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CO/2005/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2018

Before:

SIR ROSS CRANSTON

(sitting as a judge of the High Court)

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Between:

R (ON THE APPLICATION OF CHRISTCHURCH BOROUGH COUNCIL)	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
EAST DORSET DISTRICT COUNCIL, NORTH DORSET DISTRICT COUNCIL, PURBECK DISTRICT COUNCIL, WEST DORSET DISTRICT COUNCIL, WEYMOUTH AND PORTLAND BOROUGH COUNCIL, BOURNEMOUTH BOROUGH COUNCIL, POOLE BOROUGH COUNCIL AND DORSET COUNTY COUNCIL	**Interested Parties**

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Nathalie Lieven QC and Natasha Simonsen (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Sir James Eadie QC and David Pievsky (instructed by the Government Legal Department) for the **Defendant**
Gemma White QC (instructed by Bircham Dyson Bell) for the **Interested Parties**

Hearing date: 30 July 2018

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Judgment Approved

Sir Ross Cranston:

Introduction

1. This is a challenge by the claimant, Christchurch Borough Council, to the decision of the Secretary of State for Housing, Communities and Local Government to his use of the power in section 15 of the Cities and Local Government Devolution Act 2016 ("the 2016 Act") to lay before Parliament on 29 March 2018 regulations to amend the

Local Government and Public Involvement in Health Act 2007 ("the 2007 Act"). The regulations and an associated order have the effect of implementing a proposal to reorganise local government in Dorset, which includes the abolition of the claimant. The claimant opposes the proposal. All other local authorities in Dorset – the interested parties in this claim - support the proposal and want it implemented without delay, as their counsel reiterated in endorsing the Secretary of State's case at the hearing. Like the claimant they too will be abolished in the reorganisation.

2. There is a keen interest in the outcome of this judicial review, in particular its consequences for the claimant. The hearing was well attended and Sir Christopher Chope, Member of Parliament for Christchurch, was in attendance throughout. Counsel for both the claimant and the Secretary of State acknowledged that the proposal to change local government in Dorset was politically controversial.

3. This judicial review is not concerned with the merits of the proposal. None of the arguments before the court were about whether the reorganisation would reap the advantages which various reports about the reorganisation claim. Nor did the claimant raise any issue of unfairness in the procedure which the Secretary of State adopted in considering and giving effect to the proposal for the reorganisation.

4. Rather, as counsel for the claimant accepted in the course of argument, it is the legal form adopted for implementing the proposal which is at the base of these proceedings. The claimant's case is that the Secretary of State has unlawfully adopted regulations with retrospective effect using the "Henry VIII" clause in the 2016 Act. The regulations are retrospective in that they apply to a proposal for the reorganisation of local government which had been worked up and was therefore in existence before they came into effect. On the claimant's case the regulations are therefore beyond the power which Parliament conferred on the Secretary of State. Accordingly they are ultra vires, along with the implementing order. It is this and the associated legal issues which this judgment addresses, not any wider question about whether local government reorganisation in Dorset is a good or bad thing.

Background

5. Christchurch Borough Council has been one of nine local authorities in Dorset. Of these nine authorities Bournemouth Borough Council and the Borough of Poole have been unitary authorities, providing all council services to residents in their respective areas through a single tier of local government. Outside Bournemouth and Poole Dorset has had two tiers of local government, with some services provided by Dorset County Council (such as education, highways, libraries and social services) and others (such as parks, revenues and benefits, housing, leisure and planning) provided by one of East Dorset District Council, North Dorset District Council, Purbeck District Council, West Dorset District Council, Weymouth and Portland Borough Council, and Christchurch Borough Council.

6. A convenient place to begin the chronology leading to the proposal and the legislation for reorganising this system of local government in Dorset is a meeting at the end of November 2015 between the then Secretary of State and the leaders (or deputy leaders) of the Dorset councils, including the claimant. There had already been some discussion about a potential proposal for future, unitary local government structures across Dorset, in light of declining central government funding and the demand for services, which the Secretary of State had encouraged.

7. Meanwhile, what was to become the 2016 Act had its first reading in the House of Lords on 28 May 2015. The Bill had its second and third readings in the House of Commons on 14 October and 7 December 2015 respectively. After a period of ping

pong between the two houses on 12 January 2016, the Bill received Royal Assent on 28 January 2016.

8. In August 2016 there was a report from the consultants "Local Partnerships" on the potential options for reconfiguring local authorities in Dorset to obtain financial benefits. The report concluded that there would be savings from a reconfiguration, which would repay the associated costs in a short period. At a number of meetings of the claimant's full council concerns were voiced about the proposals, including flaws in the financial analysis underlying the case for change.

