PRACTICE AND PROCEDURE UPDATE NOVEMBER 2018

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Landmark Chambers

Introduction

- Main Focus – New Aarhus Costs Rules

- Other issues:
  - Delay and neighbourhood plans, *R (Oyston) v Fylde BC* [2017] 30186 (Admin)
  - Person aggrieved, *Norman v SSHCLG* [2018] EWHC 2910 (Admin).

Environmental Cost Protection Rules ("ECPR")

- The Government initially introduced a fixed costs environmental cost-protection regime ("ECPR") into CPR 45 on **1 April 2013** as part of the discharge of its obligations under both the *United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1988* ("the Aarhus Convention") and Directive 2003/35/EC ('the Public Participation Directive').

- While recognising the costs protection afforded under the system of protective cost orders ("PCOs"), the Government introduced the fixed costs regime so as to provide greater clarity for about the level of costs for claimants. *The Government has accepted for some time that it would be in the interests of applicants in environmental judicial review cases to provide greater clarity about the level of costs through a codification of the rules on PCOs which sets out the circumstances in which a PCO will be granted and the level at which it will be made.'* (Cost Protection for Litigants in Environmental Judicial Review Claims Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention, 28 August 2012, at p.5)

- Following a consultation which ran from September to December 2015, the new rules were substituted by r.8(5) of the Civil Procedure (Amendment) Rules 2017 (2017/95). The new provisions apply only to claims commencing on or after 28 February 2017, and not to claims existing before that date: see the transitional provision in rule 13(3) of the Civil Procedure (Amendment) Rules 2017.

What is an "environmental" claim within Aarhus?

- Prohibition on "prohibitively expensive" litigation in Aarhus Art 9(4) applies to cases which falls within:
  - Art 9(1), environmental information cases
  - Art 9(2), essentially "environmental impact assessment" cases
  - Art 9(3), "acts or omissions … which contravene … national law relating to the environment". By far the broadest category. Two notable cases:
    - *Venn v SSCLG* [2015] 1 WLR 2328
    - *Austin v Miller Argent (South Wales) Limited* [2015] 1 WLR 62

AARHUS FIXED COSTS REGIME, Part VII of CPR 45

- The Fixed Costs regime of the Aarhus Convention applies to two kinds of claims, which are defined as Aarhus Convention Claims:
  - Judicial Review claims which come within Articles 9(1), (2) or (3) of the Aarhus Convention, which is very broad
  - Statutory reviews (e.g. section 288 TCPA 1990) which come within Articles 9(1) and 9(2) *only*
- Response to Court of Appeal ruling in *Venn* that previous version of rules only applied to *judicial reviews,* but that this breached the Aarhus Convention and was unlawful
- Government made a deliberate decision to remedy illegality *in part only*
- Only form of stat reviews covered are (in effect) Environmental Impact Assessment cases where EU law makes Aarhus Convention directly effective
- NB In most planning and environmental cases, *central government* is respondent to statutory reviews whereas local government is respondent to judicial reviews.

AARHUS FIXED COSTS REGIME, Part VII of CPR 45

- Standard Cap for individuals £5000, for legal persons £10000.
- Reciprocal Cap of £35000 for Respondents
- Anyone can apply to have either cap varied, up or down
- A claimant can engage the Cap by simply stating claim is an Aarhus claim, and making a statement of financial resources in accordance with CPR 45.42.
- Then for Defendant to challenge. No claimant costs liability of losing that argument.
- A party who wished to vary any cap must apply with evidence
- <u>Much more generous regime than PCOs and CCOs:</u>
  - Default cap, generous levels
  - No evidence needed to get cap initially
  - No costs risk in seeking cap

Changes to the ECPR

The main changes can be summarised as:

a) public authorities no longer benefit from the ECPR;

b) the new scheme provides for *certain* statutory reviews falling within the ECPR depending on the nature of the decision being challenged;

c) the new rules create a power to vary the costs cap, and a connected requirement for claimants to file and serve a schedule of their financial resources;

d) multiple parties are treated individually for cost reciprocity purposes, in line with the case law;

e) where a defendant unsuccessfully challenges Aarhus Convention costs protection, their costs liability is now to be assessed on the standard, rather than indemnity basis;

f) costs protection extends to appeals arising out of Aarhus Convention Claims.

