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Aarhus update

James Maurici Q.C.

Introduction

- **<u>Cover recent developments (last year)</u>:**

- (1) Domestic costs cases concerning Aarhus;
- (2) Aarhus in domestic cases beyond costs;
- (3) Recent ACCC findings in several UK communications: C90, 131 and 142;
- (4) Other UK ACC cases in the pipeline: C150 and 156.

Status

- Save to extent incorporated into our law via:
  - (i) CPR in relation to costs and interim relief;
  - (ii) Any retained EU law;

  … the Aarhus Convention has the status of unincorporated treaty, and so not binding in domestic law: see ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] EWCA Civ 107
- Similarly, ACC findings not binding – see below
- Been said (by Lord Carnwath in ***Walton***) that ACCC findings deserve great respect; do they?
- Nature of ACCC and its findings;
- Processes for endorsement of findings by Meeting of the Parties.

(1) Domestic costs cases

- (1) ***R (Friends of the Earth Ltd) v Secretary of State for Transport*** [2021] PTSR 941: CA, short but important point: the capped costs recoverable from a claimant or a defendant specified in CPR r 45.431 in an Aarhus Convention claim as defined in CPR r 45.41 are, consistently with that Convention, absolute and unqualified figures and so fall to be treated as inclusive of VAT (and see also **R (CARA) v North Devon DC** [2021] EWHC 703 (Admin))
- (2) ***CPRE Kent v Secretary of State for Communities and Local Government*** [2021] 1 WLR 4168: SC, some limited discussion of Aarhus in the context of affirming the ***Mount Cook*** approach to multiple sets of costs at the permission stage.

(1) Domestic costs cases

- (3) ***R (Danning) v Sedgemoor DC*** [2021] EWHC 1649 (Admin) a challenge to a PP for converting a pub to residential, Steyn J. records "*HHJ Jarman QC rejected the claimant's contention that the claim is an Aarhus Convention claim and the claimant has not sought to renew that aspect of his claim*".
  - On what basis? Judgment does not say …
  - My experience is post ***Venn v Secretary of State for Communities and Local Government*** [2015] 1 W.L.R. 2328 (per Sullivan LJ "*since administrative matters likely to affect "the state of the land" are classed as "environmental" under Aarhus the definition of "environmental" in* ***the Convention is arguably broad enough to catch most, if not all, planning matters****. The judge's conclusion that environmental matters are given a broad meaning in Aarhus (see para 15 of the judgment) is supported by the decision of the Court of Justice of the European Union ("CJEU") in … Case C-240/09… [2012] QB 606 …* ***the Brown Bear case …****")* difficult to argue any planning challenge not covered by Aarhus.

(1) Domestic costs cases

- (4) ***Wingfield v Canterbury CC*** [2020] EWCA Civ 1588:
  - Applications under CPR 52.30(1) to re-open orders refusing permission to appeal in two planning JRs;
  - NB opening para. of the judgment "*The question raised by these renewed applications, put at its simplest, is this: when must an unsuccessful litigant accept "No" for an answer?"* … ouch!
  - In those JRs the C had Aarhus costs protection
  - CA said "*Unmeritorious applications under CPR 52.30 are inimical to that endeavour, repeated unmeritorious applications even more so. Not only do they undermine the principle of finality in legal proceedings. They also impose an unnecessary burden on the court's resources, impede access to justice for litigants in other proceedings, including those with the benefit of costs protection in Aarhus Convention claims, and are damaging to the rule of law itself*".
  - This raises a wider issue: given caps – how can costs be used to enforce discipline in proceedings? Wasted costs orders? Touched on in CMCs in Heathrow litigation.

(2) Other domestic cases

- ***Heathrow Airport v ICO*** Appeal Number: EA/2020/0101
  - ICO finds that Heathrow is a “public authority” for the purposes of the EIR;
  - First-tier Tribunal overturns that decision;
  - Extensive consideration of ***Fish Legal***;
  - The legal analysis takes on board the Aarhus Convention background.