9. At a subsequent meeting in November 2016 between the Secretary of State and the leaders (or deputy leaders), the Secretary of State stressed the importance of re-organisation being 'bottom up' and of the councils maintaining a dialogue with local MPs. Next steps were explained, that first the councils would submit a proposal, after which the government would seek to lay before Parliament the relevant secondary legislation. It would be necessary to obtain formal consent to that secondary legislation from the councils. Following this meeting the claimant's Scrutiny and Policy Committee highlighted serious concerns with the approach being pursued by the proponents for change.

10. A report in December 2016 from an organisation "Opinion Research Services" set out its findings about public opinion in Dorset on the restructuring of local government. It had distributed questionnaires and conducted workshops. Overall across the county there was clear and even emphatic support for moving to two councils. The exception was in Christchurch, where the open questionnaire showed that a majority of respondents opposed a reduction to two councils. In the more representative household survey, the report said, support for two councils was much higher. The shift in Christchurch from less positive to more positive views was particularly pronounced in the residents' workshop, where nearly two-thirds of participants ended by approving the proposal for two councils.

11. PWC's report, "Case for Change Local government reorganisation in Dorset" in December 2016 concluded that local government reorganisation represented a significant opportunity for Dorset. Existing cooperation between local authorities in the county was good, but Dorset councils were approaching the limits of what they could achieve. Two unitary authorities would enable them to simplify their approach, strengthen their voice at regional and national level, deliver improved services for residents, achieve significant financial savings and provide stronger and more accountable leadership.

12. The claimant considered a report from its chief executive at an extraordinary meeting concerning the issue on 31 January 2017. It referred to the process that, after any locally led submission proposing re-organisation, the next step would be regulations made by the Secretary of State modifying the procedural requirements of the 2007 Act.

13. On 9 February 2017, six of the nine Dorset councils submitted to the Secretary of State their formal proposal for re-organisation of local government in the county. It was entitled "Future Dorset". The claimant opposed the proposal, along with Purbeck and East Dorset councils.

14. In response to a Parliamentary Question from Sir Christopher Chope MP, the then Minister for Local Government set out on 28 February 2017 the criteria against which the government would assess any proposal for local government re-organisation in Dorset: a judgement would be made in the round as to whether the proposal if implemented would be likely to improve the area's local government and would

command a good deal of local support in the area, and whether the area itself was a credible geography for the proposed new structures.

15. From July 2017 joint committees consisting of members nominated by each of the councils met monthly to undertake the work of implementing the proposal. The joint committees established specific groups to examine issues including the harmonisation of council tax, electoral arrangements, governance, and the division of the current functions, staff and budgets. The preparatory work involved additional expenditure by the councils.

16. An extraordinary meeting of the claimant on 8 August 2017 considered a further report. It referred to the fact that the Secretary of State, if satisfied of the merits of the Dorset proposal, would make regulations modifying the procedural requirements of the 2007 Act and a structural change order to implement it.

17. On 7 November 2017, the Secretary of State announced that he was minded to implement the proposal from the Dorset councils, subject to further representations being made by 8 January 2018. He also stated that any such representations could include suggested modifications to the proposal, and that it was open for any council in the area to come forward with an alternative proposal.

18. By late 2017, in addition to the six councils which had made the Dorset proposal, a seventh (East Dorset) supported it and an eighth (Purbeck) withdrew its opposition. The claimant conducted a local poll under section 113 of the Local Government Act 2003 to obtain its residents' views. With a voter turnout of 54% of the electorate, 84% of Christchurch residents opposed the creation of a unitary local authority for Christchurch, Bournemouth and Poole. Early in the new year the claimant approached the Secretary of State, outlining an alternative option for local government reorganisation which preserved Christchurch. Its request seeking more time to explore that option was refused. The claimant had formally adopted a resolution on 2 January 2018 that it would oppose through all appropriate means the passing of any legislation implementing the proposal should the Secretary of State decide to proceed.

19. On 3 January 2018 the Secretary of State sent an email to the project manager for the reorganisation setting out how regulations under section 15 of the 2016 Act would be used to modify the 2007 Act to implement the Dorset councils' proposal. In particular, that email explained that the proposed regulations would disapply the requirement in the 2007 Act for an "invitation", and allow the Secretary of State to implement the proposal notwithstanding the absence of such an invitation.

20. In mid-January 2018 the Secretary of State emailed the councils, including the claimant, enclosing drafts of the two statutory instruments by which it was intended that the proposal would, if accepted by the Secretary of State, be implemented. These drafts were what became the Dorset (Structural Changes) (Modification of the Local Government and Public Involvement in Health Act 2007) Regulations 2018 and the Bournemouth, Dorset and Poole (Structural Changes) Order 2018. The draft regulations contained a version of the retrospective provision in regulation 4 of the 2018 regulations, which is at the heart of this claim. On 31 January 2018, a further draft of what became the 2018 regulations was circulated, containing a version of regulation 4 identical to the final version.

