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HIGH COURT PLANNING CHALLENGES

PROCEDURAL UPDATE

Tim Buley

Landmark Chambers

1. The purpose of this talk is to consider recent developments in procedure in the last year or so, of relevance to practitioners bringing or defending challenges (by judicial review or statutory application / appeal) in planning cases in the High Court.

2. I propose to cover the following today, where I think there have been developments of some importance:
   (i) *Bovale*: Defendant's response in statutory applications / appeals Where are we now? What is the effect of the Court of Appeal's decision?
   (ii) Costs of permission hearings Permission costs in judicial review and section 289 appeals
   (iii) Delay / promptness in judicial review: *Finn-Kelcey* and after
   (iv) The tort of abuse of process: *Fladgate Fielder v Land Securities* Can developers now seek damages for abusive claims for judicial review which are pursued for some ulterior motive?

(i) *Bovale v SSCLG*

3. In *Bovale Limited v SSCLG* [2008] EWHC 2143, Collins J, following on from his own earlier decisions (in e.g. *Dinedor Hill Action Association v Herefordshire DC* [2008] EWHC 1741(Admin) continued his campaign to establish procedural requirements on Defendants (which in practice will be, in the majority of cases, the Secretary of State for Communities and Local Government, at least as lead Defendant) to put in an early response to applications made under sections 287 and 288 of the Town and Country Planning Act 1990. Collins J also indicated that the guidance would be equally applicable in relation to applications under the new section 113 of the Planning and Compulsory Purchase Act 2004. In effect, Collins J wanted to bring the situation into line with that which is found in judicial review claims, where a Defendant is required to put in Summary, and in due course Detailed, Grounds for defending a claim well before the Claimant's skeleton is due. The result is that Claimants in section 288 claims will come to the preparation of their skeleton argument with relatively little idea of what the Defendant is likely to say about their case.

4. There is at least a respectable argument therefore that this position is anomalous. Why, it might be said, should it be the case that the SSCLG, in a challenge under section 288, is under no obligation to provide Defendants with an account of their case until just before the hearing, when a Defendant facing an analogous challenge in a judicial review claim will be obliged to set out a detailed account of their case well before it gets to full hearing?

5. The argument the other way is that challenges under section 288 are, in important ways, different from many kinds of judicial review. In a section 288 challenge, a Claimant will have a detailed decision letter from an Inspector setting out why their case did not succeed on its planning merits. If they wish to succeed, they must show why that decision is flawed. The SSCLG's response will almost never require any detailed evidence, and it will very rarely be open to the SSCLG, in meeting a challenge, to raise a point which the Claimant should not be in a position to predict. Rather, the SSCLG will simply meet the points made in the Claimant's grounds head on, and argue that whatever error

of law is being claimed is not made out, normally either on the basis that (i) the Inspector did not make the alleged error, or (ii) that the alleged error was not an error at all. Claimants can be expected to assess the merits of their own claims and hence any additional procedural stage would simply add to administration and costs. In the rare cases where the SSCLG puts in extensive evidence, the rules require that he do so well in advance of the hearing.

6. In any event that is the background against which Collins J entered the fray.

7. In *Bovale* the Claimant had, in its claim (and in accordance with the suggestion of Collins J in *Dinedor)* sought an order requiring that the Defendant SSCLG file any evidence, and grounds for resisting the claim, by a certain date, and that had been granted by the Deputy Master of the Crown Office. The case then came before Collins J as a result of the SSCLG's refusal to comply with that order. In particular, the SSCLG argued that the approach indicated by Collins J in *Dinedor* was contrary to CPR 8.3(1) (which provided only for the filing of an Acknowledgement of Service containing a statement of whether the claim is to be resisted, and any additional remedy sought) and 8.9(a), which provided expressly that the Defendant was not required to file a Defence.

8. Collins J rejected the argument of the SSCLG, and in effect re-stated the guidance he had given in *Dinedor,* albeit now on a somewhat different basis. The crucial reasoning is in paragraph 23:

> *The obligation under Part 54 in judicial review cases is that a defendant's or interested party's Acknowledgement of Service should "set out a summary of his grounds" for contesting the claim. That is the wording used. It seems to me that, on its true construction, Rule 8.9(a) is indeed referring to a defence and a defence is, as Rule 8.9(a)(ii) makes clear, a defence which would otherwise be covered be Part 15. Part 15 sets out the detailed requirements that are needed for a defence. It is not suggested that that be filed, nor would it in my judgment be appropriate for the court to be faced with any application for any further particulars of whatever is lodged. But what is required, in my view, and what should be required is at the very least an indication by the defendant of the grounds of resistance. It may in an individual case be that the defendant says that a particular ground is accepted, but even if established it could not make any difference to the decision or that there was no prejudice to the claimant in the decision that was reached. However, in any event it is surely desirable and sensible that the*

explanation for the decision to resist is set out in as short a form as may be appropriate, at as early a stage as is reasonably possible, so that the claimant, and indeed all parties, can focus on the arguments that are going to be material before the court and the court is then assisted by knowing what the position is in that regard and in assessing how long the case is likely to last, and accordingly can exercise its powers in an appropriate and most cost-effective manner.

