1 the same day. This was done with some urgency and supplemental grounds were provided on the following day. In the meantime the Claimant's Certificate of Service provided in respect of the Claim Form, indicated that service had been effected by email to Mr Kelly and to Mr Sheikh.

43. I have set out the steps that followed, including the making of Applications 2 and 3 at paras 10 - 11 above.

Legal framework: service

44. CPR 6.3(1) addresses methods of service. It provides:

> "A claim form may be served by any of the following methods –
>
> (a) personal service in accordance with rule 6.5;
>
> (b) first class post…in accordance with Practice Direction 6A;
>
> (c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10;
>
> (d) fax or other means of electronic communication in accordance with Practice Direction 6A; or
>
> (e) any method authorised by the court under rule 6.15."

45. CPR 6.7(1) concerns service on a solicitor within the United Kingdom. It provides that where a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the Claim Form at a business address within the jurisdiction "the claim form must be served at the business address of that solicitor". CPR 6.8, which addresses service at an address given by the defendant, is subject to CPR 6.7.

46. CPR 6.10(b) provides that service on a government department must be effected on the solicitor acting for that department. Practice Direction 66 gives the list published under s.17 Crown Proceedings Act 1947 of the solicitors acting in civil proceedings for the

various government departments and their respective addresses. Civil proceedings include applications for judicial review for these purposes: PD 54A, para 5.2(b). The address provided in the PD 66 list for HMRC is the London address.

47. Paragraph 4.1 of PD 6A deals with service by fax or other electronic means. As relevant it provides:

> "Subject to … where a document is to be served by fax or other electronic means –
>
> (1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –
>
> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
>
> (b) the fax number, e-mail address or other electronic identification to which it must be sent."

48. Paragraph 4.2 provides that where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means, for example in terms of format or the maximum size of attachments that may be received. Paragraph 4.3 says that where a document is served by electronic means, the party serving it need not additionally send or deliver a hard copy.

49. CPR 54.7 requires that in judicial review proceedings the Claim Form is served on the defendant within seven days of the date of issue.

50. CPR 6.15(1) addresses service of the Claim Form by an alternative method. It provides:

> "Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

51. CPR 6.15(2) states that pursuant to the above rule, the court may order that steps already taken to bring the Claim Form to the attention of the defendant by an alternative method or at an alternative place constitute good service.

52. I do not need to consider the CPR provisions concerning extending the time for service of the Claim Form as an application for an extension has not been made in this case.

53. The principles applicable to the power conferred by CPR 6.15(1) to permit alternative service were confirmed by the Supreme Court in *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119 ("*Barton*"). In *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355, [2022] 1 WLR 2339 ("*Good Law Project*") Carr LJ referred to *Barton* and to the Supreme Court's earlier decision in *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043. She observed at para 54 that what constituted "good reason" was essentially a matter of factual evaluation. At

para 55 she provided the following summary of the principles identified in these authorities:

> "(i) The test is whether in all the circumstances there is good reason to order that steps taken to bring the claim form to the attention of the defendant are good service;
>
> (ii) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served. This is a critical factor. But the mere fact that the defendant knew of the existence and content of the claim form cannot, without more, constitute a good reason to make an order…
>
> (iii) The manner in which service is effected is also important. A 'bright line' is necessary to determine the precise point at which time runs for subsequent procedural steps. Service of the claim form within its period of validity may have significant implications for the operation of the relevant limitation period. It is important that there should be a finite limit on the extension of the limitation period.
>
> (iv) In the generality of cases, the main relevant factors are likely to be:
>
> (a) Whether the claimant has taken reasonable steps to effect service in accordance with the rules;
>
> (b) Whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired;
>
> (c) What, if any, prejudice the defendant would suffer by retrospective validation of a non-compliant service of the claim form.
>
> None of these factors are decisive in themselves and the weight to be attached to them will vary with all the circumstances."

