Litigating Planning and Environmental Challenges in the Higher Courts – tactical considerations and procedural issues

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Overview

A. Getting Started
B. Permission Stage
C. Post Permission
D. Substantive Hearing
E. Settlement
F. Judgment and Post Judgment Issues

A. Getting Started

- Pre-Action
- Forum
- Approach to Pre-Permission Pleadings

A. Getting Started – Pre-action (1)

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1. Pre-action - Cs

- Compliance/non-compliance with the PAP process
  - Compatibility with 6 week time limit?
  - N/A in urgent cases
  - The risks of not complying
- Cs Duty of Candour
- Pre-action specific disclosure
- EIR and FOIA requests

2. Pre-action - Ds

- When to respond/ when not to respond?
- Mediation and ADR
- Consenting to Judgment
- Costs of pre-action
- D's Duty of Candour: does it apply pre-permission?

A. Getting Started – Pre-action (2)

3. Pre-action requests: C

- Request for documents "*requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues*" (emphasis added)

4. Pre-action correspondence D

- Response to requests for information/documents "*The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so*"

A. Getting Started – Pre-action (3) - Claimant

5. Claimant Duty of Candour

- The duty esp. applicable in (a) making claim; and (b) if seeking urgent consideration/interim relief;
- Duty 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;
- Includes facts C would have known about had proper and necessary inquiries been made: see e.g. ***R Lloyds Corp. ex p Briggs*** [1993];
- A specific requirement to disclose rights of appeal, 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);
- May not enough to comply with the duty to provide relevant documents: ***R (Khan) v SSHD*** [2016] EWCA Civ 416;
- Duty is a continuing one - ***R (Bilal) v SSHD*** [2014] (IAC) - does not end on lodgement of permission/interim relief papers, if circs change duty immediately inform other parties and Court;
- Consequences if not comply: (i) costs; (ii) refusal of permission: ***Peerless Limited v Gambling Regulatory Authority (Mauritius)*** [2015] (PC).

A. Getting Started – Pre-action (4) - Defendant

6. The Defendant Duty of Candour Pre-Action

- The scope of DoC is not set out in the CPR or a PD.
- Absent a specific disclosure order (rare) – does it even apply?
- DoC is (primarily?) to the Court – query whether it even applies pre-action. See e.g. Lord Carswell in ***Tweed*** [2007] *"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"2;* Laws LJ in ***R (Quark) v FCO*** [2002] "*assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide";* Lord Donaldson MR (***R v Lancashire CC ex p Huddleston***) [1986], "*one of partnership based on a common aim, namely the maintenance of the highest standards of public administration"*
- Much of DoC caselaw applied under the old rules, where D became engaged post-permission. D is not *required* to serve an AoS or SGR; the sanction is not appearing at the OPH without leave
- "*Guidance on discharging the duty of candour and disclosure in judicial review proceedings"* (2010, TSols) considers "*the duty of candour applies as soon 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 … submissions".*

A. Getting Started – Pre-action (5) - Claimant

7. Pre-action specific disclosure Orders

- Can be sought, and ordered, pre-action 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.
- In these JRs 3 month time limit applicable but where 6 weeks …
- 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.

A. Getting Started – Pre-action (6) - Claimant

8. EIA/FOIA:

- Benefits to C of EIR (NB if environmental information – widely defined – then EIR not FOIA applies):
  - (i) no relevance test;
  - (ii) can request from non-parties (if a public authority – NB very wide after ***Fish Legal*** includes utility companies) and at any stage;
  - (iii) burden on authority to justify non-disclosure;
  - (iv) cost;
  - (v) no restriction on subsequent use.
- But timing is a an almost fatal 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!

A. Getting Started (7) - Forum

9. Forum

- Planning Court (CPR54.21(2)):
  - "*Planning Court claims*" extend beyond planning: Transport and Works Act 1992; wayleaves; highways and other rights of way; CPOs; village greens; "*the enforcement of other statutory schemes*" and "*European Union environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control*";
  - Plus anything else Planning Liaison Judge transfers in.
- London or the Regional Courts? Speed? Judges less specialist? More D friendly?
- Challenging Forum

A. Getting Started (8)

10. Pre-permission pleadings: C

- The claim form: don't neglect consideration of content, important bits: IPS, identifying decision(s) challenged; relief sought; Aarhus.
- Facts & Grounds:
  - Length … Airports NPS challenges one of claims was c. 130 pages – Holgate J. made them re-plead to 40
  - The ***Boggis*** and ***ex p Davies*** submission …
- CPR Part 18: Further and Better Particulars: use by Cs;
- The art of the C's Reply.

