Neutral Citation Number: [2016] EWHC 2484 (Admin)

Case No: CO/1647/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 October 2016

Before :

HER HONOUR JUDGE ALICE ROBINSON
(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between :

JOHN NOEL CROKE	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
(2) AYLESBURY VALE DISTRICT COUNCIL	

The Claimant in person
Zack Simons (instructed by **Government Legal Department**) for the **First Defendant**

Hearing date: Wednesday 28th September 2016

Approved Judgment

Her Honour Judge Alice Robinson:

Background

1. This is an application pursuant to s.288 of the Town and Country Planning Act 1990 ("the 1990 Act") for permission to quash a decision of an Inspector dated 10th February 2016 given on behalf of the first defendant in which he dismissed an appeal by the claimant against non-determination by the second defendant of an application for planning permission for alterations and extension to existing buildings to create a single residential dwelling with parking, sunken swimming pool and amenity space at The Grange Barns, Church Road, Ickford, Aylesbury, Buckinghamshire HP18 9HZ. The claim seeks to challenge the decision on a number of grounds including misconstruing national planning policy, failure to take into account material considerations and inadequacy of reasons.

2. The claim form was filed on 29th March 2016. It is immediately apparent that the date of filing is several days after expiry of the 6 week time limit for bringing a challenge under s.288 which ended on 23rd March 2016. As a result the first defendant has applied to strike out the claim on the grounds that the court has no jurisdiction to entertain it. The claimant asserts that, having regard to the attempts made to file the claim on 23rd and 24th March, the claim is in time and the court should determine it. On 15th August 2016 Ouseley J struck the claim out on the papers but indicated the matter could be renewed orally and it came before me on 28th September.

3. It was common ground that it is not necessary for me to consider the merits of the claim at this stage. If I considered that the court had jurisdiction to entertain the claim I would give directions for further consideration of the merits of the application for permission to apply pursuant to s.288.

The facts

4. Counsel for the first defendant Mr Zack Simons was content that the jurisdiction issue be determined on the basis that the facts set out by the claimant in his letter dated 26th April and the witness statement of James Peter Miller dated 8th June are true. Both contain a statement of truth.

5. The claimant was aware of the fact that the last day for filing was 23rd March and was intending to attend the Administrative Court office in person for that purpose. However, he missed the train from Haddenham. He was aware that the court office shut at 4.30pm so he emailed the documents to Mr Miller who was located a few minutes from the court and asked him to file the claim. Mr Miller arrived at the Royal Courts of Justice at 4.25pm but was refused entry by security at the front of the building. The security guard informed him that the counters were closed.

6. On 24th March the claimant personally attended the Administrative Court office at 3.30pm. Due to the volume of people he was not seen until about 5pm when he was informed by a member of staff that he had used the wrong claim form and would need to complete a different form. He was given a copy of the form and asked to be able to complete it then and there. He was told he would have to return the next day and that the claim would be issued on the next working day. The next day was Good Friday

and the next day the court office was open was Tuesday 29th March which is the date when the claim was filed.

The Law

7. Section 288 of the 1990 Act provides so far as relevant as follows:

> "(1) If any person—
>
> ...
>
> (b) is aggrieved by any action on the part of the Secretary of State or the Welsh Ministers to which this section applies and wishes to question the validity of that action on the grounds—
>
> (i) that the action is not within the powers of this Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action,
>
> he may make an application to the High Court under this section.
>
> (4A) An application under this section may not be made without the leave of the High Court.
>
> (4B) An application for leave for the purposes of subsection (4A) must be made before the end of the period of six weeks beginning with the day after—
>
> ...
>
> (c) in the case of an application relating to an action to which this section applies, the date on which the action is taken;"

8. There is no dispute that the effect of these provisions is as follows:

i) Time starts to run on the day after the date of the decision letter, not the date of service, *Griffiths v Secretary of State for the Environment* [1983] 1 All ER 439

ii) Time expires at midnight on the forty second day, *Okolo v Secretary of State for the Environment* [1997] 4 All ER 242

iii) The time limit is absolute and cannot be extended even if the claimant had no knowledge of the action complained about, *R v Secretary of State for the Environment, ex parte Kent* [1990] JPL 124

iv) Time continues to run over any weekend or bank holiday, *Stainer v Secretary of State for the Environment* (1992) 65 PCR 310

v) If the last day falls on a weekend or bank holiday, time is extended to the next day the court office is open, *Calverton Parish Council v Nottingham City Council* [2015] EWHC 503 (Admin).

