Landmark Chambers

Practice and Procedure Update

James Maurici QC

Monday 30th November 2020

Introduction

Landmark Chambers

Look at cases and other practice points since November 2019 …

1. Alternative remedy;
2. Time limits;
3. Standing;
4. Discontinuance;
5. Listing in the Planning Court;
6. Costs;
7. Relief;
8. Other.

(ii) Alternative remedies

- 2 cases:
  - (1) ***QM Developments (UK) Ltd v Warrington BC*** [2020] EWHC 1511 (Admin); and
  - (2) ***T&P Real Estate Ltd v Sutton LBC*** [2020] EWHC 879 (Ch).

(i) Alternative remedies

- (1) ***QM:***
  - **FACTS**: C obtained a PP for proposed residential development, subject to pre-commencement conditions on remediation work being met as there was a concern re: contaminated land.
  - C built two dwellings on the site, one of which was sold to a couple.
  - The couple commenced a civil action against the C contending that it had failed to discharge the remediation work condition which meant their property could not be resold;
  - C applied for a certificate of lawfulness of existing use or development ("CLEUD") for the property under s. 191 of 1990 Act - LPA failed to issue a decision within the statutory time limits, so C appealed under s.195(1)(b) of the against non-determination. That appeal before PINS and was still awaiting determination.
  - C submitted a second application for a certificate, which the LPA issued with an informative that the remediation work condition had not been fully discharged.
  - C sought JR of that second decision.

(i) Alternative remedies

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- C argued that although the appeal pending before PINS provided it with an alternative remedy:
  - (i) there were exceptional circumstances because only JR could determine whether the informative had a lawful basis, and
  - (ii) the civil action commenced by the couple was incapable of dealing with the complex issues of planning law which were for the Planning Court to resolve.
- Dove J. rejected this:
- C did have alternative remedies available and there were no exceptional circumstances to justify the court considering the application for JR:
- Two points made …

(i) Alternative remedies

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- **(1) S.195 of the 1990 Act contemplated a remedy which should enable a C to obtain the certificate in the terms it considered appropriate through an appeal process where the LPA had reached no decision on the application.**
- Whilst under s.195(1)(a) the opportunity to appeal only arose where an application was refused in full or in part (not if granted but with an informative), s.195(1)(b) provided an appeal against non-determination, and it was that opportunity that the C had taken up in respect of the first application for a certificate and which was still awaiting decision by PINS.
- That would be a full determination on the merits and was clearly an alternative to the application for JR.
- Moreover, the appeal would be determined by one of PINS specialist inspectors, experienced in dealing with enforcement and appeals in relation to certificate applications.

(i) Alternative remedies

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- The framework of the legislation provided the opportunity for legal questions of the kind raised by C to be determined on appeal by an inspector, along with any associated factual disputes, subject only to supervisory jurisdiction by the court in respect of errors of law.
- There was no justification for bypassing the mechanisms in the statutory framework for determining questions of the kind raised in the application by permitting them to be raised in the context of a JR.
- **(2) The civil litigation between C and the purchasers involved whether parts of the condition remained to be discharged.**
- That question was an issue which the court considering the civil dispute was seised.
- There was no reason why that court was unable or lacked the expertise to resolve that dispute. Therefore, it would be inappropriate for the court to entertain the application for JR.

(i) Alternative remedies

- (2) ***T&P***
- Developer was refused prior approval to change an office building into residential property based on the interpretation of a local authority's direction under the Town and Country Planning (General Permitted Development) (England) Order 2015 art.4 that removed permitted development rights.
- Developer brought CPR Pt 8 proceedings to challenge the refusal.
- Held: the interpretation of the direction was quintessentially an issue of public law, to be challenged via an appeal to PINS.

(ii) Time limits

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- ***South Derbyshire DC v Secretary of State for HCLG*** [2020] EWHC 872 (Admin) [2020] P.T.S.R. 1120:
- Inspector's decision dated 9 October 2019.
- 6 week period for seeking leave to challenge that decision under the 1990 Act, s.288(4B) expired on 20 November.
- Claim including the application for permission, was filed and issued at court on 15 November and posted on 19 November to GLD.
- The local authority had relied on the address for service listed in the hard copy of The White Book 2019.
- The GLD had in fact moved offices in September 2019, but at the time of posting, the hard copy of the White Book did not list the updated address.
- Although the claim form was automatically redirected to the new address, it did not arrive until 21 November 2019.