21. On 26 February 2018 the Secretary of State announced his decision that he would implement the proposal of the Dorset councils submitted the previous year. There were to be two new councils as the sole local authorities for their respective areas, which with effect from 1 April 2019 would provide a single tier of local government for Dorset, Bournemouth and Poole. The existing areas of local government were to

be abolished, and the councils for those areas wound up and dissolved. Under the proposal Dorset Council was to cover the same area as the districts of East Dorset, North Dorset, Purbeck, West Dorset and the borough of Weymouth and Portland. Bournemouth, Christchurch and Poole Council was to cover the same area as the county and borough of Bournemouth, the borough of Christchurch, and the county and borough of Poole.

22. On 14 March 2018 the final version of the draft regulations was sent to the monitoring officers and chief executives of the Dorset councils. Consent was sought to the making of the regulations between 16 and 20 March 2018, which all councils but the claimant gave. On 27 March 2018, the Secretary of State sent to the leaders of the Dorset councils the draft regulations and the associated order. In an oversight, the leader of Christchurch was not copied to that email.

23. The draft regulations and the order were laid before both Houses of Parliament on 29 March 2018. Accompanying them was an Explanatory Memorandum and a report pursuant to section 15(12) of the 2016 Act, explaining their effect and why the Secretary of State had considered it appropriate to make them. At question time in the House of Commons Sir Christopher Chope MP asked the Leader of the House about the draft regulations, stating that he had written to the Joint Committee on Statutory Instruments contending, inter alia, that they sought to change primary legislation retrospectively. That committee considered the regulations and order on 25 April 2018 and decided that neither instrument needed to be reported. It concluded that there was no issue of retrospectivity in the regulations. The instruments were considered and approved by both the House of Commons and the House of Lords.

24. As a result the regulations were made on 24 May 2018 and came into force on 25 May 2018. The order was made on 25 May 2018 and came into force on 26 May 2018.

25. Meanwhile Christchurch had sent a pre-action protocol letter to the Secretary of State on 30 April 2018 and invited him to delay the making of the instruments until the issue of their vires could be resolved. The Secretary of State declined to do so and the claim for judicial review was issued on 21 May 2018, within a week of receiving the Secretary of State's pre-action response letter. The Secretary of State lodged an acknowledgment of service. Lambert J gave permission on 21 June 2018 and ordered expedition of the claim for judicial review.

Statutory framework

Local Government and Public Involvement in Health Act 2007

26. The 2007 Act has a procedure for creating a single tier of local government in areas which were previously comprised of two tiers. For a limited period after the Act the Secretary of State could direct a county or district council to make a proposal for a single tier of government. That power is redundant and no more need be said about it.

27. The first stage of the procedure under section 2 or the 2007 Act is that the Secretary of State may invite any "principal authority" (defined in section 1(1) as a county or district council) to make a proposal for a single tier of government in an area which currently has two tiers of local government. The second stage under section 3 of the Act is the submission of a proposal by a local authority in response to an invitation. In responding to an invitation a local authority must have regard to any guidance from the Secretary of State: s. 3(5).

28. When the Secretary of State receives a proposal in response to an invitation under section 2, he may request the Local Government Boundary Commission to advise him: s. 4(2). That advice may recommend that the Secretary of State implement the proposal without modification; that he does not implement it; or that an alternative proposal be implemented: ss. 5(3)(a)-(c). Before making an alternative proposal the commission must publish a draft of the proposal, invite representations and take them into account: ss. 6(4)-(5). Representations on a commission proposal may be made to the Secretary of State: ss. 6(6)-(7).

29. The third stage of the procedure is implementation, provided for in section 7. When the Secretary of State has received a proposal in response to an invitation under section 2 he may under section 7(1)(a) implement the proposal by order with or without modification; under section 7(1)(b) if he has received an alternative proposal from the Commission under section 5, implement by order that alternative proposal with or without modification; or under section 7(1)(c) decide to take no action. Before implementing a proposal under section 7(1)(a) he must consult every authority affected by the proposal, except the authority or authorities which made it, and such other persons as he considers appropriate: s. 7(3). This does not apply if the proposal was made jointly by every authority affected by it: s. 7(5).

