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Independent Review of Administrative Law – Call for Evidence

Response by the City of London Law Society Planning and Environmental Law Committee

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The CLLS represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to the Consultation has been prepared by the CLLS Planning and Environmental Law Committee. The current members of the committee are herewith:-

https://www.citysolicitors.org.uk/clls/committees/planning-environmental-law/planning-environmental-law-committee-members/

Introduction

The Committee is made up of practising solicitors who regularly deal with judicial review and other statutory challenges under Part 54 and Part 8 respectively of the Civil Procedure Rules. We have extensive direct experience of acting for claimants, defendants and interested parties in the course of our work.

The majority of these claims are listed in the Planning Court. The Committee regards the Planning Court as having been a great success since it was established as a specialist list in the Administrative Court in 2014. The role of the Planning Liaison Judge, active case management and the target timescales for "significant" claims under Practice Direction 54E help to ensure that claims are dealt with by the Planning Court efficiently and (generally) by a judge with planning experience.

Although our evidence below therefore relates primarily to cases in the Planning Court, the Committee recognises the wider importance of administrative law to our clients and the necessary role of judicial review as a means of protecting their rights. This may sometimes require the ability to challenge executive actions and the lawfulness of decisions made by public bodies including both local and central government. The Committee regards this as a fundamental principle of the rule of law and, as such, it must be protected in order to ensure that business in the UK can be conducted with integrity, predictability and fairness.

For these reasons, it is essential that our courts retain their international reputation for independence and impartiality and that access to justice is maintained.

The remainder of this response to the IRAL panel's call for evidence sets out the Committee's comments and evidence against the IRAL's questionnaire. All comments relate to the jurisdiction of England and Wales.

Section 1 – Questionnaire to Government Departments

1. *Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?*

   No.

2. *In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?*

   We have the following suggestions for improvements to judicial review, many of which could be dealt with through the Civil Procedure Rules and would not require changes to the law itself.

   (a) First, it would be in the public interest for the Administrative Court to be more transparent, with the adoption of modern information systems and greater digitisation. In particular:

      (i) Claims should be recorded on a central register which is open to public access and capable of being searched as soon as claims are issued by the Administrative Court Office. Our clients often enter into contracts for the sale, leasing or development of land that are conditional on planning permission being granted and that permission not being challenged within the relevant period. However, it can be very difficult to find out whether or not a claim has been filed with any certainty for the purpose of reliably establishing whether the contract can go unconditional, particularly because the parties to the contract are unlikely to be the defendants to such a claim. It is not a formal requirement under the Civil Procedure Rules for all claims to be served on interested parties, so our clients frequently have to rely on making informal enquiries with the court. These are time consuming for ACO staff, cannot reliably be guaranteed for the purpose of discharging valuable contractual obligations and have not been available at all since the coronavirus pandemic began. An electronic register of claims, the accuracy of which is guaranteed by the court and which is capable of being searched remotely by any member of the public would resolve these problems.

      (ii) Similarly, a public register of interlocutory orders should be maintained and made available to public access. This would be particularly helpful in order to access orders made by judges to grant or refuse permission to apply for judicial review. Being able to see the terms of such orders would help to establish a better understanding of how potential grounds of claim are dealt with at the permission stage, meaning that fewer unarguable claims are likely to be brought. At the moment, such orders are typically only made available to the parties to the claim itself.

      (iii) Statistics as to the length of time that cases take and eventual outcomes should identify the Planning Court's performance separately from the performance of the Administrative Court more widely. This would help to advise clients on the likely delays that will be caused to their development plans whilst claims are heard and will also enable improvements to case management practices to be monitored and measured.

   (b) Secondly, greater resources should be made available to the Court of Appeal to ensure that applications for permission to appeal to the Court of Appeal are dealt with more efficiently. Our experience is that applications for permission to appeal (whether following a refusal to grant permission to apply for judicial review or following a judgment handed down after a substantive hearing) are routinely made by the disappointed party. Such applications carry little by way of adverse costs consequences, but can take many months to be heard, with little consistency as to

how long this will be from one case to another (and no target timescales, even in the case of "significant" claims). This problem is particularly acute where cases have been held to be "unarguable" and have therefore been refused permission to apply for judicial review, but then frequently take many more months to be finally disposed of whilst the Court of Appeal considers whether or not to grant permission.

