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

Claim No: CO/4943/2014

BETWEEN:

THE QUEEN

(On the application of

BLUE GREEN LONDON PLAN (as GRAHAM STEVENS))

Claimant

-and-

(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendants

-and-

THAMES WATER UTILITIES LIMITED

Interested Party

SUMMARY GROUNDS OF RESISTANCE ON BEHALF OF THE SECRETARIES OF STATE

Introduction

1. Permission to apply for judicial review should be refused as:
   (i) the claim has been brought out of time; and
   (ii) it is unarguable.

2. The Claimant seeks to challenge the decision of the Secretaries of State dated 12th September 2014 to make the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (the "Order").

3. The Order grants development consent under the Planning Act 2008 (the "2008 Act") for the construction and operation by the Interested Party ("Thames Water Utilities

Limited") of a waste water scheme in London known as the Thames Tideway Tunnel (the "TTT").

4. In summary, it is the Secretaries of State's case that the present claim is both out of time and fails to identify any error of law, let alone any arguable one which could justify granting permission to seek judicial review of the decision to make the Order. The assertions made by the Claimant amount merely to an attack on the merits of the underlying policy framework under which the application was properly decided and/or an attack on the valid planning judgements reached by the Secretaries of State, neither of which are permissible within a claim for judicial review. As such, the present claim is unarguable and the Court is requested to refuse permission and determine the application to be totally without merit.

Policy Framework

5. The National Policy Statement for Waste Water: A framework for planning decisions on nationally significant waste water infrastructure, March 2012 ("the Waste Water NPS") is the only NPS relevant to the present case. It sets out Government policy and justification for the provision of major waste water infrastructure including two specific Nationally Significant Infrastructure Projects: a sewage treatment works at Deephams in North East London and the TTT.

6. Paragraph 1.4.6 of the Waste Water NPS records that those schemes:

"…since they have been specifically included in this NPS, have been subject, at a strategic level, to the appraisals and consultation carried out on the NPS, i.e. they have been:

- subject to an Appraisal of Sustainability (AoS) that incorporates the requirements of the Strategic Environmental Assessment (SEA) Directive;
- subject to a strategic level assessment under the Habitats Directive requirements; and
- will be the subject of public consultation and Parliamentary scrutiny through this NPS process."

7. The background to the TTT scheme including an explanation of the factual and regulatory drivers of demand, the development of the TTT as a preferred solution, an assessment of alternatives to the TTT scheme and the Government's conclusions on the need for the TTT are set out at paragraphs 2.6.14-2.6.34 of the Waste Water NPS. In respect of any future application for development consent it states:

> "2.6.34 The examining authority and the decision maker should undertake any assessment of an application for the development of the Thames Tunnel on the basis that the national need for this infrastructure has been demonstrated. The appropriate strategic alternatives to a tunnel have been considered and it has been concluded that it is the only option to address the problem of discharging unacceptable levels of untreated sewage into the River Thames within a reasonable time at a reasonable cost. It would be for Thames Water to justify in its application the specific design and route of the project that it is proposing, including any other options it has considered and ruled out."
>
> [Emphasis added]

8. The Waste Water NPS also sets out in Chapter 3 entitled "Factors for examination and determination of applications" and in Chapter 4 entitled "Generic Impacts", further policies applicable to all applications for development consent to which it applies.

Factual Background

9. On 28th February 2013 Thames Water applied for development consent under the 2008 Act for the construction and operation of the Thames Tunnel. The proposed development is described at paragraphs 1.4-1.5 of the Examining Authority's "Findings and Conclusions and Recommendation in respect of the Proposed Thames Tideway Tunnel" ("the Report"):

> "1.4 The Thames Tideway Tunnel project is designed and promoted by the Applicant to control the flows from 34 combined sewer overflows (CSOs), which currently spill untreated waste water into the River Thames and which have been identified by the Environment Agency (EA) as unsatisfactory.
>
> 1.5 In overview, the project as proposed by the Applicant comprises a main tunnel which is proposed to be approximately 25km long with an approximate internal diameter of 6.5m in the west, increasing to 7.2m through central and east London. The main tunnel is proposed to run from Acton Storm Tanks in the London Borough of (LB) Ealing to Abbey Mills Pumping Station in LB Newham. The project also proposes two long connection tunnels (Frogmore and Greenwich) and nine other short connection tunnels with the purpose of linking the CSOs to the main tunnel. During and following storm events, a series of interception structures are proposed to divert waste water flows into the tunnel system to be stored and transferred for treatment. Works for the construction and operation of the project are proposed at 24 locations along the route of the tunnels, within 14 local authority administrative areas."
>
> [Footnotes omitted]