9. This led to the guidance given in paragraph 34:

What I propose to do in those circumstances is to indicate that there will be an expectation until the matter is dealt with through representations and the representations are considered, that the defendants ought to think in terms of serving grounds for resistance, however short, within the same period of ten weeks. If they do not and there is a good reason for the claimants to think that they are likely to be prejudiced or there is a real requirement in the interests of proper case management for such a service and it is not done within ten weeks, then a specific application can be made to the court and the court will if necessary make such an order. In the meantime I shall make arrangements for representations to be made by the Treasury Solicitor, by someone who is enabled to put forward the interests of local planning authorities, by someone who is able to do the same on behalf of developers, who are obviously affected, and perhaps by a representative of the planning Bar as well.

10. Thus Collins J held that a Defendant would be required to do as follows:

(i) Pursuant to CPR 8.3, the Defendant was required to file / serve an Acknowledgement of Service within the normal time scale for doing so under CPR Part 8, namely 21 days;

(ii) Pursuant to CPR 8.5, the Defendant is therefore also required to file any written evidence at the same time as he files his AoS;

(iii) There was an "expectation" that Defendant's would then file grounds of resistance within a period of some 10 weeks off the filing of the claim, albeit no rule as such;

(iv) In the event that the Defendant did not do so, the Claimant could apply for an order requiring him to do so, and the implication of the judgment was that such applications would be looked on favourably by the court;

(v) In the event that no application was made, there was an expectation that the SSCLG would file the first skeleton argument.

11. The SSCLG has appealed[1], and obtained a stay of the judgment. The effect of this was that Collins J's new regime was in existence for a very short time, since the stay was followed by a substantive decision allowing the appeal.

12. Before the Court of Appeal ([2009] EWCA Civ 171, [2009] 2 P & CR 7), whose judgment was given in March 2009, argument focused not upon the merits of the new regime which Collins J had created, but on the question of whether he had power to give guidance of this kind. This turned upon whether the guidance which Collins J had purported to lay down amounted to a "Practice Direction", such as would be contrary to the rule in section 5 of the Civil Procedure Act 1997 that such directions could not be given without the approval of the Lord Chancellor or the Lord Chief Justice.

13. All three members of the court agreed in allowing the appeal but their reasoning differed. Stanley Burnton LJ, in the minority, took a very strict line, by which any procedural guidance intended to be of general application would be contrary to section 5. The majority, Waller and Dyson LJJ, took a more flexible and nuanced approach. They drew a distinction between three different kinds of case, namely (i) the giving of guidance as to the interpretation of existing rules and practice directions, (ii) the provision of guidance in "gap" cases, where the rules are simply silent as to the procedure to be adopted, or (iii) the adoption of guidance which sought to vary or disapply existing rules or practice directions. The first two of these are permissible. The latter is not.

14. Applying this approach to the judgment of Collins J, the court held that what he had done involved the third, impermissible, approach. In his judgment Colliins J had expressed considerable dissatisfaction with the rules as they stood, and had laid down a requirement that Defendants provide their grounds of resistance notwithstanding

[1] The Claimant's substantive challenge came before Sullivan J in October, and was dismissed. Only the procedural guidance of Collins J was appealed. The Court of Appeal appointed an advocate to the court since the Claimant was not represented before it.

specific provision in the CPR that there was no obligation to file a defence to the claim. In conclusion:

> *69 As we have previously made clear the powers of the court to make orders in individual cases are very wide, but a judge is not free, and indeed has never been free once rules were made by delegated legislation, to announce that without regard to the particular circumstances of individual cases, the court now intends generally to disapply or vary the rules. Nor is he free to announce that he will simply disapply or vary a practice direction, particularly one issued following the s.5(1) procedure [the relevant version of 8PD had come into force on April 6, 2007—see note 8.0.4 and we assume was produced under that procedure]. Furthermore a judge is not free to seek to achieve that result by suggesting that, if parties do not voluntarily disapply the rules or the Practice Direction, cost consequences will follow. However well intentioned, it seems to us the judge, in purporting by his judgment to change the Rules under Pt 8 and the Practice Direction generally, was doing something he was not entitled to do.*
>
> *70 It is argued by Mr Nardell, seeking to defend Collins J.'s position, that the judge's case management powers would have entitled him to make an order for grounds of resistance to be served in a particular case, indeed in any case, and thus why should he not make clear that that was something that the court was going to do in the future in all cases of the same category? The answer to that argument seems to us to be that parties are entitled to start from the position that the relevant rules and practice directions will apply to their case; the onus will be on the party seeking a different form of process and indeed on the judge who may of his own motion wish to exercise his case management powers in a particular case to demonstrate that the case is outside the norm. What Collins J. was not entitled to do was to put the onus entirely the other way round and impose an onus on a defendant to persuade the court that some procedure inconsistent with the rules and practice directions should not be followed. The right way to alter the rules is through the Rule Committee and the right way to alter a practice direction is under the s.5 procedure.*

15. So where does that leave us? It is important to note that the court expressly approved Collins J's observations about the application of CPR 8.3 and, implicitly at least, CPR 8.5. Thus the SSCLG is required to file an AoS, setting out his stance in the claim. This requires nothing more than a statement of position, however. More importantly, he is also required to file any evidence on which he may rely.

16. Having done this, he is required to do no more until after the Claimant's skeleton argument has been filed. His own skeleton will be due 2 weeks before the hearing, and that is the first stage at which he is required to set out his position in relation to the grounds of challenge.