9. The decision in *Calverton* relates to different statutory provisions in s.113 of the Planning and Compulsory Purchase Act 2004. Lewis J analysed a number of authorities relating to statutory provisions in other fields, in particular *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336 concerning the time limit relating to a claim under the Fatal Accidents Act 1976 and the Limitation Act 1939. Having done so, he continued:

> "In my judgment, the approach set out in *Kaur's case [1973] QB 336* and approved and followed in other cases, sets out a general approach to the interpretation of statutory provisions prescribing periods within which proceedings must be brought. I recognise that the precise provisions of a particular statute may be such that a different approach is called for in relation to that particular statute. In general terms however, where a statutory provision provides that proceedings must be brought no later than the end of a specified period, and the bringing of proceedings requires that the court office be functioning, and the last day of the prescribed period falls on a day when the court office is closed, then the statutory provision is to be interpreted as permitting the proceedings to be brought on the next day when the court office is open." (paragraph 33)

10. After considering whether s.113 justified a different approach, he concluded:

> "Ultimately, however, those considerations are insufficient to justify a departure from the general approach to statutory interpretation recognised in Kaur's case. The effect of the application of the Kaur principle to section 113(4) of the 2004 Act will mean that persons will know that if the six-week period ends on a weekend, or a Bank Holiday when the court office is closed, the claim may be brought on the next working day. There will still be certainty about the application of the limitation period in section 113(4) of the 2004 Act. Further, the prescribed time limit for bringing proceedings will not be unduly lengthened beyond what Parliament must have intended when enacting section 113(4) of the 2004 Act. The Kaur principle will only have the effect, in practical terms, of lengthening the period by one or two days (if the six-week period ends on a weekend) or possibly three or four days (if it ends on the first day of a period where there are two Bank Holidays and a weekend). The time limit will still be short. It will still have to be adhered to strictly as there is no provision for any discretionary extension of time." (paragraph 37)

Submissions

11. The claimant appeared in person. Prior to the hearing he provided a helpful document, Claimant's Further Submissions on Jurisdiction, which put his case clearly and persuasively. He elaborated on those points at the hearing in submissions which were both attractive and succinct. In short, he submits that the court office may have been open on 23rd March but it was not accessible.

12. He accepts that the 6 week period is absolute and that the court has no power to extend time. However, he submits that, in the same way that *Calverton* interpreted the application of that statutory time limit where weekends were concerned, the issue here depends upon the proper interpretation and application of the statute. He relied upon the following passage from the judgment of Lewis J in that case paragraph 33:

> "where a statutory provision provides that proceedings must be brought no later than the end of a specified period, and the bringing of proceedings requires the court office to be functioning, and the last day of the prescribed period falls on a day when the court office is closed, then the statutory provision is to be interpreted as permitting proceedings to be brought on the next day when the court office is open." (emphasis added)

13. In this case the bringing of proceedings requires the court office to be functioning but, even though it was open, it was not functioning because it was not accessible. To hold that "where a court office is inaccessible then the due date is extended until it becomes accessible" would be compatible with and analogous to the accepted principle in the *Kaur* case. Such an interpretation of time limits is sensible and logical and caters for unforeseen circumstances such as a terrorist attack, or a fire alarm going off, when an office may be closed or inaccessible.

14. Legal certainty would be achieved by adopting a two stage process. First, if a court office is inaccessible the time limit carries over to the next day. Second, do the facts support the assertion that the court office was inaccessible? To cater for the possibility of prejudice to a third party who e.g. enters into a contract on the 43rd day, the court would have a discretion to decide whether to permit the claim to continue.

15. He decried the argument put forward on behalf of the Secretary of State, that to allow this claim to proceed would open the floodgates. Jurisdiction is a fundamental constitutional matter and a person cannot be deprived of access to justice simply because others may be in a similar position. He relied upon the speech of Lord Dyson in *R(Cart) v The Upper Tribunal* [2012] 1 AC 663 at paragraph 114:

> "Finally, in so far as a floodgates argument is relied upon by the respondents to justify restricting the scope of judicial review, this should be resisted… Second, this is in any event not a legitimate basis for the courts to restrict the scope of judicial review as a matter of judicial policy where Parliament, in enacting the [statute], decided not to do so for itself. As Lord Bridge of Harwich said in *Leech v Deputy Governor of Parkhurst Prison [1988] AC 533*, 566C:

> 'In a matter of jurisdiction it cannot be right to draw lines on a purely defensive basis and determine that the court has no jurisdiction over one matter which it ought properly to entertain for fear that acceptance of jurisdiction may set a precedent which will make it difficult to decline jurisdiction over other matters which it ought not to entertain. Historically, the development of the law in accordance with coherent and consistent principles has all too often been impeded, in diverse areas of the law besides that of judicial review, by the court's fear that unless an arbitrary boundary is drawn it will be inundated by a flood of unmeritorious claims'."