R (RSBB and ors) v Lord Chancellor [2017] EWHC 2309 (Admin)

- Following the 2017 Amendments, a consortium of NGO's (RSBB, Friends of the Earth, and Client Earth) sought to challenge the amended rules.
- 3 main complaints / grounds of challenge:
  - Ground 1, timing and varying the costs cap: that the new rules permitted varying of the costs cap at any time
  - Ground 2, public hearing in relation to sensitive financial information: that the rules are unlawful in not making provision for closed hearings in relation to financial information
  - Ground 3, relevance of claimant's costs That in considering what costs exposure would make a claim "prohibitively expensive" it would be relevant to take account of a claimant's costs of bringing a claim.

R (RSBB and ors) v Lord Chancellor [2017] EWHC 2309 (Admin): Ground 1

- NGOs argued that rules must provide certainty at outset – possibility of later variation of costs cap, when too late to do anything about it, would deter claimants. Part and parcel of costs not being prohibitive is that they should be "reasonably predictable".

- Government did not disagree with general thrust of this concern but argued that it did not require an absolute prohibition on later variation. Drew attention to CPR PD 23A 2.7 which provides that "every application should be made as soon as it becomes apparent that it is necessary". A defendant who does not comply with this may fail to achieve a variation – but that does not prevent a later application if circumstances change.

- As Dove J put it, "an application [to vary the cap] after the grant of permission could only be properly contemplated if there was good reason for making it"

R (RSBB and ors) v Lord Chancellor [2017] EWHC 2309 (Admin): Ground 1, conclusion

- Dove J held that the rules are lawful as made, but emphasised the importance of timeous applications to vary the costs caps.

> *39. … I accept the submissions made by Mr Maurici in relation to the consideration of any applications to vary the costs caps thereafter. If the application was made because the defendant had failed for whatever reason to engage with the question of whether or not the default levels of the costs caps were appropriate at the permission stage, then it would be too late for that issue to be raised subsequently in the absence of good reason. Such an application would not have been brought as soon as it became apparent that it was necessary or desirable to make it. It would additionally, in principle, be in breach of the EU principles which have been set out above.*
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> *40 It has to be accepted that there may be exceptions to this if either it is demonstrated that the claimant has provided false or misleading information in the schedule of financial resources, or there has been a material change in the claimant's financial resources which justifies a re-examination of the question of whether or not the default costs caps can be increased without the litigation becoming "prohibitively expensive". I can see no proper objection to CPR 45.44 applying in those circumstances.*

R (RSBB and ors) v Lord Chancellor [2017] EWHC 2309 (Admin): Ground 2

- As explained above the new rules require claimants to file a statement of financial resources with the claim to assert reliance on the Aarhus rules. This may be highly sensitive information from their perspective. The charities argued that putting this information in the public domain should not be the price of access to environmental justice.

- The government conceded that there was some merit in this complaint, and offered to bring forward changes to the rules which would clarify that hearings concerning such matters should ordinarily be held in private.

R (RSBB and ors) v Lord Chancellor [2017] EWHC 2309 (Admin): Ground 2, conclusion

Dove J said this was welcome but did not go far enough:

> *57 To summarise … I am satisfied that if a dispute in relation to the appropriate level of costs caps were to proceed to a hearing (as opposed to* [on paper]*) then the rules should provide for that hearing to be in private in the first instance. That is not simply for the same reasons that other analogous hearings identified in Practice Direction 39A are to be listed in the first instance in private to preserve confidentiality, but also because I am satisfied that the chilling effect which the prospect of the public disclosure of the financial information of the claimant and/or his or her financial supporters would have on the propensity to bring meritorious environmental claims would be in breach of the requirements to ensure wide access to justice set out in the CJEU jurisprudence set out above …The suggestion by the defendant that the form of financial information required could be in the form provided by Practice Direction CPR 46PD.10 does not obviate this. Thus, in my judgment Practice Direction 39PD para 1.5 requires amendment to include the first hearing in relation [to] disputes over the variation of cost caps in ACR cases. Whilst not strictly before the court, in the light of the arguments which have been raised in this case it would be clearly beneficial for specific definition to be provided as to the nature and content of the financial information required by CPR 45.42(1)(b) .*

R (RSBB and ors) v Lord Chancellor [2017] EWHC 2309 (Admin): Ground 3

In the event this point was common ground between the parties.