17. It may be noted that it remains open to a Claimant to apply to the court for a specific order. The important difference between the approach which would have been taken pursuant to the judgment of Collins, and that which follows from that of the Court of Appeal, is that (see paragraph 70) the starting point will be that such an order will not be appropriate. The burden of showing that a different order is appropriate will now be squarely on the Claimant.

18. The Court of Appeal expressly declined to rule upon the merits of the new approach which Collins J had laid out. It remains a possibility that the medium or long term effect of this litigation will be that further consideration will be given to what Collins J called "the special needs of the Administrative Court and the parties to claims such as this" (Collins J, paragraph 17). As the Court off Appeal said:

> *73 It will be noted that we have expressed no views on whether what Collins J. was seeking to do was likely to help in the management of cases in the Administrative Court. There appear to be two views on that and the correct process is to have the matters considered in accordance with the procedure now adopted for the issuing of practice directions under s.5(1) allowing for full consultation with all those affected.*

19. Section 289 Appeals An issue may also arise in relation to section 289 appeals. Section 289 appeals are at present governed, not by Part 8, but CPR 52, because they are "appeals" rather than "applications". They also have a compulsory oral leave stage, unlike section 288. Thus by the time the case reaches a full hearing, there is a likelihood that the SSCLG or other parties may have, to an extent, shown their hand by the stance taken at the leave hearing itself (they are not required to attend, but very often do so). In practice however, section 289 leave applications are dealt with in precisely the same way as renewed applications to seek judicial review, and it is difficult to see why a party who wishes to take part in such a hearing should not be required to put in some sort of response a specified time before the hearing itself. Indeed, given that Claimants in such cases are very frequently litigants in person, the unfairness of not requiring this would seem to be rather greater than in many other areas. It would not, I think, be unduly onerous to place upon the SSCLG a requirement to file a skeleton, or grounds of

resistance, a certain set time before the hearing of the leave application, if he wishes to take part[2].

(ii) Permission costs in judicial review

20. The guidance on costs at the permission stage is contained in two authorities (both, as it happens, planning cases, albeit applicable more generally), namely *R (Mount Cook Land Ltd) v Westminster City Council* [2004] 1 PLR 29, and *R (Ewing) v Deputy Prime Minister* [2006] 1 WLR 1271. Both of these authorities have now been extant for some time. To recap, the general rules are that:

    (i) The Defendant should be entitled to recover the costs of an Acknowledgement of Service, including the preparation of summary grounds, if permission is refused on the papers. Those costs do not include other pre-permission costs, such as responding to a pre-action letter, and are limited to the costs of the AoS and summary grounds only.

    (ii) However, as explained by Carnwath LJ in *Ewing*, the Defendant's response at this stage should be truly "summary", limiting itself to knock out points, and should often do no more than exhibit a pre-action response letter. Defendants should not incur "substantial expense" at this stage, and will not be entitled to such costs if they choose to do so.

    (iii) Defendants are not generally entitled to the costs of attending an oral permission hearing.

    (iv) They may be so entitled in certain "exceptional circumstances".

21. As a matter of logic this guidance raises a further issue. How do these principles apply where a claimant is granted permission, perhaps after an oral hearing, but the claim is ultimately dismissed? In such cases in practice the court would normally simply order all costs incurred as costs in the case. But that seems to undermine the principle that the

[2] There is no analogy here with the Skeleton Argument in a judicial review permission application (for which there is no time limit, and which are frequently filed shortly before the hearing), because the Defendant in a JR will already have filed Summary Grounds.

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk

Defendant should not have been entitled to costs of attending the oral hearing, and a Claimant is worse if, in relation to such costs, as a result of being successful at that hearing. It also seems at odds with the pre-permission costs being limited to the AoS, and not therefore including other pre-permission preparation costs (such as advice).

22. These issues were explored by the CA in *Davey v Aylesbury Vale DC* [2007] EWCA Civ 1166. The court reiterated the guidance in *Ewing,* that the response in the AoS should be summary, and that Defendants should not expect to recover substantial expenditure. As to the above issues, Sedley LJ gave guidance in the following terms:

> *21. Taking the same approach, these seem to me to be the appropriate guidelines for dealing with the present problem. They should be read subject to the caveats set out in the judgment of the Master of the Rolls.*
>
> *(1) On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs.*
>
> *(2) If awarding costs against the claimant, the judge should consider whether they are to include preparation costs in addition to acknowledgment costs. It will be for the defendant to justify these. There may be no sufficient reason why such costs, if incurred, should be recoverable.*
>
> *(3) It is highly desirable that these questions should be dealt with by the trial judge and left to the costs judge only in relation to the reasonableness of individual items.*
>
> *(4) If at the conclusion of such proceedings the judge makes an undifferentiated order for costs in a defendant's favour*
>
> *(a) the order has to be regarded as including any reasonably incurred preparation costs; but*
>
> *(b) the 2004 Practice Statement should be read so as to exclude any costs of opposing the grant of permission in open court, which should be dealt with on the Mount Cook principles.*

23. *Davey* was referred to again by Buxton LJ in *R (Roudham) v Breckland Council* [2008] EWCA Civ 714. In that case the court awarded a sum of £5000 (overturning the judge's order, below, of £12,500) in respect of the costs of an AoS and summary grounds. However, lest that be considered encouragement to Defendants to incur substantial costs, it must be put in the context of the nature of the claim. The Claimant's grounds ran to 30 pages, and the claim for was accompanied by 400 pages of documentation and

evidence. The court specifically warned against treating this figure as providing a benchmark for other cases:

