



DEVELOPMENTS IN JR PROCEDURE

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1. INTRODUCTION

Aim of this session

- Some significant recent case-law developments, but equally ...
- Aspects of CPR 54 and Practice Direction (replaced RSC O 53 on 2 October 2000) and JR Pre-Action Protocol (issued December 2001) still bedding in;
- Several revisions to rules and PD since introduction); and
- Implications of older case-law developments (e.g. *Burkett* – 2002) still playing out
- So provide snapshot of important aspects of JR procedure -- tips, problems, pitfalls – drawing special attention to developments over last 2 years or so

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2. BEFORE YOU BEGIN: THE PRE-ACTION PROTOCOL

The Claimant

- Purpose: extends to JR two important themes of CPR: “cards on the table” approach, and diversion of cases to alternative methods of resolving dispute - “Identify the issues in dispute and establish whether litigation can be avoided” (para. 8).
- Advantages:
 - A well thought-out pre-action letter confronting D with its errors may be effective, e.g. prompting reconsideration
 - Put to D particular reasons justifying JR, e.g. lack of appeal/alternative remedy where in doubt
 - LSC likely to insist on letter before issuing full representation certificate for proceedings
 - Costs consequences of unjustified failure to comply, eg. if proceedings issued and D concedes early on
- Problems:
 - The big one: **delay**. Leisurely process of detailed letter and considered reply unsuited to urgent cases. Protocol does not affect the JR time limit (see below): para. 14.
 - May be necessary to commence proceedings straight away to obtain urgent interim relief (procedure: Claim Form accompanied by N463 Application for Urgent Consideration and draft order).
 - Solution: **flexible approach**. In emergency cases may be genuinely impossible to write first (para. 6). Even then, should **fax draft claim form** (para. 7). In moderately urgent cases, **invite reply in shorter timescale** than the norm (14 days – para. 12) and set out reasons why. Explain urgency to LSC. Prepare proceedings while reply awaited.
 - Difficulty where D functus. But can still invite D to agree to submit to judgment.
- Suggest ADR?
- Copy to interested parties

The Defendant and Interested Parties

- Opportunity for D to reconsider position in light of Claimant's letter
- Protocol does not impose any greater **duty to give reasons** than already provided for by law (para. 6). But:
 - Good practice to explain why Claimant's contentions resisted
 - Opportunity to raise specific objections, e.g. standing, delay, alternative remedy.
 - CLS funded Claimant may have to justify proceeding in face of compelling response by D.
- Extension of time for reply: may not head off proceedings, because does not stop time running (Protocol, para. 14).
- ADR:
 - The Government's pledge: ADR "will be considered and used in *all* suitable cases where the other party accepts it". See <http://www.dca.gov.uk/civil/adr/adrmon.htm#part2>
 - Laying the paper trail for the permission stage: issuing proceedings where ADR should have been attempted may result in refusal of permission
- Costs consequences of failure to comply: see below

3. PERMISSION ISSUES

Generally

- Court favouring flexible test. Attitude towards questions of delay and standing will be informed by merits and degree of public importance of challenge: ***R. (Grierson) v OFCOM, Atlantic Broadcasting and others Interested Parties [2005] EWHC 1899***, Stanley Burnton J
- Relevance of overriding objective? Proportionality of use of court's time

Timing of proceedings: fertile ground for permission disputes

- The time limit: CPR 54.5. Must issue claim "(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose"

- Problem areas -- prejudice to **third party who has acquired an interest** as a result of the decision:
 - Former requirement of “utmost promptitude”, notably in third party challenges to grant of planning and similar consents (where a *de facto* limit of 6 weeks was enforced)
 - The retreat: ***R. (Burkett) v London Borough of Hammersmith & Fulham [2002] 1 WLR 1593, HL:***
 - Time runs from formal grant of permission, not resolution to grant;
 - Uncertain notion of “promptness” will not be allowed to impede access to court to pursue an arguable case:

“The lack of certainty is a recipe for sterile procedural disputes and unjust results. ...there is at the very least doubt whether the obligation to apply “promptly” is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms.” (Lord Steyn, paras. 49, 53).
- Impact of ***Burkett***: more liberal approach to delay at permission stage, e.g.
 - ***R. (Hammerton) v London Underground Ltd [2002] EWHC Admin 2007*** (ELLX litigation) — lapse of planning permission regarded as a continuing state of affairs, not once-and-for-all event;
 - ***Grierson*** (above): Court reluctant to shut out a case on delay grounds without taking merits into account. Decision to issue commercial radio licence to C’s competitor made 7.3.05 for reasons published 18.3.05; protocol letter 20.4.05; claim for quashing order issued 23.5.05. C’s delay “*not so egregious that the court should refuse to countenance the grant of permission irrespective of the merits of his claim*”.
 - Balance of prejudice may persuade court to allow the application to proceed but grant a remedy short of quashing order, e.g. declaration: ***R. (Gavin) v Haringey LBC [2003] EWHC Admin 2591*** — failure by council to notify neighbour of either application for planning permission or its grant in September 2000; first aware when excavators arrived in March 2003. JR claim filed **32 months** after grant of permission. Claim allowed to proceed. Grant of planning permission **declared** in breach of publicity and EIA requirements, but prejudice to developer (who was entitled to rely on the authority complying with requirements) meant **no quashing order**.

- Claimant in person likely to be given greater latitude: **Grierson**
- “Piggy-backing”: courts still sceptical of attempts to disguise delay by artificially challenging a later decision — **R. (Louden) v Bury School Organisation Committee [2002] EWHC Admin 2749** — real complaint was irregularity in LEA’s publication of proposals, not approval by SOC
- Dealing with delay issues in the Grounds for Review/Summary Grounds of Opposition:
 - **Claimant:** hedging bets in borderline cases – proceedings issued in time, but provide reasons why not issued earlier (eg. public funding delays), and if necessary head off “prejudice” argument.
 - **Defendant/Interested Party:** *explanation and evidence* of prejudice, not just assertion. *Birkett* presupposes that launch of JR proceedings within 3 month limit will cause *some* prejudice. Must show impact over and above the norm.
- **Permission v substantive stage:**
 - Delay generally determined at permission stage.
 - But court may direct “rolled up” permission/substantive hearing where a separate permission hearing to deal with satellite issues (delay, non-disclosure, etc) would be disproportionate or would add to delay.
 - **R. v Lichfield District Council & Williams, ex parte Lichfield Securities, [2001] EWCA Civ 304, [2001] EGCS 32** -- Where permission **granted** in face of objections from delay, Defendant will **not be allowed to re-open at substantive hearing** unless:
 - judge at permission hearing indicated the issue could be reconsidered;
 - new relevant material is introduced;
 - exceptionally, issues emerging at substantive hearing put new aspect on promptness; or
 - the judge giving permission judge plainly overlooked a relevant matter or acted *per incuriam*.
 - If delay argument succeeds at the substantive stage, generally goes to **discretion to refuse relief**.
 - Delay/prejudice issues may arise in other guises post-permission, e.g. if a party seeks an adjournment of the substantive hearing, but court will give due weight to fact that permission has been given and the

claim is *ex hypothesi* arguable: ***R. (Anderson and Collins) v York City Council [2005] EWHC 1995 (Admin)***, Elias J (adjournment of JR refused on prejudice grounds despite Cs' funding difficulties).