54. At para 57 Carr LJ addressed the extent to which there was any obligation on a defendant to point out deficiencies with service. She said:

> "Provided that a defendant has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve. The potential defendant can sit back and await developments…Thus, there is no duty on a defendant to warn a claimant that valid service of a claim form has not been effected…"

55. Lady Justice Carr also emphasised that "service of the claim form requires the utmost diligence and care to ensure that the relevant procedural rules are properly complied

with": para 63. At para 84 she noted that CPR 6.15 was not a generous provision for claimants where there are no valid obstacles to service of a Claim Form within time.

56. In assessing the extent of any prejudice suffered by the defendant, the court is entitled to take into account the fact that retrospective authorisation would deprive the defendant of an accrued limitation defence: *Good Law Project* at para 65.

Legal framework: time limits in judicial review proceedings

57. CPR 54.5(1) provides that in relation to an application for judicial review the Claim Form must be filed: "(a) promptly; and (b) in any event no later than 3 months after the grounds to make the claim first arose". Time may be extended pursuant to CPR 3.1(2)(a) where "good reason" is shown for doing so.

58. In *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 1 WLR 1593 ("*Burkett*") the House of Lords considered when time ran in the context of a planning case, specifically did it run from when the local planning authority resolved that outline permission for the development would be granted or from the subsequent grant of planning permission. Their Lordships held that it ran from the latter. Lord Steyn gave the leading speech. At para 38 he noted that it was *possible* to apply for judicial review in respect of a resolution to grant outline permission. Ms Clement stressed that the fact that it was *possible* to apply for judicial review at an earlier stage, did not in and of itself preclude time running from a later decision. At para 39 Lord Steyn said:

> "…The ground for challenging the resolution is that it is a decision to do an unlawful act in the future; the ground for challenging the actual grant is that an unlawful act has taken place. And the fact that the element of unlawfulness was already foreseeable at earlier stages in the planning process does not detract from this natural and obvious meaning. The context supports this interpretation. Until the actual grant of planning permission the resolution has no legal effect…The resolution may come to nothing because of a change of circumstances…In the search for the best contextual interpretation these factors tend to suggest that the date of the resolution does not trigger the three-month time limit in respect of a challenge to the actual grant of planning permission."

59. Lord Steyn then discussed the Divisional Court's decision in *R v Secretary of State for Trade and Industry ex p. Greenpeace Ltd* [1998] Env LR 415 ("*Greenpeace*") to the effect that time ran from "the substantive act or decision which is the real basis of the complaint", which the Court of Appeal had relied upon in the instant case (paras 40 – 42). He observed that the fact an arguably premature application could be stayed or adjourned was "hardly a satisfactory explanation for placing a burden on a citizen to apply for relief in respect of a resolution which is still devoid of legal effect" (para 42). At para 43 Lord Steyn said:

> "At this stage it is necessary to return to the point that the rule of court applies across the board to judicial review applications. If a decision-maker indicates that, subject to hearing further

> representations, he is provisionally minded to make a decision adverse to a citizen, is it to be said that time runs against the citizen from the moment of the provisional expression of view? That would plainly not be sensible and would involve waste of time and money. Let me give a more concrete example. A licensing authority expresses a provisional view that a licence should be cancelled but indicates a willingness to hear further argument. The citizen contends that the proposed decision would be unlawful. Surely, a court might as a matter of discretion take the view that it would be premature to apply for judicial review as soon as the provisional decision is announced. And it would certainly be contrary to principle to require the citizen to take such premature legal action. In my view the time limit under the rules of court would not run from the date of such preliminary decision in respect of a challenge of the actual decision. If that is so, one is entitled to ask: what is the qualitative difference in town planning? There is, after all, nothing to indicate that, in regard to RSC Ord 53, r 4(1), town planning is an island on its own."

60. The reasoning in para 43 indicates that Lord Steyn did not consider his conclusion that time ran from when the decision had legal effect rather than from an earlier point when the decision was foreseeable or provisional, was limited to the planning context. At paras 44 – 50 he identified a number of factors that pointed against the *Greenpeace* approach (which was overruled). In particular, he stressed the desirability of a clear and straightforward interpretation that would yield a readily ascertainable starting date, whereas the lack of certainty inherent in the *Greenpeace* approach was "a recipe for sterile procedural disputes and unjust results" (para 49).