> *31. ... It cannot be too strongly stressed that the sum is not to be regarded as any sort of benchmark or guide for trial judges who perform the task required of them by principle (3) of the Sedley-Clarke principles.*

24. Costs of section 289 Permission Hearings A question arises from to time is as to the application of the *Mount Cook* guidance, and how the *Mount Cook* principles apply in relation to section 289 permission hearings. There is an important difference between these hearings and judicial review hearings, because there is no oral permission stage and nothing equivalent to the written acknowledgement of service. There is therefore a powerful argument that judicial review does not provide an appropriate analogy. The orthodox position is that contained in *Rozhon v Secretary of State for Wales* [1994] COD 111, which is that a Defendant is entitled to its costs of resisting permission. However, whilst judicial review may not provide an appropriate analogy, a possible alternative analogy is with an appeal: section 289 leave applications proceed in accordance with CPR 52. The general expectation is that a Respondent will not attend such hearings, will not be entitled to be heard if they do, and will not be entitled to costs if they do.

25. The issue arose recently in relation to whether the *Davey* line of authority could be extended to section 289 appeals: would a Respondent who was unsuccessful at the leave stage, but successful substantively, be entitled to their costs of attending the leave hearing. In *Williams v SSCLG* [2009] EWHC 475 (Admin), Hickinbottom J declined to give any definitive guidance, but held that he should proceed on the basis that the costs of the leave application should follow the "final event" i.e. the substantive outcome of the case. He rejected an argument that *Rozhon* that the costs of the leave stage would follow the outcome of the leave stage itself, in the event that permission was granted.

(iii) Delay / promptness in judicial review

26. There was for many years an accepted rule of practice that, by reason of analogy with the six week rule for applications under section 288 TCPA, by which "it was nearly impossible to conceive of a case" in which a claim for judicial review of a planning permission granted by a local authority would be allowed to proceed if it was brought more than six weeks after the grant of the permission: per Laws J in *R v Ceredigion CC, ex parte McKeown* [1997] COD 463. The idea of a six week rule was however rejected by Lord Steyn in *R (Burkett) v SSE* [2002] UKHL 23.

27. It has however recently had something of a renaissance. In *R (Finn-Kelcey) v Milton Keynes Council* [2008] EWCA Civ 1067, Keene LJ described the remarks of Laws J in *Ceredigioin* as "a somewhat extreme statement", and accepted that it had been rejected in *Burkett*. He accepted that the courts could not and should not adopt a policy of applying a shorter time period in planning cases than the general 3 months provided for in the CPR, but said that the 6 week period in section 288 applications was nevertheless of some relevance, at least as a reminder of the need to bring claims promptly in planning cases. He accepted that there were important differences between section 288 applications in this regard, and claims for judicial review, such as the requirement to notify parties who attend the public inquiry in section 288 cases.

28. More importantly, however, the court emphasised the fact that CPR 54.5 contains two separate requirements, namely (i) promptness and (ii) that the claim be brought within 3 months. It restated, in strong terms, the need for promptness in planning cases:

> *22. The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In R v. Exeter City Council, ex parte J.L. Thomas Co Ltd [1991] 1 QB 471, at 484G, Simon Brown J (as he then was) emphasised the need to proceed "with greatest possible celerity", as he did also in R v. Swale Borough Council, ex parte Royal Society for the Protection of Birds [1991] 1 PLR 6. Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are*

time limits on the validity of a permission will normally wish to proceed to implement it without delay.

29. It also appears from paragraph 26 that a Claimant who fears any point being taken in relation to promptness would do well to deal with this in their evidence up-front rather than waiting for a point to be taken against them. The court also reiterated (which is in any event clear from the Pre-Action Protocol) that the sending of a pre-action letter will not excuse a lack of promptness in brining the claim, albeit it was at least relevant (however, as pointed out by Sedley LJ in *Davey*, in para 14, a planning authority cannot in any event withdraw a planning permission once granted, and hence the pre-action protocol does not, strictly, apply).

30. *Finn-Kelcey* gives a considerable boost to Defendants who wish to defend claims for judicial review in planning cases on grounds of lack of promptness. It has been relied upon successfully a number of cases in the last year, which illustrate the stricter approach now being taken (and it must be remembered that since the issue is generally dealt with at the permission stage, where no citeable judgment will generally be given, it seems likely that the effects of *Finn-Kelcey* go much further). In *R (Organisation for Environmental Needs) v Tower Hamlets LBC* [2008] EWHC 3053 (Admin), Pitchford J was concerned with a claim which had been filed three days before the 3 month "outer" time limit. Pitchford J set himself a stern warning that *Finn-Kelcey* laid down no mechanical rule that claims must be brought within 6 weeks:

71 I accept the submission made on behalf of the claimant that I should not when considering promptness impose some hypothetical yardstick, for example, the six weeks period allowed for statutory challenge under section 288 Town & Country Planning Act 1990 following refusal (c.f Burkett supra and Finn-Kelcey v Milton Keynes Council and MK Windfarm Ltd [2008] EWCA Civ 1067 per Keene LJ at para 24 and 25).

