Landmark CHAMBERS

# Information and disclosure in judicial review

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## Candour and disclosure in judicial review – key sources

1. The House of Lords decision in ***Tweed v Parades Commission for Northern Ireland*** [2007] 1 AC 650 ***("Tweed")*** – remains leading case on disclosure in judicial review ("JR"), applied and considered in many subsequent cases;
2. *Guidance on discharging the duty of candour and disclosure in judicial review proceedings* (January 2010, Treasury Solicitor) ("the T Sols guidance") – status?;
3. *Defendant's duty of candour and disclosure in judicial review proceedings a discussion paper* (28 April 2016, Lord Chief Justice – written by Cranston and Lewis JJ) – recommendations for changes to CPR Part 54 not yet actioned ("the LCJ Discussion Paper") – status?;
4. *The Administrative Court Judicial Review Guide* (July 2017, Administrative Court Office) – see especially sections 6 and 11 ("The JR Guide").

## The questions

1. What are a claimant's ("C") duties? What are consequences for C of non-compliance?
2. What about the position of interested parties ("I/P")?
3. The Defendant's ("D") duty of candour ("DofC"):
   - What is the scope of D's DofC?
   - Does the DofC extend to the provision of documents as well as information?
   - Does the DofC only apply after permission is granted or does it apply also: (i) pre-action; and/or (ii) at the acknowledgement of service ("AoS")/ summary grounds of resistance ("SGR") stage?
   - What are the consequences for D of non-compliance?
4. When can and should a specific disclosure application be made by a C?
5. When will a Court order/refuse such disclosure in JR?

## What are a claimant's duties (1)?

- The DofC applies to C also;
- The duty especially applicable in relation to:
  - (1) the pleaded claim; and
  - (2) any application for urgent consideration and/or interim relief;
- DofC includes duties:
  - (1) To set out all the relevant facts, including those which both support and undermine case – and give the Court the *"full picture"*: see the JR Guide at para 6.4 and 14.1.4;
  - (2) Sometimes not enough to comply with the duty to merely provide relevant documents, instead a specific explanation of a document or an inconsistency must be given in the pleaded claim or more usually in a witness statement: see the JR Guide at para 14.1.4 and also ***R (Khan) v SSHD*** [2016] EWCA Civ 416;

## What are a claimant's duties (2)?

- (3) DoC applies to material facts known to the C and those C would have known about had proper and necessary inquiries been made*:* see e.g. ***R (Lloyds Corp. ex p Briggs*** [1993] 1 LLR 17;
- (4) A specific requirement exists to disclose any rights of appeal that exist, and whether they have been used, and any statutory provision that appears to exclude jurisdiction: see e.g. ***R v Humberside CC, ex p Bodgal*** (1992) 5 Admin LR 405;
- (5) DofC applies equally to litigants in person (see JR Guide para 3.2.3);
- (6) DofC on Cs are especially acute in respect of any application for interim relief and/or urgent consideration and where the Court may be required to act *ex parte* (see the JR Guide at section 14.1);
- (7) Duty is a continuing one (on this see ***R(Bilal) v SSHD*** [2014] UKUT 00329 (IAC)) does not end on lodgement of permission/interim relief papers, if circumstances change duty to act immediately and inform other parties and Court.

## What are a claimant's duties (3)?

- Some further points:
- (1) Some of case-law on C's DofC was at a stage where permission stage (leave, as was) *ex parte* and no requirement for D to file AoS/SGR but NB CA in ***Khan*** (above) – change in rules from *ex parte* permission stage did not justify taking a more relaxed view of C's DofC – see also ***R (Mahmood) v SSHD*** [2015] Imm AR 193.
- (2) Don't go too far - ***R (Wildbur) v MoD*** [2016] EWHC 821 (Admin) - two paragraphs in a C's reply in JR proceedings were struck out as in breach of the rule preventing disclosure of without prejudice discussions. All that could properly be stated was that alternative dispute resolution had been attempted unsuccessfully.
- (3) LCJ discussion paper recommended amending Part 54 PD to spell out extent of DofC on Cs/applicants – see para. 42.

