

## **DEFENDING A CLAIM**

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#### **Introduction**

1. This paper is divided into six main parts, covering the following matters:
  - a. The role of public authorities in judicial review proceedings.
  - b. Assessing the merits of applications for judicial review.
  - c. Effective use of the pre-action protocol.
  - d. Early concession to judgment.
  - e. Tactics at the permission stage.
  - f. Tactics at the substantive stage.

#### **The role of public authorities in judicial review**

##### **The duties of co-operation and candour**

2. It is appropriate to start by emphasising a basic point of approach which applies to public authorities at every stage of the judicial review process, namely the need to fulfil the duties of co-operation and candour. The nature of those duties was described by Sir John Donaldson MR in *R v. Lancashire CC, ex parte Huddleston*<sup>1</sup>:

“In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority”.

“[J]ust as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why.”

Judicial review “is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority’s hands.”

3. It will be apparent from those remarks that a different approach is required from that which might ordinarily be appropriate in private law proceedings. In the section which follows I have set out some examples of how the duty can arise in practice at the various stages of the judicial review process.

##### **Opportunities for candour.**

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<sup>1</sup> [1986] 2 All ER 941, at 945

4. Whilst the duties of co-operation and candour apply to every stage of the judicial review process, there are a number of points in the procedure where they will often come into sharper focus:

a. The pre-action protocol letter of response

If the claimant's pre-action protocol letter has been properly drafted, it should make clear what the complaint is, and thus enable the defendant to check what documents or other information it has which might be relevant to the grounds of challenge. All such documents and information should be disclosed, particularly if you think it might be said to support the claimant's case.

Many pre-action protocol letters will also ask for further information and/or documents. In responding to such requests, it is appropriate to remember the duty of candour and co-operation. If the defendant is aware of other documentation and information which is relevant, but has not specifically been requested, that too should be disclosed.

b. The grounds of defence

The grounds of challenge can sometimes change between the pre-action stage and the submission of the claim form. It is therefore as well to check again at the stage of preparing summary grounds of defence to see whether the defendant is aware of any documentation and other information which may be relevant to the case as now pleaded. All such material should be disclosed.

The same may be true following the granting of permission, particularly if there has been a permission hearing at which the arguments have developed and/or changed. A further check should therefore be undertaken at the stage of settling detailed grounds of defence.

c. The submission of evidence

Defendants commonly submit evidence to explain the decision-making process that has been undertaken, and to exhibit the relevant documentation. If there has been proper compliance with the duty of candour at each stage, the defendant's witness statement should stand as a true and comprehensive account of the process. If not, there is a real risk that the defendant and its legal advisors will find themselves the subject of adverse judicial comment.

### **The wrong approach**

5. An excellent example of how not to do it is provided by the case of *R (Quark Fishing Ltd.) v. SSFCA*<sup>2</sup>.
6. The decision under review concerned the licensing regime applied to vessels engaged in the highly lucrative business of fishing for the Patagonian Toothfish off South

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<sup>2</sup> [2002] EWCA Civ 1409

Georgia. The claimants owned a vessel which had been refused a licence (having been granted one in previous years). As Laws LJ said at the outset of his judgment:

“The decision-making process which led to this result is at the centre of Quark’s challenge to the Secretary of State’s direction; and I may say at this stage that the business of uncovering the course it took has in my view been tortuous and problematic”<sup>3</sup>.

7. Certain key items of correspondence, which revealed that the decision-making process was in fact quite different from what had been described in witness statements submitted on behalf of the Secretary of State, only emerged at a very late stage in the proceedings. In respect of these items of correspondence, which were found to be important in the decision-making process, Laws LJ said this:

“[one letter] was only disclosed by the Secretary of State after an order to that effect was made by Scott Baker J. [Three further letters] were not disclosed until Mr Parker QC, for the Secretary of State, produced them on the last day of the hearing in this court; though as I understand it, it is accepted that these documents were in counsel’s possession at the time when Mr Parker and his learned junior were settling the Secretary of State’s evidence in the proceedings in the SGSSI Supreme Court. Mr Vaughan [leading counsel for the claimants] complains bitterly at this late disclosure”<sup>4</sup>.

8. In his conclusions on the issue of disclosure, Laws LJ referred again to the claimant’s counsel’s

“vigorous complaint at the Secretary of State’s late disclosure of the correspondence”,

and his submission that

“this was merely an instance of a more general failure of frank disclosure of which, he submitted, the Secretary of State through counsel was guilty in both the SGSSI and the London proceedings.”

