Landmark Chambers

Using the EIR in environmental judicial review proceedings

James Maurici QC

Introduction (1)

Landmark Chambers

- There are documents not publicly available which you believe may assist either:
  - (i) in assessing merits of an environmental JR claim; or
  - (ii) to support proposed claim.
- Will look at these issues:
  - How useful is the EIR to Cs in this scenario?
  - What other routes to obtaining documents are there in the JR proceedings?
  - How do EIR relate to such other routes?
  - What regime and tactics should a C use in seeking documents?
  - How should Ds/IPS deal with requests pre-action?

Introduction (2)

Landmark Chambers

- Structure:

- (1) What are the routes to obtain documents in a proposed JR:
  - Disclosure applications;
  - Duty of Candour;
  - Pre-Action Protocol requests for documents
- (2) EIR as an alternative or additional route: the pros and cons vs JR;
- (3) Interaction issues: EIR and JR;
- (4) Tactics for Cs and Ds
- (5) JRs aimed solely at obtaining documents.

JR routes (1): Disclosure (1)

- CPR rules on disclosure of documents do not apply to JR, see Part 54A PD para. 12.1 "*Disclosure is not required unless the court orders otherwise*";

- The Court may though "*exceptionally*" order disclosure: see ***Tweed v Parades Commission for Northern Ireland*** [2007] 1 AC 650 ("***Tweed***") and the Administrative Court Judicial Review Guide (July 2018, Administrative Court Office) ("the Judicial Review Guide") at para 6.5.1.

- So an application can be made in a JR for disclosure of specific documents or documents of a particular type and Court may (under CPR 31.12(1)) order disclosure where this is necessary to deal fairly and justly with a particular. But such orders remain "*rare*".

JR routes (1): Disclosure (2)

- Specific disclosure can be sought, and ordered, pre-action in JR but such applications very, very rarely successful in JR, see e.g. ***BUAV v SSHD*** [2014] EWHC 43 (Admin) and ***K v SSD*** [2014] EWHC 4343 (Admin);
- In ***BUAV*** it was said there are no examples of successful applications, but soon after …
- ***R. (National Association of Probation Officers) v SSJ*** [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.
- Indeed generally, the right time for specific disclosure applications by C in a JR seen to be post- D's DGR and evidence.

JR routes (1): Disclosure (3)

- Specific disclosure when sought in JR can be refused if:
  - A) The Court considers it not necessary for fair and just resolution of proceedings - something that will be judged against: (i) the particular issues raised; (ii) the extent of disclosure already made, or (if application pre D's DGR/evidence) the disclosure likely to be made, by D in its evidence; and (iii) the desire of the Courts to avoid "*fishing expeditions*";
  - B) Volume of material is too great: see ***Tweed*** at paras. 4, 33 and 37: no examples;
  - C) Confidentiality: see **Tweed** at paras. 33, 37 and 57, and see also ***R (Perry) v Hackney*** [2014] 1721 (Admin) refusing disclosure of developer's financial viability assessment;
  - D) Public Interest Immunity: see ***Tweed*** at paras. 5, 25, 33, 41 and ***R(A) v Chief Constable of B Constabulary*** [2013] EWHC 4120 (Admin);
  - E) Legal professional privilege: ***Richborough Estates v SSCLG*** (2017, unreported) challenge to WMS changing planning policy – Gilbart J. refusing disclosure of advice to minister on need for consultation and other legal advice.

(2) Duty of Candour ("DoC") (1)

- One reason why disclosure rarely ordered is said to be that compliance by D with DofC means generally no need for orders for disclosure.
- ***What is it?***
  - **NB: DofC not the same as disclosure of documents** – see below;
  - (1) ***Huddleston***: "*explain fully what they have done and why they have done it"* and not be "*partisan in their own defence*";
  - (2) ***Tweed*** per Lord Carswell at para. 31 "*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*";
  - (3) ***R (Quark) v Secretary of State for FCO*** [2002] EWCA Civ 1409 per Laws LJ at para. 50 "*assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide*."
  - (4) ***R (Al-Sweady) v Secretary of State for Defence*** *[2010] HRLR 2 "a very high duty"*;

(2) DoC (2)

Landmark Chambers

- **Key issue here does the DoC apply at the pre-action stage?**
  - (1) Guidance on discharging the duty of candour and disclosure in judicial review proceedings (January 2010, Treasury Solicitor) ("the T Sols guidance"): "*the duty of candour applies 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 written and oral submissions*."
  - (2) De Smith's *Judicial Review* (8th ed) para. 16.027 *"The duty arises as soon as the public authority becomes aware that's someone is likely to challenge a decision affecting them …".*

(2) DoC (3)

