

This is a precis of the judgement given by SIR ROSS CRANSTON (sitting as a judge of the High Court) after hearing the case of CBC against the Secretary of State for Housing, Communities and Local Government on 30th July 2018 about the implementation of Future Dorset.

The judge draws attention to the fact that in oral submissions CBC conceded that its legal case is based upon a matter of “form”. It agreed that the Secretary of State could have achieved his goal by casting the 2016 regulations in prospective rather than retrospective form. Apparently, in the opinion of CBC, getting the legal niceties right matters in this context. The abolition of CBC it claimed is secondary to ensuring the principle of legality.

I must assume that the judge is reporting CBC correctly. In that case I find that last sentence difficult to swallow since it runs contrary to nearly everything CBC Councillors who oppose Future Dorset have said and done.

The judge continues that in his view the Secretary of State had power under the 2016 Act to make the 2018 regulations. First, it is not the law that the Secretary of State must have an express power to make retrospective regulations. The regulations have the effect of allowing the Secretary of State to implement a proposal for change if certain conditions are met. Secondly, the principles concerned are rooted in **fairness** which is not a black and white concept but rather a matter of degree.

He discusses fairness in this context. There can be he says be little or no unfairness in the exercise of the regulation-making power in the 2016 Act. **Thus, any presumption against retrospective action is virtually non-existent.**

He expands upon that. First, 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.

Throughout that period CBC has engaged in the process, voiced its objections and made representations about the proposal. Indeed, it has made its own alternative proposal.

The local MP, Sir Christopher Chope, has been vigorous in advancing CBC’s case.

Further, the Secretary of State made known the criteria against which he would measure the proposal relatively early in the piece. There was wide public consultation.

Lastly, in early 2018 CBC saw the draft regulations and order.

None of what happened in this case even registers on a spectrum of unfairness.

In argument CBC 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 retrospective legislation disappear into the ether if there is no unfairness.**

Finally, there is no legal right that CBC enjoys with which there has been an unfair interference. Because of the proposal the claimant will be abolished, along with the other local authorities in Dorset. But the claimant does not have a right not to be abolished and so there is no unfair interference.

The judge then looks at timing. **In my view, he says, this claim has not been brought promptly.**

CBC had the draft regulations in January 2018. Even earlier, in 2017, CBC knew that the Secretary of State intended to adopt the procedure of the 2016 Act. 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.

Even if the grounds did not arise in 2017, time in my view started to run when CBC saw the draft regulations in January 2018. CBC 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 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.**

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

Finally, the judge says, even if the Secretary of State had acted illegally as suggested it is highly likely that the outcome would not have been substantially different. 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. In other words, the claim would, if it were to succeed, make no difference.

Then, in a final highly significant paragraph, he says that in any event he would refuse the claim as a matter of discretion.

First, because its effect would make no real difference and would simply cause further delay and inconvenience to the other Dorset local authorities but not affect the overall outcome.

Secondly because it would be detrimental to good administration given the time, effort and public money already expended by councils across Dorset on implementing the proposal.

Jim Biggin

August 2018