30. Under section 11, the order to implement a proposal or recommendation may deal with the wide range of matters set out. There is further provision for implementation orders to address incidental, consequential, transitional or supplementary provisions in sections 13 (1) and section 14 (1). Section 15(1) sets out a list of matters to which the references to "incidental, consequential, transitional or supplementary provision" in sections 13 and 14 relate. These include matters such as the transfer of functions, property and rights between local authorities.

31. Section 15(2)-(3) then contains what is commonly termed a Henry VIII power, enabling the Secretary of State to amend Acts by secondary legislation.

32. Section 21 provides for what are termed "pre-commencement invitations" which the Secretary of State made to local authorities before the commencement of the power in section 2. These are treated as if made under the Act.

Cities and Local Government Devolution Act 2016

33. The Cities and Local Government Devolution Act 2016, as its title suggests, is aimed at devolving powers to local authorities. Included is a provision which was said by the Explanatory Note to empower the Secretary of State to "fast track" structural and boundary changes to non-unitary local authority areas where at least one local authority has asked for it.

34. As enacted in section 15 of the 2016 Act, the regulation-making power with the consent of only one authority in a non-unitary area is time-limited (expiring on 31 March 2019) and is subject to the affirmative resolution procedure in Parliament. At the same time the Secretary of State lays such regulations before Parliament, he is required to lay a report explaining what they do, describing why they are being made, and including details of any consultation taken into account, any representations considered, and any other evidence or contextual information the Secretary of State considers appropriate. In its relevant parts section 15 provides:

> "(1) The Secretary of State may by regulations make provision about…
>
> (c) the structural and boundary arrangements, or electoral arrangements, in relation to local authorities under Part 1 of [the 2007 Act] or under Part 3 of

the Local Democracy, Economic Development and Construction Act 2009…

(3) Regulations under this section may in particular make provision—

(a) about how the enactments mentioned in subsection (1) or (2) are to apply in relation to particular cases (including by disapplying the application of any such enactment to a particular case or applying it subject to any variations that are specified in the regulations)…

Nothing in paragraph (a) limits the power to make provision under subsection 9(d).

(4) Regulations under this section may only be made with the consent of the local authorities to whom the regulations apply (subject to subsection (5)).

(5) Regulations under this section, so far as including structural or boundary provision in relation to a non-unitary district council area, may be made if at least one relevant local authority consents…

(8) Subsections (5) to (7) expire at the end of March 2019 (but without affecting any regulations already made under this section by virtue of section (5)).

(9) The power to make regulations under this section…

(d) may, in particular, be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under an Act passed before this Act or in the same Session…

(11) A statutory instrument containing regulations under this section may be made only if a draft of the instrument has been laid before each House of Parliament and approved by a resolution of each House.

(12) At the same time as laying a draft statutory instrument containing regulations under this section before Parliament, the Secretary of State must lay before Parliament a report explaining the effect of the regulations and why the Secretary of State considers it appropriate to make the regulations.

(13) The report must include—

(a) a description of any consultation taken into account by the Secretary of State,

(b) information about any representations considered by the Secretary of State in connection with the regulations, and

(c) any other evidence or contextual information that the Secretary of State considers it appropriate to include…"

35. Taken together, sections 15(1), (3) and (9)(d) of the 2016 Act comprise a "Henry VIII" clause. Unlike the Henry VIII clause in section 15 of the 2007 Act which expressly applies to future Acts as well as past Acts, this Henry VIII clause applies to Acts in force at the time the 2016 Act was passed.

The Dorset (Structural Changes) (Modification of the Local Government and Public Involvement in Health Act 2007) Regulations 2018

36. The Dorset (Structural Changes) (Modification of the Local Government and Public Involvement in Health Act 2007) Regulations 2018, 2018 SI No 636 ("the 2018 regulations") were made in exercise of the powers conferred by section 15 of the 2016 Act 2016. The preamble to the regulations states that in accordance with section 15(4) and (5) of the 2016 Act, Bournemouth Borough Council, Dorset County Council, East Dorset District Council, North Dorset District Council, Poole Borough Council, Purbeck District Council, West Dorset District Council and Weymouth and Portland Borough Council, being relevant local authorities to whom the regulations apply, had consented to their making.

37. Regulation 3 adds words to section 2 of the 2007 Act, allowing local authorities to make proposals for local government reorganisation on their own initiative instead of in response to an invitation from the Secretary of State: reg. 3(a)-(b). They also empower the Secretary of State to order the implementation of proposals received in that manner: reg. 3(c).

38. Regulation 4 is crucial to this judicial review and provides:

> "A proposal made by any of the relevant authorities before the date that these Regulations come into force that otherwise complies with section 2 of the 2007 Act (as modified by these Regulations) shall be treated as a proposal made under that section."