9. The judgment records that at the court’s invitation both parties’ counsel put in substantial written submissions on this point after the hearing, which Laws LJ described as a “somewhat acid skirmish”<sup>5</sup>. No doubt the vigour and acidity of the exchanges reflected both the underlying seriousness of the complaint being made about the conduct of the Secretary of State’s counsel, and the sense of grievance that must have been felt by the claimant that the true nature of the decision-making process (the outcome of which had plainly lost the company a lot of money) only emerged right at the end of the second set of judicial review proceedings.

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<sup>3</sup> Paragraph 9

<sup>4</sup> Paragraph 12

<sup>5</sup> Paragraph 15

10. Laws LJ accepted that there was no general duty of disclosure in judicial review proceedings, but went on to say this:

“However there is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure: see *Padfield* [1968] AC 997, per Lord Upjohn at 1061G-1062A)”<sup>6</sup>.

11. Laws LJ was careful to stress that his findings did not cast any shadow on the professional integrity of counsel for the Secretary of State, but he nevertheless made some telling criticisms of the evidence that had been submitted:

“... the material put forward by the Secretary of State in the SGSSI and London proceedings did not convey a fair and full picture of the decision-making process in this case, and the letters of February and March 2001 demonstrate as much.

A conspicuous example of this want of frankness, or at least of clarity ...

This is an important point of departure between the contemporary documentation and the written evidence. ...”<sup>7</sup>.

12. It was also noted that:

“On this matter of disclosure we have, in my judgment, to bear in mind that what matters is the effect of any failure on our appreciation of the overall merits of the case; we are not concerned to discipline or penalise the Secretary of State. Even so, I am constrained to say that the Secretary of State in this case has fallen short of those high standards of candour which are routinely adhered to by government departments faced with proceedings for judicial review.”

13. No public authority, or its lawyers, would wish to face judicial criticism of that sort. Explain everything fully and fairly from the outset, and, if in doubt, disclose.

### **Assessing the merits of applications for judicial review**

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<sup>6</sup> Paragraph 16

<sup>7</sup> Paragraphs 18 and 19

### **The importance of early and thorough assessment.**

14. An early and thorough assessment of the merits of a threatened claim is perhaps the single most valuable step a defendant can take when threatened with judicial review proceedings. There are a number of reasons for this:
  - a. It is very difficult to comply with the duty of candour unless you have a clear and informed understanding of the issues to which the potential grounds give rise.
  - b. Once the merits have been properly understood, and the defendant's line of defence determined and clearly articulated in writing, the task for the defendant at each stage of the process is relatively simple. Sooner or later the defendant will need to carry out a detailed assessment and formulate the detailed response. The earlier that is done, the more likely it is that the line of defence will be consistent throughout the process. It can give a very damaging impression if the defendant's defence is seen to change materially from one stage to the next. Moreover, an ill-considered statement made in the authority's defence at an earlier stage can take on a quite different and less helpful meaning, and potentially cause real damage, if the line of defence has to shift in due course.
  - c. A thorough understanding of the case will also tend to make the pre-action protocol process much more effective. A non-meritorious case can sometimes be stifled before it becomes a claim, or at least reduced in its potential scope.
15. More generally, it is very hard to determine the correct tactics to resist a claim until that claim has been properly assessed and understood.
16. A proper assessment of the merits of the case must, of course, spring from a comprehensive understanding of the relevant factual material. If the process of gathering together the factual matrix is incomplete, the advice given and the tactics adopted may well both be wrong. Hence the importance of getting to grips with the detail of the case at the very earliest possible stage. Advice should therefore be taken as soon as judicial review is threatened, which will normally be in the pre-action protocol letter.

### **Common characteristics of a well-founded claim.**

17. In my experience, most well-founded applications for judicial review share most if not all of the following characteristics:
  - a. Selectivity
    - i. Well-founded claims tend to be tightly focussed on a limited number of points. The vast majority of administrative decisions are perfectly lawful. A small number fail to satisfy that requirement, but most of those will only fail on one or in some cases two grounds.

- ii. There are occasional decisions which suffer from more than two significant public law errors, but in my experience those are a small minority. So any claim featuring a dozen or more grounds of challenge is likely to be treated with instinctive suspicion by the courts. By the time the judge has disposed of the first fifteen grounds of challenge, he is unlikely to approach the remainder with a sympathetic disposition. Any meritorious points in amongst the crowd will therefore tend to be swept out with the rubbish.
- iii. A good point will normally be obvious, and a good claim will tend to focus hard on the best point or points, rather than throwing in everything in the hope that something will stick.

b. Accuracy

Most meritorious claims are founded on a balanced and objectively accurate understanding of the salient facts. If the judge feels he can trust and rely upon the claimant's explanation of the facts in reaching his decision, he is likely to treat the claim more seriously. Conversely, the loss of the judge's trust can be disastrous to the prospects of success.

c. Clarity and logic

A good claim will clearly identify the category of public law error that is alleged, and particularise the accusation by reference to the salient facts of the instant case in a logical step-by-step manner.

d. Timing

A carefully considered claim will include express consideration of the timing of the application, and the extent to which the application has been made promptly. This is particularly true in cases where timing is likely to be in issue.

e. Discretion

The remedies in judicial review are all discretionary, even where an error of law has been made out. Where the claimant's lawyers have done their job properly, the claim form will address the issue of the court's discretion and why – assuming the alleged error is established – the discretion ought to be exercised in the claimant's favour.

