Environmental Impact Assessment
Some Primary Considerations
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Scope

- Recent developments in practice and procedure in High Court claims raising EIA issues.

- Consider the main preliminary considerations for Claimants when bringing a claim and for Defendants/developers when defending a claim.

- 5 main issues and how they have manifested in recent EIA cases.

Scope (2)

- **1. Standing**: Can this Claimant bring a claim? Individuals; unincorporated associations; companies; NGOs, local authorities: all give rise to different considerations.

- **2. Timing :** Is the Claim too late? Has there been delay? Is time extendable? Is the claim premature? Which procedure- JR, s.288/289?

- **3. Costs:** Funding the claim; costs protection and its scope; protective costs orders; whether case is an Aarhus case.

- **4. Merits:** Totally without merit?

- **5. Target**: Is the claim directed at the right target- screening direction or planning permission?

Standing: Who can bring a High Court EIA claim?

- **Individuals**- usually local residents or campaigners eg Lady Berkeley.
- **Local authorities-** eg. *R (Luton Borough Council v Central Bedfordshire Council* [2015] EWCA Civ 537 (note Aarhus rules).
- **NGOs**- eg *R (Forest of Dean (Friends of the Earth v Forest of Dean District Council* [2015] EWCA Civ 683.
- **Companies-** Commercial rivalry: see *R (Commercial Estates Group Ltd v SSCLG* [2015] J.P.L. 351 in which Stuart Smith J referred at [44] back to *R (The Noble Organisation) v Thanet District Council* [2004] EWCA Civ 782 at [68] where Auld LJ said that applications such as this, which may be characterised as part of a commercial struggle between rival developers, "should be subject to rigorous examination by the single judge at the permission stage of a claim for judicial review."

Standing (2)

Incorporated Associations:

- Have general capacity to litigate eg. *Residents Against Waste Site Ltd v Lancashire CC* [2007] EWHC 2558
- Defendant submitted company lacked standing, as it was formed two days before bringing the claim for judicial review.
- In substance company represented the interests of local residents. Real issue: security for costs
- "persons aggrieved" formula from s. 288 TCPA 1990 not applicable to standing requirements for judicial review [17]
- Case represents the direction of travel in an “increasingly catholic view of *locus standi” (see R (On the Application Of) Plantagenet Alliance Ltd v Secretary of State for Justice* [2014] EWHC 1662 at [81])
- See also *R –v- Leicestershire County Council ex parte Blackfordby and Boothorpe Action Group Limited* [2001] Env LR 35 (Richards J) and *Herefordshire Waste Watchers Limited –v- Hereford Council* [2005] EWHC 191 (Admin) (Elias J).

Standing (3)

Unincorporated Associations:

- Can they bring a claim for judicial review?
- *"No": R v Darlington BC and Darlington Transport Company ex p the Association of Darlington Taxi Drivers (*1994): Lacked legal capacity to litigate at all (Auld J)
- Yes": *R v Traffic Commissioner for the north Western Traffic Area ex p 'Brake'* [1996] Turner J. J.R. invokes a supervisory jurisdiction to control excess of power. Not a knock-out.
- Real issue is security for costs.

Standing (3)

- "**Person aggrieved"** formula found in section 288 TCPA 1990 (and also section 113 of the PCPA 2004): see *R (Mackman) v SSCLG* [2013] EWHC 3396 at [16] – [22]: Should not be interpreted restrictively: see *Walton* at [83]- [86].

  (appeal dismissed on 09.07.15- [2015] EWCA Civ 716):

- Article10a of EIA Directive requires members of the public with a "sufficient interest" have access to a review procedure. Article 1(2) provides that environmental NGOs have a sufficient interest. Considered in *R (Ashton) v SSCLG* [2011] Env LR D7.

Standing (4)

Put-Up Claimants; Substitute Claimants; Claims out of time

Broad Approach to Standing: see eg.

- ***Edwards v The Environment Agency* (CO/5702/2003)** (Keith J)- not abusive for Edwards to front claim- LSC had seen fit to allow him to stand for whole community.
- ***River Thames Society v FSS*** [2007] JPL 782: Lady Berkeley substituted herself for River Thames Society as Claimant.
- ***R (SDR) v Bristol City Council* [2012] EWHC 859 (Admin): SDR** was originally "the only person prepared to put his head above the parapet in the prevailing atmosphere of intimidation and harassment". Later he discontinued the claim, but claimant "ABC" was allowed to bring a fresh JR well out of time.

2. Timing (1)

Time Periods for High Court Claims and Appeals

- CPR rule 54.5 (5):

  "Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose"

- Otherwise "promptly and in any event within three months" (rule 54.5(1)).
- So no promptness requirement for planning JRs.
- Brings into line with section 288 of the Town and Country Planning Act 1990 and other statutory challenges with exception of section 289 TCPA which provides for an extendable four week period for enforcement appeals.