(c) Thirdly, the Committee would welcome a review of the recent practice of crowdfunding in relation to cases in the Planning Court. The use of crowdfunding to finance claims has grown significantly over the past five years, in parallel with the use of social media to publicise grievances against planning decisions more widely. Whilst we understand that this has a place in helping members of the public to access justice in the absence of legal aid for judicial review, crowdfunding is unregulated and we have real concerns about the way in which some claims are described on crowdfunding sites, which can bear little resemblance to the actual grounds of claim before the court. There is a risk that people are being induced to donate money to claimants without fully understanding how their money will be used, let alone the prospects of success for the claim in question. One possibility would be to introduce a requirement for claimants to disclose in full the information they have given on crowdfunding sites to the court, with cost penalties where the information is regarded as being misleading in any way.

(d) Fourthly, the Committee suggests that there would be merit in considering an amendment to section 31(3C) of the Senior Courts Act 1981 so that, when considering whether to grant permission to apply for judicial review, the High Court (and the Court of Appeal, where such an application is appealed) is obliged to consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred. Currently, this question is only considered by the High Court of its own motion or where the defendant asks it to. It would be a waste of the court's time and resources for a claim to proceed to a substantive hearing in circumstances where the outcome would not have been substantially different had the conduct complained of not occurred, so it must be reasonable and appropriate for this question to be considered on every application for permission to apply for judicial review. This would remain subject to the safeguard in section 31(3E) that the court may disregard such a requirement if it considers that it is appropriate to do so for reasons of exceptional public interest.

Section 2 – Codification and Clarity

3. *Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?*

The Committee does not believe that statutory intervention in the judicial review process is necessary, nor that it would add any certainty and clarity to judicial reviews.

Statutory codification would also reduce the inherent flexibility of the Civil Procedure Rules and the ability of the courts to respond quickly to changes in circumstance.

4. *Is it clear what decisions/powers are subject to judicial review and which are not? Should certain decisions not be subject to judicial review? If so, which?*

The Committee regards it to be clear what decisions/powers are subject to judicial review and which are not. In principle, all decisions by public bodies which affect the rights of businesses or individuals should be subject to judicial review.

Specifically in relation to planning law, the supervisory role of the courts is necessary in order to ensure that the right to a fair hearing by an impartial and independent tribunal is upheld. For example, if the courts did not have jurisdiction to review the fairness and lawfulness of public decisions, then the Secretary of State's role as both policy maker and decision taker in relation to planning applications that are determined by him directly would be unsustainable (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23).

5. *Is the process of i) making a judicial review claim, ii) responding to a judicial review claim and/or iii) appealing a judicial review decision to the Court of Appeal/ Supreme Court clear?*

The Committee regards these processes all to be clear. The Administrative Court Judicial Review Guide, which is now in its fifth edition, is particularly invaluable for these purposes. The Guide is produced by judges, lawyers and the staff of the Administrative Court and covers all the stages of a claim for judicial review, as well as identifying good practice and potential pitfalls. The Guide is available to members of the public on the Gov.UK website and therefore plays an important role in facilitating access to justice.

Section 3 – Process and Procedure

6. *Do you think the current judicial review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?*

The majority of planning law claims must be brought within six weeks. The introduction of this deadline in 2013 has helped to establish greater certainty than the traditional judicial review time limit of claims having to be made "promptly and in any event within three months". This certainty is of fundamental importance to our clients for the reasons set out in our response to question 2 above (at paragraph 2(a)(i)).

To improve this certainty, the Committee recommends that Part 54 of the Civil Procedure Rules is amended so that judicial review claims are required to be both issued and served on the defendant and interested parties within six weeks. At present, claims must be filed at court within six weeks but can be issued by the court outside that period. The claimant then has a further seven days in which to effect service. In practice, this means that it can take up to eight weeks before the defendant and any interested parties are notified of a claim (and frequently longer during holiday periods, when delays to claims being issued by the court are common).

Part 8 of the Civil Procedure Rules requires statutory review claims to be issued and served within six weeks, so there should be no reason why Part 54 claims are not made subject to the same requirement.

The Committee observes that a fixed period for claims to be made might well be considered helpful to establish greater administrative certainty in relation to other types of judicial review not related to planning matters.

7. *Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?*

The Committee does not have any evidence of the rules regarding costs in judicial review are applied too leniently by the court.