18. That is not to say that all claims which have those characteristics will necessarily be well-founded. But I have found that very few claims which do not exhibit those characteristics are successful.

**Common characteristics of an unfounded claim.**

19. Many unfounded claims exhibit characteristics which are essentially the converse of the desirable traits set out above. So they will often include large numbers of grounds,

demonstrate a lack of candour by setting out a demonstrably inaccurate or partial version of the salient facts, be hazy in pinning down the complaint to any hard-edged category of public law error, and/or fail to address an obvious delay point or an issue as to discretion. In addition, however, there are a number of other common characteristics to watch out for:

a. Over-complexity

If a public law error has occurred in a decision-making process, it can normally be explained quite simply and shortly. Even if the background facts and law are complex, a well-founded and properly understood claim should normally include a simple explanation of the error that those facts reveal. If, having read the claim form, you are left in real doubt as to the nature of the claimant's case, the judge's reaction is likely to be the same.

b. Nit-picking

Far too many challenges are founded on over-anxious scrutiny of the documents produced by the defendant in connection with the decision. The court will invariably look at documents such as officer's reports and decision letter as a whole and in context to see if there is some significant error in approach (see e.g. *R v. Selby DC, ex parte Oxton Farms Ltd.*<sup>8</sup>; *South Bucks DC v. Porter (No. 2)*<sup>9</sup>; *Kilmartin Properties (TW) Ltd. v. Tonbridge Wells BC*<sup>10</sup>). Any challenge that is based on close forensic scrutiny of individual words or phrases in a report or decision letter, but does not seek to demonstrate that the overall approach was erroneous, is unlikely to get very far.

This can sometimes manifest itself in a line-by-line or paragraph-by-paragraph critique of the decision letter or officer's report. Where the claim form is structured in this way it is generally a sign that no real error has been identified.

c. Un-particularised allegations of *Wednesbury* irrationality.

All too often this is used as a flimsy pretext for an attempt to re-argue the merits of the underlying decision. Unless the decision simply does not add up, in other words, some error of reasoning robs the decision of logic, it will not fail the *Wednesbury* test (*R v. Parliamentary Commissioner, ex parte Balchin (No. 1)*<sup>11</sup>). If the claimant does not properly particularise the alleged logical error in his pleadings, there probably isn't one.

d. An allegation that a relevant consideration has been left out of account, simply because no mention is made of it.

<sup>8</sup> (Unreported) April 18, 1997

<sup>9</sup> [2004] 1 WLR 1953 per Lord Brown of Eaton-under-Heywood at 1964

<sup>10</sup> (2004) Env. LR 36

<sup>11</sup> [1998] 1 PLR 1 per Sedley J (as he then was) at p. 13E-F

The court will not infer that a relevant consideration has been overlooked simply because it is not mentioned by the decision-maker, unless the surrounding circumstances are such as to make that conclusion irresistible. For example, if a relevant policy has not been mentioned, but the decision-maker's reasoning indicates an overall approach which is consistent with the policy, the court is unlikely to conclude that the policy was overlooked (see e.g. *R (on the application of Save Britain's Heritage) v. (1) Westminster City Council (2) The Lord Chancellor*<sup>12</sup>).

### **Effective use of the pre-action protocol**

#### **Does the pre-action protocol apply?**

20. There will be some decisions where the pre-action protocol does not apply. As the protocol itself acknowledges:

“This protocol *will not be appropriate* where the defendant does not have the legal power to change the decision being challenged, for example decisions issued by tribunals such as the Asylum and Immigration Tribunal.”

21. On that basis it might not, for example, apply to decisions to grant planning permission (see *Davey v. Aylesbury Vale DC*<sup>13</sup>). Even in those circumstances, the use of the protocol can provide significant advantages to both parties and I have found that it is more often followed than not<sup>14</sup>.