10. Applications for development consent orders are made to the Secretary of State following pre-application consultation. Formal notification of acceptance and of the deadline for persons to make representations about the application takes place following submission to and acceptance of the application by the Secretary of State. An "Examining Authority" consisting of a single Examining Inspector or (as here) a number of Inspectors conducts an examination. Under the 2008 Act, the examination process is principally a written one

with all the submitted and examined material published and available online. Questions will often be set by the Authority for written response. Hearings are also held by the Examining Authority. The Examining Authority then submits a reasoned report, with a recommendation, to the deciding Ministers, here the Secretaries of State.

11. The Examining Authority concluded that, on balance, the case for development was made out and its final recommendation was that the Secretaries of State should make an order granting development consent for the TTT. In reaching this conclusion the Examining Authority found, at paragraph 21.6, that:
    (1) The making of the Order would be in accordance with the National Policy Statement for Waste Water NPS when taken as a whole;
    (2) There was no reason on the basis of the matters before the Examining Authority to believe that deciding the application in accordance with the Waste Water NPS would:
        a. Lead to the United Kingdom being in breach of its international obligations;
        b. Lead to the Secretaries of State being in breach of any duty imposed on the Secretaries of State by or under any enactment; or
        c. Be otherwise unlawful by virtue of any enactment.

12. The Examining Authority followed the NPS policy that the need for the Tunnel had been demonstrated: Report, paras 3.13, 3.14.

13. The Secretaries of State published their decision and reasons for granting the Order on 12th September 2014 (the "Decision"). The Secretaries of State agreed with the Examining Authority's overall conclusions set out above and accepted its recommendation (subject to presently immaterial modifications) to make an Order granting development consent. The Order itself was published on the same day. They agreed that need had been demonstrated by the NPS (Decision, para 15).

Legal Framework

14. The 2008 Act creates a new system of development consent for nationally significant infrastructure projects ("NSIPs"). The new system includes the grant of development consent for the construction of infrastructure for the transfer or storage of waste water of a certain capacity.

15. Section 5 of the 2008 Act introduces the concept of the national policy statement ("NPS"). Subsection (1) provides that the Secretary of State may designate a statement as an NPS if it is issued by the Secretary of State and sets out national policy in respect of one or more specific descriptions of development. The Secretary of State is required to exercise the NPS designation functions 'with the objective of contributing to the achievement of sustainable development' (section 10(2)) and in particular have regard to the desirability of mitigating and adapting to climate change (section 10(3)). An NPS contains the reasons for its policies (section 5(7)), including how the policy takes into account Government policy on the mitigation of, and adaptation to, climate change (section 5(8)). Particular locations may be identified in an NPS as suitable, or potentially suitable, for a specified description of development, subject to appropriate consultation (sections 7(5) and 8). The draft NPS has to be laid before Parliament (section 9).

16. The lawfulness of an NPS may only be questioned by judicial review proceedings brought within six weeks of publication of the NPS (section 13(1)).

17. The Thames Tideway Tunnel is an NSIP as defined by sections 14(1)(o) and 29(1A).

18. Section 31 of the 2008 Act sets out the requirement for development consent for NSIPs.

19. Section 104 deals with decisions of the Secretary of State in cases where an NPS has effect. So far as is relevant, it provides that:

> "(2) In deciding the application the Secretary of State must have regard to—
>
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
>
> (aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009,
>
> (b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),
>
> (c) any matters prescribed in relation to development of the description to which the application relates, and
>
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

(9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying."

20. Section 106 lists representations which **may** be disregarded by the Secretary of State determining an application for development consent, including those which 'relate to the merits of policy set out in a national policy statement' (subsection (1)(b)). The Examining Authority may do the same (section 87(3)(b)).

21. Section 116(1) of the 2008 Act sets out the legal duty on the Secretary of State under that Act to give reasons for granting or refusing development consent.

The Claim has been brought out of time

22. The making of a development consent order may only be challenged by judicial review (section 118(1) of the 2008 Act):

"A court may entertain proceedings for questioning an order granting development consent only if—
(a) the proceedings are brought by a claim for judicial review, and
(b) the claim form is filed during the period of 6 weeks beginning with—
(i) the day on which the order is published, or
(ii) if later, the day on which the statement of reasons for making the order is published."