39. The regulations expire at the end of March 2020: reg. 5.

The Bournemouth, Dorset and Poole (Structural Changes) Order 2018

40. The Bournemouth, Dorset and Poole (Structural Changes) Order 2018, 2018 SI No 648 ("the 2018 order") was made by the Secretary of State in exercise of the powers conferred by sections 7, 11, 12 and 13 of the 2007 Act. Its preamble states that it implements a proposal, submitted to the Secretary of State under section 2(2) of 2007 Act, that there should be a single tier of local government for Bournemouth, Dorset and Poole.

The claimant's case

41. The claimant's case is that the 2018 regulations are ultra vires because there is no power under the 2016 Act to make retrospective delegated legislation. The 2018 regulations are retrospective because regulation 4 deems a proposal made outside the 2007 Act, because it is not by invitation of the Secretary of State, to be a proposal made under it (or at least the 2007 Act as amended by regulation 3 under the Henry VIII power). An event which occurred in the past, namely the proposal for reorganisation of local government in Dorset, which the Dorset local authorities submitted to the Secretary of State in February 2017, and which he approved on 26 February 2018, is being treated as having complied with a legal regime not in force until late May 2018.

42. In the claimant's submission, the Secretary of State could have made an invitation to the local authorities under the 2007 Act to submit its proposal. There was ample time to do that in this case. What the 2016 regulations have done is to seek to remedy that omission retrospectively with regulation 4. That was unlawful.

43. It was common ground that there was no express provision in section 15 of the 2016 Act authorising retrospective delegated legislation. In the claimant's submission an implied power to do so is not enough. Nothing short of an express power will suffice.

44. In any event the claimant contends that there is no implied power in section 15 to make regulations with retrospective effect. There is no need to read down the reference in section 15(3) to "particular cases" to apply to extant proposals to give it a sensible meaning, since there are conceivable regulations under the 2016 Act to address the Secretary of State's concerns. These would be prospective in character, for example, amending section 2 so that a local authority proposal was treated as if it had been made on the Secretary of State's invitation; amending section 7(2) to abridge the time periods within which the Secretary of State had to wait in implementing a proposal; and amending section 7(3) to dispense with or amend the requirement for consultation. Such regulations would have met the Secretary of State's aim of fast tracking.

45. In oral submissions the claimant conceded that its case reduced to a matter of form: the Secretary of State could have achieved his goal by casting the 2018 regulations in prospective form. That did not undermine the thrust of its legal argument. Form, it submitted, and getting the legal niceties right, mattered in this context. The claimant's abolition was secondary to ensuring the principle of legality.

46. Further, the claimant submitted that section 21 of the 2007 Act – the pre-commencement proposals provision – told against an implied power to make retrospective regulations. Section 21 enabled proposals made before the 2007 Act commenced to be treated as if made under that Act, notwithstanding that the relevant provisions were not in force at the time they were made. Parliament could easily have introduced a similar provision in the 2016 Act but did not do so.

47. In support of these submissions reference was made to the court needing to exercise particular care where secondary legislation is made in the exercise of a Henry VIII power, especially with retrospective effect. If there is any doubt as to whether the 2018 regulations are within power, the doubt must be resolved against the executive. Statutory instruments made in the exercise of Henry VIII powers must be construed narrowly: see *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531, [25], [30].

48. The claimant then made reference to the strong disposition when interpreting legislation against giving it retrospective effect: e.g., *L'Office Cherifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 A.C. 486, 524G-525A, E-F, per Lord Mustill. Particular emphasis was laid on the decision in *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28 for the proposition that the presumption against retrospectivity should be even stronger with secondary legislation. That is because it is subject to a lesser degree of scrutiny than Acts of Parliament, especially in circumstances where the secondary legislation in question purports to amend an Act of Parliament. The claimant's case was that the question whether an Act empowered making regulations with retrospective effect is a binary question. It does not require any consideration of a range of factors and is not a matter of degree.

49. *Friends of the Earth* involved tariffs which the Secretary of State could fix through modifying licenses for renewable energy in delegated legislation under the Energy Act 2008. The argument for the claimants in that case was that he had no power to introduce modifications with retrospective effect. The Secretary of State contended that the tariff rates were simply those which he determined from time to time in the exercise of his power to modify arrangements. Moses LJ (with whom Richards and Lloyd LJJ agreed) said that the issue was to identify a clear Parliamentary intention to take away an existing entitlement to a fixed rate of return for capital investment incurred - to make a modification with such a retrospective effect - not whether the

proposed modification might have a significant adverse impact on those proposing to install systems once the proposal was announced: [55]. Moses LJ said:

> "43. I have concluded that the delegated legislation proposed in the consultation of October 31, 2011 would have retrospective effect in respect of any installation becoming eligible for payment prior to the modification coming into effect, as proposed on April 1, 2012. Such legislation would only be valid if the empowering provision contained in s.41 of the 2008 Act authorises such an effect. Just as there is a presumption against retrospective operation in the construction of statutes, so there is a presumption in relation to the construction of a statute delegating legislative powers. Indeed, the authors of *de Smith's Judicial Review*, 6th edn, suggest that the presumption is even stronger in relation to the powers conferred by delegated legislation (5–040, in reliance upon *Newcastle Breweries v The King* [1920] 1 K.B. 854; (1920) 2 Ll. L. Rep. 236 KBD at 865). Absent a clear provision conferring power to make retrospective delegated legislation, the assumption of such a power offends the legality principle."

50. Finally, the claimant submitted that the presumption against retrospectivity could not be avoided with the reasoning that the 2018 regulations were procedural rather than having an effect on substantive rights. Procedural matters were, the claimant submitted, those concerned with the machinery of justice, in other words, court or arbitral proceedings. Even if a more expansive approach to procedural matters were to be adopted, it could not touch substantive matters. A passage from *Bennion on Statutory Interpretation* (LexisNexis, 7th ed), section 5.14, was invoked, that "a procedural change is expected to improve matters for everyone concerned (or at least to improve matters for some, without inflicting detriment on anyone else who uses ordinary care, vigilance and promptness)."

51. By contrast, the claimant contended, the 2018 regulations were plainly determinative of rights, rather than about the machinery of the courts or procedural matters more broadly. Rather than improving matters for everyone, they would abolish the claimant, a legal person. If held to be valid, they would also enable the executive to enact materially identical provisions in respect of non-unitary council areas across England and Wales, effectively rendering the 2007 Act scheme an irrelevance and allowing sweeping changes to local governance to be made by executive fiat.

Discussion

52. In my view the Secretary of State had power under the 2016 Act to make the 2018 regulations, including regulation 4. There is no vice of retrospectivity in that regulation. Section 15(3) of the 2016 Act empowers the Secretary of State to make regulations disapplying section 2 of the 2007 Act in relation to "particular cases". On their natural and ordinary meaning those words are wide enough to enable regulations which treat a proposal already made by any of the relevant authorities before the date the regulations come into force, and which otherwise complies with section 2 of the 2007 Act (as modified), as being a proposal made under that section. Section 21 of the 2007 Act does not throw light on what is the natural and ordinary meaning of a provision in much later legislation.

53. There is no compelling reason for reading down the words of section 15(3) and for treating regulation 4 of the 2018 regulations as ultra vires the Act. First, it is not the law that the Secretary of State must have an express power to make retrospective regulations. What Moses LJ said at paragraph 43 of *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28 was that there had to be

a clear provision conferring power to make retrospective delegated legislation, not that there had to be an express power. Section 15(3) is a clear provision.

54. Secondly, the principles concerning retrospectivity are rooted in fairness. Fairness is not a binary matter but falls along a spectrum. The analysis does not differ with delegated legislation from the approach for primary legislation laid down in *L'Office Cherifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 A.C. 486. In *Friends of the Earth*, Moses LJ said:

> "44. In *Wilson v First County Trust Limited (No.2)* [2003] UKHL 40; [2004] 1 A.C. 816 at [19] Lord Nicholls adopted the principle expressed by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All E.R. 712; (1992) 4 Admin. L.R. 57 CA (Civ Div) at 724:
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> > "The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."
>
> That underlying standard of fairness was invoked by Lord Rodger ([196]). He sought to steer the courts away from application of what he described as "the somewhat woolly label of 'vested' rights" [196]."

55. There can be little or no unfairness in the exercise of the regulation-making power in section 15(3) of the 2016 Act given its legislative context. Thus the presumption against retrospectivity is virtually non-existent. That is the case even when it encompasses a Henry VIII power to vary the 2007 Act and in light of the scrutiny to which the exercise of such a power must be subject. The features which in combination mitigate any unfairness are:

i) The regulations under the section, so far as including structural or boundary provision in relation to a non-unitary district council area, may only be made if at least one relevant local authority consents to them: ss. 15(5)-(7). (This point will be strengthened after March 2019 when they may only be made with the consent of all local authorities to which they will apply: ss.15(4), (8)). We have seen the consent to the 2018 regulations of the other eight local authorities in Dorset (apart from the claimant) on the face of the regulations.

ii) The regulations may be made only if they are approved by both Houses of Parliament under the affirmative resolution procedure, not the less demanding negative resolution procedure: s. 15(11). There is therefore the opportunity for more effective Parliamentary scrutiny of what might be proposed, an opportunity taken in this case.

iii) The Secretary of State must lay before Parliament, along with the regulations, a report explaining their effect and why he considers it appropriate to make them: ss. 15(12)-(13). That indicates that the legislative intention was that Parliament was to play an active role in scrutinising section 15 regulations. At a practical level it offers another basis on which to challenge what might be thought to be an ill-thought out proposal. (I note in passing that this provision suggests a fully developed proposal, in other words a proposal on a particular case which is in existence at the time the relevant regulations are laid before

Parliament. This is another reason in support of the construction of section 15(3) I have adopted.)