#### **Compliance with the pre-action protocol**

22. Where the pre-action protocol does apply, or is otherwise used by the claimant for some proper reason, it is vital that the defendant follows it properly. Paragraph 7 of the protocol explains that where its use is appropriate, the court will normally expect all parties to have complied with it and will take into account compliance or non-compliance when giving directions for case management of proceedings or when making orders for costs<sup>15</sup>.
23. The letter of response should therefore normally be sent within 14 days (if it cannot be, an interim response should be sent within that timeframe proposing a reasonable extension of time). The defendant's position should be set out in clear and unambiguous terms, and:
- a. where appropriate, contain a new decision, clearly identifying what aspects of the claim are being conceded and what are not, or, give a clear timescale within which the new decision will be issued;

<sup>12</sup> [2007] EWHC 807 (Admin)

<sup>13</sup> [2007] EWHC 1166 (Admin)

<sup>14</sup> See [2008] JPL1551 at 1557-1558

<sup>15</sup> See also CPR 44(3)(b); Practice Direction on Pre-Action protocols, paragraph 2.3; *Aegis Group plc v. Commissioners of Inland Revenue* [2005] EWHC 1468 (Ch)

- b. provide a fuller explanation for the decision, if considered appropriate to do so;
  - c. address any points of dispute, or explain why they cannot be addressed;
  - d. enclose any relevant documentation requested by the claimant, or explain why the documents are not being enclosed; and
  - e. where appropriate, confirm whether or not they will oppose any application for an interim remedy<sup>16</sup>.
24. It is essential that the reply to the letter before action should properly grapple with the points that have been raised. Anything less effectively invites the claimant to proceed to litigation, defeats the purpose of the pre-action protocol, and may be used in due course to deny the authority some or all of its costs if the claim fails (see above). The reply should therefore be drafted on the basis of a thorough and comprehensive review of the merits of the proposed claim. If that has been done, and the reply has been carefully drafted, it provides the authority with a reasonable opportunity to dissuade the prospective claimant from proceeding (either in whole or at least on some grounds). Even if that is not the result, a well-considered reply should provide the substance of the Summary Grounds in due course.
25. The reply also provides a tactical opportunity to interrogate the prospective Claimant, who also owes a duty of candour. This can sometimes be helpful in establishing the identity and/or means of the prospective claimant, where relevant, and helping the authority to decide whether, for example, it should seek security for costs in the event that a claim is made. It can also be a useful opportunity to ask questions about the reasons for any delay that might have occurred between the decision and the letter before action.

### **Interested Parties**

26. Where there is an interested party, it may also wish to put in a reply. A reply is sometimes submitted to encourage the authority to defend its own decision and/or to alert it to potential lines of argument. This can be useful, bringing a further set of legal minds to bear on the task of defeating a proposed claim. However, it can also lead to difficulties, particularly the risk that the two parties may find themselves adopting inconsistent positions. Any co-ordination of effort with Interested Parties needs to be handled carefully, not least because of the importance of the authority maintaining an appropriate degree of independence from both parties. A simple test is to ask whether any co-ordination that does take place would give rise to embarrassment for the authority if it were subsequently to be revealed in court.

### **The obligation to consider alternatives to litigation**

27. Alternative dispute resolution (“ADR”) can be difficult to achieve in public law cases. The use of ADR in judicial review was given impetus by the Court of Appeal in *R (Cowl v. Plymouth CC)*<sup>17</sup>, in which Lord Woolf CJ gave the leading judgment. He described the case as illustrating that

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<sup>16</sup> Pre-action protocol paragraph 16

<sup>17</sup> [2002] 1 WLR 803

“even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible”<sup>18</sup>.

28. The approach urged by the Court of Appeal in that case was endorsed in the Practice Statement (Administrative Court: Listing and Urgent Cases)<sup>19</sup> given by Scott Baker J, then lead judge of the Administrative Court<sup>20</sup>.
29. In practice, however, the use of ADR appears to have gained little traction in Administrative Court cases. There are a number of reasons why that is unsurprising:
  - a. The public authority involved will normally have far less scope to negotiate than parties involved in private law disputes.
    - i. It will generally be constrained in its freedom of action by the relevant statutory scheme, and cannot fetter its discretion by undertaking to reach any particular decision in future.
    - ii. It cannot quash its own decision, and the scope for undoing that decision may be limited and/or unappealing. A good example is the absence of any regular use by local planning authorities of the long-standing power to revoke planning permissions, because of the compensation implications of doing so. Where the local planning authority recognises that a particular permission should not have been granted it is not unknown for a councillor to launch a ‘friendly’ judicial review, rather than resorting to the revocation of the permission.
  - b. The need for prompt action on the part of the claimant in judicial review cases provides little time for exploring alternatives to litigation.
    - i. The usual scenario is that by the time the claimant has organised legal representation and taken advice, there is only just enough time to go through the pre-action protocol before lodging the claim form.
    - ii. Those drafting the pre-action letter will rarely have any opportunity for mature consideration of what steps might be taken by the relevant authority to address the underlying concern, short of consenting to judgment.
    - iii. The authority is generally given 14 days in which to reply, which is often only barely sufficient to establish the facts, obtain advice on the merits of the proposed grounds, and draft a reply. No real opportunity is afforded at this stage for mature reflection on what alternative means there may be for resolving the underlying dispute.