61. Mr Tolley KC relied upon *R (Nash) v Barnet London Borough Council* [2013] EWCA Civ 1004, [2013] PTSR 1457 ("*Nash*") as indicating that where a decision was challenged on the basis that it had been made without proper consultation, time ran from the point when it was resolved not to consult, rather than from the date of that decision. Ms Clement disputed that *Nash* was authority for this broad proposition and maintained that time ran from when the decision in question had legal effect. It is therefore necessary to consider the Court of Appeal's reasoning in *Nash* in some detail.

62. The challenge in *Nash* concerned the outsourcing to the private sector of a number of services previously provided by the defendant council. Following an oral hearing, Underhill LJ found that the council had failed to fulfil a statutory consultation duty, but he refused permission on the grounds of delay. He also rejected other grounds of challenge, but only his conclusion on delay was appealed. Accordingly, the Court of Appeal was solely concerned with the time limits question.

63. The circumstances were as follows. At a cabinet meeting on 29 November 2010 the council decided to commence the procurement process to identify a private sector strategic partner for the delivery of development and regulatory services ("DRS"). The procurement process came within the Public Contracts Regulations 2006 (SI 2006/5). At a cabinet resources committee meeting on 2 March 2011 a similar decision was made in respect of "customer services organisations and new support organisation" ("NSCSO"). The public procurement procedures then ran their course, with extensive

consideration by the council at various stages of the process. In December 2012 the council resolved to accept Capita's tender as the approved bid in relation to the NSCSO project. The claimant was an aggrieved resident of Barnet who opposed outsourcing. Her Claim Form indicated that she challenged the December 2012 decision and an "expected decision of 31 January 2013" in relation to the approved bidder for the DRS contract. She alleged a failure to comply with statutory consultation obligations under s.3(2) Local Government Act 1999 ("LGA 1999").

64. In addressing the time limits issue, Davis LJ said that it was necessary to identify "when a decision was taken in respect of which the statutory duty to consult first arose: because it is the alleged failure to consult which is the essence of these proceedings" (para 49). He went on to say that this depended upon the terms of s.3 LGA 1999. The section imposed a duty to "make arrangements" to secure continuous improvements in the way an authority's functions were exercised; and the obligation to consult under s.3(2) arose for the purposes of deciding "how" to fulfil that duty (para 50). As such, it was "an impossibly narrow application" of the section to link it to the December 2012 decision to appoint Capita. The section was not concerned with decisions about which particular contract an authority was minded to make; the duty was geared to consultation at a much earlier stage (para 51). Here the claimant's complaint was not about a failure to consult her about entering into a contract with Capita, but about a failure to consult about "the whole proposal to outsource in principle". As such there was a "clear lack of connection" between the absence of consultation on the policy of outsourcing and the decisions challenged on the face of the Claim Form (para 52). Furthermore, the subsequent decision to award a contract to Capita was not one "which required the council to consult at all"; whereas the decisions of November 2010 and March 2011 "were intended to, and would be known to, have both legal effect and significant consequences" (para 55).

65. Lord Justice Davis went on to distinguish *Burkett* from the present case (para 64). He explained that distinction as follows at para 65:

> "…the council was not provisionally resolving to enter any outsourcing contract at all, let alone a provisional contact relating to the DRS project or to the NSCSO project. What…the council was doing was actually deciding to enter into a procurement process by way of competitive dialogue. That process then, and in accordance with the 2006 Regulations, proceeded in stages. Thus, in contrast with the initial resolution in *Burkett*'s case, work here was lawfully and foreseeably done and money was expended precisely because of such decisions. The decisions thus had and were intended to have legal effect: not, of course, in terms of sanctioning a binding contract but in terms of authorising and causing the initiation of the procurement process, with attendant inevitably heavy expenditure and significant use of time and resources. Without such decisions, those things could not and would have been done. Those decisions are thus, indeed, in my view properly to be regarded as substantive or, if you like 'final'… for that purpose. They are not to be regarded as contingent or provisional, even though there was no guarantee at all that any

> outsourcing contract or contracts might ultimately result. Mr Griffin did suggest that to so conclude would be tantamount to resurrecting "the real basis of complaint" approach put forward in the *Greenpeace* case but which was disapproved in *Burkett*'s case. In my view, however, it does no such thing: rather, as I have sought to say earlier in the judgment, it identifies the actual decision by reference to which the grounds of challenge first arose."

