Landmark Chambers

Practice and procedure update (including Aarhus costs)

Georgina Fenton

Introduction

1. New Part 54 Practice Directions
2. Disclosure and Duty of Candour
3. New directions for OPHs
4. Aarhus Costs
5. General points on costs
6. Setting aside refusal of PTA
7. Delay

Landmark Chambers

New Part 54 Practice Directions

The new Practice Directions

Landmark Chambers

- Before 31 May 2021 CPR Part 54 was supplemented by four PDs: 54A, 54C, 54D and 54E (PD 54B had been previously revoked).

- Amendments to CPR Part 54 which came into effect from 31 May 2021:
  - PD 54A: General provisions relating to judicial review
  - PD 54B: Urgent applications and other applications for interim relief
  - PD 54C: Administrative Court (Venue)
  - PD 54D: Planning Court Claims
  - PLUS: Administrative Court Electronic Bundle Guidance

NB: The rules relating to planning court claims have not undergone any substantive changes. The main changes are in relation to PD54A.

PD 54A (1)

Landmark Chambers

- The changes made to PD 54A were prompted by concerns expressed by the Court of Appeal in a number of cases, including ***R (Dolan and others) v Secretary of State for Health and Social Care*** [2020] EWCA Civ 1605. In that case the Court highlighted (at [116]-[118])
  - the importance of “procedural rigour”;
  - the need to avoid “excessive prolixity and complexity in what are supposed to be concise grounds for judicial review”;
  - and the need to avoid a “rolling” approach to judicial review where multiple subsequent amendments to the claim are made.

PD 54A (2)

Landmark Chambers

- The changes to PD 54A now mean that the following page limits apply:
  - Statement of Facts and Grounds: 40 pages
  - Summary Grounds: 30 pages
  - Detailed Grounds: 40 pages
  - Skeletons: 25 pages
  - Hearing bundle: if exceeds more than 400 pages, then need a core bundle

Landmark Chambers

Disclosure and Duty of Candour

Pre-action

- PD 54A does not deal with the pre-action stage.
- JR Pre-action Protocol aims to ensure parties "*understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents*" (para. 3(a)).
- Paragraph 13 says:
  i. Requests for documents should be **proportionate** and **limited to what is properly necessary** for C to understand why the decision has been taken.
  ii. D should comply with any request which meets these requirements "unless there is good reason for it not to do so".
  iii. Where the court considers that a public body should have provided relevant documents and/or information, it may **impose costs sanctions**.
- Paragraph 23 says D's response should: (i) enclose any relevant documentation requested by C or explain why the documents are not enclosed; and (ii) where documents cannot be provided within the time scales required, then give a clear timescale for provision.

Pre-permission

Landmark Chambers

Disclosure

- PD 54A, paragraph 6.2 (2):

  "*The Summary Grounds should identify succinctly any* ***relevant*** *facts. Material matters of factual dispute (if any) should be highlighted. The Grounds should provide a brief summary of the* ***reasoning underlying the measure*** *in respect of which permission to apply for judicial review is sought* ***unless*** *the defendant gives reasons why* ***the application for permission can be determined without that information***"

- So, in short, the obligation in terms of disclosure is to:

  (i) identify succinctly the relevant facts; and

  (ii) provide a brief summary of the underlying reasoning, unless permission can be determined without this.

Duty of Candour

- PD 54A makes no explicit mention of the Duty of Candour at the pre-permission stage.

Post-permission

PD 54A

- Para 10.1 "*In accordance with the **duty of candour**, the defendant should, in its Detailed Grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted*."
- Para 10.2 "***Disclosure is not required** unless the court orders otherwise*."

Paragraph 10.1 is significant because:

(1) **For the first time** there is explicit reference to Duty of Candour in CPR rules or PD;

(2) This suggests that the Duty of Candour obligation is most clearly engaged at the detailed grounds/evidence stage, rather than pre-permission;

(3) The way that the duty is expressed is focused on identifying the relevant facts and any underlying reasoning, and **NOT** the provision of documents.

Landmark Chambers

New directions for OPHs

Oral Permission Hearings

Landmark Chambers

- New directions imposed for oral permission hearings in the High Court.
  1. 30 min hearing;
  2. C must file an electronic Permission Hearing Bundle within 14 days of letter;
  3. If C wishes to produce skeleton it must be filed 7 days before the hearing and be no more than 10 pages;
  4. C must file an authorities bundle 7 days before;
  5. Failure to comply with these Directions will result in the case being referred to a judge to consider whether the claim should be struck out, or other order made;
  6. Any application to vary these Directions must be made on notice to any D and IP.

Landmark Chambers

Aarhus Costs

R (Friends of the Earth Ltd) v Secretary of State for Transport [2021] PTSR 941

Landmark Chambers

- Judgment handed down January 2021.
- Court of Appeal had ordered the Secretary of State to pay the costs of Friends of the Earth, amounting to £70,000.
- The question was whether this sum was inclusive or exclusive of VAT.
- It was held that the capped costs recoverable from a Claimant or Defendant as specified in CPR r 45.43 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 <u>inclusive</u> of VAT**.

R (CARA) v North Devon DC [2021] EWHC 703 (Admin)

- Judgment handed down in March 2021.

- Applied *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 941 to hold that the Interested Party's cost liability was limited to £35,000 inclusive of VAT.

- The court varied the cost order accordingly, holding that this was the "fair course".

Landmark Chambers

General points on costs

Multiple costs at permission stage (*Mount Cook* costs) (1)

- Established position: if permission is refused at the permission stage, multiple defending parties are prima facie entitled to seek their costs (AoS and SGR) from the Claimant (as per ***R (Mount Cook) v Westminster City Council*** [2017] PTSR 1166).