16. In any event, the claimant submitted that the circumstances of this case were unusual and, by implication, unlikely to be repeated.

17. In this case, on 23rd March the court office was due to close at 4.30pm and was presumably open at 4.25pm. However, Mr Miller was prohibited from accessing the office by security staff and so, in the claimant's submission, the office was inaccessible and time was extended to the next day. This principle would not permit someone to say they could not access the office for some personal reason e.g. they missed a train. The issue was whether the office was physically accessible. He submitted that at 4.25pm there was enough time to get from the front security at the Royal Courts of Justice to the Administrative Court office before 4.30pm.

18. As to 24th March, there was no reason why the court could not have accepted the Part 8 claim form he had used, it contained exactly the same information as the alternative form he was given. Further, he was told by the court staff that if he returned the next working day the claim would be issued.

19. For the first defendant, Mr Simons submitted that the 6 week time limit is absolute and cannot be extended by the court. Although that time limit is to be construed in accordance with the *Kaur* case and *Calverton*, that does not assist the claimant because here the last day of the 6 week period fell on a day when the court office was open. There is no evidence the court office was not open until 4.30pm. Whatever the conduct of individual security guards the obligation on the claimant was to ensure that his claim was lodged on time. He emphasised the need for legal certainty. The approach of asking whether the court office is accessible would be a departure from previous authority and there was no support for it.

20. In response to the claimant's example of being unable to access the court office because the building was evacuated as a result of a fire alarm, he submitted that the only question which needed to be asked was whether the court office was open. If the issue was whether the court office was accessible to a particular litigant at a particular time, that would deprive the statutory time limit of the legal certainty which is required. In this case the claimant failed to get the claim issued not once but twice in circumstances which could be prayed in aid by many litigants. Further, the reasons why the claim was not issued on 24th March were entirely the claimant's fault and could not justify extending time to the next working day after that.

Discussion

21. Although this case raises a short point, it is an important one and one which is not without difficulty.

22. It is common ground that, in order to "make an application" for the purposes of s.288 of the 1990 Act, it is necessary for the court office to be functioning. Making an application involves the issuing of proceedings and that can only be done by the Administrative Court office. In paragraphs 38 to 42 of *Calverton*, Lewis J explained why this is the position in the case of an application to challenge a development plan document pursuant to s.113 of the Planning and Compulsory Purchase Act 2004. The same is true of an application under s.288 for the same reasons which I gratefully adopt and need only summarise briefly.

23. Section 288(1) provides that a person aggrieved "may make an application to the High Court". The procedure for making such an application is prescribed by rules of court which govern the practice and procedure in the High Court made pursuant to s.1(1)(b) of the Civil Procedure Act 1997 and CPR 2.1(1)(b). An application under an enactment giving the High Court jurisdiction to quash any decision of a Minister must be made under Part 8 of the CPR, CPR 8.1(6) and 8APD paragraph 9.1. Proceedings are started when the court issues a claim form at the request of the claimant, CPR 7.2(1) and a claim form is issued on the date entered on the form by the court, CPR 7.2(2), both of which are applied to Part 8 claims by 8APD 4.1(1). The claim form in an application to quash a decision of a Minister must be filed at the Administrative Court, 8APD paragraphs 9.2 and 22.3. "Filing" means delivering a document by post or otherwise to the court office, CPR 2.3(1). The opening days and hours of the court offices are specified in 2APD paragraph 2.1.

24. Although not cited to me, I note that in *Van Aken v Camden London Borough Council* [2003] 1 WLR 684 the Court of Appeal held that the above definition of "filing" means it is a unilateral act which was achieved in that case by putting the document through the letter box of the county court office at 6.30pm on the last day. However, that case related to a notice of appeal as to which there are different provisions in the CPR. CPR 7.2(1) is clear that a claim is not started until "the court issues a claim form" and in my judgment the provision in 8APD paragraph 22.3 relating to "filing" a claim form is therefore directed not to how a claim may be started but to where it should be started. In any event, Mr Miller did not leave the claim form at the Royal Courts of Justice on 23rd March, so that even if Lewis J and I are both wrong that "making an application" is not a unilateral act, it does not avail the claimant in this case.