Landmark Chambers

- (3) *Defendant's duty of candour and disclosure in judicial review proceedings a discussion paper* (28 April 2016, Lord Chief Justice – written by Cranston and Lewis JJ) – recommendations for changes to CPR Part 54 not yet actioned ("the LCJ Discussion Paper"): reviews the current law, rejects view DoC should apply at pre-action stage, indeed says better view is that DoC does not apply pre-permission being granted.
- (4) **PLUS:** even if does apply pre-action - the LCJ Discussion Paper also says it is doubtful (see para 19) that the DoC requires disclosure of documents as opposed to identification of relevant facts and the reasoning process. Disclosure of documents as part of DoC is voluntary. See also ***R. (Sustainable Development Capital LLP) v Secretary of State for BEIS*** [2017] EWHC 771 (Admin) per Lewis J. But *contra* ***Tweed*** para 4 – the best evidence rule, and see ***R. (National Association of Health Stores) v SSH*** [2005] EWCA Civ 154

(2) DoC (4)

Landmark Chambers

- The LCJ discussion paper concluded in making its recommendations (see para. 19):
  - " … *the better approach at present is to express the content of the duty of candour simply by reference to the wording of existing case law dealing with the identification of relevant facts and the reasoning process".*
  - *"That would leave 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 necessarily for fairly dealing with an issue, that can be dealt with by means of an application for specific disclosure".*
  - *"We would not, at present, consider it appropriate to particularise (and in our view, extend) the scope of the duty of candour on a defendant by incorporating specific disclosure obligations into the Practice Direction*."
- So on current law whatever DoC requires, and whether it applies at pre-action stage or not, not necessarily a route to getting actual documents.

(2) DoC (5)

Landmark Chambers

- **<u>Does DoC apply to I/Ps?</u>**
- Privy Council in ***Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment*** [2004] Env. L.R. 38 suggested same duties as a D in JR.
  - JR of decision by DoE in Belize to build dam; co-respondent was independent private company Belize Electricity Company Limited ("BECOL"), which was going to construct the dam pursuant to a franchise agreement with the Belize Government.
  - Lord Walker said "*there is a very close identity of interest between these parties. They are in effect partners in an important public works project … its most important consequence is that BECOL was also, in my opinion, under a duty to make candid disclosure to the court*"
  - PC critical re non-disclosures by the Belize Government and BECOL.

(2) DoC (6)

Landmark Chambers

- Not much consideration of DofC applicable to I/Ps in English case-law, and not mentioned in LCJ discussion paper and recommendations.
- Is reasoning on DofC in ***Belize*** case limited to I/Ps in close partnership with a public authority as BECOL were? Probably not. Just a clear example of where DofC on I/P.
- I/Ps will often have information relevant to a JR claim, so an I/P developer may have information which is of assistance to someone challenging a grant of planning permission, and also challenges to procurement decisions where the winning party may possess information that would assist the losing party who is seeking JR.
- If I/P plays active role e.g. pleadings and evidence – then DofC probably applies.
- But what if I/P chooses not to play active role? Plus I/P not in same position re: costs – will not normally recover even if successful, so faces a possible unfair burden of DofC but no costs recovery.
- **NB unless I/P a "public authority" under EIR then this not an alternative …**

(3) Pre-Action Protocol for Judicial Review Requests for information and documents (1)

Landmark Chambers

NB this Protocol applicable to all JR claims (emphases added):

*"**Requests for information and documents at the pre-action stage***

13. 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. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided relevant documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions."

(3) Pre-Action Protocol for Judicial Review Requests for information and documents (2)

Landmark Chambers

- Look at this closely – 4 elements:
- (1) Cs may request documents pre-action but need to be: (i) proportionate; and (ii) "*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*";
- (2) If request meets those requirements D should comply unless "*good reason"* not to;
- (3) If D fails to so provide then costs sanctions may be applied and this "*particularly"* so "*where this failure is a breach of a statutory or common law requirement*". What does this mean?
  - A. Statutory requirement: EIR, FOIA or Data Protection Act?
  - B. common law? DoC – probably not, or ***Kennedy v Charity Commission*** [2015] AC 455 extending the common law principles of open justice;

EIR: the benefits vs seeking disclosure in JR proceedings (1)

Landmark Chambers

- (i) no relevance test – see above;
- (ii) can request from non-parties as well as parties and at any stage inc. pre-action;
- (iii) burden on authority to justify non-disclosure;
- (iv) no *inter partes* costs regime (albeit there are charges and costs limits – see below);
- (v) no restrictions on subsequent use;
- (vi) where documents said to be confidential/ or subject to LPP this regime more willing to consider disclosure see e.g. on LPP: explore this further …

EIR: the benefits vs seeking disclosure in JR proceedings (2)

- (1) LPP:
  - No express reference to LLP in EIR.
  - Under EIR arises under reg. 12(5)(b): disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
  - The qualified nature of the exception acknowledges that there will be circumstances in which material subject to LPP must be disclosed. Public interest balancing test applies. Albeit rare for disclosure to be ordered. As ICO says "*There is a strong public interest in ensuring that the EIR do not undermine other legal procedures that govern access to court records and information held for inquiries, such as the Civil Procedure Rules and Criminal Procedure Rules"*.
  - Disclosure most commonly ordered where advice *"stale"*.
  - In JR proceedings disclosure of LPP materials ever ordered?