- This position was challenged in ***CPRE Kent v Secretary of State for Communities and Local Government*** [2021] 1 WLR 4168 on the basis that it is inconsistent with the decision in ***Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)*** [1995] 1 WLR 1176.

Multiple costs at permission stage (*Mount Cook* costs) (2)

Landmark Chambers

- The Supreme Court noted three important points:
  - *a)* *Bolton* can be distinguished: it concerned the award of costs after a substantive hearing and pre-dated the introduction of the CPR Rules.
  - b) Despite judicial calls for the CPR to include the procedure for cost applications at the permission stage, no amendments to that effect have been made.
  - c) In planning cases, overall costs are often controlled by Aarhus caps.

- The Supreme Court held:
  - a) If permission is refused, C **may** be liable to more than one D and/or IP for the costs of preparing and filing their AoS and SGR.
  - b) It is **not necessary** for the additional Ds and/or IPs to show ‘exceptional’ or ‘special’ circumstances in order, in principle, to recover those costs.
  - c) However, to be recoverable, those costs must be **reasonable** and **proportionate**.

Determination of cost issues

Landmark Chambers

- Other important point from *CPRE*, was the application and reiteration of *R (Gourlay) v Parole Board* [2020] 1 WLR 5344.
  - The Court of Appeal has the principal responsibility for monitoring and controlling the developing practice in relation to orders for costs.
  - Accordingly, absent an error of law of general public important, the Supreme Court is very slow to intervene in such matters.

- In *CPRE*, the Supreme Court held that it is "wrong to treat its [the CA's] rulings on principles of practice as binding legal precedents from which it could not depart … Nonetheless, it was appropriate for the Court of Appeal to review a decision laying down a principle of practice **only where there was a sufficient reason to do so**, such as where there has been a material change of circumstances or where a previous case had been decided per incuriam" (at [18]).

Landmark Chambers

Setting aside refusal of PTA

CPR 52.30 (1)

Landmark Chambers

- Under CPR 52.30 a party can apply to re-open a final determination refusing permission to appeal in a JR.

- The wording of CPR 52.30 demonstrates that it is a high test to be met:

  "(1) The Court of Appeal or the High Court **will not** reopen a final determination of any appeal unless—

  (a) it is **necessary** to do so in order to **avoid real injustice**;

  (b) the circumstances are **exceptional** and make it appropriate to reopen the appeal; and

  (c) there is **no** alternative effective remedy."

CPR 52.30 (2)

Landmark Chambers

- The difficulty in meeting the test to re-open a final determination was reiterated recently in ***Wingfield v Canterbury CC*** [2020] EWCA Civ 1588.
- The opening paragraph of the judgment states: “The question raised by these renewed applications, put at its simplest, is this: when must an unsuccessful litigant accept “No” for an answer?”
- The Court of Appeal went on to hold that:

  > “unmeritorious applications under CPR 52.30 […] 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”.

- The lesson: **CPR52.30 should be used very sparingly**.

CPR 52.30 (3)

- ***Mariana v BHP Group PLC* [2021] EWCA Civ 1156**. Claimants' relied upon CPR r.52.30 to appeal against the refusal of permission to appeal a strike out of their claim.
- The court held that the "**stringent test"** imposed by CPR 52.30 was **satisfied** because:

  a) in refusing permission, the judge had failed to address essential points that went to the heart of the claimants' challenge;

  b) that failure critically undermined the integrity of the process for granting PTA;

  c) if the judge had grappled with the essential points there was a "powerful probability" that the outcome would have been different, and that he would have granted PTA.

- However, this was a "**most unusual case**" where the claim was of exceptional importance and the issues raised of wide general importance.
- In conclusion: CPR 52.30 can be relied upon successfully but only in exceptional circumstances.

Landmark Chambers

Delay

R (Croyde Area Residents Association) v North Devon District Council [2021] P.T.S.R. 1514

Landmark Chambers

- High Court judicial review of a grant of planning permission dating back to 2014.

- The High Court exercised its discretion to grant the extension of time, despite
  a) the judicial review being issued more than 6 years late
  b) the developer obtaining a Lawful Development Certificate based on the 2014 Permission and,
  c) the Lawful Development Certificate having not been challenged in the 6 weeks allowed under Planning Acts.

- Two overriding factors:
  a) harm that would flow from upholding the planning permission given it would allow for development in an AONB which had never been lawfully permitted;
  b) It would undermine the credibility of the planning system if a permission granted in complete error was not quashed.

- Interestingly, this case was given permission to appeal to the Court of Appeal, but the appeal has been withdrawn.

R (Flyde Coast Farm) v Flyde BC [2021] 4 All ER 381

Landmark Chambers

- Considered the time limits that apply to challenges to Neighbourhood Plans under section 61N of the TCPA 1990.
- The making of neighbourhood development orders or plans is a seven step process. Section 61N makes separate statutory provision about challenges to step 5 (consideration of the independent examiner's report), step 6 (holding a local referendum) and step 7 (making the order or plan).
- The court considered the scenario where a challenge is brought to the making of a neighbourhood development order or plan which is based upon a challenge to an earlier step in the prescribed process, which is said to invalidate the making of the order or plan itself.
- It held: a party cannot wait and challenge for errors in stages 5 and 6 by way of a Judicial Review of stage 7.

Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
Cornwall Buildings
45 Newhall Street
Birmingham, B3 3QR
+44 (0)121 752 0800

Contact
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

Follow us
@Landmark_LC
Landmark Chambers
Landmark Chambers