(ii) Time limits

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- Preliminary issue was the application made within the 6 weeks, as required by s . 288.
- Previous case-law supported view that it had been (making meant issuing not serving – service required by rules not Act and could be extended)
- Issue raised was had the CPR and the Court of Appeal decision in ***Croke*** [2019] PTSR 1406 changes this?
- Held: it did not.
- Service not part of making the application, that instead provided for by CPR PD 8C.
- Power under CPR to extend time.
- ***Croke*** was not about service; nothing in ***Croke*** suggests no power to extend time.
- In terms of non-compliance with service rules: (i) rules couched in mandatory terms; (ii) intend certainty within 6 weeks as to whether claim made; (iii) here LA made reasonable attempts to serve as relied on address in White Book; (iv) short delay caused no prejudice, extension granted.

(iii) Standing

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- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] 1 W.L.R. 2355
- Issue:
- Does an unincorporated association have capacity to bring a challenge under s. 113 of the 2004 Act to adopt a site allocation plan?
- Forum was designated as a neighbourhood forum under the 1990 Act, s.61F with objectives which included the good planning of the neighbourhood. The designation had expired and its renewal remained pending.
- Argued not “person” aggrieved under s. 113.
- In many cases it had been assumed an unincorporated association could be a C in a JR.
- There was an issue as to such an association could be a C in a statutory review in ***Williams*** [2015] LGR 624 and it was held they could.
- Wider policy led to more flexible approach to standing esp. in planning and environment cases where impact might fall on a group.

(iv) Discontinuance

- ***Westminster City Council v SSHCLG*** [2020] J.P.L. 1162
- FACTS: 2 s. 288 claims brought by the LPA as C
- Substantive hearing of the claim was listed for 5 March 2020.
- On 12 February, C sent a draft consent order with a view to settlement. This did not refer to payment of the S/S's costs, which the C was required to pay in accordance with CPR Pt 38.
- The court was not notified of the intention to settle until 26 February.
- The court directed that a draft order be filed by 28 February explaining the lateness of the settlement, the failure to apply for an extension of time, the delay in sending the consent order to the court and the reasons for C's failure to comply with directions that had been given as to the filing of trial bundles and skeleton arguments.
- C submitted a draft consent order which provided for the discontinuance of both claims, the vacation of the hearing date and, in that version, payment of the S/S's costs.
- No explanation was provided for the procedural failures.
- The matter remained listed for 5 March to allow the parties to explain the reasons for the lateness of the settlement.

(iv) Discontinuance

- HELD by Holgate J.
- (i) Delay in notification of Court
- (1) The parties were obliged to inform the court as soon as possible after becoming aware that a case was likely to settle;
- (ii) The court's ability to deal with its caseload in accordance with the targets in CPR PD 54E depended upon all parties taking a realistic view of their prospects of success. Settlements which occurred at a late stage for no good reason undermined the efficient running of the court in the interest of all users;
- The Administrative Court Judicial Review Guide 2019 para.12.2.1 set out good practice to be followed by parties in order to comply with their duty to help the court and further the overriding objective in CPR r.1.1.

(iv) Discontinuance

- <u>(ii) Obtaining approval for a consent order:</u>
- Para. 17 of CPR PD 54A set out procedure for obtaining court's approval of a consent order for the disposal of a case.
- The draft legal statement needed to be clear, correct and adequately reasoned. The statement contained in the order might affect the subsequent re-examination of the case by the local planning authority or secretary of state. It might also affect the application of the doctrines of issue estoppel and abuse of process.
- Therefore, the parties had to have a reasonable opportunity to agree the terms of the order and the statement of the legal basis upon which relief was sought and for a judge to consider approving that order. That should be done sufficiently far in advance of any fixed substantive hearing to allow for redeployment of the court's resources.
- A claimant should be reviewing the claim from at least the service of detailed grounds of resistance and any evidence in support to see whether that material affected the assessment of the merits.