EIR: the benefits vs seeking disclosure in JR proceedings (3)

- (2) Confidentiality, example of different approach, viability assessments in planning/CPO:
  - (a) String of authority vs disclosure in JR:
    - ***R (Bedford) v LB Islington and Arsenal FC*** [2002] EWHC 2044 (Admin);
    - ***R (Perry) v Hackney LBC*** [2014] EWHC 3499 (Admin);
  - (b) EIR:
    - Reg. 12(5)(e) *"disclosure would adversely affect - … the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*" – subject to public interest test;
    - ICO and Tribunal seems more willing than Courts to challenge confidentiality assertions and order at least some disclosure: see LB Southwark (FS5058692, 25 April 2016) and ***Greenwich v Information Commissioner*** EA/2014/0122;
    - But not always: see London Borough of Hackney (FS50538429; 1 April 2015), ICO upholds nondisclosure of information subject of ***Perry*** case.
    - And timing: Courts quicker so looking at information when fresher, and confidentiality issues more acute, not years later ….

EIR vs JR: the downsides (1)

- (1) Costs limits: in a complex case very quickly met;
- (2) And the big one: **DELAY**

- Planning Act JR or procurement: 6 week time limit;

- Environmental JRs (where EU law involved): 3 months – see ***Berky v Newport v Newport City Council*** [2012] 2 C.M.L.R. 44;

- Environmental JR (non-EU law): promptly and in any event 3 months;

- These are all tight time-scales …, some tighter than others

EIR vs JR: the downsides (2)

- (1) Time limit for compliance "*as soon as possible and no later than 20 working days after the date of the receipt of the request*": EIR reg 5(2).
- (2) Where a public authority reasonably believes that the complexity or volume of information requested makes it impracticable to deal with a request, it may award itself a further 20 working days within which to deal with the request: EIR reg 7(1).
- (3) If refused: internal review, EIR reg. 11: The authority must notify the requester of the outcome of the internal review as soon as possible and no later than 40 working days after receiving the complaint.
- (4) Only then complain to the ICO, and then the trouble really begins as ICO notoriously slow …
  - https://www.whatdotheyknow.com/request/time_to_process_complaints
  - Average time to deal with EIR complaints: 157 days in 2009
- (6) Then appeals to Tribunal … And Courts … Tribunal very slow …

Interaction issues

- (1) ICO advice https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/receiving-a-request/ - no need to mention EIR in request, if receive a request for "*environmental information*" (very widely defined) need to consider if should be dealt with under EIR Regulations.
  - If request is specifically said to be under EIR then clearly should be so deal with unless good reason not to (e.g. not environmental information);
  - But not every request needs to be so treated.
- (2) In a pre-action protocol letter often clear request not being made under EIR but under the Protocol itself:
  - Wrong for a public authority to respond by saying will treat as EIR request.
  - DO NOT DO IT!
- (3) Should EIR be amended to have a quicker response time if being requested for JR purposes? A fast-track?

Tactics for Claimants

- (i) Request in letter before claim and make clear request is under the protocol not EIR (and make a separate request under EIR);
- (ii) NB "*Requests … 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*".
  - Be focussed, otherwise too easy to bat it off.
- (ii) Make a separate request under EIR: why?
  - May be too slow to be useful but may not …
  - Scope different to request in proceedings – results may be different …
  - Different personnel – often no connection to litigation … can get different results … see App 2 to judgment in ***R (Shoesmith) v Ofsted & Others*** [2010] EWHC 852 (Admin) at para. 8.

Tactics for Defendants

- (i) Set up systems to co-ordinate litigation team and EIR team;
- (ii) If pre-action protocol request disproportionate – then no need to respond at pre-action stage – end of the matter …
- (iii) If a focused pre-action request then should carefully consider if any basis for withholding – a good reason for withholding at this stage: relevance, confidentiality, LPP etc. and if not provide;
- (iv) If ignore: costs sanctions risk;
- (v) Keep position re DoC under review throughout proceedings.

One other issue: using JR to get information

Landmark Chambers

- Can you use JR to get documents, e.g. request documents, and if refused JR that decision and seek mandatory order.
- Problem is alternative remedies under EIR/FPIA regimes, see:
  - ***R (Hardy) v Milford Haven Port Authority*** [2008] J.P.L. 702 and [2007] EWCA Civ 1403 – FOIA/EIR alternatives remedies.
  - ***R (Lord) v SSHD*** [2003] EWHC 2073 (Admin) – DPA as alternative remedy.
- But seemingly encouraged by SC in ***Kennedy*** (see above): see e.g. paras. 8, 56, 132, 136, 197 and 199.
- But of course no use bringing JR to get a document to assist with a possible JR, by the time JR resolved re the document request, time for the JR on the substantive matter will have long gone …

Thank you for listening

Landmark Chambers
Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)

London
+44 (0) 20 7430 1221

Birmingham
+44 (0) 121 752 0800

Contact
clerks@landmarkchambers.co.uk

www.landmarkchambers.co.uk
@Landmark_LC