72 It is common ground between the parties that while good administration requires adherence to time limits, what is required by the duty of promptness may depend upon the circumstances and upon the effect on others of any delay. As Sedley LJ said in R (Lichfield Securities Ltd v Lichfield District Council [2000] EWCA Civ 304; [2001] 3 PLR 33 , at para 37:

> *"But promptness, like undue delay, is not to be gauged simply by locating the earliest practicable opportunity and adding a short time for lawyers to advise and launch proceedings. It is crucially affected by the potential or actual effects of the passage of time on others. This is the reason for the particular pressure on applicants in many planning cases."*

31. He explained the crucial facts as follows:

> *74 Here, OPEN Shoreditch was aware of the decision in principle on 13 March 2008 because two of its members were present at the meeting. Within three weeks the claimant had articulated its complaints in detail in letters to the defendant, the GLA and the Secretary of State. The claimant had some experience of litigation. Mr Parry-Davies, a partner in the claimant's solicitors' firm, is a member of the claimant company. The need to take instructions and secure funding was quickly apparent. It was clear that by the time the planning permission was issued on 21 May 2008 the planning authority was immoveable, the Mayor of London would not be cancelling the resolution, and the Secretary of State would not be calling the matter in.*
> *75 The grounds have not changed since the issue of the decision, save for the addition of new ground three following a change of counsel after refusal of permission by the Deputy Judge. It seems to me there was no acceptable reason why proceedings should not have been commenced within a month or so of the issue of the decision. Actual financial and other prejudice was being suffered by the interested party during the passage of time. Mr Jones asserted that the interested party should not now be heard to complain of delay when neither it nor the defendant demanded expedition following the issue of the letter of complaint in April and the letter before claim in July. In my view the obligation was upon the claimant to comply with the requirement of the rule. It was not entitled to assume that the absence of litigation advice from the other parties somehow relaxed the requirement of the rule. It could not be and was not argued that the claimant was in any way misled.*

32. Thus, the Claimant had been aware of, and had articulated, its grounds of challenge even before the formal planning permission was issued, but had then waited until nearly three months after its formal issue before filing its claim. In the circumstances it may be unsurprising that it was said not to have acted promptly.

33. The second case of note applying *Finn-Kelcey* is *R (Derwent Holding Ltd) v Trafford BC* [2009] EWHC 1337 (Admin). In this case heard by Mr CMG Ockleton, sitting as a deputy judge, a claim was brought at the outer edge of the 3 month time limit, and in *R (Condron) v Merthyr Tydfil CBC* [2009] EWHC 16 21 (Admin), a case was brought just outside the three month period. Unsuprisingly, in both cases permission was refused in part with reference to the delay.

34. In all of these cases the judge also rejected the substantive grounds of challenge either as wrong, or unarguable, so it is important to recognise that delay may not provide a knock-out blow. As Beatson J observed in the *Condron* case, where there has been a lack of promtness there may be a need for a "clear cut" case. It therefore remains to be seen whether the courts will take such a strict line where satisfied that a clear cut case is made out.

(iv) The tort of abuse of process

35. In *Land Securities and ors v Fladgate Fielder (A frim)* [2009] EWHC 577 (Ch), an attempt was made to re-invigorate, or arguably to create, the tort of abuse of process in the context of judicial review and, specifically, judicial review of planning decisions. The Claimants were commercial developers who were aggrieved at the decision of Fladgate Fielder ("Fladgate"), a firm of solicitors, to bring proceedings for judicial review to challenge a number of grants of planning permission to them by Westminster CC. Land Securities alleged that the claim had been brought against them for improper purposes, without any genuine concern as to the merits of the planning decisions which they were challenging.

36. The possibility of such a claim might come as a considerable surprise to most planning lawyers. As Auld LJ observed in *R (Mount Cook Land Ltd) v Westminster CC* [2003] EWCA Civ 1346, "judicial review applications by would-be developers or objectors to development in planning cases are by their very nature driven primarily by commercial or private motive rather than a high-minded concern for the public weal".

37. <u>The facts in brief</u> Fladgate are a firm of commercial solicitors with offices in Oxford Street. They had, in about 2005, taken a decision that they would seek to move from those offices. In 2006 they received notice of a planning application for a major development directly opposite their existing offices. The implications of this, from their point of view, was that the carrying out of this development had major implications for

the value of their offices, their ability to attract clients, and their ability to move in the medium term, not because of any problem with the development as finally built, but because of the very considerable upset that would be caused by the carrying out of construction work. They therefore decided to object to the application. More importantly, they discovered a link between the proposed development ("Park House") and another similar development also to be carried out by Land Securities and its subsidiaries in another part of Westminster, "Wilton Plaza". The link arose because of a decision by Westminster, in relation to the Wilton Plaza development, that it could "bank", or treat as a "credit", the provision of additional affordable housing and residential floorspace in that development, to be set off against deficiencies in the provision of affordable housing and residential floorspace in other developments in Westminster including, expressly, Park House. Fladgate therefore resolved to challenge the resolution of the Council to this effect, and the planning permission for Wilton Plaza to which it related.