11. Pre-permission pleadings: D

- SGRs: length, evidence
- Strategies for *"scattergun"* cases where *"not practicable to examine every pellet in detail"*, (Simon Brown LJ in *R (Richardson) v North Yorkshire CC* [2004]; appendices, tables, select attachments, key judgments
- Evidence – especially if relying on s.31 Senior Courts Act 1981
- Who settles them (Counsel? QC? Solicitor?)
- The knock out blow?
- Seeking costs
- Seeking a TWM marking
- Replying to a C's Reply – is this ever a good idea?

B. Permission Stage

- Costs Protection
- Urgency, expedition and interim relief
- Standing / “person aggrieved”
- Alternative Remedy
- S.31 Senior Courts Act 1981
- Oral Permission Hearings
- Delay/Prejudice

B. Permission Stage (1) – costs protection

- Rule changes in force 6 April 2018 following on from the judgment of Dove J. in ***R (Royal Society for the Protection of Birds) v Secretary of State for Justice*** [2017]. To be covered by Tim Buley.
- Issues:
  - 1] schedule of the claimant's financial resources - content;
  - 2] seeking to vary the default caps – when to do it;
  - 3] When do Aarhus costs rules apply – scope of protection;
  - 4] If Aarhus costs rules do not apply: can a CCO be sought under the Criminal Justice and Courts Act 2015 ("the 2015 Act"): in ***Venn*** the CA ruled that where a deliberate expression of a legislative intent to exclude cost protection in Aarhus costs rules, "*it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to side-step the limitation (to applications for judicial review) that has been deliberately imposed by … legislation*" (see [33]).
  - 5] What about costs management provisions in CPR 3.12 apply by default only to Part 7 multi-track cases. The Court has the power to direct costs management in any other proceedings, per CPR 3.12(1A). Jackson recommended extending to *"complex"* JRs. Govt. not done so.

Permission stage (6) – expedition/urgency/interim relief

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4. expedition/urgency/interim relief

- (1) C: N463: when to use?
  - JR Guide "*some litigants and practitioners are misusing, and even abusing, the procedures for seeking urgent adjudication*".
  - See section 16 of the Guide: warnings clear …
  - Can a D or I/P use?
- (2) Interim relief: CPR Part 25 PD: if "*injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings*":
  - In deciding if cross-UT required – consider prohibitive expense;
  - "*make such directions as are necessary to ensure that the case is heard promptly*"
- (3) An exception to alternative remedy rule, seeking interim relief where statutory appeal does not suspend challenged decision if realistic prospect of success and otherwise appeal rights rendered illusory: see ***R (ABC Ltd) v Revenue and Customs Commissioners*** [2018] going to SC
- (4) Expedition? Is it worth applying for vs – timetable for significant planning cases ….

Permission stage (7a) – Defendant issues

5. Standing / "person aggrieved"

- Factors: Nature of decision; directness of impact; grounds on which someone claims to be aggrieved; whether fair opportunity to participate; when made objections before decision taken; ***Walton v Scottish Ministers*** [2012]. Examples :
  - ***Ashton v SSCLG*** [2010] - representations to Council during planning process insufficient – need to participate at hearing/inquiry
  - ***Zurich Assurance Ltd v Winchester City Council*** [2014] - enough to participate through agents, even if identity of principal unclear
  - ***JB Trustees Ltd v SSCLG*** [2013] **–** withdrew objection at inquiry; wanting and failing to get ransom strip not enough
  - ***Norman v Secretary of State for Housing, Communities and Local Government*** [2018] – C elected Councillor and member of the planning committee of Herefordshire Council and the Chair of the North Herefordshire Green Party. She lived 10 miles away from the development site and did not have a private interest that would be affected. She had not participated in the appeal. Not a person aggrieved.

