Strategy for Defendants: How to Dig Yourself Out of a Hole!

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Yes, really!

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BEFORE THE PAP (pre action protocol letter) ARRIVES

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- Have systems and policies in place to ensure good administrative decision making.
- Basics:
- (a) Provide reasons for decisions.
- (b) Have notes/records of why decisions were taken.
- (c) If something may be controversial, ensure that relevant factors have been taken into account
- (d) Make sure that individuals have recused themselves if there is possibility of bias.
- (e) Check the Equality act and HRA implications of decisions before they are made – do you need to do an EIA; is there a risk of a breach of the HRA by the decision which is taken?

BEFORE THE PAP ARRIVES

- Good relationships with the client: do they take your advice?
- Being sighted on difficult/problematic decisions – to get some advice.
- Obtaining relevant documents.
- Make sure that the clients are retaining and preserving documents

WHEN THE PAP ARRIVES

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- Make sure that the PAP arrives on your desk in good time (again, systems and policies) .
- Do you want to defend the decision?
- Issues to consider:
  - COST
  - ADMINISTRATIVE TIME
  - IMPORTANCE OF THE DECISION TO THE ORGANISATION
  - REPUTATIONAL RISK
  - IS IT RIGHT?

STRATEGY - ANSWERING THE PAP

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- Time: is it within three months or promptly?
- Alternative remedy: could it go to another appeal/review/body and can they make a decision which is as effective and expeditious?
- Mediation/discussion – is there scope for mediation/roundtable agreement?
- Is the PAP factually accurate?
- What is the defendant's case – you need to make sure that the PAP answers the claim as put or points out where it is legally wrong/incorrect.
- Can the decision be remade (can you do so or would you be acting outside your powers) ?
- Costs implications if PAP response is inadequate (M v Croydon)
- Respond within the time limit or ask for extra time

STRATEGY: ANSWERING THE PAP (2)

(1) Documents: make sure that you have or obtain the relevant documentation.

(2) Make sure you get instructions from the right client: within large organisations, often layers and silos of decisions – have you got the right person?

(3) Remind your client and yourself of the duty of candour: if it is relevant, it should be disclosed: embarrassment and unhappiness are not reasons for non disclosure: remember the reputational risk of not disclosing matters and the heavy duty on Defendants because of the lack of general disclosure in judicial review. Remember that this can extend to documents which may give rise to a ground of judicial review.

(4) Who makes the ultimate decision: make sure you have sign off from relevant Minister/Director if this is needed.

WRITING THE SUMMARY GROUNDS

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- 21 days for Summary Grounds (can apply for an extension)
- Keep it concise but set out your main legal arguments.
- If there is a knock out blow, put it first.
- Always put a summary as your first paragraph of any summary grounds setting out why permission should be refused.
- Attach evidence at this stage if it would lead to permission being refused.
- Attach relevant case law if required.
- Get it in on time: remember time limits .
- Seek any extension BEFORE time has expired: seek the consent of the other side.
- Would a stay to try and resolve matters work?
- Does the hearing need to be expedited?

Costs at Summary Grounds Stage

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- You need to apply for costs of defending the claim in the AOS (and identify how much has been spent)
- You will then get an order for costs in the order refusing permission (or a permission grant)
- If the Claimant renews to an oral hearing, then you can ask for the costs order to be affirmed (but can't claim costs of OPH – see Mount Cook)
- BUT – possible alternative; make clear in AOS that you won't seek costs at paper stage but will seek them if permission refused and there is a renewal to an OPH

DEALING WITH INTERIM RELIEF AND EMERGENCY CLAIMS

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- If the Claimant has used an expedited process, is this justified?
- If not justified, write to the Court and ask them not to make the order (as quickly as possible)
- If they seek interim relief, be prepared to draft brief reasons and provide evidence as to why it should not be granted.
- If it would be sensible to agree it, do so (so that there is not an order which there may be difficulties complying with then leading to contempt proceedings) .
- Make sure that the Defendant's voice is heard: phone the Court, ask to speak to the lawyer on the case and ask them to wait to get your representations.
- If you need to use an expedited process, make an application before filing the summary grounds if necessary, to do so.

PERMISSION STAGE – General Points

- Should permission be conceded?
- Should there be a rolled up hearing (advantages and disadvantages: advantage – one hearing rather than two: expeditious. Disadvantage: have to prepare for a full hearing , often quickly).
- Is there a knock out blow?
- If oral hearing – make sure skeleton filed at least seven days in advance (honoured mainly in the breach).
- Would evidence help?
- Hearing : does it need to be longer than 20 mins? Make sure agree and/or ask for longer hearing
- Using permission stage as a mini final hearing (can be advantageous for Defendant).
- What is arguable varies from judge to judge: from “This is not silly” to “The claim has good merits”

IF PERMISSION IS GRANTED

- STOP AND THINK
- (a) How much will this cost?
- (b) Can I do anything to resolve this outside court?
- (c) Should we now concede?
- (d) What are the cost implications of conceding?

DETAILED GROUNDS AND EVIDENCE

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- 35 days from grant of permission
- Evidence is crucial in judicial review: make sure that you get it.
- Defendant's evidence will be preferred to Claimant's evidence if there is a dispute of fact (unless application for cross examination is made)
- Create a table to cross reference their grounds and evidence, so that you can make sure you answer the points that they make.
- Start work on the evidence the day you get the permission order.
- Check and recheck the relevant documentation
- Consider again the duty of candour.
- The evidence ideally needs to be ready before the DGs can be drafted: factor this into your instructions to counsel.
- If time, con with counsel to consider merits before or just after filing DGs.

THE HEARING

- Who should be there?
- Getting instructions on the day (there is always a question asked which no-one knows the answer to).
- Filing skeleton in time.
- Late evidence.
- Short, sharp submissions
- Get to the point.
- Remember the ball is often in your court: JR is often for the Defendant to lose, rather than the Claimant to win.

THE HEARING

- Just as it is important to approach things from the perspective of the judge, so too it may be critical to approach it from the perspective of the other party, claimant or defendant.
- If you have not understood their case, your response to it will be superficial:
  - Claimants may see only the adverse effect on them, without really understanding why the decision was made
  - Defendants may fail to appreciate what it is in the claimant's case which will attract the judge's sympathy
- NB Critical benefit of experiencing acting for both sides in judicial review.

AFTER THE HEARING

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- Should you appeal?
- What will this cost?
- Could it make the situation worse?
- How could it make it better?
- Is there a point of principle?
- What happens in the meantime (given how long appeals can take).

Thank you for coming!

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Good news, drinks are next.

Carine Patry, Landmark Chambers

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