66. Accordingly, it does not appear to me that *Nash* circumscribes the reasoning in *Burkett* or casts any doubt upon it. The Court of Appeal decided that the circumstances were factually distinct because: (i) the earlier decisions made in November 2010 and May 2011 were not provisional, but had legal effect; and (ii) the substance of the challenge regarding consultation was in fact directed towards those earlier decisions made in November 2010 and May 2011 to embark upon the procurement process, rather than the more recent decision to appoint Capita, which involved no obligation to consult at all.

67. Mr Tolley also drew my attention to Davis LJ's citation from para 250 of the judgment of Moore-Bick LJ in *R (Risk Management Partners Ltd) v Brent London Borough Council* [2010] PTSR 349. This was another public procurement challenge. The case concerned an alleged breach of reg. 47 of the 2006 Regulations. However, the passage cited by Davis LJ at para 68 simply makes the point that where there has been a failure to comply with a certain stage of the prescribed procedure, the later award of the contract does not constitute a separate breach of duty.

68. In support of her submission that time ran from when the Direction had legal effect, Ms Clement also relied upon the judgment of Lang J in *R (Amey Plc and Enterprise Managed Services Ltd) v Secretary of State for Housing Communities and Local Government* [2020] EWHC 3132 (Admin) ("*Amey*") given in relation to a permission application. An issue arose in respect of the Local Government Pension Scheme (Amendment) Regulations 2022 as to whether time ran from the date when the Regulations were made or from the later date when they came into force. Mrs Justice Lang noted that there was no binding authority on the point and that the caselaw pointed in different directions. At para 45 she concluded that the better view was that time ran from the date on which the Regulations came into force. She noted that the coming into force date was set out in the Regulations "thus providing clarity and certainty to all".

Conclusions: Service of the Claim Form in JR1

Service within the rules

69. The Claimant's case is that valid service was effected by either:

    i) The email that Mr Barnfield sent to Mr Kelly and to Mr Sheikh at 14:28 hours on 11 May 2022 attaching the issued Claim Form; or

    ii) Provision of the hard copy permission bundle, including the issued Claim Form, at the Salford address on 12 May 2022.

    I will consider these in turn.

Service by email on 11 May 2022

70. It is accepted that service of an unsealed Claim Form does not suffice. Accordingly, the email of 10 May 2022 attaching the same is not relevant for present purposes. As I have noted earlier, it is also common ground that the Claim Form was never served on the "new proceedings" email address.

71. It is clear from the procedural chronology of events that Mr Kelly did not at any stage inform Mr Barnfield that his email address could be used for service. Indeed, para 28 of Barnfield 1 accepts that during their telephone call on 9 May 2022 Mr Kelly did not expressly state that service could be validly effected by an email sent to his email address. Furthermore, Mr Barnfield does not suggest that such an indication was ever given in writing. Accordingly, it is apparent that emailing the Claim Form to Mr Kelly did not constitute service within the rules as there had been no compliance with PD 6A para 4.1 in respect of this email address.

72. Accordingly, the question is whether emailing the Claim Form to Mr Sheikh, but not to the new proceedings email address, constituted good service. Mr Tolley submitted that what para 46 of the 1 April 2022 letter really meant was that proceedings were to be served on the new proceedings email, with Mr Sheikh copied in. He said that this would be consistent with HMRC's Press Release of 9 April 2020, indicating that HMRC would now accept service of legal proceedings by email served on the Solicitor for HMRC at the new proceedings email address. I reject that submission as it is not what the letter actually said. It said that service of legal proceedings was "to be made via email" to the new proceedings address *and* to Mr Sheikh's email address. Equally, I do not accept Ms Clement's submission that the terms of the letter indicated that service upon one *or* the other of these email addresses would suffice. In my judgment the letter is to be read as meaning what it said, namely that for service to be effected by email, the Claim Form was to be emailed to both of the stated email addresses. The next question, therefore, is what the legal effect of this is.