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<sup>18</sup> Paragraph 1

<sup>19</sup> [2002] 1 WLR 810

<sup>20</sup> Paragraph 5

- iv. When the authority's reply has been received the race will be on for the claimant's lawyers to get the claim form in as soon as reasonably practical thereafter, in order to avoid accusations of delay. The scope for taking time to explore alternatives is heavily constrained by the need to act promptly.
  - c. If there really is an alternative remedy available the well-advised claimant would not be contemplating judicial review.
  - d. It should also be noted that the underlying dispute in the *Cowl* case was of a nature that was intrinsically well-suited to ADR, and that an alternative means of dealing with the dispute was (in the end) agreed upon by the parties. Although the case raises a point of potentially wider application, the terms of the judgment must nevertheless be understood by reference to the particular facts. Lord Woolf CJ was careful to confine his comments on the court's approach to "applications for judicial review in the case of applications *of the class with which this appeal is concerned*"<sup>21</sup> (emphasis added).
30. Nevertheless, it is appropriate that in every case the lawyers for both parties should always give consideration to whether there is a role for ADR, even if it is only to narrow the issues which cannot be resolved other than by bringing them before the Administrative Court.

### **Early concession to judgment**

#### **Determining when to throw in the towel**

- 31. If a claim is well-founded, it will generally be in the authority's interest to consent to judgment at the earliest opportunity. This will minimise costs, and administrative inconvenience, and allow the impugned decision to be reconsidered at the earliest possible date. That consideration underlines the importance of carrying out a thorough review of the merits at the earliest possible stage.
- 32. There may be some cases where a threatened claim is thought likely to succeed, but where there is nevertheless a prospect that the particular claimant may ultimately not proceed to make that claim if the authority provides a suitably bullish reply. In my experience such cases are rare, and of course it will only be open to the authority to adopt this approach if it does at least have a properly arguable defence, even if it considers that defence is ultimately unlikely to succeed.

#### **The costs implications**

- 33. In *R (Boxall) v. Waltham Forest LBC*<sup>22</sup>, the court considered the authorities dealing with the costs consequences in cases that are settled before permission is granted, and cases which are discontinued after permission is granted but before a substantive hearing.

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<sup>21</sup> Paragraph 2

<sup>22</sup> (Unreported), Scott Baker J, 21.12.2000

Cases settled before the permission stage is reached

34. The fact that a case has been settled before the permission stage has been reached is not a bar to a costs order. That is the effect of the decision in *R v. Royal Borough of Kensington and Chelsea, ex p Ghrebreghiosis*<sup>23</sup>, although it was made clear that where this has occurred a costs order would only be made in a very clear case, and the decision is not to be regarded as a green light for applicants to seek orders for costs against a local authority that has made a concession at an early stage. In *R v. London Borough of Hackney, ex p Rowe*<sup>24</sup> the court emphasised that the practice on costs should do nothing to discourage sensible settlement and encourage pointless expeditions to the Court that incurred further costs.

Cases settled after permission has been granted

35. In *R v. Liverpool CC, ex p Newman*<sup>25</sup> it was held that the general rule is that if judicial review proceedings are discontinued the respondents will recover their costs provided that such discontinuance can be shown to be the result of the applicant's recognition of the likely failure of his challenge, but if discontinuance follows a step rendering the challenge academic, the position may be different.
- a. If the step has been brought about by the respondent in recognition of the high likelihood he will fail in court, he should not recover his costs and may have to pay the claimant's costs.
  - b. If the step has been brought about by the respondent to short-circuit proceedings and avoid delay without in any way accepting likelihood of success, he should not be deterred by the thought he may have to pay the claimant's costs. In this latter situation, there should be no order as to costs. The same would be true if some action wholly independent of the parties had rendered the matter academic.
36. It will seldom be appropriate to investigate in depth the merits of an academic challenge in order to deal with the issue of costs. However, if the court can relatively easily determine the likely outcome of the judicial review application, it may be appropriate to make an award of costs accordingly (*R v. Independent Television Commission, ex p Church of Scientology*<sup>26</sup>; *R v. Holderness BC, ex p James Roberts Developments Ltd.*<sup>27</sup> and *R v. Calderdale BC, ex parte Houghton*<sup>28</sup>).
37. In *Boxall*, Scott Baker J summarised the effects of the authorities as follows:
- a. The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
  - b. It will ordinarily be irrelevant that the Claimant is legally aided.