Standing: the rise and rise of the third party

- Often a permission issue, though may be an issue for argument at substantive hearing
- “Sufficient interest”: the wide net
 - The trend: courts recognising wide public interest in bringing unlawful conduct by a public body to the courts’ attention. Anyone who is not a “mere busybody”.
 - NGOs: courts recognise assistance that can be given by expert body – ***R. (CND) v Prime Minister [2002] EWHC 2777 (Admin)*** (permission refused for reasons other than standing of CND).
 - Individuals: interest defined by nature of decision and challenge. ***R. (Edwards) v Environment Agency [2004] JPL 1691*** – individual resident of Rugby had sufficient interest to challenge permission for operations at Rugby cement works on EIA grounds because, even though had not actively come forward during consultation process, could arguably claim to be affected by environmental impact.
 - **Derivative interest** no longer a bar to standing, *cf. Durayappah v Fernando [1967] 2 AC 337, PC* (Mayor lacked individual standing to challenge dissolution of local authority): claim in ***Grierson*** brought by Managing Director of unsuccessful bidder, but derivative nature of his interest taken together with weak merits **tilted balance against permission**.
- Public funding points:
 - Nominal claimants with protection of CLSF certificate: so long as individuals have sufficient interest, Defendant unlikely to succeed in argument that it is abusive for eligible individuals to “front” a public interest challenge. Court will not second-guess LSC decision to grant certificates: ***Edwards*** again.
 - Alternative funding and contribution: Funding Code Guidance 5.5.
- Standing to seek **interim relief against private activity** which an enforcement authority decides to permit:
 - Where a public regulatory body alone has a discretionary power of enforcement but proposes to allow activity to proceed, does a member of the public have standing to seek a remedy on JR? The ELLX litigation...

- Claimant/court **must not usurp** local planning authority's discretion; but a **declaration as to the legal position** may be appropriate (so the authority can reconsider its position on a proper basis), and an interested member of the public has standing to claim it: **R. (Hammerton) v London Underground Ltd [2002] EWHC Admin 2007**, Collins J
- Member of the public may seek **interim injunction** pending substantive hearing of JR claim against the regulator — **R. (Prokopp) v London Underground Ltd, LB Hackney and LB Tower Hamlets [2003] EWHC Admin 960**, Collins J, para. 15:

“If a developer is about to take what may be **irrevocable steps** which are said to be **unlawful** but the LPA is not taking action, there must be a way in which the **court can preserve the position**. Thus I am satisfied that **an individual can seek and, if appropriate, obtain interim relief** to prevent such arguably unlawful action. His claim will initially be against the developer, but he must notify the LPA and add it (as has been done here) as defendant. The developer will then become an interested party and the claim will proceed against the LPA. The court will in such a case have imposed time limits on the LPA to ensure that it makes its decisions within a reasonable time. What a private individual **cannot** do, at least in a public law claim, is to obtain a **permanent injunction** the effect of which is to take the enforcement action which is the responsibility of the LPA and which contains safeguards for the developer in the form of rights of appeal on specific grounds.”

- May be wise for C to address standing issues in Grounds for Review

Claimant's duty of disclosure?

- Under old RSC O 53, “leave” stage an *ex parte* process, so C under positive duty of full and frank disclosure; failure could result in dismissal of claim. However, permission proceedings now invariably on notice, so remedy is for D to supply the “missing” material. But not an excuse for sloppy practice by Claimants. Careful thought about bundle contents will assist C.

4. POINTS ARISING DURING THE COURSE OF PROCEEDINGS

The response stage: pitfalls for defendants

- CPR 54.14: D must file and serve **detailed grounds for contesting the claim** and any **written evidence** within 35 days of service of order granting permission.
- No express sanction for failure to file detailed grounds, but costs issues may arise if C has to deal belatedly with a point not raised in D's written evidence or in summary grounds filed by D at permission stage

- Failure to file written evidence within 54.14 time limit: unless court gives permission, D will be precluded from relying on evidence not served in time (CPR 54.16).

Third party interventions

- CPR 54.17, PD54 para. 13: letter to Admin Court, with oral hearing if necessary. “Must be made at the earliest reasonable opportunity” to avoid delaying the hearing.
- Court may limit intervention to written evidence or written submissions. Example of reasons for allowing oral intervention: Collins J giving League Against Cruel Sports permission to intervene in Hunting Act JR before Divisional Court. In view of A-G’s position on interim relief, need for public to be confident that a party at hearing would robustly resist claim.