73. Although the focus of Barnfield 1 was on the proposition that emailing the Claim Form to Mr Kelly sufficed (a proposition I have rejected), Ms Clement advanced a different point in her skeleton argument and oral submissions. She contended that PD 6A para 4.1 only contemplated a party providing *one* email address, so that if a party elected to provide more than one email address it was not open to them to stipulate that service must be to *each* of the addresses, rather, in these circumstances, the party serving the document was entitled to choose which of the email addresses to use and that in this instance Mr Barnfield permissibly chose to use Mr Shiekh's email address.

74. Counsel informed me that they had not found any authorities that had considered the requirements of PD 6A para 4 in this regard. The terms of PD 6A para 4.1 refer to "email address" in the singular. Ms Clement accepted that the singular can be read as including the plural where the context so admits, but she submitted that it did not do so here. She pointed out that the authorities I have cited earlier emphasise the importance of clarity and certainty in respect of service; whereas permitting a party to require that for electronic service to be valid the communication had to be sent to more than one, and potentially several, email addresses would be a recipe for confusion. I accept the force of this point. Service of the Claim Form under the rules is generally a single event. Accordingly, I agree that PD 6A para 4.1 contemplates that the party who agrees to accept electronic service will provide one fax number, email address or other electronic

identification at which they may be served. Plainly the situation would become absurd if parties could submit multiple email addresses to which documents were to be sent before good service had been effected.

75. However, this construction of PD 6A para 4.1 is not sufficient for the purposes of Ms Clement's argument. As I have indicated, she submits that I should imply into para 4.1 words to the effect that if more than one email address is provided by the other party, the serving party has the right to elect between them. Furthermore, she submits that this election can be made without communicating it to the other party. I do not accept this submission. Firstly, it involves reading significant words into para 4.1 that are not present and I am not persuaded that there is any warrant for doing so. Secondly, this approach would itself be a recipe for uncertainty and confusion in an area that requires clarity.

76. In my judgement the consequence of the other party failing to provide a single email address (or fax number or other electronic identification) is not to give rise to a right to elect between two or more addresses that have been provided, as Ms Clement suggests. The purpose of PD 6A para 4.1 is not to mandate a form of service (by fax or other electronic means), rather it is to provide an *option* of effecting service in this way if the stipulated information is provided. Where the other party gives more than one email address for service, para 4.1 has not been complied with, in that the stipulated information has not been properly provided. In these circumstances the serving party cannot, as matters stand, undertake good service by electronic means. They have two options: either they can serve the Claim Form by one of the prescribed means in CPR Part 6 or they can ask the other party to clarify which is the one email address that they may use to effect service, so that para 4.1 is then satisfied. No clarification of that kind was sought in this case.

77. In case I am wrong in my interpretation of PD 6A para 4.1, I add for completeness that even if Ms Clement's submission as to the effect of that provision is correct, her contention would fail on the evidence. Mr Barnfield did not suggest contemporaneously and has not suggested in his witness statement that he believed he was making an election between Mr Sheikh's email address and the new proceedings email address. Furthermore, his actions at the time were not consistent with making an election to this effect as he emailed the Claim Form to an entirely different email address, namely Mr Kelly's (copying in Mr Sheikh).

78. Accordingly, I conclude that the Claim Form was not properly served by email on 11 May 2022.

Service by hard copy on 12 May 2022

79. The Claimants accept that the effect of CPR 6.10(b) read with the provisions I have summarised at para 46 above, is that the physical address for service was the London address. It is agreed that the Claim Form was not delivered to this address.

80. CPR 6.7 does not assist the Claimants in the circumstances: the London address was the address provided in writing at which service would be accepted and none of the communications during the material period indicated that the Defendant's solicitors were instructed to accept service at the Salford address. Counsel were not agreed as to whether a Government Department could agree to accept physical service at a different

location to that which appeared in the PD 66 list. In any event it is unnecessary for me to resolve that point as it is quite clear from the correspondence that no such agreement was purportedly made in this instance. The correspondence of 12 May 2022 indicates that the hard copy bundle was supplied to the Salford address at the Defendant's request as a convenience to Mr Kelly; there was nothing to indicate that this was an address for service.