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<sup>23</sup> (1994) HLR 602

<sup>24</sup> [1996] COD 155

<sup>25</sup> (1992) 5 Admin LR 669

<sup>26</sup> [1996] COD 442

<sup>27</sup> (1992) 66 P&CR 46 (though see the dissenting judgment of Simon Brown LJ at p. 52)

<sup>28</sup> (unreported) 21 June 2000

- c. The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.
  - d. At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
  - e. In the absence of a good reason to make any other order the fall back is to make no order as to costs.
  - f. The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.
38. The Court of Appeal subsequently endorsed that as an accurate summary of the law on this issue<sup>29</sup>.

### **Tactics at the permission stage**

#### **Summary grounds of defence**

39. If the authority's reply has failed to dissuade the Claimant, and a claim form is filed and served, the next step is to acknowledge service and set out the summary grounds for defending the claim. This must be done no more than 21 days after service of the claim form<sup>30</sup>.

#### **The importance of the summary grounds**

40. The potential value of well-drafted summary grounds of defence should not be underestimated. When the application for permission to bring proceedings is being considered by the judge on the papers, all that the claimant has to establish is that it has an arguable case. The authority must not only show that its arguments are better, but also that the claimant's arguments have no realistic prospect of success.
41. Remember that your case will almost certainly be one of a great many that the judge has to deal with on that day (or that evening/weekend), and that each file can therefore only be given a finite amount of time. If the authority's summary grounds of defence do not provide the judge with a clear and complete answer to the grounds of challenge, permission is very likely to be granted. The order that you should be seeking at this stage is one that reads along the following lines: "Permission is refused for the reasons set out in the Defendant's summary grounds of defence". In other words, the authority's lawyers should do the hard work so that if the judge wants to refuse permission the otherwise onerous task of explaining such a decision is made easy.

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<sup>29</sup> *R (on the application of Kuzeva) v. LB Southwark* [2002] EWCA Civ 781

<sup>30</sup> CPR Pt. 54.8

42. The potential benefits of such hard work can be discerned from an Article in the December 2006 edition of *Judicial Review*, entitled “Judicial Review in Action: An Empirical Perspective”<sup>31</sup>. The authors highlight the importance of the summary grounds of defence in reducing the number of applications being granted permission to proceed, and the regularity with which judges expressly rely on those grounds in explaining why permission has been refused.

How much detail should be included in the summary grounds?

43. There is a delicate balance to strike in determining how much detail to go into when drafting summary grounds of defence. In *R (Ewing) v. Deputy Prime Minister*<sup>32</sup>, two interested parties had provided lengthy “summary” grounds of defence, with associated costs claims of £6,400 and £10,700 respectively. Carnwath LJ referred to the principle that such costs can be recovered, established by *R (Mount Cook Land Ltd.) v. Westminster City Council*<sup>33</sup>, and cautioned that this must not be applied “in a way which seriously impedes the right of citizens to access to justice, particularly when seeking to protect their environment”<sup>34</sup>. He went on to say:

“Neither the rules nor the practice direction expand on what is meant by a “summary” of grounds. However, the “summary” required under this rule must be contrasted with the “detailed grounds for contesting the claim” and the supporting “written evidence”, which are required following the grant of permission (CPR54.14). In construing the rule, it is necessary also to have regard to its purpose, and place in the procedural scheme. If the parties have complied with the Protocol, they should be familiar with the general issues between them. The purpose of the “summary of grounds” is not to provide the basis for full argument of the substantive merits, but rather (as explained in para 24 of the Bowman report: see para 15 above) to assist the judge in deciding whether to grant permission, and if so on what terms.”

44. The court emphasised the usefulness of the pre-action protocol in familiarising the parties with the issues between them, and thus reducing the need for detailed exposition in the summary grounds. Indeed, Carnwath LJ suggested that in some cases it may be enough simply to append the defendant’s pre-action protocol letter to the acknowledgment of service<sup>35</sup>. If the defendant has provided a detailed rebuttal of the claimant’s case in the pre-action protocol correspondence (and assuming the claim form does not include new arguments raised in response), that course of action may well be appropriate. But where that is not the case, or where the proposed claimant has failed to comply with the protocol, the defendant may face something of a dilemma.