23. The period therefore *begins with* the date of publication. That is, the first day of the six week (42 day) period is the date of publication (not the day after). Consequently where, as here, the publication takes place on a Friday the last day of the six week period is a Thursday. In *Barker v Hambleton District Council* [2012] EWCA Civ 610, [2013] P.T.S.R. 41 the Court of Appeal considered the time limit of 'six weeks starting with the relevant date' for challenges to development plans under section 113 of the Planning and Compulsory Purchase Act 2004. They held that 'when a statutory time limit *starts with* a particular day, time runs from that day and not from the following day' [para 14]. 'Starting with' and 'beginning with' are synonymous.

24. The publication of the order and reasons was on Friday 12th September 2014. Consequently the last day for filing the claim was Thursday 23rd October 2014.

25. Mr Stevens' claim was filed on Friday 24th October 2014, one day out of time.

26. This is a jurisdictional time limit and the Court simply has no power to entertain proceedings brought outside it. It arises whether or not the issue is raised by the parties. Parties cannot agree to extend the time period or waive compliance with it, nor does estoppel have any bearing (see *Barker* at para 19). Nothing any of the parties may do can give the Court a jurisdiction which it does not have.

27. The time period is set in the statute so the Court has no ability to extend time under the Civil Procedure Rules.

28. The inability to extend a statutory period for bringing High Court challenges is well-established, not least in the planning field: *Griffiths v Secretary of State for the Environment* [1983] 2 A.C. 51 at 70

29. In *Barker v Hambleton District Council* the local planning authority had published a statutory advertisement informing potential claimants that the challenge period began (and so ended) ten days later than it did so. However the Court of Appeal rejected the argument that as a matter of European Union law (including as it applies the Aarhus Convention) or under the Human Rights Act the statute could be read down to permit a challenge within the statutorily advertised period in that case (para 19 to 29). The Court

of Appeal held that the principles of effectiveness and the right of access to the Court did not avail the Claimant.

30. In the subsequent case of *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20, [2012] 1 W.L.R. 1604 the Supreme Court held the seven or 14 day appeal periods for extradition had to be read as allowing an extension of time by the Court in exceptional circumstances where a UK citizen could rely on Article 6.1 ECHR rights as otherwise the very essence of the right of access to the Court would be impaired (para 38 and see para 22) . Lord Mance JSC held [para 39] that the High Court:

> "must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously."

31. This approach was applied to the 28 day period for lodging an appeal to the High Court from a decision of the Nursing and Midwifery Council: *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 W.L.R. 3156. Maurice Kay LJ held that if the time limit is to be read down [para 15]:

> "it must be to the minimum extent necessary to secure compliance with Convention. In my judgment, this requires adoption of the same approach as that of Lord Mance JSC in *Pomiechowski's case* [2012] 1 WLR 1604 , para 39. A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously"."

32. In that case no extension was given for filing two days out of time when the appellant was aware of the decision in good time.

33. The exceptional circumstances relaxation does not apply to the 2008 Act or to other planning cases. The limitation period is longer, at six weeks rather than one, two or four weeks. It is no more difficult to file proceedings within 42 days than within 43 days. Potential claimants will usually be well aware of the decision, and if they had participated in the process would often be informed on the day. If the deadline is missed this is either because they calculated the date incorrectly, were badly organised or cut it so fine that a mishap delayed filing. The public interest in finality is greater in planning cases as there will inevitably be other directly interested persons (such as the developer, local authority or neighbours) as well as a general public interest in the carrying out of development decisions.

34. Even if exceptional circumstances could apply, they do not do so in the present case. The Claimant must have done all that he could do to bring the proceedings in time. In the present case :

    (i) The Claimant has not identified at the time or since filing the proceedings that the claim has been brought late, let alone offered any explanation. The late filing appears therefore to be because he miscalculated the date and left filing to what he thought was the last day rather than because of some independent mishap.

    (ii) It is not apparent what misfortune entirely independent of Mr Stevens could prevent a litigant in person based in London from filing a claim at the Royal Courts of Justice.

35. Consequently the proceedings have been brought out of time and the Court has no jurisdiction to hear them. An exceptional circumstance proviso is not to be read into the planning legislation, but even if it did, it does not apply to the present case.

Response to the Grounds

36. The grounds are all unarguable.

Ground 1 Environmental Impact Assessment (EIA)

37. To the extent that paragraph 9 of the grounds is intended to raise a separate point on the compliance of the Environmental Statement with the Urban Waste Water Treatment Directive, the complaint is not set out. The Examining Authority considered the Environmental Statement and the other information submitted in detail and considered it was adequate for EIA purposes (para 16.29-16.34). This is not a case, unlike *Berkeley*, where there was no Environmental Statement.