81. I therefore conclude that the Claim Form in JR1 was not validly served.

Alternative service

82. As I indicated in setting out the legal framework, I need to consider whether there is "good reason" to validate one or other of the two steps that I have just considered as service by alternative means. I will do so by reference to the factors identified in the appellate authorities (para 53 above).

Did the Claimant take reasonable steps to effect service in accordance with the rules?

83. I conclude that having regard to all the relevant circumstances the Claimants did not take reasonable steps to effect service in accordance with the rules. In particular:

i) The Claimants did not attempt to serve a hard copy of the Claim Form at the London address, which was the prescribed address for service;

ii) The Claimants did not attempt to clarify with the Defendant which of the email addresses given in para 46 of the 1 April 2022 letter should be used before attempting to effect service by email. Further, no attempt was made to serve on the new proceedings email address (although Barnfield 1 accepts that Mr Barnfield was aware of the Press Release I have referred to at para 72 above);

iii) The Claimants have at all times been represented by professional advisers, who ought to have had no difficulty in identifying and understanding the rules as to service on HMRC;

iv) Had the advisors been appropriately diligent there was no physical or other impediment preventing physical service on the London address; or preventing the position being clarified in relation to the email address to be used for electronic service;

v) There was nothing in the telephone conversation between Mr Kelly and Mr Barnfield or in the former's correspondence that gave rise to a reasonable basis for believing that serving the Claim Form on him by email would be accepted as good service. Equally, the communications relating to the provision of a hard copy bundle to the Salford address do not suggest that Mr Barnfield was led into believing that he was effecting service by taking this step. (The certificate of service he subsequently completed tends to confirm this);

vi) The fact that Mr Barnfield completed the material part of the Claim Form by giving Mr Shiekh's email address as the address for service suggests that he had not applied his mind to the service requirements in the CPR. This impression is reinforced by the terms of the covering letter sent with the hard copy bundle on

12 May 2022, which referred to service having been effected "in pre-action correspondence on 10 May". As the Claim Form had not been issued by this stage, this was plainly an erroneous statement;

vii) The appellate authorities make clear that serving the Claim Form in a CPR-compliant way requires the "utmost diligence and care" (para 55 above); and

viii) Although Mr Barnfield highlights the fact that Mr Kelly did not point out that emailing the Claim Form to him was not good service, the appellate authorities make clear that there was no obligation on him to do so (para 54 above).

84. I accept that there are some factors pointing in the other direction, specifically:

i) It is likely that the Defendant caused some confusion by providing the two email addresses for service in the 1 April 2022 letter in circumstances where (as I have found) PD 6A para 4.1 only contemplates the provision of one such address. Mr Tolley's submission as to how the letter should be read (para 72 above) suggests that the intention was to give the new proceedings email address as the address for service, with an indication that Mr Sheikh should be copied in. However, that was not what the Defendant's letter said. Furthermore, the Defendant then replicated this confusion in the 11 April 2022 letter;

ii) I accept that in sending the hard copy bundle including the Claim Form to Salford Mr Barnfield was trying to be helpful and that he did so in response to the Defendant's request; and

iii) I accept that in emailing the Claim Form to Mr Kelly, Mr Barnfield was also trying to be helpful and that he did so in response to the Defendant's request.

85. Nonetheless, I consider that on balance and for the reasons I have identified it cannot be said that the Claimants took reasonable steps to effect service in accordance with the rules.

<u>Was the Defendant or his solicitor aware of the contents of the Claim Form at the time when it expired?</u>

86. There is no doubt that Mr Kelly received the Claim Form via the email sent on 11 May 2022 which attached this document. He also received the hard copy bundle on the following day. However, it is clear from the authorities that this is a necessary, but not a sufficient condition in itself for granting an application for alternative service.