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<sup>31</sup> [2006] JR 275

<sup>32</sup> [2006] 1 WLR 1261

<sup>33</sup> [2004] 2 P&CR 405

<sup>34</sup> 1270E-F. In this respect, Local Planning Authorities should note the recommendation contained in the Report of the Working Group on Access to Environmental Justice *Op Cit.* that in Aarhus Convention cases the costs of the permission stage should generally be set at a very modest level (page 35, key recommendation 4).

<sup>35</sup> 1270H-1271B

45. In the *Ewing* case, Carnwath LJ described the Council’s summary grounds of defence as a “model of what is required by way of a “summary”, making all the necessary points in 2 ½ pages”<sup>36</sup>. If a more detailed response is provided (for example in a more complex case), this might be more likely to achieve the desired result, but there is a risk that the costs of producing it may not all be recovered. In *Davey v. Aylesbury Vale District Council*<sup>37</sup>, Sir Anthony Clarke MR referred to what Carnwath LJ had said in *Ewing* in the following terms:

“Carnwath LJ explained what is meant by a “summary of grounds” at the permission stage. He stressed at [43] that the purpose of the summary is not to provide the basis of full argument of the substantive merits, but rather to assist the judge in deciding whether to grant permission and, if so, on what terms. He added that it should be possible to do what was required without incurring “substantial expense at this stage”.

It seems to me that any defendant who incurs more cost at the permission stage than is contemplated by Carnwath LJ will not be awarded such additional cost at the permission stage if the application is unsuccessful. Moreover, as I see it, the court should at that stage decline to look at anything which goes beyond the “summary of grounds” described in *Ewing*.”

46. On the other hand, providing a less detailed response might prove counter-productive if permission is granted when it need not have been. The right balance will need to be struck on a case by case basis, and adhering rigidly to Carnwath LJ’s “model” of a document of 2½ pages in length is likely to be unworkable in more complex cases. Moreover, the work required to produce the summary grounds – and therefore the cost to the defendant – will not be reduced in any significant way simply because the document ultimately produced is kept short. The claimants’ case must be properly assessed in order accurately to identify and state the summary grounds of resistance<sup>38</sup>; and providing a truly effective summary can often be more time-consuming than producing a slightly longer document. Nevertheless, in the light of those judgments, defendants should as a general rule confine themselves to what could properly be described as potential ‘knock-out blows’ at the permission stage, expressed as pithily as possible, and avoid lengthy written submissions on what appear to be arguable points. Where it is felt necessary to provide a longer “summary” than that envisaged by Carnwath LJ, it would be prudent to explain at the outset why that is considered appropriate in the circumstances of the particular case.

### Delay

47. It is at the permission stage that any ‘pure’ delay point must be taken<sup>39</sup>. Where the application has not been made promptly, it may also be appropriate to make contact

<sup>36</sup> Paragraph 44 of the Transcript

<sup>37</sup> *Op Cit.* at paragraphs 32 and 33

<sup>38</sup> When this work has been undertaken in order to advise the authority, it may be possible to recover some of the associated costs under the heading of “preparation costs” as distinct from “acknowledgment costs”: see *Davey Op Cit.*, per Sedley LJ at paragraph 21(2) of the Transcript.

<sup>39</sup> See *R v. Criminal Injuries Compensation Board, ex p. A* [1999] 2 AC 330

with any interested parties in order to ascertain whether the delay in bringing proceedings has given rise to any substantial hardship or prejudice to its interests. In an appropriate case, where further delay favours the Claimant but is either causing harm to the interests of a third party or is contrary to the public interest, an application can be made to expedite the proceedings. Any prejudice would have to be established through evidence, and a witness statement or statements would be required.

48. In addition to submitting any evidence relevant to a delay point, it will in some cases be appropriate to submit evidence to complete the factual picture if that is only partially covered by the Claimant's evidence. This can of course be done once permission is granted, but if the effect of the additional evidence is to undermine the claim there may be merit in submitting the evidence at the permission stage. There is only a limited amount of time in which such evidence can be submitted. Once the defendant's summary grounds have been submitted, the decision on the paper application can often follow quite quickly. In practice, therefore, any evidence should be served and filed at the same time as the summary grounds – which can then refer to and rely upon that evidence.

### **The permission hearing**

49. If permission is refused on paper, the claimant can renew his application in open court<sup>40</sup>. But in those circumstances he starts on the back foot, a High Court judge having already rejected his claim as having no reasonable prospects of success. Decisions on the papers are often overturned following an oral hearing, but the advantage of obtaining refusal on paper is significant. At the very least, the costs involved for a claimant in an oral hearing will usually be substantial compared to those of submitting an application on paper. Less wealthy challengers may be disinclined to commit further funds to the pursuit of a possible claim that has previously been dismissed by the court as having no reasonable prospects of success.
50. Unless an order for expedition can be obtained, and that will be rare, the permission hearing will usually represent the last opportunity to secure a reasonably quick victory. If permission is granted, it may be several months until the substantive hearing takes place – and even if that is successfully defended there is always the possibility of appeal to the Court of Appeal.
51. Attendance by the local authority at the permission hearing is not necessary unless the court directs otherwise, and, where an authority does attend, the court will not normally make an order for costs against the claimant<sup>41</sup>. In practice, however, many if not most oral applications for permission are opposed, for the reason I have given.