(3) Case C-90: findings

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Case 1: ACCC/C/2013/90 (adopted 26/7/2021)

- NI case, a company expanded its concrete production plant without PP and in close proximity to the River Faughan SAC. The development included a settlement lagoon for contaminated materials within the floodplain;
- Some enforcement action, and company applied for retrospective PP, and eventually granted;
- The communicant ("C") JRd the PP and lost, costs award vs C was limited to £5,000 by the Costs Protection (Aarhus Convention) Regs 2013 but own costs were c £160,000
- Took matter to ACCC

(3) Case C-90: findings

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- (1) Any activity covered by Article 6 of the Convention (essentially EIA development) cannot be permitted after commenced "*save in highly exceptional cases and subject to strict and defined criteria*"
  - Seems to go further than CJEU case-law on retrospective EIA consent: see Case C-215/06 ***Commission v Ireland*** [2008] ECR I-4911 and the CA in ***R. (Ardagh Glass Ltd) v Chester City Council*** [2011] P.T.S.R. 1498 – how much further?
- (2) Such development cannot become immune from enforcement or be subject of lawful development certificate:
  - Goes further than CJEU caselaw: ***Commission v United Kingdom*** (Case C-98/04) [2006] ECR I-4003, ECJ;
  - Contrary to CA in ***R (Evans) v Basingstoke*** [2014] 1 W.L.R. 2034

(3) Case C-90: findings

- (3) Breach of standard of review because High Court did not itself consider if Schedule 3 EIA criteria met rather than relying on evidence that the public authority had properly screened … NB do also say though Convention does not require "*a completely fresh analysis*" … ?!
- (4) Breach of Aarhus Convention that developers have right of appeal but not third parties (NB this contrary to earlier findings in ACCC/C/2010/455 and ACCC/C/2011/60) no recommendation though pending ACCC/C/2-17/156 re standard of review in JR – see below …
- (5) The £160k own costs not a breach as although high – no evidence how could have mitigated e.g. CFA, one counsel not two.

(3) Case C131

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Case 2: ACCC/C/2015/131 (adopted 26/7/2021)

- PP for redevelopment of a former hospital site in LB of Merton;
- Negative screening opinion not uploaded on to online planning register;
- Ombudsman complaints – some success;
- Discharges of conditions under PP, said to require screening, C JRd, certified TWM and costs awarded capped at £5,000
- Complains to ACCC

(3) Case C131

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- Findings of breach include:
  - (1) Not making documents available promptly online including screening decisions;
  - (2) Legal system which sets time to bring JR from date decision taken not date C knew or ought to have known of it!!
    - This totally vs domestic law position;
  - (3) That costs vs C were awarded at £250 per hour when actual rate charged less – NB this common, and allowed in our system, for GLD and local government costs based on old case law;
  - (4) £5,000 at permission stage too high;
  - (5) In allowing low LIP recovery rates vs rates for lawyers!

(3) Case C142

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Case 3: ACCC/C/2016/142 (adopted 25/7/2021)

- Litter abatement proceedings vs Council under EPA brought by local MP, following Council failures to collect green waste;
- Proceedings in Magistrates Court – lost and costs awarded of c. £13,000, and account taken of failure to accept offer;
- Then High Court proceedings – case stated – failed and more costs c. £5,000;
- Findings:
  - (i) proceedings prohibitively expensive;
  - (ii) taking account of offer to settle being refused unfair and inequitable!

(3) Cases

- ACCC increasingly radical findings;
- Many of these findings:
  - (i) fail properly understand our legal system at all;
  - (ii) are huge departures from our established law;
  - (iii) are difficult to justify;
  - (iv) seem to ignore CJEU law on very similar points …
- Will the Government fight the Meeting of the Parties adopting the ACC findings, as the EU Commission did in C32?
- Will our Courts reject, as non-binding?
- Where does this lead?
- UK a rogue state, as some suggested? No, not at all. ACCC gone rogue?

(4) Other ACC pipeline cases

- (1) ACCC/C/2017/150: this is a communication concerning Brexit and impact on environmental law; lodged October 2017 – still no hearing …
- (2) ACCC/C/2017/156: this has been heard, and it concerns whether the ***Wednesbury*** standard of review is compatible with Article 9
  - This issue first raised as concern by ACCC in ACCC/C/2008/33, a "concern" but no finding of breach;
  - View rejected by CA in ***R (Evans) v Secretary of State for Communities and Local Government*** [2013] JPL 1027;
  - Despite strong defence by UK Government at ACCC seems inevitable will rule ***Wednesbury*** a breach ….
  - Seen reference to this in C90 above … in context of third party appeals …

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Thank you for listening

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NB all views are my own

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