## What are consequences for claimants if do not comply

1. Adverse costs award, including wasted costs;
2. Refusal of permission to apply for JR the ultimate sanction:
   - see case-law discussed by Privy Council in ***Peerless Limited v Gambling Regulatory Authority (Mauritius)*** [2015] UKPC 29, especially ***R v Wirral MBC, ex p Bell*** (1994) 27 HLR 234;
   - Ultimately the Privy Council did not refuse permission because of breach of DofC; and see same result in ***R (Derwent Holdings Ltd) v Trafford BC*** [2009] EWHC 1337 (Admin).

## Interested Parties (1)

- Most of rest of talk focussed on D's DofC.
- What about I/Ps?
- Privy Council in ***Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment*** [2004] Env. L.R. 38 suggested same duties as a D in JR.
  - Belize case. JR of DoE decision to build dam; co-respondent was independent private company Belize Electricity Company Limited ("BECOL"), which was going to construct the dam pursuant to a franchise agreement with the Belize Government.
  - Lord Walker said "*there is a very close identity of interest between these parties. They are in effect partners in an important public works project … its most important consequence is that BECOL was also, in my opinion, under a duty to make candid disclosure to the court*"
  - PC critical re non-disclosures by the Belize Government and BECOL.

## Interested Parties (2)

- Not much consideration of DofC applicable to I/Ps in English case-law, and not mentioned in LCJ discussion paper and recommendations.
- Is reasoning on DofC in ***Belize*** case limited to I/Ps in close partnership with a public authority as BECOL were? Probably not. Just a clear example of where DofC on I/P.
- I/Ps will often have information relevant to a JR claim, so an I/P developer may have information which is of assistance to someone challenging a grant of planning permission, and also challenges to procurement decisions where the winning party may possess information that would assist the losing party who is seeking JR.
- If I/P plays active role e.g. pleadings and evidence – then DofC probably applies.
- But what if I/P chooses not to play active role? See below re non-active Ds.
- Plus I/P not in same position re: costs – will not normally recover even if successful, so faces a possible unfair burden of DofC but no costs recovery.

## The basics: a quick reminder (1)

- Before turning to D's DofC and questions in relation to this some basics:
  - DofC not the same as disclosure of documents – see below;
  - CPR rules on disclosure of documents do not apply to JR, see Part 54A PD para. 12.1 *"Disclosure is not required unless the court orders otherwise*";
  - The Court may *"exceptionally"* order disclosure: see ***Tweed*** and the JR Guide at para 6.5.1, so an application can be made in a JR for disclosure of specific documents or documents of a particular type and Court may (under CPR 31.12(1)) order disclosure where this is necessary to deal fairly and justly with a particular issue (see e.g. ***R v Secretary of State for the FCO, ex p WDM*** [1995] 1 WLR 386 at 396 – 397)
  - But such orders remain "*rare*": see below.

## The basics: a quick reminder (2)

- Such disclosure orders are rare because:
  - (1) JR concerned with legality – so issues raised are legal issues – JR generally not appropriate for disputed facts;
  - (2) Compliance by D with DofC means generally no need for orders for disclosure; and
  - (3) Court will not tolerate *""fishing expeditions", where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge"* (***Tweed***, per Lord Carswell)
- NB in Jackson review on costs it was noted JR costs generally much lower than other HC litigation and one of reasons for that was that disclosure of documents as per CPR Part 31 generally not applicable.