<sup>40</sup> CPR Part 54.12(3)

<sup>41</sup> CPR Part 54PD 8.5-8.6. That is in contrast to the approach at the substantive stage where costs normally follow the event. Local planning authorities may wish to note, however, that in *Davey Sedley LJ* held that even if the defendant is successful following a full hearing of the challenge, where the claim is brought partly or wholly in the public interest it may properly result in a restricted or no order for costs (paragraph 21(1) of the Transcript). Fortunately – at least from an authority's point of view – that suggestion was largely neutralised by Sir Anthony Clark MR in the same case, who said that "*It does seem to me that costs should ordinarily follow the event and that it is for the claimant who has lost to show that some different approach should be adopted on the facts of a particular case ... where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of money diverted from the funds available to fulfil its primary public functions*" (paragraph 29 of the Transcript).

## **Tactics at the substantive stage**

### **Detailed grounds of defence**

52. In the event that permission is granted, there is provision for a more detailed explanation of the local authority's position to be given, together with written evidence<sup>42</sup>. This is to be done within 35 days after service of the order giving permission. In practice, it has often been the case that the detail of the defendant's case is set out in the summary grounds, with little if anything added at this second stage. The implications of Carnwath LJ's judgment in the *Ewing* case should be to discourage unnecessarily lengthy "summary" grounds, and thereby to restore the detailed grounds stage to something closer to its intended purpose. It remains to be seen whether or not that will lead to a reduction in the costs of judicial review litigation.

### **Evidence**

53. The authority's evidence can play an important role in defeating an application. If the claimant's account of the factual background is incomplete or misleading, it will often be worthwhile submitting evidence to set out the local authority's account of the factual background. In appropriate cases evidence can also usefully be given as to the adverse implications for good administration of granting permission to a claimant who has not been prompt in bringing his application before the court.

## **The substantive hearing**

### **The role of the defendant's solicitor at the hearing**

54. There are certain practical points that the well-prepared solicitor should bear in mind when getting ready for the hearing:
- a. Do not assume that the judge will have all of the relevant documents, even if they have all been delivered to the court in good time. Documents often get lost in the system, so it pays to have a spare bundle which can be handed to the judge if necessary. Counsel should bring spare copies of the skeleton argument, but it is no bad thing to have a spare copy available just in case.
  - b. Be selective in suggesting last-minute points to counsel. By the day of the hearing the battle lines should be clearly drawn, counsel should be completely familiar with the facts and the arguments, and all being well there should be little of substance to discuss on the morning of the hearing. There are

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<sup>42</sup> CPR part 54.14

occasions when a good point has been overlooked, but it is important to recognise that when a person is just about to stand up in court to present a thoroughly prepared argument, adrenaline coursing through their veins (even if that is not immediately apparent from their manner and external appearance), there is a limit to the number of new points they can be expected to take on board and weave into submissions. Make sure the representative of the lay client understands this too, and filter his or her points accordingly.

- c. Review the correspondence file thoroughly in advance of the hearing, so that any questions concerning who said what and when in correspondence between the parties can be resolved quickly.
- d. If there is to be a summary assessment of costs, ensure that:
  - i. the schedule of costs is submitted in time;
  - ii. spare copies are available in court;
  - iii. counsel is briefed on any aspects of the defendant's schedule likely to be questioned by the claimants; and
  - iv. counsel is briefed on any aspect of the claimant's schedule which you consider to be questionable.

#### The role of the officer at the hearing

55. Perhaps the most valuable role of an officer of the authority at a hearing is to assist with the relevant factual matrix. The officer with responsibility for the impugned decision will often be the person in the court with the best and most detailed understanding of the facts. If some important factual point is being misunderstood or overlooked by counsel and/or the judge, it needs to be put right.
56. In many cases this can be done quite simply, by handing a note to counsel explaining the point. If possible, the point needs to be clearly and shortly expressed with references to the relevant part(s) of the bundle. Counsel will often be trying to take the point on board whilst simultaneously listening to submissions being made by the other side or will be in the middle of his own submissions. Either way, there is a limit to the amount of information that can be absorbed in those circumstances and anything that can make it more digestible will be appreciated.

**Hereward Phillpot**  
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Francis Taylor Building

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