Permission stage (7b) – Defendant issues

6. Alternative Remedy

- ***R (Piffs Elm) v Tewkesbury*** [2016] – Council biased but statutory appeal to PINS sufficient remedy
- ***R (Glencore Energy UK Ltd) v HMRC*** [2017] – judicial review is remedy of last resort; statutory process for tax appeals was sufficient, promoted proportionate allocation of judicial resources
- ***R (Zahid) v Univ of Manchester*** [2017], ***R (Cowl) v Plymouth CC*** [2001] – complaints procedures suitable alternative remedy
- ***R (Mazz Rafique-Aldawery) v St George's, University of London & Office of the Independent Adjudicator*** [2018] - complaints made against higher education institutions to the Office of the Independent Adjudicator were recognised by the courts as being a suitable alternative. Although the OIA did not rule on legal rights and obligations, it did scrutinise the behaviour of higher education institutions to a standard which would reflect that contained in judicial review proceedings and the redress it could provide had a practical flexibility which judicial proceedings lacked.

B. Permission Stage (8) – oral permission hearings

7. Oral Permission Hearing

- The 30 minute myth …
- JR Guide if *"either party reasonably believes that the renewed hearing (including judgment) is likely to last more than 30 minutes, that party should inform the ACO as soon as possible of that fact, and of that party's revised time estimate (including judgment)".* If not adjourn, costs …
- Says if tell the Court in advance: Cwill allocate time it considers appropriate
- A worrying trend – inviting applications to adjourn … Damned if you do damned if you don't …
- ***R (Help Refugees Limited) v SSHD*** [2017] EWHC 2727 (Admin) – Divisional Court
  - "*The position was compounded by the parties' collusion in giving and maintaining an unrealistically short estimate for the hearing, (three days), when a more realistic estimate was up to five days. This was done so as to achieve an earlier hearing*".
- Knowing your judge ….

B. Permission Stage (9) – Delay for a Claimant

8. Delay as a strategy

- Delaying a development a key objective of planning JRs, sometimes it seems only objective
  - The Planning Court; significant cases timetable
  - Listing for counsel's availability
  - Dealing with interlocutory applications: can delay progress
  - The rolled up hearing
  - Forum: Regions still faster?
  - Appeals … the Achilles heal – see e.g. ***Shirley***. JR of refusal to call-in scheme or 4,000 dwellings together with a variety of other forms of complementary development. LPA not issued PP despite resolving to grant Dec 16. Call-in refusal also Dec 16. JR launched Feb 17. Heard July 17, Judgment September 2017. Pta sought. Paper decision June 2018!! Heard in CA September 18 on urgent basis. Judgment awaited.

9. Delay as a challenge

- When (if ever) is a planning permission safe from JR ? The latest case: ***R (Thornton Hall Hotel Limited) v Wigan Metropolitan Council*** (Kerr J, 23 March 2018)

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B. Permission Stage (10) – Defendant Delay and Other Issues

10. Delay/promtness as a defence

- 6 week rule in planning cases
- 3 months "*promptness*" in other environmental cases
- Promptness - does not apply if EU law: ***R (Berky) v Newport CC*** [2012]
- Prejudice – need to raise at permission stage: ***Thomas v Albutt*** [2015]

11. Section 31 Senior Courts Act 1981 "*undue delay*"

- S.31(6) of the Senior Courts Act 1981 if "undue delay" may refuse leave/relief "*if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration*"

12. Section 31 – as amended by the 2015 Act

- Section 3D: If Court considers "*highly likely that the outcome for the applicant would not have been substantially different*" then it "*must*" refuse leave
- unless disregard for "*exceptional public interest*" (Section 3E)
- Section 3C – may consider of its own motion but must consider if Defendant asks

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C. Post-Permission Stage (1) - Actions for Defendants/Ips (i)

1. Detailed Grounds of Resistance and Evidence

- DGs:
  - Sometimes overlooked strategically? or
  - Does anyone ever refer to or read these? Overtaken by skeleton?

- Evidence:

  - Key for Defendants: real opportunity when well managed to present, and improve, case
  - Credibility
  - Also: Manage and protect from other issues which may arise;
  - Also: opportunity to set and explain approach (very useful in technical cases)

- Ex post facto; treated by the Courts with caution but often admitted; have close regard to Stanley Burnton J in ***R(Nash) v Chelsea College*** [2001]

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C. Post-Permission Stage (1) - Actions for Defendants/Ips (ii)

R(Nash) v Chelsea College [2001]

(i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that … "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances, if at all, will the Court accept subsequent evidence of the reasons;

(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:

(a) Whether the new reasons are consistent with the original reasons.