25. In the *Kaur* case, the authority relied upon by the claimant, the 3 year limitation period for bringing a claim in respect of a fatal accident expired on a Saturday. The writ was issued the following Monday. The issue was whether the statute could be interpreted so that, if the time limit expired on a non-working day, the claim could be brought on the next working day. Lord Denning MR, with whom Karminski LJ agreed, said this at p.349:

> "The arguments on each side are evenly balanced. The defendants can say: 'The plaintiff has three years in which to bring his action. If the last day is a Saturday or Sunday, or other

> dies non, he ought not to leave it till the last day. He ought to make sure and issue it the day before when the offices are open.' The defendants can rely for their view on the reasoning of Russell LJ in *Hodgson v Armstrong [1967] 2 QB 299*, 323 et seq, and the cases to which he refers.
>
> The plaintiff can say: 'The statute gives me three years in which I can bring my action. If I go in to the offices on the last day, and find them closed, I ought not to be defeated on that account. I should be allowed to go next day when the offices are open. Otherwise, I should be deprived of the three years which the statute allows me.' The plaintiff can rely for this view on the reasoning of Sellers LJ in *Hodgson v Armstrong*, pp 309 et seq and the cases to which he refers.
>
> Those arguments are so evenly balanced that we can come down either way. The important thing is to lay down a rule for the future so that people can know how they stand. In laying down a rule, we can look to parallel fields of law to see the rule there. The nearest parallel is the case where a time is prescribed by the Rules of Court for doing any act. The rule prescribed in both the county court and the High Court is this: If the time expires on a Sunday or any other day on which the court office is closed, the act is done in time if it is done on the next day on which the court office is open. I think we should apply a similar rule when the time is prescribed by statute. By so doing, we make the law consistent in itself: and we avoid confusion to practitioners. So I am prepared to hold that when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other dies non, the time is extended until the next day on which the court office is open."

26. As Chadwick LJ commented in *Aadan v Brent London Borough Council* (2000) 32 HLR 848, either approach was tenable and the question as to which was the right one to adopt was essentially a matter of policy. When deciding which was the right approach Lord Denning considered two factors. First, the need for certainty, that whatever rule was laid down should be clear so that people know where they stand. In the *Kaur* case, that would have been the case whichever approach had been adopted. The second factor was consistency and by adopting an approach that was in common with rules of court, practitioners would not be confused by having different rules applying to time limits in a statute to time limits specified by rules of court. In my judgment, these factors are relevant here.

27. So far as I am aware there are no authorities which have addressed the issue which arises in this case, namely what the position is if you are physically prevented from accessing the court office on the last day for making the application. The claimant says that for a security guard at the entrance to the building in which the court office is located to physically prevent a litigant from accessing the court office appears to

deprive the litigant of access to justice. The time limit which has been given by statute for making the application has not yet expired yet he is prevented from making it.

28. The difficulty with this argument is that access is already cut down by the fact that the court office is not open until midnight on the day the time limit expires. In cases where the act which the statute requires to be done requires the court office to be functioning, time is treated as expiring on the last day notwithstanding the fact that the litigant is deprived of several hours at the end of the day in which to perform the act because the court office is closed. In *Moulai v Deputy Public Prosecutor in Creteil, France* [2009] 1 WLR 276 the House of Lords considered when time expired for service of a notice of appeal against an extradition order. Lord Neuberger of Abbotsbury, who gave the leading speech, considered that where the recipient's office is closed during the whole of the last day, the notice will be validly filed or served if it is done on the next day the office is open, paragraph 84. He went on to consider the position where offices close before the end of the last day:

> "85. It might be argued that it follows from this that time should be similarly extended to the next business day, in cases where, even if only for a few hours, the required recipient's office is closed before midnight on the final day (as will always be true of the court, and will almost always be true of any other recipient). In my opinion, while there is a real argument based on consistency to support such a proposition, it is not correct, at least where the office in question is open during normal hours. While there is no reason to deprive an appellant of his full statutory seven or 14 days, if, for instance he transmits his notice of appeal by fax, or even if he posts the notice through a letter box in the door of the respondent's office, just before midnight on the last day for service, it does not follow that he should have cause for complaint if he cannot file the notice at the court office, or serve it on the respondent in person, outside normal office hours. I believe that this conclusion is consistent with the law as it is understood in relation to time limits for filing and service, when it comes to the operation of the Limitation Act 1980."