## The D's duty of candour (1) – what is the scope of the duty?

- The scope of the duty is not set out in any rule or PD;
- The underlying concept, see :
  - LCJ discussion paper (para. 10) – "*is that the courts need to be placed in a position where they can carry out their role of ensuring the lawfulness of the decision under challenge". This is said to be "itself an element of the maintenance of the rule of law*";
  - ***R v Lancashire CC, ex p Huddleston*** [1986] 2 All ER 94 per Lord Donaldson MR explaining that the JR process is:
    - "*one of partnership based on a common aim, namely the maintenance of the highest standards of public administration …* ";
    - *"which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands";*
  - ***R (Al-Sweady) v Secretary of State for Defence*** *[2010] HRLR 2 "a very high duty"*;
  - T Sols guidance "*a weight responsibility".*

## The D's duty of candour (2) – what is the scope of the duty?

- Because DofC derives from case-law, not rules or PD, the formulations of scope differ somewhat:
  - (1) ***Huddleston***: "*explain fully what they have done and why they have done it"* and not be "*partisan in their own defence*";
  - (2) ***Tweed*** per Lord Carswell at para. 31 "*the obligation resting on a public authority to make candid disclosure to the court of its decision making process, laying before it the relevant facts and the reasoning behind the decision challenged*";
  - (3) ***R (Quark) v Secretary of State for FCO*** [2002] EWCA Civ 1409 per Laws LJ at para. 50 "*assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide*."

## Does the DofC extend to the provision of documents as well as information? (1)

- This is a surprisingly difficult question to answer:
- (1) As noted above the Part 54A PD makes clear rules on disclosure of documents *not* applicable to JR unless Court so orders.
- (2) The formulations above on the scope of the duty (***Huddleston, Tweed*** and ***Quark***) focus on identification of the relevant facts and reasoning rather than the actual disclosure of documents.
- (3) On some occasions, courts have referred to the DofC as involving the D in explaining the relevant facts *and also disclosing relevant documents*, even though the issue did not need to be decided (see e.g. ***R (AHK) v SSHD*** [2012] EWHC 1117 (Admin) at para. 22 and see the decision of Privy Council in ***Graham v Police Services Commission*** [2011] UKPC 46 at para. 18); and this perhaps surprisingly appears to be view taken in T Sols guidance. Highly questionable if this correct.

## Does the DofC extend to the provision of documents as well as information? (2)

- Two key points:
  - (1) Public bodies may choose, and often do choose, to discharge the DofC by disclosing the revenant documents themselves; and
  - (2) the Courts have *encouraged* the disclosure of relevant documents as good practice – absent a good reason e.g. confidentiality – see e.g. ***Tweed*** per Lord Bingham at para. 4 "*[w]here a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says*" (emphasis added). This is the so-called best evidence rule.

## Does the DofC extend to the provision of documents as well as information? (3)

- The best evidence rule:
  - Seen what was said in ***Tweed***;
  - A far stronger view – *obiter* – in ***R. (National Association of Health Stores) v Secretary of State for Health*** [2005] EWCA Civ 154 - Challenge to Ministerial decision; w/s summarising briefing to Ministers; document not disclosed; Judge at first instance refused specific disclosure; that not appealed:
    - However, Sedley LJ said *"[t]his court, however, raised it … because it seemed … that we were being required to ignore the best evidence rule by being made to rely on a second-hand account of a document of which the original was available".*
    - "*The best evidence rule is not simply a handy tool in the litigator's kit. It is a means by which the court tries to ensure that it is working on authentic materials. What a witness perfectly honestly makes of a document is frequently not what the court makes of it. In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable if the state is allowed to waive it at will by tendering its own précis instead*".

## Does the DofC extend to the provision of documents as well as information? (4)

- The LCJ discussion paper concluded in making its recommendations (see para. 19):
  - *" … the better approach at present is to express the content of the duty of candour simply by reference to the wording of existing case law dealing with the identification of relevant facts and the reasoning process".*
  - *"That would leave the public body free to continue with the practice of voluntarily providing disclosure of relevant documents. If it is said that the disclosure of a particular document is necessarily for fairly dealing with an issue, that can be dealt with by means of an application for specific disclosure".*
  - *"We would not, at present, consider it appropriate to particularise (and in our view, extend) the scope of the duty of candour on a defendant by incorporating specific disclosure obligations into the Practice Direction*."