(iv) Discontinuance

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- The fact that the parties were discussing the terms of a draft order did not justify a failure to notify the court of a potential settlement; nor should an imminent fixture be retained so as to act as leverage in the discussions. The waste of a fixture delayed access to justice for other users
- Sanctions: court could award costs to mark disapproval;
- Other matters: CPR r.2.11 allowed for time limits to be varied by agreement of the parties. The time limits set by the procedural directions for a trial bundle and skeleton arguments did not exclude or modify the application of r.2.11; however, that was always subject to the parties' obligation to assist the court in furthering the overriding objective;
- Accordingly, agreed extensions of time should not imperil a future hearing date or otherwise disrupt the conduct of the litigation.

Discontinuance and costs

- In the ***M v Croydon*** [2012] 1 WLR 2607 type cases the JR is withdrawn/settled by a consent order but costs not agreed;
- If the C *instead* discontinues different CPR r.38.6 provides *"Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant*."
- For a review of relevant principles see ***Khan v Governor of Mount Prison*** [2020] EWHC 1367 (Admin) include:
  - (1) the burden is on the C to show a good reason for departing from the presumption;
  - (2) the fact that the C would or might well have succeeded at trial is not in itself a sufficient reason for doing so

(v) Listing in the Planning Court

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- 23 September 2020:

"Reminder from the Planning Court to

PEBA Members

Fixing Dates in the Planning Court

Mr Justice Holgate has requested that barristers and their clerks should seek to be much more flexible when fixing dates with the Planning Court.

In the interests of efficient administration and to avoid unnecessary delay, the Court requests that every effort be made to be available for dates suggested by the listing staff.

Your co-operation is appreciated."

(vi) Costs

- 3 cases on Aarhus:
  - (1) ***R (Kent) v Teeside Magistrates Court*** [2020] EWHC 304 (Admin);
  - (2) ***Bertoncini v LB of Hammersmith & Fulham*** [2020] 6 WLUK 174;
  - (3) ***Abbotskerswell Parish Council v SSHCLG***

- NB ***CPRE v SSHCLG*** [2019] EWCA Civ 1230 on multiple parties and Aarhus costs being heard by Supreme Court in January 2021.

(1) *Kent*

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- IP, but not ultimately D, challenged entitlement of C to Aarhus costs protection, and following a hearing Court held it was an Aarhus Convention claim.
- D had in summary grounds disputed claim was Aarhus claim but then adopted neutral stance. IP continued with the point and loses.
- C sought costs of hearing vs IP
- Court held:
- (i) It had jurisdiction to award costs vs an IP notwithstanding that CPR 45.45(3) referred only to a D (followed CPRE on this);
- (ii) The starting point is CPR 44.45(3)(b) is that if the court holds that the claim is an Aarhus Convention claim, the C will normally recover its costs;
- (iii) awarded costs of £24,000 plus VAT (!?!) as the issues raised were unusual and required a large amount of research and preparation.

(2) *Bertoncini*

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- On a paper refusal of permission D argued that the cap (and hence the C's potential costs liability) should be increased from the default £5,000 to £10,000, whereas the IP argued that it should be increased to £20,000.
- On the papers, Judge increased the cap to £20,000 and ordered the C to pay costs totalling £14,991 (of which £10,000 were to be paid to the IP).
- C renewed her permission application to an oral hearing.
- A point of jurisdiction arose, namely whether an IP has standing to apply for a variation to an Aarhus Convention costs cap as there is no express provision to that effect in the CPR.
- HHJ Bird concluded that an IP does have standing to apply for a variation.
- He maintained the cap at £20,000, and ordered the C to pay costs totalling £16,991 (of which £12,000 are to be paid to the IP).