Timing (2)

Pre-Action Protocol

Addition to paragraph 6 of the pre-action protocol: “the parties should still attempt to comply with this protocol but the court will not apply normal cost sanctions where the court is satisfied that it has not been possible to comply because of the shorter time limits”. Further, “This protocol will not be appropriate where the defendant does not have the legal power to change the decision being challenged.

Target timescales for significant planning cases (PD 54E, para 3.4):

a) applications for permission to apply for judicial review are to be determined within three weeks of the expiry of the time limit for filing of the acknowledgment of service;

b) oral renewals of applications for permission to apply for judicial review are to be heard within one month of receipt of request for renewal;

c) applications for permission under section 289 of the Town and Country Planning Act 1990 are to be determined within one month of issue;

d) substantive statutory applications, including applications under section 288 of the Town and Country Planning Act 1990, are to be heard within six months of issue; and

e) judicial reviews are to be heard within ten weeks of the expiry of the period for the submission of detailed grounds by the defendant or any other party as provided in Rule 54.14

Timing (3)

R (Blue Green London Plan) [2015] EWHC 495 (Admin);

The time limit for challenging orders granting development consent, which was calculated as a "period of six weeks beginning with the day on which the order is published" under section 118 of the Planning Act 2008 included the day on which the order was made. The court had no power to extend that time limit. Permission refused. (Ouseley J)

R (Williams) v SSECC [2015] EWHC 1202 (Admin);

Following the above judgment, the court did not have jurisdiction to hear a claim for judicial review of a development consent order where the claim had been issued one day after the expiry of the time limit in section 118 of the Planning Act 2008. The ways in which the secretary of state had publicised the order and the reasons for it, and notified interested parties, constituted publication for the purposes of s.118. There was no uncertainty about the period within which a challenge had to be commenced. Claim dismissed.

NB that by **section 92 of the Criminal Justice and Courts Act** section 118 has now been amended to eradicate this trap so that the six week period starts the day after the decision, not on the day.

Timing (4)

R (Gerber) v Wiltshire Council [2015] EWHC 524 (Admin)

- Challenge to planning permission for PV farm affecting the setting of a Grade II* listed building. Already built by time of claim
- Screening Opinion: not EIA development. Court held screening opinion was flawed and could not say it would be the same if re-taken [75]
- Claimant also succeeded on three other grounds on failures to consult English Heritage; failures to take account of duty to preserve listed building and failure to properly consult the public

Timing (5)- *Gerber cont.*

- Claim brought more than one year after the decision (pp 25.6.12; claim 20.6.14).
- At time of decision CPR 54.5(1) provided that claim must be brought "promptly and in any event within 3 months"
- Change from 3 months to six weeks for J.R. "emphasises the importance of promptness in bringing claims for planning cases" [77]
- Considered at [78] the guidance on delay in *Finn Kelcey v Milton Keynes*- correct?
- Delay prior to March 2014 could not be criticised because Claimant had- wrongly- not been made aware by the Council of the planning application. Thereafter had to play catch-up. No neglect or lassitude [86].

Timing (6)- *Gerber* cont

- Dove J's factors in favour of quashing:
  - Illegality of decision relating to important heritage assets [103]
  - Failure to comply with EIA Directive: screening an important safeguard and issue raised in this case one of substance not technicality [105].
  - Development not constructed in accordance with the permission [107]

- Dove J's factors against quashing
  - Serious financial prejudice would be suffered by the developer [93]; [108]
  - Importance of renewable energy [109]
  - Prejudice to good administration
- Granted a quashing order, not just declaratory relief. Contrast eg. *R (Macrae) v Herefordshire* [2012] EWCA Civ 457 at [31]
- Case s going to Court of Appeal.

Criminal Justice and Courts Act 2015

- Section 91 and Schedule 16 to introduce a permission stage into various statutory challenges including sections 287, 288, 113 challenges- so “knock out blows” will become of more relevance (provisions not yet in force).

3. Costs: Aarhus Claims

- Rules on costs limits in “Aarhus Convention claims”: **Part VII of CPR 45**
- ”Aarhus Convention claim’ means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of [Aarhus Convention] including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject (CPR 45.41)
- CPR 45.42 allows for “opt out” from rules on costs limits by Claimant
- CPR 45.43 provides for a limit to be prescribed in the Practice Direction, which may prescribe different amounts for different “nature of claimant”. Current limit is £5,000 where “claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person” and £10,000 in all other cases (see PD para 5.1)
- Reciprocal cap (i.e. cap on amount Claimant can recover) is £35,000 (PD para 5.2)
- CPR 45.44 allows for challenge to whether an Aarhus claim
- If Court finds *not* an Aarhus claim, no order as to costs
- f Court finds it is an Aarhus claim, D pays C’s costs on the indemnity basis

Costs: *Venn (1)*

- ***Venn v SSCLG*** [2015] 1 W.L.R. 2328 (CA)
- Claim under section 288 TCPA 1990
- Judge below held claim concerned environmental matters within the scope of Aarhus Convention, but was not an Aarhus claim under the new rules because brought under section 288 not by judicial review.
- She made a ‘ bespoke’ protective costs order in any event.