## Does the DofC extend to the provision of documents as well as information? (5)

- ***R. (Sustainable Development Capital LLP) v Secretary of State for BEIS*** [2017] EWHC 771 (Admin) per Lewis J - NB one of authors of LCJ Discussion Paper;
- A reference to a document in a witness statement filed in support of a claim for JR made under CPR 54 is *not* to be treated as disclosing the document for the purposes of CPR 31;
- *"The specific provisions of Practice Direction 54A contemplate that disclosure will only be required if the court so orders. A defendant public body may voluntarily provide copies of documents and is encouraged to do so (and it may be a method of discharging its duty of candour to ensure that a court is informed of the relevant facts underlying and the reasons for a decision). Until an order is made, however, a defendant is not required to disclose documents. In those circumstances, a reference to a document in a witness statement filed in the course of proceedings for judicial review would not amount to disclosure. Consequently, I ruled at the hearing that the Claimant had no right to inspect the document pursuant to CPR 31.3 ...".*

## When does the D's DofC apply? – pre-permission - (1)

1. D's DofC developed in case-law pre-CPR and provision now made in the CPR for AoS/SGR, and so tends to be phrased as applying post-permission – of course under the old rules it was only then D generally became engaged at all in JR proceedings;
2. What is position now?
   - Ds are not actually *required* to file and serve an AoS and SGR, if D doesn't only sanction is: D cannot appear at oral permission hearing without leave of Court;
   - Inconsistent with this to say DofC binding on D pre-permission?
   - LCJ Discussion Paper recommended that if D does file AoS/SGR then PD should require D "*provide a brief summary of the decision-making process, identifying the principal relevant facts and the principal reasons underlying its decision. That would assist the court in deciding whether or not there is an arguable case that the decision or measure under challenge is unlawful*" (see para. 33).

## When does the D's DofC apply? – pre-permission - (2)

   - The LCJ Discussion Paper recognises may be exceptions – e.g. if contest permission because of something unrelated to merits e.g. delay, alternative remedy or that decision academic (see paras. 34 and 35) then DofC may not require even the "*brief summary of the decision-making process, identifying the principal relevant facts and the principal reasons underlying its decision".*

3. Linked to this while specific disclosure can be ordered pre-permission: rare, should usually wait until D's DGR and evidence before applying, see e.g. ***R (Waltham Forest) v SSCSF*** [2010] EWHC 3358 and also the decision of Gilbart J. in ***Richborough Estates v SSCLG*** (2017, unreported) – disclosure application in context of multi-developer claimant challenge to a Written Ministerial Statement amending planning policy. (NB Court *did* order disclosure of matters put before minister – relevant to allegation of irrationality. Refused disclosure of advice to minister on need for consultation (and other legal advice) – said to be relevant to alleged LE of consultation).

## When does the D's DofC apply? – pre-action - (3)

- What about the DofC pre-action?
  - (i) Specific disclosure application is possible but very rarely granted at such an early stage – see below;
  - (ii) Is DofC applicable?
    - The DofC is to Court, the pre-action stage is pre any Court being seised;
    - LCJ Discussion Paper seemed to reject application of DofC pre-action – see para. 37.
    - T Sols guidance – a wider view – "*the duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel's written and oral submissions.*"
    - I think this is wrong, and cases do not support it.

## What are the consequences of non-compliance for a Defendant?

1. If there is no adequate identification of the reasoning underlying the decision, the court may infer that no adequate or valid reason exists (see, e.g. Laws L.J. in ***Quark*** at para. 50, and ***R v Secretary of State for Trade and Industry ex p. Lonrho*** [1989] 1 W.L.R. 525).
2. May provoke applications by C for specific disclosure, and risk these being granted by the Court, – see below;
3. May result in highly adverse costs awards including indemnity costs irrespective of outcome of JR: see ***Al-Sweady*** and ***R (Shoesmith) v Ofsted*** [2010] EWHC 852 (Admin);
4. May result in on-going judicial investigations: see ***Shoesmith*** requiring evidence of what happened;
5. Could exceptionally result in a determined case being re-opened: see ***R (Bancoult) v SSFCO*** [2016] 3 WLR 157.