(3) *Abbotskerswell Parish Council v SSHCLG*

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- There is currently an ongoing controversy as to whether the £35,000 Aarhus cap is inclusive or exclusive of VAT.
- Dove J. in an ex tempore judgement held that the cap was exclusive of VAT, applying the approach of Rabinder Singh QC (as he then was) in ***R (Warley) v. Wealden DC*** [2011] EWHC 2083 (Admin).
- S/S considering whether to appeal that decision …

Costs: settlement and IPs

- ***R (Easter) v Mid-Suffolk DC*** [2020] EWCA Civ 1378
- JR by C of PP granted to neighbour, N.
- Shortly before AoS deadline LPA indicated would consent, neither LPA nor N filed AoS and a consent order was under discussion.
- Court order refused permission. C renews.
- N decides to defend and on 5/2/20 makes application to file AoS out of time.
- At oral hearing C granted permission, and given leave to amend claim.
- Consent order agreed with costs to be dealt with in writing.
- Judge on papers says LPA pay costs to 5/2/20 and N pays costs thereafter.
- N appeals

Costs: settlement and IPs

- CA hold:

- (1) confirm ability of Court to decide such matters on the papers, relying on CPR 54.1(2)(a) and 40(6);
- (2) Discretion on costs broad, CA should not substitute its judgment, apply, ***R. (Parveen) v Redbridge LBC*** [2020] EWCA Civ 194;
- (3) Judge entitled to find N had from filing of AoS taken on burden of defending the claim, awarding all costs after that date accorded with “broad justice” even if some of those costs not required by actions of N.

(vii) Relief

- (1) ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 2183 (Admin)
- Court finds errors of law in process leading to adoption of Leeds Site Allocation Plan.
- Issue should Court quash under s. 113(7)(a) or remit under s. 113(7)(b).
- S. 113 widened powers of the Court; gave flexibility to decide relief depending on (i) nature of unlawfulness (ii) stage error occurred at; and (iii) expends and delay caused.
- Errors: fundamental, could not be cured by more reasons.
- Remit, take process back to stage where error occurred.
- Remitted all policies on GB allocations of housing.
- No reason why need different inspectors.

(vii) Relief

- (2) ***R. (Plan B Earth) v Secretary of State for Transport*** [2020] EWCA Civ 214
- Airports NPS unlawful for failure to have regard to Paris Agreement (under appeal);
- Court declined to quash;
- CA declared the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provisions, including the provisions of sections 6, 7 and 9 of the Planning Act.
- Also refused to make a mandatory order requiring the Secretary of State to undertake a section 6 review, bearing in mind that the Secretary of State has a discretion under section 6(1) to decide to undertake a review "*whenever [he] thinks it appropriate to do so*". But no effect unless reviewed.

(viii) Other

- (1) Setting aside orders on the papers
- Orders (other than on permission) made without a hearing and without all of the parties having explicitly confirmed their consent to the matter being dealt with without an oral hearing;
- Such orders are within CPR 23.8(c) and CPR 23A paragraph 11.2 such that it is to be treated as an application made on the court's own initiative – even if applicant/party seeking to set aside itself asked for paper decision;
- So if don't like order not an appeal; rather an application to set aside, vary or stay that order can be made under CPR rule 3.3(5);
- See ***Collier v Williams*** [2006] 1 WLR 1945 at [32]-[34] and has been followed in a number of cases including ***R (Nolson) v Stevenage BC*** [2020] EWCA Civ 379 at [16] – 18].

(vii) Other

- ***R (Kuznetsov) v Camden LBC*** [2019[EWHC 3910 (Admin)
- Costs order made on papers, application to set aside;
- What is the test to be applied?
- Mostyn J. held that the test was *"the court should give due weight to the decision of the judge who dealt with the matter without a hearing and should be able to identify a good reason for disagreeing with his or her decision"* [24];
- But case-law holding applications to set aside such orders by way of rehearing not review: see e.g. ***Al-Zahra (Pvt) Hospital v DDM*** [2019] EWCA Civ 1103. So can Mostyn J. be correct?

(vii) Other

- <u>(2) Amending grounds</u>
- (1) ***Keep Bourne End Green v Buckinghamshire CC*** [2020] EWHC Admin 1984 Holgate J.: *"11th hour" application to amend the Statement of Facts and Grounds …" " "Because this new point is not arguable, it would be inappropriate for me to give permission for the amendment to be made, quite apart from the lateness of the application"*
- (2) Recent decision of Lang J. on challenge to a tall building in Birmingham CC. Amendment allowed to add ground as not made last minute, made more than 7 days before hearing. NB lateness to do with objections on which it was based not being loaded on to website by Council.

Thank you for listening

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