38. Fladgate's intentions in bringing these claims were either to delay the development, or to secure a deal with Land Securities so as to provide for Land Securities to mitigate the harm which would otherwise be done to Fladgate by the development. Following the filing of the Wilton Plaza claim, a meeting took place between Fladgate and Land Securities:

The Critical Meeting:

11 On 31st March 2006 Fladgate arranged for a meeting to take place with a representative of the claimants at Fladgate's offices on 5th April 2006 and sent them a copy of the Opinion of Leading Counsel "relating to the proposed development at Wilton Plaza, Victoria, which is linked to the Park House Scheme … in the hope that this will lead to a positive discussion when we get together."

12 A meeting took place on 5th April 2006 between Messrs Cohen, Harnett and Goreing of Fladgate and Mr Hussey of LS. It lasted some 20 or 30 minutes. It is an important meeting because what was said there lies at the heart of the claimants' allegations in this case.

13 It is pleaded in the Particulars of Claim that Mr Cohen, after referring to the feared impact on the defendant's business of the proposed development:

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk

- *a. "Stated that the proposed development at Park House looked fine;*
- *b. Wished the claimants well with [it];*
- *c. Indicated that the defendant wished to relocate from its current premises at North Row;*
- *d. Stated that the Defendant's opposition to the Second Claimant's application for planning permission in relation to Wilton Plaza was purely a business transaction;*
- *e. Stated that the Defendant would do anything necessary to secure a move away from its current premises, including if necessary a challenge to the proposed development of Wilton Plaza;*
- *f. Stated that the Defendant's purpose in challenging the grant of planning permission for the development at Wilton Plaza was to delay that development and thereby possibly delay the Park House development;*
- *g. Stated that, … the Defendant's other option would be to object to the application for planning permission in relation to the Park House development and to be "very difficult all of the time";*
- *h. Stated that he saw the applications for planning permission made by the Second and Third Claimants as the Defendant's best opportunity to force the Claimants to the negotiating table to effect a relocation of the Defendant's business to alternative premises;*
- *i. Stated that if the Claimants did not put forward a proposal to the Defendant within the next few days, the Defendant would make the matter public and would issue an application for judicial review."*

14 Witness statements served by each side from those who attended the meeting show similarities to a significant degree but some differences, mainly of emphasis. There is one seemingly significant difference: Mr Cohen says:

"I also said that the firm was anticipating three years of "hell" while the development was under construction. Mr Hussey asked me what we wanted. I remember him saying "Do you want money?" to which I replied: "Absolutely not".

I suggested that one way out would be for Land Securities to take an assignment of our lease. I said that this would enable us to "slip away" with Land Securities' assistance. Otherwise an alternative would be to delay the development of Park House until the end of our lease in 2013. … Mr Goreing asked Mr Hussey if Land Securities had any stock in W1 (which would have enabled us to swap our existing building for other premises)."

15 Mr Hussey appears not to agree entirely with this. He says:

"My view is that the financial co-operation they sought, whilst unidentified, was intended by them to go beyond assistance in their plans to relocate, although it was presented in part in that context. … I believe that when they discovered that Land Securities were applying for planning permission to redevelop Park House in February 2006, Fladgate Fielder saw an opportunity to use the possibility of judicial review (and other tactics as in Mr Harnett's note) as a weapon to force us to the negotiating table, with a view to assisting them to implement their plans by financial payment. In spite of Mr Cohen's denials, I do think they were looking for a windfall."

He added that he was "outraged" and that "[t]his outrage is fully shared by the Board …"

16 There are three observations I wish to make in passing. The first is that it is not pleaded that Fladgate asked for payment of money: this accords with Mr Hussey's statement. The suggestion advanced in Mr Hussey's statement that that was "plainly what they had in mind", while an interesting insight into the confidence he has in his ability to read other people's minds, is not admissible evidence and if admitted is unlikely to carry weight.

17 Secondly, what Mr Hussey is speculating is not merely that Fladgate wanted money but that they were seeking to turn a windfall – that is to say, to shuffle onto Land Securities not the losses to which they would be put by the arrival of the development but the normal expenses to which they would be exposed from extracting themselves from an expiring lease and finding other premises. There is no evidence of this and no sign in the documents disclosed to date that this was any part of Fladgate's thinking.

18 Thirdly, Mr Hussey and LS appear to display an outrage threshold which is rather lower than an outsider might expect of major players in the development industry. Ultimately, however, the test which the court must apply is not whether Mr Hussey and the claimants are outraged but whether the court is affronted by what was proposed.

39. Subsequently, Land Securities disavowed any intention to rely upon the land banking scheme in respect of Park House, and Fladgate withdrew its challenge. However, it brought two subsequent claims against two identical planning permissions which were in due course granted in respect of the Park House scheme (the latter planning permission was granted in the face of the challenge to the earlier planning permission). Those cases were eventually heard in *Fladgate LLP v Westminster CC* [2009] EWHC 991 (Admin) by Collins J, in February 2009. The claims were dismissed. However, both claims were given permission to proceed, and it is notable that the earlier claim succeeded substantively: relief was refused only on the basis that, since the second claim had not succeeded, and the two planning permissions were (all but) identical, a quashing order would serve no purpose.

40. The Land Securities claim, which was for damages of the order of £17 million occasioned by the delay caused to Land Securities in implementing their planning permissions, was pleaded as follows:

The Defendant threatened to issue and then issued and pursued two applications for judicial review of planning permissions obtained by the second and third claimants in respect of Wilton

Plaza and Park House respectively. In so doing, the defendant sought to pressurise the claimants into making financial contributions and assisting it to relocate its business from its premises opposite Park House. The defendant was not motivated by concern about the lawfulness of the planning permissions and its purpose was not to prevent the developments from taking place, but rather to force the claimants to assist it to move. That objective was beyond the scope of the judicial review proceedings and amounted to an improper and collateral advantage. That conduct by the Defendant amounts to an abuse of civil process and is tortious.