(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.

(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).

(d) The delay before the later reasons were put forward.

(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.

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C. Post-Permission Stage (1) - Actions for Defendants/IPs (iii)

2. Duty of Candour

- Duty of Candour; concept well known
- But does it extend to documents as well as information?
- Public bodies may *choose* to disclose through relevant documents; Courts have *encouraged* ("best evidence rule") but compare ***Tweed*** [2007] per Lord Bingham at para 4 ("*it is ordinarily good practice to exhibit it…")* with ***R (National Association of Health Stores) v SSH*** [2005] ("*best evidence rule is not simply a handy tool in the litigator's kit…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….")*
- "*Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings – A Discussion Paper",* April 2016, prepared for Lord Chief Justice by Mr Justice Cranston and Mr Justice Lewis: "*the better approach at present is to express the content of the duty of candour simply by reference to the existing case law dealing with the identification of relevant facts and the reasoning process"* which leaves 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 necessary for fairly dealing with an issue, then that can be dealt with by means of an application for specific disclosure…"*
- And for IPs: ***Belize Alliance of Conservation NGOs v DoE*** [2004], Privy Council held IP "*under a duty to make candid disclosure to the court"*

C. Post-permission stage (2) – Actions for Claimants

3. Actions for Cs:

- C's reply to Detailed Grounds, not in CPR but often provided for in Court orders: why do it? Why not?
- Part 18 requests
- Notices to admit facts
- Specific disclosure applications:
  - Post DGR and D evidence usually the right time;
  - Specific disclosure still exceptional;
  - ***Richborough Estates v SSCLG*** (2017, unreported) – disclosure application in context of multi-developer claimant challenge to WMS. 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.

C. Post-permission stage (2)

4. Resisting specific disclosure

(a) Not necessary for fair and just resolution of proceedings, ***Tweed*** at para 3; this is the most common basis.
(b) Court will not tolerate "*fishing expeditions*", ***Tweed*** at para 31, 46, 56
(c) The volume of material, ***Tweed*** *at* para 4, 33, 37
(d) Confidentiality, ***Tweed*** at para 33, 37, 57
(e) Public Interest Immunity, ***Tweed*** at para 5, 25, 33, 41,58
(f) Legal Professional Privilege

But if ordered - have to comply – ***Babbage v SSHD*** [2016]

D. Substantive Hearing

- Cross examination
- Skeletons and bundles

D. Substantive hearing (1) – Cross-examination

- Supposed to be very rare … but of late something odd happening …

1. ***Greaves v Boston Borough Council*** [2014]:order by consent for XX on noise issues – following remark of Gloster LJ; at substantive hearing Dove J. "*derived almost no benefit in reaching the conclusion as to whether or not there was an error of law in this case from the cross-examination of both witnesses*" and should be "*it became clear to me that it would seldom if ever be necessary or appropriate to order cross-examination of experts in cases of this kind*"
2. ***R. (Jedwell) v Denbighshire CC*** [2016]*:* CA orders XX on if screening reasons ex-post facto – see subsequent HC judgment [2016] 2 C.M.L.R. 49. Claim failed.
3. ***Benson v SSCLG*** (2017): granted an application by the Appellant to XX a Planning Inspector in a s. 289: Grounds (1) the Inspector failed to properly exercise his discretion in refusing to consider late evidence produced on the day of the planning inquiry, and (2) the Inspector failed to give reasons for his refusal to consider the late evidence. Facts disputed.

D. Substantive hearing (2) – skeletons and bundles

- ***R (Network Rail) v Secretary of State for the Environment*** [2017]
- Holgate J (lead Judge Planning Court) issues a strong reminder to claimants of the need to present concise and focused arguments/material
- *"I regret the need to have to make some observations on the inappropriate manner in which the claim was put before the court"*
- Claimant succeeded on one simple point, but had submitted over 2,000 pages of material to the court and a lengthy skeleton argument, without proper cross-referencing, and in which the key ground *"had merely been alluded to in paragraph 76 and the first two lines of paragraph 77"* and "*the point was buried within the discussion of Ground 3 of the claim, a part of the Claimant's argument to which it does not belong".*
- *"The Claimant's skeleton argument was long, diffuse and often confused … The skeleton gave little help to the court"*