56. In this case it could hardly be said that there was unfairness to the claimant. Nor was any claimed. But is salutary to recall the background contained earlier in the judgment. First, it makes clear that the proposal put to the Secretary of State by the other Dorset councils, and the making of the 2018 regulations, has been a lengthy process going back to 2015. Next, we have seen how the claimant has engaged in the process, voiced its objections and made representations about the proposal. Indeed the claimant has made its own alternative proposal. The local MP, Sir Christopher Chope, has been vigorous in advancing the claimant's case. Further, the Secretary of State enunciated criteria against which he would measure the proposal relatively early in the piece. There was wide public consultation. Lastly, in late 2015 the Bill which was to become the 2016 Act had been introduced into Parliament, so that it was public knowledge that the Secretary of State would be able to make regulations disapplying the invitation procedure of section 2 of the 2007 Act. In November 2017 the claimant was explicitly informed that the Secretary of State intended to do that. In early 2018 the claimant saw the draft regulations and order, including by the end of January the final version of regulation 4. On the spectrum of unfairness to which the authorities refer, none of what happened in this case registers.

57. Thirdly, section 15 of the 2016 Act was plainly intended to enable a straightforward, fast-track procedure for local government reorganisation, avoiding the procedure of a formal invitation from the Secretary of State contained in the 2007 Act. There is nothing in section 15 (or its legislative history, if reference to that were permissible) to suggest that implementing regulations under it could not apply to proposals which at least one of the local authorities affected have already worked up. In argument the claimant fairly accepted that its objection was to form, and that if the regulations had been couched differently all would be well. In this area, however, the courts are concerned with substance, not form or legal niceties. Incantations against Henry VIII clauses and retrospective legislation disappear into the ether if there is no unfairness. That being the case there is no need to canvass the Secretary of State's submissions that the claimant's suggestions about the operation of section 15 would be unworkable in practice and thwart Parliament's intentions.

58. Finally, there is no legal right the claimant enjoys with which there has been an unfair interference as a result of the decision challenged in this case. As a result of the proposal the claimant will be abolished, along with the other local authorities in Dorset. But without the regulations, the claimant would not have enjoyed a right under the legislation not to be abolished. The regulations have the effect of allowing the Secretary of State to implement a proposal for change if certain conditions are met. The situation in the *Friends of the Earth* case, on which the claimant placed such reliance, was to deprive by secondary legislation those producing renewable energy of an entitlement to a fixed rate of payment. The position here is quite different. It is not a case as with *Friends of the Earth* where private parties have made arrangements on the basis of a certain state of affairs, which they cannot revisit if legislation has retrospective effect.

59. In addition to these three points, the Secretary of State is correct in my view in his further submission that the regulations in this case are procedural in character, and thus the principle that the law should not take retrospective effect does not arise: see *Bennion on Statutory Interpretation* (LexisNexis, 7th ed), section 5.12(1). Procedure in this context is not confined to court (or arbitral) proceedings. There is no authority to that effect. Rather, procedural is used in the context of this principle by contrast with a situation where primary or secondary legislation retrospectively causes

prejudice to, or deprives someone of, a valuable substantive right which could not fairly have been predicted at the relevant time. In this case the regulations are procedural in that they simply make changes to the procedural requirements before a proposal for local government reorganisation can be implemented. The presumption against retrospectivity does not arise.

Delay

60. The claimant contended that it had brought this judicial review timeously and that it should not be denied a remedy because of delay. It had acted within the period laid down in CPR 54.5. The draft regulations were laid before Parliament on 29 March 2018, and were made on 24 May 2018. The claimant cited *R v Her Majesty's Treasury, ex parte Smedley* [1985] QB 657; [1985] 2 WLR 576, where Sir John Donaldson MR said that possibly in most circumstances the proper course would be for the courts to refuse to consider a challenge to draft regulations but to invite a claimant to renew the application if and when they were made: at 667. In any event, the claimant added, a challenge to putative future regulations in this case would have been regarded as premature since at that stage the claimant would not have been able be to identify the ultra vires issue with which they were tainted.

