

# Remedies outside of the tribunal system

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## Topics covered



- Judicial review: what is it and when can it be used?
- **Corus**: the nature of the VO's duty to maintain the list
- **NCP**: the test for challenging VO delays
- The vexed issue of remedy
- When might JR be used in a rating context?
- Ombudsmen: a cheaper alternative?

## The nature of judicial review

- Court's supervisory jurisdiction over executive (and some tribunal) decision-making
- Established grounds of judicial review include:
  - Illegality/*ultra vires*
  - Procedural fairness/natural justice
  - Fettering of discretion
  - Irrationality
  - Human rights/EU law

## Remedies available

- Range of available remedies:
  - Quashing order
  - Prohibiting order
  - Mandatory order
  - Declaration
  - Injunction
  - Monetary remedies?

# The practical limits of judicial review (1)



- Timing: challenge must be brought promptly and in any event within three months of the impugned decision
- Standing: claimant must have a “sufficient interest” in the decision to bring a claim.
  - Where claimant is an affected ratepayer this will seldom be a problem

## The practical limits of judicial review (2)



- Alternative procedure: courts will not (usually) entertain applications for JR where a statutory mechanism exists to resolve the dispute.
  - i.e. can't challenge VO's decision on the RV of your hereditament
  - Ombudsmen...
- Cost.

## *R (Corus UK Ltd) v VOA* [2001] EWHC Admin 1108



- Concerned VO decision to reduce RV of Corus' property by some £6.5 million in the 1990 list, w.e.f 1/4/90
- Context – RV reduction affected transitional relief, resulting in increased rates bill of c. £9 million
- Corus had made a proposal in 1990, which in 1994 resulted in an RV reduction w.e.f. June 1990.
- Reduction w.e.f. 1/4/90 was not actioned until 29/3/2001 (two days before the VO's power to amend the 1990 list ceased)

- Claimant contended that the delay gave rise to conspicuous unfairness amounting to an abuse of power, and that such an abuse could lead to the quashing of the list alteration

- Sullivan J held:
  - VOs under a duty to act fairly in the discharge of their functions
  - Unfairness may arise where VO gives preferential treatment to certain hereditaments, or certain occupiers
  - But unfairness unlikely to arise where VO does his honest best:

*“The [VO’s] duty has to be discharged in the real world, where there are finite resources, and only 24 hours in the VO’s day. He may have to give priority to certain known alterations, and defer consideration of other matters which possibly require alteration”*

- Court rejected argument that delay amounted to abuse of power, in circumstances where:
  - List entry in the 1990 list was undoubtedly incorrect
  - VO had no ulterior motive
  - VO had made no representation to Corus not to alter the list
  - Length of time for amendment was reasonable in the context: complex matter with related tribunal proceedings
  - Pre-amendment, Corus was (and knew it was) taking advantage of an anomaly in the transitional relief provisions

- Court also rejected contention that VO had discriminated against Corus:
  - VO hadn't taken a conscious decision to treat Corus' hereditament differently to others
  - Insofar as there was differing treatment, it was between simple disputes and complex ones
  - No reason for VO to have been aware of implications of list alterations for transitional relief: BA's function, not the VO's

## Lessons from *Corus*

1. VO under a duty to act fairly
2. Possible that the duty to act fairly can override the duty to maintain an accurate list
3. But circumstances in which that will come about will be rare
4. May do so if VO consciously delays decisions for some hereditaments but not others, or if VO discriminates against individual/class of hereditaments/ratepayers

Prioritisation of list alterations which increase revenue???

## *NCP v Baird (VO)* [2004] EWCA Civ 2181



- Issue similar to ***Corus***
- NCP made proposals to alter RVs of two hereditaments
- NCP and VOs agreed the amended RVs (orally) in Jan and April 1994
- Regulations changed in early July 1994
- Agreements actioned by VOs in late July and August 1994 respectively
- Result: amendments took effect from 1/4/90 rather than 1/4/92, and NCP lost significant sums in transitional relief

“No doubt, as the parties agreed, a valuation officer is amenable to judicial review to compel him to perform his duties. If he abuses his powers or exercises them in an irrational or unfair manner or refuses to exercise them at all then any person with a sufficient interest may obtain an order by way of judicial review setting aside what he has done or requiring him to do what he ought to do.