<u>What, if any, prejudice would the Defendant suffer by the retrospective validation of a non-compliant Claim Form?</u>

87. The prejudice that is relied upon is that if service of the Claim Form in JR1 is validated, the limitation defence that can be raised in respect of JR2 is lost. As I indicated earlier, the Defendant contends that in relation to Grounds 1, 2A and 2B, time ran from the 17, 18 or 24 February 2022. This is potentially significant as the Claim Form in JR1 was filed on 10 May 2022 and the Claim Form in JR2 was filed on 27 May 2022, so that the latter was filed more than three months after the date from which it is said that time ran.

It is agreed that for these purposes the test is whether the Defendant would have a reasonably arguable limitation defence if the earlier claim were not validated.

88. I will address Grounds 2A and 2B first. Ms Clement emphasised that the Claim Forms in JR1 and JR2 indicate that the challenged decision is not the decision to introduce a mandatory P87 form, but the decision to: (a) introduce it *from 7 May 2022* and (b) the decision to *include a field on the form for provision of the employer's PAYE reference number* (without indicating that this was not a requirement). She submitted that based on what the attendees were told at the 24 February 2022 MS Teams meeting, final decisions had yet to be made in respect of both of those matters. I agree. On 17 February 2022 Mr Sacher had been informed that the P87 form would be introduced on 6 April 2022. By 24 February 2022 HMRC indicated that this had been moved back to 7 May 2022, but attendees at the MS Teams meeting were asked for their feedback in relation to this and were told that the points they had raised would be considered. At the time of the 24 February meeting the new P87 form had not been finalised and attendees were informed that it was still in draft; a draft was not provided at that stage and the discussion proceeded on the basis of the current, optional form; and attendees were told that the points they raised would be considered.

89. Accordingly, the very earliest date from which it could credibly be said that time ran in respect of the challenged decisions was 21 March 2022 when the P87 form was published together with the guidance notes and/or 22 March 2022 when the draft Direction was published which included the date when the mandatory requirements were due to come into operation.

90. However, in my judgement these would be unrealistic contentions given there had been no legally effective decision taken by that point. Consistent with the decision in *Burkett*, the sheer fact that it may have been possible to bring a challenge to an anticipated or foreseeable future decision does not mean that the time for challenging the decision ran from before the time when the decision had legal effect (paras 58 - 60). The decisions complained of did not have legal effect until the Direction was brought into force from 7 May 2022. I address the *Nash* submission and Ground 1 below; in any event I can see no basis for doing other than applying the *Burkett* approach in relation to Grounds 2A and 2B. This is also consistent with the approach taken in *Amey* (para 68 above). As I referenced earlier, both cases emphasised the importance of there being a clearly ascertainable point from which time ran.

91. Mr Tolley highlighted the threat to bring judicial review proceeding in the earlier pre-action protocol letters. However, this does not undermine the analysis I have just set out; as I have explained, the possibility of earlier challenge does not preclude time running from the point when the decision has legal effect. Furthermore, as Ms Clement submitted, the correspondence was in the nature of a warning of legal action, sent at a time when it was hoped that HMRC would amend its plans.

92. I turn to Ground 1. Mr Tolley argued that time ran from when the decision not to consult was made on 23 December 2021 or at least (allowing for the anticipated extension of time) from when the Claimants became aware of this. He submitted that this was on 17 or 18 February or on 24 February 2022 at the latest.

93. For the reasons that I explained in paras 61 – 66 above, I do not consider that *Nash* is authority for the proposition that Mr Tolley advanced. The Court of Appeal's

conclusion in that case was based on the fact that the decisions identified on the Claim Form were not ones that involved any obligation to consult and the complaint being raised was really a challenge to the Council's earlier decisions to outsource without complying with its statutory duty of consultation. The distinctions with *Burkett* that were identified in *Nash* do not apply to the present circumstances, where there was no legally effective decision before 7 May 2022 and where the alleged duty to consult is said to arise in respect of the decisions that came into effect at that stage. The Court of Appeal did not identify a general principle that in a consultation challenge, time for commencing proceedings runs from the date when the alleged breach of duty was determined upon. If that were the case, then uncertainty of the kind deprecated in *Burkett* would inevitably arise, not least because consultation challenges frequently allege multiple breaches of the principles identified in *R v Brent London Borough Council ex p. Gunning* (1985) 84 LGR 168, yet on Mr Tolley's approach time could run from a different date in respect of each ground or sub-ground of challenge. Furthermore, this would amount to, or at least come close to, reintroducing the overruled *Greenpeace* approach.