41. Fladgate then sought to strike out the application. They argued both that (i) the tort of abuse of process did not exist, or had fallen into disuse and could no longer be relied upon, and (ii), that in any event the claim was doomed to failure having regard to the elements of the tort which must be established.

42. The deputy judge, Bernard Livesey QC, declined to hold that the tort of abuse of process did not exist, and it is perhaps this which provides the most important and interesting aspect of the claim. The judge held as follows in that respect:

63 In Gregory v Portsmouth City Council [2000] 1 AC 419 the plaintiff sought to argue that the tort of malicious prosecution should be available just as much where he was subjected to a civil disciplinary process as it would had he been subjected to a criminal prosecution. The House of Lords refused to extend the tort to cover civil proceedings.
64 There are however torts for maliciously and without any reasonable or probable cause procuring a plaintiff to be arrested (see Daniels v Fielding (1864) 16 M. & W. 200 and Roy v Prior [1971] AC 470); a plaintiff to be adjudicated bankrupt (Johnson v Emerson (1871) L.R. 6 Exch. 329); a search warrant to be issued and executed against a person (see Gibbs v Rea [1998] AC 786 PC). And wherever it is of the essence of the tort that the process was procured maliciously and without reasonable or probable cause it is a requirement that the proceedings should have been brought to a conclusion in favour of the claimant.
65 It remains the case, after Gregory , that there is no general tort of maliciously instituting civil proceedings. There is however the tort of abuse of process, as first formulated in the case of Grainger v Hill and in this tort it is not necessary to prove malice, nor want of reasonable and probable cause nor that the proceedings were terminated, let alone in favour of the plaintiff. Contrary to Mr Steinfeld's submission that the tort has fallen into desuetude and no longer exists, I have concluded that the tort does still exist and, if it does not, it should be the Court of Appeal who declares this to be the case and not me.
66 Grainger v Hill was indeed, as Mr Steinfeld stresses, a case involving the abuse of mesne or ancillary process and where the process was abused in order to extort property from the person against whom the ancillary process was directed. Indeed, it is evident that most of the cases in which the courts have determined that there has been an abuse have involved actual or threatened extortion of property, either under threat of issue, or by misuse, of writs or other process which in proper use would authorise and legitimise what would otherwise be an unlawful deprivation of liberty, seizure of property, interference with credit, status, good name

and freedom; or have involved the threat of issue or use of process for the prosecution of persons for supposed criminal offences or for rendering a person bankrupt, usually for the financial benefit of the person misusing the process.
67 Mr Steinfeld may be right in arguing that the tort should be limited to cases where ancillary, rather than originating, process is involved; he may also be right in submitting that the commission of the tort ought truly to require some element of extortion, oppression or pressure to achieve an improper object. However, some of the authorities to which my attention has been drawn have not expressly so limited the ambit of the tort and it does not seem to me that I am the appropriate person to substitute these limitations where judges of the Court of Appeal here and in the Commonwealth have contemplated the formulation of the tort without imposing such limitations. In so far as it is arguable that the tort should not be so limited it seems to me that I cannot strike out under CPR 3.4(2)(a) or dismiss the action under CPR 24.2 for its failure to present itself factually in accordance with the limitations which Mr Steinfeld urges me to impose.

43. These remarks clearly do not constitute the most ringing endorsement of the existence of a tort of abuse of process or of its application to a case such as this. At best the judge ruled that such claims might arguably be capable of proceeding, subject to some contrary decision of the Court of Appeal. However, at least subject to some such decision in the future, it appears that we must proceed that claims of this kind are at least a possibility on particular facts.

44. The judge nevertheless held that Fladgate were entitled to summary judgment against the Claimants. The judge held that the central issue was what was meant by

Improper/Collateral Purpose/Collateral Advantage:

74 At the heart of this case is the question whether Fladgate was acting for an improper collateral purpose or collateral advantage.
75 This element of the tort has been set out in different ways by different judges in the various authorities since Grainger v Hill . It may help to set them out seriatim:

Grainger v. Hill (1838) 4 Bing N.C. 212 : "to effect an object not within the scope of the process" (per Tindal CJ at 221); "for an ulterior purpose" (per Bosanquet J at 224)

Varawa v Howard Smith Co Ltd [1911] HCA 46 : "for purposes foreign to the scope of the process itself" (per Griffith CJ at page 7); "for some purpose other than the attainment of the claim in the action … merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate" (per Isaacs J at page 26)

Dowling v The Colonial Mutual Life Assurance Society Ltd [1915] HCA 56 : "some collateral object extraneous to the purpose of the insolvency law" (per Griffith CJ at page 2); "foreign to the nature of the process" (per Isaacs J at page 5)

In Re Majory [1955] Ch 600 : "for the purpose of obtaining some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist" (per Evershed MR at 623-4)

Goldsmith v. Sperrings Ltd [1977] 1 WLR 478 : "diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end" (per Lord Denning MR at 489); "has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out "to effect an object not within the scope of the process … not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought" (per Scarman LJ at 488-9); "an ulterior purpose unrelated to the subject matter of the litigation" (per Bridge LJ at 503