## When can and should specific disclosure be sought by a C? (1)

1. Clear that generally Courts view is should come *after* D filed and served DGR and evidence – see cases cited above;
2. Can be sought pre-permission but very rarely granted:
   - ***Sky Blue Sports & Leisure Ltd v Arena Coventry Ltd*** [2013] EWHC 3366 (Admin). C refused permission on papers, and renews. Then applies for specific disclosure of documents referred to in D's summary grounds. The basis for the application was that the disclosure was necessary for the determination of the permission. Application refused. Disclosure restrictive in JR; C had much documentation already. If C were unsuccessful in the instant disclosure application, there was no reason why they could not point to the fact that they had not had full disclosure so as to strengthen their contention that they should be granted permission. That could be a persuasive or a decisive argument on the permission hearing and undermined C's case that the disclosure sought was necessary at the instant stage

## When can and should specific disclosure be sought by a C? (2)

3. Can be sought, and ordered, pre-action in JR but such applications very, very rarely successful: see e.g. ***BUAV v Secretary of State for the Home Department*** [2014] EWHC 43 (Admin) and ***K v Secretary of State for Defence*** [2014] EWHC 4343 (Admin):
   - In ***BUAV*** Court said no examples of successful applications, but soon after ***R. (National Association of Probation Officers) v Secretary of State for Justice*** [2014] EWHC 4349 (Admin): rare example of grant of pre-action disclosure for proposed JR of plan to restructure probation services. Disclosure ordered of certain documents relating to test reports on the proposed restructure.
4. More generally, the right time for disclosure applications by C is post- D's DGR and evidence. Need some really very good reason for applying before that stage reached.

## When will disclosure be ordered/refused? (1)

- (1) Specific disclosure *"exceptional"* (see the JR Guide) and case-law supports that this is so, see e.g. the Privy Council in ***Save Guana Cay Reef Association v R*** [2009] UKPC 44 at para. 47;
- (2) In some types of cases more likely e.g. where jurisdictional fact in issue, human rights cases (see ***Tweed*** at para.3 and ***Al-Sweady)*** and where proportionality is in issue. LCJ Discussion Paper proposed no special rules for such cases as *"very much the minority of cases"*;
- (3) Disclosure can be refused if:
  - A) Court considers it not necessary for fair and just resolution of proceedings – something that will be judged against: (i) the particular issues raised; (ii) the extent of disclosure already made, or (if application pre D's DGR/evidence) the disclosure likely to be made, by D in its evidence; and (iii) the desire of the Courts to avoid "fishing expeditions";

## When will disclosure be ordered/refused? (2)

- Examples of refusal on basis not necessary post ***Tweed***: see e.g.:
  - ***R (Actis SA) v Secretary of State for Communities & Local Government*** [2007] EWHC 344 (Admin)
  - ***R (AA, CK) v SSFCO*** [2008] EWHC 2292 (Admin);
  - ***R (BMA) v GMC*** [2008] EWHC 2601 (Admin);
  - ***R (Friends of the Earth) v SSBERR*** [2008] EWHC 2983 (Admin);
  - ***Save Guana Cay Reef Association*** (see above);
  - ***Waltham Forest*** (see above);
  - ***R (Pardon) v Havering BC*** (unrep. 4 November 2015);

## When will disclosure be ordered/refused? (3)

Other bases for refusal:

- B) the volume of material: see ***Tweed*** at paras. 4, 33 and 37;
- C) Confidentiality: see ***Tweed*** at paras. 33, 37 and 57, and see also ***R (Perry) v Hackney*** [2014] 1721 (Admin) refusing disclosure of developer's financial viability assessment;
- D) Public Interest Immunity: see ***Tweed*** at paras. 5, 25, 33, 41 and 58 and ***R(A) v Chief Constable of B Constabulary*** [2013] EWHC 4120 (Admin);
- E) Legal professional privilege: see the ***Richborough*** case referred to above;

- (4) Looking at cases the most common basis for refusal is A) above namely not necessary for fair and just resolution of proceedings.