Ground 1.1 EIA and alternatives

38. Paragraph 10 of the grounds raises matters of planning judgment with which the Claimant disagrees, but not legal errors.

39. The Urban Waste Water Treatment Directive does not require the adoption of a 'Blue Green London Plan' or any other plan, and neither does the decision of the CJEU in *Commission v United Kingdom* C-301/10 [2013] 1 C.M.L.R. 24. That judgment did find that the current discharges of untreated sewage into the River Thames was a breach of the

Directive [judgment para 93, 95]. The need to meet the requirements of the Directive is one of the reasons why the NPS finds that the Thames Tunnel is needed.

Ground 1.2 unlawfulness of the NPS

40. This ground is an out of time challenge of the NPS which should have been brought within six weeks of its designation in March 2012: section 13(1), the2008 Act. Similarly any decision not to carry out a review of the NPS could only be challenged by judicial review within six weeks of a decision not to review: section 13(2).

41. The consideration of the development consent application is entitled not to consider matters settled by the NPS: see sections 104(3), and 106(1)(b) of the 2008 Act.

Ground 1.3 Commission v UK

42. The *Commission v UK* decision serves to confirm, rather than to overrule, the requirement of the NPS for the Thames Tunnel. The CJEU said:

> "87 The United Kingdom does not dispute the facts relied upon by the Commission and observes that a project is in fact underway for the construction of a new 30km long tunnel under the tidal part of the River Thames to intercept collecting system overflow discharges and convey them for treatment at the Beckton treatment plant. Also, it is proposed to construct another tunnel, the Lee Tunnel, with the aim of reducing overflow discharges from the Beckton and Crossness collecting systems. Finally, improvement works are taking place to install extra capacity at the Beckton, Crossness and Mogden treatment plants.
> ...
> 89 It must be stated that the Commission, in reliance upon the TTSS report mentioned in [85] of the present judgment, which is not disputed by the United Kingdom and which indicates that the frequency and volume of the discharges come about in the case not only of exceptional events but also of moderate rainfall, has demonstrated clearly the normality of the waste water discharges into the River Thames.
> 90 As regards whether it is technologically impossible to reduce the number of waste water discharges from the collecting system for London and whether the costs are disproportionate to the environmental benefit obtained, it is to be noted that the United Kingdom decided, in April 2007, to carry out the works proposed by the TTSS report of November 2005 consisting in particular in the construction of a new underground tunnel. Thus, technological solutions to the problem of the collecting system for London exist and their costs cannot be regarded as disproportionate given that the United Kingdom has already taken the decision to implement them."

43. The assertion in paragraph 15 of the grounds that 'it is a complete misrepresentation for the NPS to hold the Tunnel is in any way a project in the public interest' is an

impermissible challenge to the lawfulness of the NPS, discloses no legal error and is purely a disagreement on the merits.

Ground 2 Alternatives

44. The NPS considered the need for the Tunnel, explaining the need to divert diluted sewage from the combined sewers and existing sewage treatment works into the Rivers Lee and Thames (para 2.6.15). Such overflows into the River Thames tideway occur approximately 50 times per year and affect biodiversity, health and the attractiveness of the environment (para 2.6.16). The need to reduce such incidents to comply with the Urban Waste Water Treatment Directive and the Water Framework Directive was explained (para 2.6.20, 2.6.21) along with the problems of increased population and a greater frequency of extreme rainfall events with climate change (para 2.6.22, 2.6.23). The development of the preferred solution was discussed (para 2.6.24, 2.6.25), along with the rejected alternatives to the tunnel (2.6.26-2.6.32). The government's conclusion on need is then set out (para 2.6.33-2.6.34).

45. The Claimant's challenge to the grant of development consent amounts to a wider, impermissible challenge to the underlying policy framework set out in the Waste Water NPS which establishes the strategic case for the development of the TTT.

46. As explained above the Waste Water NPS was designated by the Secretary of State in March 2012 after completion of the requirements to carry out an appraisal of sustainability and the consultation, publicity and parliamentary requirements set out in sections 5, 7 and 9 of the 2008 Act.

47. Any challenge to the strategic policy framework created by the NPS would now be out of time. The Claimant cannot circumvent this obstacle by seeking to raise issues which go to the merits of the NPS within a challenge to an order for development consent granted under it. The decision was to be taken in accordance with the NPS unless particular exceptions applied (section 104(3)). Section 106(1)(b) of the 2008 Act expressly permits the Secretaries of State to disregard representations on such issues when determining applications for development consent.

