Landmark CHAMBERS

Issues for Parish Councils in High Court challenges

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Overview: Issues for Parish Councils in High Court challenges

A. Issues in Getting Started
B. Issues in Making a Claim
C. Issues at Oral Permission Hearings
D. Issues Post Permission and Substantive Hearings
E. Issues following a Hearing

A. Issues in Getting Started

1. Identifying if you have a claim
2. Bringing together a team
3. Pre-Action steps: compliance/non-compliance with the PAP (“Pre Action Protocol” process)
4. Pre-action specific disclosure?
5. EIR and FOIA requests?

B. Issues in Making A Claim

- The claim form - key points:
  - Identify Claimant or Claimants (NB costs)
  - Facts and Grounds
  - Identify decision challenged
  - Identify relief sought
  - Identify Interested Parties
  - Other Orders?
  - Aarhus Costs Caps…. What are they? Who Qualifies? How do we get one?

B. What is an Aarhus Costs Cap? (1)

- An “Aarhus Costs Cap” is a specific term used to define a type of costs cap which the CPR gives to some parties bringing some environmental claims
- The definition is in CPR r.45.41
- defines an ‘Aarhus Convention Claim’ as follows:

(a) “Aarhus Convention claim” means a claim brought by one or more members of the public—

(i) by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 (“the Aarhus Convention”); or

(ii) by judicial review which challenges the legality of any such decision, act or omission and which is within the scope of Article 9(3) of the Aarhus Convention;

(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention.

B. What is an Aarhus Costs Cap? (2)

- The cost cap is set out at CPR r.45.43:

  (1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.

  (2) For a claimant the amount is—

  (a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

  (b) £10,000 in all other cases.

  (3) For a defendant the amount is £35,000.
- CPR r.45.42(1) provides that:

  Subject to paragraph (2), rules 45.43 to 45.45 apply where a claimant who is a member of the public has—

  (a) stated in the claim form that the claim is an Aarhus Convention claim; and

  (b) filed and served with the claim form a schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant and which is verified by a statement of truth
- Therefore, a claimant may not obtain the benefit of a costs cap unless they have filed and served a schedule of their financial resources as specified.

B. But I heard that….

- <u>Various changes over the last few years altering what an "Aarhus Costs Cap" *means.*</u>

a) public authorities no longer benefit … *but best view is Parish Councils do*;

b) Amended Rules give a power to vary the costs cap – previously was fixed

c) Amended Rules require claimants to file and serve schedule of financial resources;

d) New Amended Rules amend this further

e) Amended Rules provide multiple parties are treated individually

f) Amended Rules provide that *certain* statutory reviews fall within scope

g) Amended Rules have changed that a defendant can challenge Aarhus Convention costs protection on the standard, rather than indemnity basis

B. What Does All This Mean? (1)

- Firstly, to qualify for an “Aarhus Costs Cap”, the claim has to be brought by ‘one or more members of the public’.
- Rules now seek to exclude public authorities from the scope of protection (contrary to in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2015] EWCA Civ 203; see In ACCC/C/2014/100 and 101)
- Current view : Parish Councils included. Arhus Compliance Committee (ACC) consider community councils in Scotland are within “public” (ACCC/C/2012/68)

B. What Does All This Mean? (2)

- Secondly, it means you have to give a "*schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant and which is verified by a statement of truth*"
- A claimant has to provide:
  - a schedule of the claimant's financial resources, verified by a statement of truth
  - the claimant's significant assets, liabilities, income and expenditure;
  - details of the aggregate amount of any financial support which any person has provided or is likely to provide to the claimant
- BUT…

B. What Does All This Mean? (3)

- To vary a cap, the Court will consider whether proceedings will be considered 'prohibitively expensive' if their likely costs, including court fees, fail either the subjective or objective tests:
  - subjective test: do the likely costs exceed the financial resources of the claimant?
  - objective test: are the likely costs objectively unreasonable having regard to the factors at r.45.44(3)(b)?

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the claimant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

B. What Does All This Mean? (4)

- AND the cap can now be varied after it has been set
- New Amended Rules - April 2018 (seeking to apply ***R (Royal Society for the Protection of Birds) v Secretary of State for Justice*** [2017] EWHC 2309 (Admin)) Rules
- The (Amended) Rules provide that where a cap is sought to be varied:
  - by a claimant it must "*be made in the claim form and provide the claimant's reasons why, if the variation were not made, the costs of the proceedings would be prohibitively expensive for the claimant*"
  - by a defendant it must "*be made in the acknowledgment of service and provide the defendant's reasons why, if the variation were made, the costs of the proceedings would not be prohibitively expensive for the claimant*" and it must "*be determined by the court at the earliest opportunity*".
- It is also provided that (emphasis added) "[*a*]*n application to vary may be made* ***at a later stage*** *if there has been a* ***significant*** *change in circumstances (including evidence that the schedule of the claimant's financial resources contained* ***false or misleading information****) which means that the proceedings would* ***now****— (a) be prohibitively expensive for the claimant if the variation were not made; or (b) not be prohibitively expensive for the claimant if the variation were made*". Where such an application is made:
  - by the claimant it must "*be accompanied by a revised schedule of the claimant's financial resources or confirmation that the claimant's financial resources have not changed*" and "*provide reasons why the proceedings would now be prohibitively expensive for the claimant if the variation were not made*"
  - by the defendant it must "*provide reasons why the proceedings would now not be prohibitively expensive for the claimant if the variation were made.*"