... the 1988 Act provides for a remedy by way of proposal and agreement or appeal. Further the remedy of judicial review is discretionary. A ratepayer who, having followed the route of proposal and appeal, deliberately abandons his appeal and refrains from recording the agreed values in writing eschews the specific rights afforded to him by regulations 11 and 12. I consider that it is most unlikely that the court would permit such a ratepayer to bypass the specific provisions of the 1988 Act and the regulations and make an order by way of judicial review requiring the valuation officer to alter the list in accordance with the oral agreement; in particular where the purpose of seeking the order of the court is to maintain on the list ... what is agreed to be a wrong value.” (para 43)

- VO's duty to maintain the list is not subject to a requirement to make amendments in a reasonable time (para 45)
- Issue of delay considered in detail by Dyson LJ in a concurring judgment.

- Dyson LJ's approach to whether delay amounts to a breach of statutory duty (para 61):

“Rather than asking the broad question whether a failure to perform a statutory duty involves unfairness amounting to an abuse of power, I consider that a more structured approach should be applied. In my view, there is no simple answer to the question how the court should determine whether a failure to perform a statutory duty is unlawful where the statute is silent as to when the duty should be performed. The answer will depend on all the circumstances of the case. Relevant factors will at least include (i) the subject-matter of the duty and the context in which it falls to be performed, (ii) the length of time taken to perform the duty, (iii) the reasons for any delay, and (iv) any prejudice that is, or may be, caused by the delay.”

## Element 1: subject-matter

- VO's duties concerned with economic/property interests
- VO therefore allowed more latitude than would be the case for life/limb/liberty type duties

## Element 2: delay

- Possible that delay can give rise to a breach even if (a) the only interests affected are property interests, and (b) there is little or no prejudice (para 63)
- But, valuation is art not science, and list alterations can have consequences for other hereditaments.

## Element 3: reasons

- Delay more likely to be countenanced where there are rational reasons for it
- As a general rule, lack of resources is not an acceptable reason for otherwise-unconscionable delay (para 64)

## Element 4: prejudice

- Courts (unsurprisingly) will expect greater expedition where prejudice to ratepayer is serious
- *Quaere*: how is the VO to know? C.f. **Corus** on transitional relief

## Remedies: what would the Court actually do if breach of duty is established?



- Expressly left open by the Court of Appeal in **NCP** (para 54, per Clarke LJ)
- Declaratory relief likely to be available ... but what's the benefit of securing it?
- Would the Court quash a list entry (and thus make the list less accurate) by virtue of the delay in making it?
  - Accuracy vs fairness
- What about damages?

## JR in rating - examples

- Clearly difficult to get a rating JR off the ground ... but not impossible
- Consider:
  - List amendment resulting in serious prejudice to ratepayer (e.g. loss of otherwise accrued appeal right)
  - Prioritisation of revenue-increasing amendments and consequent delay in revenue-decreasing measures
  - Adoption of prejudicial/unfair policies
  - Delay in provision of information from BA to VO (c.f. ***Secerno***)

## Ombudsmen

- Alternative (and free) option where VO/BA acts maladministratively.
- What is maladministration?

“It will cover "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on." It "would be a long and interesting list," clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised; but excluding the *merits* of the decision itself or of the discretion itself. It follows that "discretionary decision, properly exercised, which the complainant dislikes but cannot fault the manner in which it was taken, is excluded"”

***R v LCA for the North and East Area of England ex parte Bradford MCC***

[1979] QB 287 at 311

- Two relevant Ombudsmen:
  - (1) Parliamentary Ombudsman (PHSO) oversees the VOA
  - (2) Local Government Ombudsman (LGO) oversees BAs
- Complaint must have been through the full “local resolution” process first
- For the PHSO:
  - Adjudicator’s Office is an intermediate step
  - MP referral
- Remedy only recommended where maladministration causes injustice: broadly similar test to prejudice (c.f. ***NCP; Honda***)

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