48. The Examining Authority and the Ministers were therefore entitled to consider that the need for the Tunnel had been demonstrated and that alternatives to a Tunnel did not fall to be considered in the development consent order application.

49. No point on the Aarhus Convention is identified and it does not add to the analysis.

Ground 3 The approach to the decision

50. Ministers considered that none of the exceptions to the duty to determine the application in accordance with the NPS applied (Decision para 17). The previous Secretary of State for Environment, Food and Rural Affairs had designated the NPS in 2012 and his successor agreed with the Secretary of State for Communities and Local Government that the development consent order should be made. Those decisions were made having considered the relevant evidence and there was no lack of comprehension or ulterior motive as claimed in paragraphs 17 to 18 of the grounds.

Ground 3.1 Alleged departure from the Examining Authority's view on the Urban Waste Water Treatment Directive

51. The Examining Authority considered that the application would meet the requirements of the Urban Waste Water Treatment Directive as required by the NPS (para 18.69). The Secretaries of State identified the contribution to meeting those requirements as a significant benefit of the proposal (para 90, 146). There was no departure from the Examining Authority's conclusions on this point.

52. The Examining Authority acted in accordance with the law and the NPS.

53. The comments of the former Secretary of State for Environment, Food and Rural Affairs to a newspaper in October 2014 would have had no bearing on the decision even if he had made the development consent order, which he did not.

Ground 4 Human Rights

54. Reference is made to Articles 6, 8 and Article 1 of the First Protocol without any explanation as to how they might have been breached. Those points are obviously unarguable. As a preliminary point, the Secretaries of State note that the Claimant is not a

victim of the breaches he alleges. Accordingly, he cannot satisfy the requirement of section 7 of the Human Rights Act 1998 ("HRA") that he must be a "victim" of action by a public authority said to be unlawful under section 6 HRA. As such, he has no standing to bring a human rights claim. That is a complete answer to this point.

55. In any event, the Article 2 point appears to concern deaths due to air quality, heat stress, hyperthermia, flooding, drought and high crime rates (grounds para 21, 22). Air quality was considered in detail and the Examining Authority concluded that 'the proposal would not lead to new breaches of national air quality limits or result in any substantial changes to air quality in the area' (para 5.17). They concluded that the project was resilient to flooding and flooding was not a reason to refuse the order (para 9.26, 9.27). Ministers agreed on air quality (para 33) and flood risk (para 45-47). The Claimant does not say why this analysis is wrong.

56. In respect of the grounds generally it is a firmly settled principle of planning law that matters of planning judgment are within the exclusive province of the decision maker: *Tesco Stores v. Secretary of State for the Environment* [1995] 1 WLR 759, at 780G-H *per* Lord Hoffmann. A challenge to a planning decision brought by way of judicial review should not be used as an opportunity to reargue the planning merits of the case: *R (Newsmith Stainless Steel Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6] *per* Sullivan J. Furthermore, although planning policy is to be interpreted objectively, its application to a given set of facts requires an exercise of planning judgement by the decision maker. Such judgements will only be susceptible to challenge if they are irrational or perverse: *Tesco Stores Ltd v. Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, at [19] *per* Lord Reed.

Conclusion

57. For the reasons set out above the claim is out of time and the grounds raised by Mr Stevens are unarguable and permission should be refused. The Court is asked to deem the application to be totally without merit pursuant to CPR 23.12 and 54.12(7) as it is bound to fail on timing and the substantive grounds.

58. If permission is refused, the Secretaries of State seek a contribution to their costs of filing of the Acknowledgement of Service in accordance with the schedule of costs on the principles in *R (Mount Cook Land Ltd) v. Westminster CC* [2004] JPL 470.

59. For the purposes of CPR 45.43 it is accepted by the Defendants that the present claim is an Aarhus Convention claim. As the Claimant is representing others his liability is limited to £10,000.

RICHARD HARWOOD QC

DAVID BLUNDELL

20 November 2014

39 ESSEX STREET

LANDMARK CHAMBERS

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

Claim No: CO/4943/2014

BETWEEN:

THE QUEEN
On the application of
BLUE GREEN LONDON PLAN (as GRAHAM STEVENS)

Claimant

-and-

(1) SECRETARY OF STATE FOR THE DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT

(2) SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS

Defendants

-and-

THAMES WATER UTILITIES LIMITED

Interested Party

DEFENDANTS' SUMMARY GROUNDS OF DEFENCE

Treasury Solicitor's Department
One Kemble Street
London
WC2B 4TS

Ref: Z1426674/CLJ/B5
Claire Jones
Solicitor to the Defendants