B. What Does All This Mean? (5)

- Fourthly, it means in most cases you want to have one claimant – not many claimants. Each Claimant is responsible for their own cost cap…

B. What claims are covered?

- (i) judicial reviews; most/many planning judicial reviews likely to be caught as "environmental"
- (ii) "*review under statute*" e.g. statutory review (not appeals) such as s. 288;
- (iii) *"does not apply to appeals other than appeals brought under section 289(1) of the Town and Country Planning Act 1990 or section 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which are for the purposes of this Section to be treated as reviews under statute*".
- But **NB protection only extends beyond judicial review** to (ii) and (iii) above if the claim challenges "*the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2)".*
- Article 9(1) and (2): So basically only if challenge EIR, EIA, IED … *take advice if not a judicial review*
- For other cases outside Articles 9(1) and (2), e.g. those within Article 9(3) protection still only applies to judicial reviews, not statutory reviews or appeals.
- Art. 9(3) "*administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*"

B. What if our case isn't in these catergories?

- Many might not be, e.g.:
  - Cases such as other statutory review (many s.288 or s.289 TCPA 1990 claims)
  - Other public law claims which are not within judicial review, e.g. appeals to the General Regulatory Chamber of the First Tier Tribunal
  - private law cases (e.g. nuisance).
- NB: Non environmental JRs will usually fall within the scope of applying for Cost Capping Orders
- In all these cases: take advice. Inside different legal structure:

(a) Cases where no EU law element: old ***Corner House*** principles. These generally have more room for judicial discretion so may be more favourable to claimants, but (for Parish Councils) degree of public interest can be an issue for localised impacts, and uncertainty e.g. financial requirements.

(b) Cases where EU law makes Aarhus directly effective, apply Art 9(4) directly to avoid prohibitively expense: *R **(Garner) v Elmbridge DC*** [2011] 3 All ER 418. Probably this is mainly/only cases relating to Industrial Emissions Directive 2010/75/EU as main category of case where EU law is directly effective is EIA cases, which are caught

(c) Cases where EU law in play but no direct reference to Aarhus, e.g. Habitats, Strategic EIA: see C-240/09 ***Lesoochranárske Zoskupenie VLK*** [2011] 2 C.M.L.R. 43 while Art. 9(3) not of direct effect, it was for the national court *"to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention".* Many Habitats cases however likely to be EIA cases.

Issues in making the claim – other considerations

1. Venue – where is the LPA/Parish? Is their substantial the local interest? London – or transfer to a regional court?
2. Expedition or urgency - can be sought if justified
3. Interim relief: CPR Part 25 PD: if "*injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings*" – take advice because there is a risk of cross-undertakings for damages
4. Summary Grounds of Resistance;
   - served by Defendant's / and Interested Parties if they wish
   - Strategic decisions; Length? Evidence?
5. Reply: Claimant's may wish to serve a "Reply"
6. Reply to a Reply?

C. Oral Permission Hearings

1. Refusal of permission → Renewal to Oral Hearing?

- Tight timetable to renew; 7 days
- Carefully review case but
  - many cases which are refused on the papers are granted at oral renewal
  - "arguability" is a poorly defined concept
  - Around 20-25% of cases get permission on the papers
  - Around 60% of cases which renew get permission at the oral hearing
  - Public Law Project did research which showed that permission grants range from Judges who grant permission in 46% of cases to a judge who granted 0% (which was in immigration)

2. OPH Hearings

- They are usually short; they are supposed to be 30 minutes …
- Skeleton arguments; direct them to *arguability*
- Knowing your judge

D. Issues Post Permission and Substantive Hearings

1. Main issue for Parish Councils is usually evidence

- Defendants: main opportunity to serve evidence is with “Detailed Grounds of Defence”
- Claimants, Defendants, and IPs: Duty of Candour
- Claimants often want to put in further evidence

2. Other issues which may come up for Parish Councils include

- Cross examination
- Disclosure orders
- Issues as to what to include in bundles

E. Issues following a Hearing

So you win – what next?

- Always advise clients to think about what happens if/when you win – think hard before bringing a case (time, expense) because
  - What happens *next* after success → remitted appeal / fresh decision
  - If you know what you want to happen next, there may be parts of a judgment that can help that path – if you've thought about it
  - Knowing that path impacts how you run a case
  - Thinking medium and long-term → Neighbourhood Plans? Allocating housing?
- Always advise clients to also think about what happens if you lose
  - Impacts other cases – especially in a Parish / local authority area
  - Influencing development in an area takes place over time

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