D. Substantive hearing (3) – skeletons and bundles (2)

- Holgate J stated that core bundle of 250 pages will generally be sufficient for the parties' legal arguments to be made
- "*Prolix or diffuse "grounds" and skeletons, along with excessively long bundles, impede the efficient handling of business in the Planning Court and are therefore contrary to the rationale for its establishment … Whichever party is at fault, such practices are likely to result in more time needing to be spent by the judge in pre-reading material so as to penetrate or decode the arguments being presented, the hearing may take longer, and the time needed to prepare a judgment may become extended. Consequently, a disproportionate amount of the Court's finite resources may have to be given to a case prepared in this way and diverted from other litigants waiting for their matters to be dealt with. Such practices do not comply with the overriding objective and the duties of the parties ... They are unacceptable*".
- He warned that in the face of such *'unacceptable'* conduct, the court has a range of case management powers at its disposal, including the power to refuse to accept excessively long skeletons or bundles and to impose costs penalties.

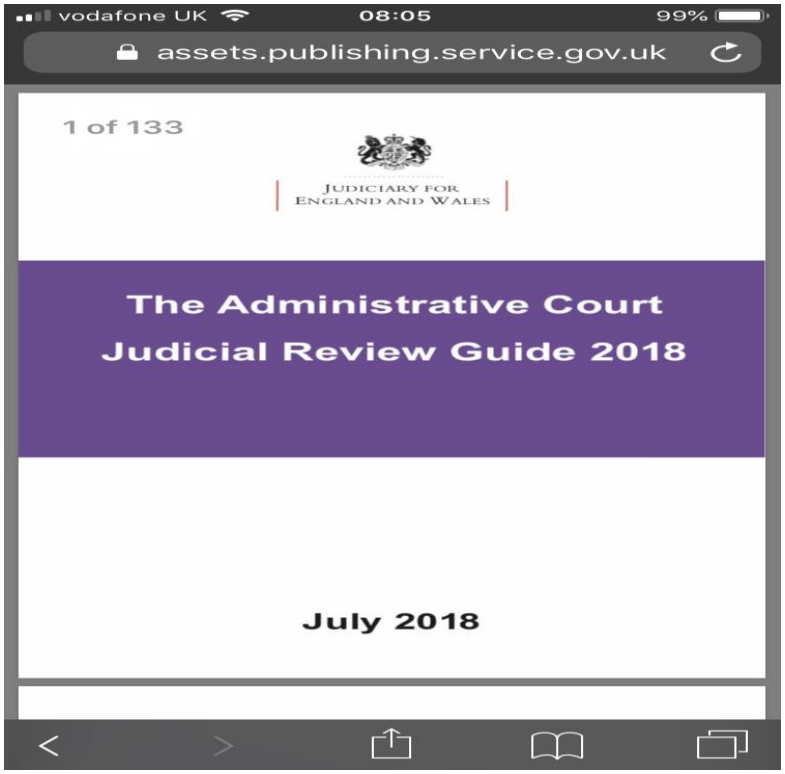
D. Substantive hearing (5) – skeletons and bundles (4)

Other tactical / procedural points

- Standard directions for timetable of skeletons and bundles – are they suitable?
  - Are they best?
- Expedited directions?
- On appeals see Practice Directions:
  - Court of Appeal: CPR r52 and PD52C
  - Supreme Court: Practice Direction 5 and 6
- Ensuring compliance
- CA rules on length of skeletons draconian (25 pages, and font and footnote size limits). Disobey at your peril.
- Does this create an issue? Lengthen oral hearings?

E. Settlement

- If settle:
  - Withdrawal/discontinuance
  - Consent order (needs reasons)
- Need comply with JR Guide – section 22;
- If costs disputed need follow procedure set down – written reps etc.;
- A new danger with late settlement …



F. Judgment, relief and post judgment – remedies and other matters

- C:
  - Declarations in a s.288? (***Skipton Properties***, 2017; ***Harvey v Mendip*** *DC,* 2017, CA)
  - Response to draft judgments: ***Edwards*** [2008] but …
  - Who really won?
- D: 2015 act insertions into s. 31 of the Senior Courts Act 1981 – no substantial difference
  - Referred to many times according to Westlaw
  - Evidence to use it
  - Applicable to a s.288? (***Anna Hoare v Value of White Horse DC***, 2017)
- Costs, appeals and delay