29. Although the views expressed are obiter dictum, clearly they are persuasive authority. Lord Neuberger was there saying that, if the act cannot be done because the offices are closed for the last few hours on the last day, the litigant cannot complain and time is not extended until the next day, so long as the office is operating normal hours. It is true that Lord Neuberger says that does not prevent a notice of appeal from being sent by fax or physically putting it though a letterbox just before midnight. However, in extradition cases the requirement for filing and serving a notice of appeal has been held to be a unilateral act that does not require action on the part of the recipient, see e.g. *Kane v Spain* [2012] 1 WLR 375.

30. What if the office is not operating normal hours? In my judgment the test proposed by the claimant, "where a court office is inaccessible then the due date is extended until it becomes accessible", raises more questions than it answers. What does inaccessible mean? How near does the litigant have to get to the office before the obstacle can be treated as rendering the office inaccessible? Would it count if the litigant were

stopped half a mile from the court building by the police who had temporarily closed the road because of a bomb scare? Does it matter what causes the obstacle? Suppose the lift within the court building broke down with the litigant in it before he managed to reach the court office? It would also be unsatisfactory if the answer to the question as to whether a litigant had arrived at the Royal Courts of Justice in sufficient time to attend the court office depended on how far the office was from the front entrance. It is a substantial building with some court offices a considerable distance away from the front entrance.

31. Mr Simons urged upon me that the test was whether the court office was open. Even though they may be rare, there are many potential problems that may cause the court office to close unexpectedly, such as the fire alarm example. He submitted that in such a case the court office would be closed and if a litigant arrived during normal office hours but could not file a claim for this reason, time would be extended until the next day.

32. In my judgment adopting that approach could cause similar problems to that proposed by the claimant. Although subsequent enquiry could determine when the office was closed and at what time a litigant arrived there to find it closed, that would provide no certainty to the public at large. As the claimant recognised, the fixed 6 week time limit provides important safeguards for those affected by planning decisions. Court opening days and hours are set out in a practice direction and published so that everyone knows what they are.

33. The problems which could be caused by either approach can be illustrated by considering what could have happened in this case if the roles were reversed. If the Inspector had granted planning permission and the local planning authority had sought to challenge the decision but been turned away like Mr Miller, the claimant could have rung the court office at lunchtime the next day, ascertained that no challenge had been brought and then let a contract for the building works. The claim could have been issued later that afternoon and, if it was ultimately successful, the claimant could have suffered serious financial loss. The same would be true if, unknown to the claimant, the local planning authority had been prevented from filing a claim because the court building was evacuated owing to a fire alarm at 3pm on the last day.

34. In my judgment it is no answer to this to say that the court would have a discretion to decide that the claim was not brought in time, as suggested by the claimant. There is no provision in the 1990 Act or the CPR permitting the exercise of any discretion in such a case, it is a matter of statutory interpretation when time expires and that time limit cannot be extended.

35. In any event, this is not a case where the court office was closed nor where the claimant or Mr Miller has been prevented from attending the court office by any action on the part of the court office itself. Where it is necessary to issue a claim in a court office, litigants must anticipate security procedures and the need to obey the directions of security staff. The position would have been just the same if there had been a queue to go through security and by the time Mr Miller got to the security screening it was 4.30pm and he had been turned away.

36. In my judgment the interpretation proposed by the claimant suffers from the fundamental defect that it provides no certainty at all, either as to the nature of the event which is sufficient to bring the principle into play, or to third parties who may be affected. Further, it is one without precedent and is likely to cause confusion to litigants and others. There is no reasonable basis on which it could be said that Parliament intended a litigant in these circumstances to be able to file their claim the next working day. Thus, looked at from both perspectives considered in the *Kaur* case, legal certainty and consistency, the claimant's interpretation fails to meet either objective. Litigants whose claims are subject to strict time limits must make arrangements to ensure that they attend the court office in good time so that they are not thwarted by unexpected problems. For these reasons I reject the claimant's interpretation. It is not necessary for me to decide whether the interpretation proposed on behalf the first defendant is correct and I prefer not to express a concluded view about it.

37. In the event, it is not necessary for me to decide whether the court office was right to reject the claim form used by the claimant on 24th March. Even if he had been permitted to issue the application that day, it would still have been out of time.

38. For all these reasons the s.288 application was made out of time and the court does not have jurisdiction to entertain it.