61. Alternatively, the claimant submitted, the period within which a claim for judicial review could be made should be extended in this case given the public interests involved. Its challenge was to the vires of delegated legislation purporting to have retrospective effect which, if valid, would lead to a fundamental restructuring of local government in Dorset, and potentially elsewhere in England through a similar mechanism.

62. In my view this claim has not been brought promptly. The grounds did not first arise when the Secretary of State decided to lay draft regulations before Parliament in March 2018. The claimant had the draft regulations in January this year and the final version of regulation 4 by the end of that month. Even earlier, in 2017, the claimant knew that the Secretary of State intended to adopt the procedure of the 2016 Act, and not to proceed with a 2007 Act invitation. It also knew of the existing proposal of the other Dorset authorities and that the Secretary of State would introduce regulations concerning it, if satisfied as to its merits.

63. It seems to me that where the government lays regulations before Parliament which give legal effect to a publicly stated position, which itself could have been challenged by way of judicial review much earlier, the court will look carefully at whether the final making of the regulations justifies a fresh period to apply for judicial review under CPR 54.5. There is support for this approach in *R (on the application of The Association of Independent Meat Suppliers) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 1961 (Admin), [58], per Fraser J. The legal policy behind this is that if claimants believe that a publicly stated position contains potential errors of law the sooner it is corrected before reaching Parliament the better. Sir John Donaldson MR's *obiter* remark in *Smedley* does not lay down a mandatory rule. Indeed *Smedley* was a case where no Order in Council in the terms of the draft had been made, but the court held that it was proper it to consider the questions of law which would arise if it were.

64. Even if the grounds did not arise in 2017, time in my view started to run when the claimant saw the draft regulations in January this year. The claimant did not act promptly at that point. Nor did it act promptly after 26 February 2018 when the decision to implement the proposal was announced. It waited more than two further months before sending its pre-action protocol letter, commencing proceedings on 21

May 2018. Promptness in this case was of obvious importance when the steps to prepare for reorganisation have been continuing during 2017 and have involved the expenditure of considerable time, effort and public moneys. If objection had been raised earlier steps could have been taken to avoid any potential issue.

65. There is no case for an extension of time. The reason for the delay is said to be that the claimant did not seek advice on the retrospectivity point until 12 April 2018, and had assumed prior to that date that the process had been lawful. Given the claimant's involvement with the process, its access to legal advice, and its desire to prevent the re-organisation from taking place in face of support elsewhere in Dorset, I agree with the Secretary of State that there is not a good explanation for the delay or justification of an extension.

No difference and relief

66. Under section 31(2A) of the Senior Courts Act 1981 the Court must refuse relief, if it appears highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred.

67. The claimant submitted that its claim should not be refused under this section on the basis that the "no difference" principle cannot apply where regulations are ultra vires the enabling Act and the power to act does not exist. In any event, the claimant submitted, it cannot be assumed that there would not be any difference. If the 2018 regulations lacked the retrospectivity provision in regulation 4 the effect would be a prospective amendment of the 2007 Act, allowing the Dorset councils to make proposals on their own initiative to the Secretary of State. If that were the case, it cannot be said that the proposal, and the process which would have been followed, would necessarily be the same. At this point the proposed reorganisation has not proceeded to the stage of inevitability: no redundancies have yet been made. The claimant and East Dorset had been working closely in recent times and it might be that a new proposal would build on that. The claimant might even seek to be part of Hampshire.

68. In my view the requirements of section 31(2A)(a) of the Senior Courts Act 1981 are met. If regulation 4, the retrospective provision, were ultra vires, that would not touch the remaining parts of the 2018 regulations or the 2018 order. The other eight Dorset councils could resubmit the proposal as a new proposal, and the Secretary of State could confirm that for the reasons previously given he still wished to implement it. The proposal reflected in the order would still have been submitted under section 2 of the 2007 Act. In other words the claim would, if it were to succeed, make no difference. The claimant suggested that if matters had proceeded in accordance with what it contends were lawful regulations, the proposal or the process used to consider its merits would not necessarily have been the same. There is no evidence to this effect, only speculation. On the material before me I am satisfied that it is highly likely that the outcome would not have been substantially different if regulation 4 were ultra vires.

69. In any event I would refuse relief as a matter of discretion, first, because its effect would make no real difference when it would simply cause further delay and inconvenience to the other Dorset local authorities but not affect the overall outcome (see the Court of Appeal in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860, [53]; and secondly, under section 31(6) of the Senior Courts Act 1981, when it would be detrimental to good administration given the time, effort and public moneys already expended (described earlier in the judgment) on implementing the proposal.

Conclusion

70. For the reasons given I dismiss the claim.