American Restatement, Torts , 2d s.682 (quoted in eg Speed Seal , per Fox LJ at 1335): "primarily to accomplish a purpose for which it is not designed"

Metall & Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 : "predominant purpose … in using the legal process [was] other than that for which it was designed" (per Slade LJ at 469F)

Hanrahan v. Ainsworth (1990) 22 NSWLR 73 : "using court process for an ulterior purpose, that is, for a purpose not within the scope of such process" (per Kirby P at 96C); "used to effect an object not within the scope of the process" (per Clarke JA at 112B)

Williams v. Spautz (1992) 174 CLR 509 : "for a purpose or to effect an object beyond that which the legal process offers" (per Mason CJ, Dawson, Toohey, McHugh JJ at 523); "to use them as a means of obtaining some advantage for which they are not designed or some advantage beyond what the law offers" (per Mason CJ, Dawson, Toohey, McHugh JJ at 526-7)

76 Superficially these might appear to be very similar formulations of the same test but they are in fact rather different. Lord Denning in Goldsmith v Sperrings Ltd ("so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end") would appear to require rather more than Tindal CJ in Grainger v Hill itself ("to effect an object not within the scope of the process") until one remembers that Grainger was itself a case of extortion and oppression and the exertion of pressure to achieve an end which was grossly improper, the end being what the court recognised as the conversion of property under compulsion. At the other end of the scale is the formulation of Bridge, LJ., ("an ulterior purpose unrelated to the subject matter of the litigation") where the degree of relationship to the subject matter of the litigation can be to a greater or lesser degree.

45. With these dicta in mind, and being cautious about making any attempt to define the precise limits of the tort, the judge nevertheless felt able to give judgment in Fladgate's favour. He observed as follows:

83 However, it does not seem to me to be realistic or appropriate to regard the remedies afforded by the judicial review process in a purely literal way for the purposes of applying them to the tort of abuse of process. Once it is recognised that the planning system provides in public

law a means by which the owner of property may protect his interest in and enjoyment of that property, then it will follow that the wider protection of his property interests is within the scope of protection which judicial review is able to provide, even though the remedy it is able to give is often of very narrow and technical scope and on the face of it may appear to bear no relation to the property being protected. I have considered in paragraphs 69 to 71 above the ways in which judicial review provides such protection as the law is able to give to those affected by planning decisions. In short, when making the decision to apply for judicial review, it is enough that Fladgate is seeking to protect in some way its interest in and enjoyment of its property; it is under no obligation to have a high-minded desire to put right the workings of the affordable housing scheme or planning procedures in Westminster.

84 The factor which in my judgment breaks down the claimants' argument is the fact that there is an obvious connection between the Credit Resolution passed in relation to the Wilton Plaza application and the use intended to be made of it in relation to the third claimant's application to redevelop Park House. That it was a real connection is evident from the fact that the claimants did not seek to defend the judicial review proceedings to the end but instead severed the connection by offering to make payment of some £5.769 million in lieu of affordable housing at Park House to the Westminster Affordable Housing Fund and amended both planning applications accordingly.

85 The matters in the preceding paragraphs do to my mind greatly affect what amounts to a collateral purpose for the purposes of the application of the tort to judicial review proceedings. If, as I am satisfied is the case, a property owner is entitled to use judicial review proceedings for the protection of his interest in and enjoyment of his property, why should he not compare the diminution in the value of his interest and enjoyment of his own property, which is likely to attend the development, with the countervailing (and perhaps very substantial) development gain which the developer will enjoy from the same development? Why should it be a collateral purpose if the property owner seeks to use any negotiating position he may have to restore the value he believes he will lose by the development by getting it from the person who caused it – who happens also to be the only person who might be prepared to pay it? How can it be said that the objective set out in the proposal which Mr Cohen put to Mr Hussey on the 5th April 2006 was, in Bridge LJ's words, "an ulterior purpose unrelated to the subject matter of the litigation". Is such an objective not very obviously "reasonably related to the provision of some sort of redress for [Fladgate's] grievance"?

86 As I have pointed out in paragraph 66 above, almost all of the cases, in which the courts have determined that there has been an abuse, have involved actual or threatened extortion of property, either under threat of the issue, or by misuse, of writs or other process authorising the deprivation of liberty, the seizure of property, and the interference with credit, status, good name and personal liberty, or by the issue or threat of issue of criminal proceedings and/or bankruptcy process. It is perfectly understandable that the judges of the past would have been outraged at the thought that the court's process, which alone would have authorised and legitimated actions which would otherwise be unlawful, should have been used improperly to achieve such ends, all of which were grossly improper ends in themselves.

46. The precise scope of the tort therefore remains unclear, but it seems clear that its existence does not threaten the pursuit of judicial review applications against the grant of planning permission for commercial or tactical reasons in the way that many of us have become used to for many years. It would take an extreme case before one could conclude that the tort was made out. The most helpful guide, as an antidote to the

deployment of the tort in such cases, may be some remarks of Bridge LJ in the *Goldsmith* case:

> *For the purpose of Evershed MR's general rule, what is meant by a "collateral advantage"? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose on an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land, these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject-matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process.*

TIM BULEY

17 October 2009