## When will disclosure be ordered/refused? (4)

- (5) Some examples of specific disclosure being given:
  - ***R (Babbage) v SSHD*** [2016] EWHC 148 (Admin) – see below on this one;
  - ***R. (Plantagenet Alliance Ltd) v Secretary of State for Justice*** [2013] EWHC 3164 (Admin);
  - ***R (Bredenkamp) v Secretary Of State for FCO*** [2013] EWHC 2480 (Admin);
  - ***McVey v Secretary of State for Health*** [2009] EWHC 3084 (Admin);
  - ***Family Planning Association of NI's Application*** [2013] NIQB 1
- (6) Example of where disclosure neither refused nor granted:
  - 1) ***R (Public and Commercial Services Union) v Minister for the Civil Service*** [2011] EWHC 2556 – Judge expressing doubt that the full range of disclosure requested in the notice of application was required, the judge asked counsel to see if they could agree which categories of documents could be disclosed based on his findings above, and disclosure of the documents agreed was ordered.
  - 2) ***Re Finucane's Application*** [2013] NIQB 45 – Court orders documents be delivered to Court for inspection to see if necessary to disclose.

## Importance of compliance with orders made – *Babbage* (1)

***Babbage*** (see above) a salutary warning:

Background:

- Court ordered "*all relevant documents not already disclosed must be disclosed together with the acknowledgment of service";*
- *"I confess to having been extremely concerned about the attitude of the Secretary of State, or alternatively her advisers, towards the supply of documents necessary for the resolution of this case. The Secretary of State, through her officials or advisers, was under a duty to disclose this material of their own volition. They did not do so. They were prompted to supply it by the solicitors for the Claimant. They did not provide them. They were ordered to provide it by Collins J. They failed properly to comply with that order. They were then ordered to provide specific, identified material, or an explanation of why they could not do so, by Picken J. They failed to comply with that order too …"* (emphasis added)

## Importance of compliance with orders made - *Babbage* (2)

The consequences:

- Solicitor concerned required to produce w/s and attend Court to explain failures – was did not disclose certain documents because took view not relevant;
- *" …once a Judge of this Court has identified specific documents which are required to be disclosed, there is no basis for the exercise of any discretion by the Secretary of State's advisers. If the document falls within the class covered by the Order, it must be disclosed"* (emphasis in original).
- Lesson: if as a D. you are ordered to disclose certain documents, and you do not appeal vs that order, then you had better disclose them! There is no room at this stage to argue documents not relevant or otherwise should not be disclosed.

## Some other issues (1)

1. How to deal with DofC/disclosure if D does not appear: ***R. (Midcounties Co-operative Ltd) v Forest of Dean DC*** [2015] B.L.G.R. 829:

   *"… if a defendant public authority finds itself in the position where it cannot, for financial reasons, defend its own decision in judicial review proceedings, and in particular where it cannot file a skeleton argument or make oral submissions at a substantive hearing, it should at least consider the following:*

   *(1) whether it has complied with its duty of candour and co-operation, by disclosing all relevant documents;*

   *(2) whether its duty of candour and co-operation requires it to file a witness statement to assist the court in understanding its decision-making process and dealing with the claim for judicial review fairly …"*

## Some other issues (2)

2. Overlap EIA/FOIA:
   - Benefits to C of EIA/FOIA:
     - (i) no relevance test;
     - (ii) can request from non-parties and at any stage;
     - (iii) burden on authority to justify non-disclosure;
     - (iv) cost;
     - (v) no restriction on subsequent use.
   - But timing is a real negative; especially if authority says "no" and one needs to go to ICO or Tribunal. Little chance will get documents before JR time period: prompt and in any event 3 months (and strict 6 weeks for some cases). May not get before JR resolved!