94. Accordingly, I can see no good basis for distinguishing between Ground 1 and Grounds 2A and 2B; in each instance the decision that is the subject of the challenge came into effect on 7 May 2022.

95. The Claimants acted promptly after 7 May 2022. JR1 was filed a few days later on 10 May 2022 and JR2 was filed within the same month on 27 May 2022. Mr Tolley accepted during oral submissions that if time ran from 7 May 2022, he did not suggest that the period between 11 May and 27 May and the reasons for issuing the second proceedings constituted a free-standing failure to commence JR2 promptly.

96. Accordingly, I conclude that validating service of the Claim Form in JR1 would not deprive the Defendant of a reasonably arguable limitation defence in respect of JR2, as it is relatively clear that time ran from 7 May 2022 in respect of the Grounds 1, 2A and 2B challenges.

Conclusion

97. In all the circumstances I conclude that, on balance, there is good reason to order that the steps taken to bring the Claim Form to the attention of the Defendant constitute good service. I have found that Mr Kelly was made aware of the contents of the Claim Form on the day that it was issued (11 May 2022) and that the Defendant would suffer no prejudice as a result of retrospective validation of the non-compliant service of the Claim Form. I have decided that the Claimants did not take reasonable steps to affect service in accordance with the rules, but I have noted that there were some mitigating factors and, accordingly, these affect the weight that this factor carries.

98. I will therefore authorise service of the Claim Form by email to Mr Kelly's email address on 11 May 2022 in the particular circumstances of this case, pursuant to CPR 6.15(1).

Outcome of the Applications

99. Accordingly, I will grant Application 3 in respect of the order for alternative service of the Claim Form in JR1. For reasons explained earlier, I refuse the first part of that

application seeking a declaration that the Claim Form was validly served. It also follows that the basis of Application 2 was well-founded in the sense that the Claim Form had not been validly served in May 2022 as asserted by the Claimants.

100. As regards Application 1, when she made her order of 13 May 2022 Foster J was not aware that the Claim Form had not been validly served, nor could she have known that her order would not be properly served and would not come to the Defendant's attention until 26 May 2022. The timetable that she directed was largely superseded by the subsequent events that I have described and the question of how permission was to be addressed was the subject of HHJ Auerbach's 28 June 2022 order. To avoid ongoing allegations that the Defendant breached the Court's order, in the circumstances I will vary the directions made by Foster J to permit the Defendant to submit an AoS and SGR by 1 June 2022 (as in fact occurred).

Permission to apply for judicial review

101. It follows from my earlier conclusions that I have considered the question of permission in relation to JR1. The Claimants must take steps to bring JR2 to an end, whether by discontinuance or consent order.

102. It also follows from my earlier conclusions that the time for issuing the proceedings in respect of Grounds 1, 2A and 2B ran from 7 May 2022 and that the claim was filed in compliance with CPR 54.5.

103. In light of the oral submissions which I have considered carefully, I accept that each of the Claimants' grounds of challenge are arguable and that they have a realistic prospect of success. Having reached that conclusion it is inappropriate for me to comment on them further.

Summary of conclusions

104. For the reasons that I have identified earlier, I have found that the Claim Form in JR1 was not validly served, but that the Claimants' application for alternative service under CPR 6.15 succeeds. I accept that the Claim Form in JR1 was filed in compliance with the requirements as to time in CPR 54.5 and I have granted permission to apply for judicial review in respect of each of the Claimants' grounds of challenge.

105. Directions will need to be given for the future conduct of the proceedings. Whilst I note that the Defendant does not accept the Claimants' evidence as to the extent of the consequential effects on their businesses, it is plainly desirable for the issues raised in this case to be resolved expeditiously, given the potential impact on the legality of the Direction. Provision must also be made for bringing JR2 to an end.