5. COSTS

Costs at permission stage

- Permission **granted: costs in case** unless court otherwise orders (*Practice Direction: Judicial Review – Costs [2004] 1 WLR 1670*).
- Defendant’s costs where **permission refused on papers**:
 - Claimant should pay costs of the acknowledgement of service and the application for costs: *R. (Leach) v Commissioner for Local Administration [2001] EWHC Admin 445*; *R. (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346*.
 - Defendant should include the application for costs in the acknowledgement of service (eliminating need for satellite hearing about costs).
 - But Defendant may be refused costs if not complied with the **pre-action protocol: *Mount Cook Land***, para. 76(1)
- Defendant’s costs where **permission refused following a hearing**:
 - PD54 8.6: where Defendant **attends permission hearing** court **will not order Claimant to pay costs of the hearing** unless good reason.
 - ***Mount Cook Land***: permission hearing costs of Defendant (or interested party) should only be awarded against Claimants in **exceptional circumstances**. Factors:
 - hopelessness of claim

- Claimant persisting in claim after being alerted to facts/law demonstrating its hopelessness (hence importance of D's compliance with Pre-Action Protocol)
- abuse of JR for collateral ends (e.g. developer in a planning case exerting commercial pressure on a rival)
- whether the permission hearing has in reality given the Claimant an early substantive hearing of the claim
- in exercising discretion court should take into account whether Claimant has "substantial means"

Costs following substantive hearing

- Rule that costs follow the event may be relaxed in public law cases: D may not be entitled to costs against a Claimant who is bringing alleged illegality by a public authority to the court's attention in the public interest. Eg. Lord Woolf CJ in Hunting Act JR (*R. (Jackson and others) v HM Attorney General* [2005] 2 WLR 866)
- But Claimant may seek certainty through **protective costs order**:
 - Court has jurisdiction under CPR 44.3 to grant claimant in advance order providing for C to pay no, or limited, costs to D if permission (or claim) refused: *R. (CND) v Prime Minister (Costs)* [2002] EWHC Admin 2712 — C's exposure for D's costs of permission stage limited to £25,000.
 - Criteria elaborated in *R. (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, CA:
 - issues of general public importance which the public interest requires should be resolved
 - C has no private interest in outcome
 - fair and just to make order having regard to financial resources of parties and likely amount of costs
 - C would probably and reasonably discontinue proceedings if no order were made
 - Court will look favourably on *pro bono* representation for C
 - As a *quid pro quo* for limitation of C's liability for D's costs, order likely to cap C's recoverable costs to cost of "modest representation" (unless C's lawyers acting *pro bono* and order simply prevents D recovering costs against C regardless of outcome)

(CA made protective order to enable NGO to challenge DTI's revisions of EGCD forms and procedures without consultation and in breach of policy)

- C should make application in claim form supported by evidence, and D should respond in acknowledgement of service. If order refused on paper, can be renewed at oral hearing limited to 1 hour. C will be liable for D's costs of successfully resisting a protective order.
- **Indemnity costs against Defendant** may be appropriate where serious or persistent refusal to give effect to C's entitlement: ***R. (Bernard) v Dudley MBC [2003] EWHC 147 (Admin)*** – persistent refusal by prosecuting authority to provide particulars of case under Health and Safety at Work Act 1974, necessitating adjournment of magistrates' court trial over JR. Particulars provided after proceedings issued; court considered costs at ***Boxall*** hearing: particulars should plainly have been provided and the Council would clearly have lost had the JR proceedings continued to a conclusion.
- Claimant's costs of **successful claim against an inferior court or tribunal**:
 - General rule that the **inferior court will not be ordered to pay costs** has been gradually **eroded**: ***R. (Davies) v HM Deputy Coroner for Birmingham [2004] EWCA Civ 207*** — traditionally costs not awarded where the inferior court appears at the hearing to **assist the Admin Court neutrally** on issues of jurisdiction, etc; but now costs will be more readily awarded so that a successful claimant can be fairly compensated from a public source for otherwise **irrecoverable expense** of asserting rights where the inferior body erred in law and there is **no other obvious candidate** to pay costs