Costs: *Venn (2)*

- Court of Appeal agreed this claim was within the scope of the Aarhus Convention, and agreed it was not within the scope of the new Aarhus rules.
- Agreed that the claim did not fall within the strict terms of CPR 45.41.
- Claim *was not* a case affected by an EU Directive (not an EIA based claim). *And so* *R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600* applied: see further *R (Garner) v Elmbridge Borough Council [2012] PTSR 250*.
- Claimant argued the new rules in CPR 45.41 moved the goalposts: the judge had been right to grant a PCO since if this were a grant of planning permission by a local planning authority costs protection would be automatic. The form by which the Claim was brought was irrelevant and so the court should fill in the omission of the rules.
- Alternative, the Claimant said was that the UK would remain in breach of the Aarhus Convention.

Costs: *Venn (3)*

- Court held however that the costs protection regime introduced by CPR r 45.41 is not compliant with the Aarhus Convention in so far as it is confined to claims for judicial review and excludes statutory appeals and applications.
- A costs regime for environmental cases falling within the Aarhus Convention under which costs protection depends, not on the nature of the environmental decision or the legal principles upon which it may be challenged, but on the identity of the decision-taker, is systemically flawed in terms of compliance with the Convention [34]
- If the flaw is to be remedied, action by the legislature was necessary.
- Note the new rules do not cover Appeals either, so there may be anomalous outcomes there too. See ***Edwards*** (SC) [2014] 1 W.L.R. 55 in which SC said that “the same principles should be applied to the assessment at each stage, taking account of costs previously incurred”

Some More Costs Protection Cases

R (Kendall) v Rochford D C [2015] Env. L.R. 21: Lindblom J made a PCO following *Venn* in High Court. Does not say so, but looks as though he would not have done in light of CA in *Venn*. See paragraph [3].

R (HS 2 Alliance) v SST [2015] 2 Costs L.R. 411: A local authority was entitled to the costs protection conferred by CPR r.45.41.

Luton Borough Council v Central Bedfordshire Council [2015] EWCA Civ 537: "Luton BC's claim qualified as an Aarhus Convention claim for the purposes of the special costs regime for such claims (set out in CPR 45.43 and associated Practice Direction). Luton BC and CBC made an agreement that any costs order to be made as between them should be for a nil amount. However, the interested parties were not a party to that agreement and were in no way bound by it. The judge was fully entitled to award the interested parties their costs of preparing the acknowledgement of service, in line with ordinary principles as identified by him. The costs awarded were at a level well below the maximum costs award permissible in respect of an Aarhus Convention claim under the Rules."

Costs:
Criminal Justice and Courts Act 2015

- Sections 88-90 make provision about cost capping orders in judicial review (only).
- Not yet in force.
- Costs Capping Orders will only be allowed in accordance with rules of court made pursuant to these provisions when in force
- Intended to limit availability of costs capping by regulating financial criteria for qualification and tightly defined public interest test
- Seem on their face to require some thought as to consequences of ***Edwards*** (CJEU) [2013] 1 W.L.R. 2914 which emphasises "affordability" is not purely subjective.
- Appear to make reciprocal caps mandatory. May be an issue there- considered but not resolved in Case C-530/11 ***Commission v UK***

4. Totally Without Merit

CPR rule 54.12(7):

"Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing"

Commercial Estates Group Ltd v Secretary of State for Communities and Local Government [2015] J.P.L 351 (see [45]-47])

- It would not be appropriate for a Judge on a renewal application to amend the terms of an order given on the papers in an attempt to give different expression to what he or she thinks that order meant or implied…
- The main purpose of certifying an application to be TWM on the papers is to prevent oral renewal. So futile at an oral renewal hearing which has, by definition already happened, and by which point no appeal to Court of Appeal is possible.

5. Target

Usually target is the decision notice- see ***Burkett*** [2002] 1 W.L.R. 1593

R. (on the application of Corrie) v Suffolk CC [2015] Env. L.R. 5; (Cranston J):

"69 Accordingly I accept Mr Stinchcombe's submission that the screening direction of the Secretary of State conclusively determined that this waste facility was not an EIA development. The Council was bound by the Secretary of State's screening direction and it was therefore entitled to grant planning permission. There has never been any challenge to the Secretary of State's screening direction and any such challenge would now be too late. The failure to challenge the Secretary of State's screening direction means that this ground of challenge must fail. As Simon Brown LJ indicated in *Evans v First Secretary of State [2003] EWCA Civ 1523* , at [10], the Secretary of State's decision is decisive.

70 I also accept Mr Stinchcombe's submission that it would be contrary to the conduct of good administration and legal certainty for an individual such as the claimant to hold off from challenging a screening direction of the Secretary of State, thereby leaving a local planning authority in the position where it had no choice but to act in accordance with that direction, only to seek later to impugn the decision to grant planning permission on the basis that it was flawed. That analysis is supported by the thoughtful remarks of Lindblom J in *Threadneedle Property Investments Ltd v Southwark London Borough Council [2012] EWHC 855 (Admin); [2013] Env. L.R. 1* , [117]-[118]."