> *58 The claimant seeks a declaration that in undertaking the assessment of whether or not proceedings are "prohibitively expensive" the court may take into account the claimant's own costs in bringing the claim. The defendant accepts … the claimant's position, namely that the claimant's costs may be a material matter for the court to consider in determining any application for a variation of the costs caps. In my view that concession is properly made …*
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> *Thus all of the costs potentially involved in bringing a case, including a claimant's own costs, are matters which can properly be taken into account by the court in assessing whether the default costs caps are appropriate or not.*

The judge refused to grant relief on this point.

Subsequent rule changes

- The rules were subsequently amended in February 2018 to provide further clarity in relation to the issues raised under Ground 1 and Ground 2 of the claim.

- As to the financial information to be provided, this must now be a:

  schedule of the claimant's financial resources, which is verified by a statement of truth and provides details of—

  (i)the claimant's significant assets, liabilities, income and expenditure; and

  (ii)in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided."; and

- As to applications to vary the costs cap, by default an application by a defendant to vary the cap must be in the AOS (CPR 45.44(5)). CPR 45.44(6) provides for later applications only if it can be demonstrated that there has been a "significant change of circumstances".

Timing of neighbourhood plan challenges, *Oyston v Fylde BC*

- Section 61N of the TCPRA 1990 provides for challenges by way of judicial review to the various sequential procedural stages of decision making in relation to the promulgation of a Neighbourhood Plan. There are four such stages:
  - Examiner's report under Schedule 4B, para 10
  - Local authority action on examiner's report
  - Decision to hold a referendum
  - Making of NDP order following referendum

- Section 61 N provides for legal challenge to all but the first of these, brought within 6 weeks of the decision and with no ability to extend time.

- In *Oyston,* claimant brought challenge within 6 weeks of final decision to make NDP, but its grounds related to the legality of the earlier decision, following receipt of the examiner's report, to proceed with an NPD (including a refusal to follow certain of the examiner's recommendations).

- Kerr J held that the challenge was time barred.

Person aggrieved, *Norman v SSHCLG* [2018] EWHC 2910 (Admin)

- Section 288 TCPA challenge to an inspector decision allowing an appeal and granting planning permission for poultry buildings for 82,500 birds. Grounds of challenge related to environmental impacts of proposed buildings.

- Such issues had been raised by LPA and other objectors but claimant herself had not participated in appeal to inspector nor put in written representations. Claimant was however elected councillor and chair of local Green Party.

- Claim failed on substantive grounds in any event

Person aggrieved, *Norman v SSHCLG* [2018] EWHC 2910 (Admin) (2)

- Justine Thornton QC, sitting as a deputy, also held that claimant was not a person aggrieved:

  … participation in the planning process which led to the decision sought to be challenged is required. There are exceptions but the example Pill LJ relies on – a person misled by a planning advertisement - indicates that the failure to participate requires readily apparent justification.

- She continued:

  The Claimant lives 10 miles away from the development site. She does not have a private interest … . She did not participate in the appeal .... It was open to her to submit representations to the Inspector in a personal capacity but she chose not do so. Mr Goodman suggested her participation would have been superfluous because she would simply have been making the same case as the Council given her membership of the Planning Committee. Yet … the Claimant has wider reasons and experience to bring to the claim than simply her membership of the Council ... She is the chair of the North Herefordshire Green Party and has broader environmental concerns based on her experience. These are factors which the inspector might have found helpful to hear about but which were not put before him.

- Standing for judicial review was not the same thing, and not enough (para 61). The judge concluded:

  … the Claimant has simply stepped into the shoes of the Council and the neighbouring owners, who would be persons aggrieved, having participated in the appeal before the Inspector, but who have chosen, for whatever reason, not to challenge the inspector's decision. Whilst the Claimant may feel aggrieved about the inspector's decision, that does not make her a person aggrieved under the 1990 Act.