However, the Committee wishes to draw attention to the position relating to cost recovery by interested parties. Interested parties, typically the applicant for planning permission, play an important role in judicial review proceedings in support of the public body whose decision is being challenged. But

it is rare for an interested party to be awarded a second set of costs if the claim is unsuccessful, with costs only being awarded to the defendant. The Committee would welcome greater consideration being given to the costs incurred by interested parties as a result of judicial review claims against their development proposals in appropriate cases (subject, where relevant, to *Aarhus* cost caps). The failure to take these costs into consideration may well result in undue leniency being given to an unsuccessful claimant.

The corollary of this is that costs should also be capable of being awarded against interested parties where a claim is successful.

8. *Are the costs of judicial review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?*

With regard to the proportionality of the costs of judicial review claims, we refer to our comments in response to question 7 above. We do not believe that standing should be a consideration for the panel in this context.

With regard to unmeritorious claims, the Committee suggests that further consideration is given to the use of the "totally without merit" certification, which in our experience is rarely used. It may be appropriate for such claims, which by definition have been ruled to be "bound to fail" by a judge already, not to be capable of being appealed to the Court of Appeal, which adds many months to the timescale for the disposal of the claim.

9. *Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?*

The Committee does not regard the range of remedies available the court to be inflexible. We do not believe remedies such as damages should be introduced. We refer to our comments in response to question 10 below with regard to other potential remedies that would be beneficial.

10. *What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?*

The House of Lords held in *R (Burkett) v London Borough of Hammersmith and Fulham* [2002] UKHL 23 that the time limit for bringing judicial review proceedings starts when planning permission is actually issued, rather than when the local planning authority resolved to issue that permission.

This means that where the grounds for judicial review have arisen at the resolution to grant stage (for example, because of alleged flaws in the officers' report to committee or the committee's reasoning in reaching its decision), a potential claimant is able to store up his or her complaint until after planning permission is issued, by which time the local planning authority is *functus officio* and unable to rectify the error in order to avoid the need for litigation.

Even where the planning authority recognises, in response to a pre-action protocol letter received following the grant of planning permission, that the decision may have been flawed, the parties then have to go through a process of agreeing that the proceedings be commenced so that a consent order can be agreed by the parties and sealed by the court, resulting in the formal quashing of the permission.

This also results in claims being made, and the realisation of the significant public benefits of development being delayed whilst claims work their way through the courts (often for many months or

years), in circumstances where the subject-matter of the claim is something that the local planning authority's planning committee would be able to reconsider and resolve in a much shorter time period, were they to retain jurisdiction to do so. A large number of claims could be disposed of were this to be possible, freeing up resources in the Planning Court to deal with cases where there are genuine and substantive grounds for judicial review, rather than simply an attempt to appeal the merits of a duly and properly made planning decision.

The Administrative Court's pre-action protocol for judicial review, a "code of good practice" which "contains the steps which parties should generally follow before making a claim for judicial review", says nothing expressly to discourage the approach of storing up potential grounds of challenge until it is too late for any errors to be rectified other than by way of litigation. The protocol is expressed at a general level that does not engage with the specifics of the planning process. The Committee suggests that the pre-action protocol should be amended so that prospective claimants are advised that they should never store up prospective grounds of challenge until the planning permission is granted, but instead should make them known to the local planning authority and any potential interested parties without unreasonable delay and with the objective of giving the parties the ability to address the grounds (if necessary by corrective administrative steps) before the planning permission is granted and thus before it is too late to undo the administrative step of issuing the permission.

If further structure is needed around this, consideration might be given to endorsement of a procedure whereby a local planning authority (and the Secretary of State, in the case of a called-in application or an appeal) may choose to make clear to the public in its publicity that if the outcome of a planning committee decision is to resolve to grant planning permission, the planning permission will not be issued before a specified date (say at least four weeks after the date of the resolution) and within that period those with potential complaints about any aspect of the process up to that point should make them known so that they can be considered by an internal review panel within the local planning authority (including the council's monitoring officer or suitable nominee). Whilst a subsequent claim for judicial review would not be automatically turned away by the court if the claimant seeks to make a complaint which had not been raised through that process (because we recognise that the claimant may not have been legally represented at that point or had the necessary information or resources to raise the issue), it would be a relevant matter for the court to take into account in deciding whether or not to grant permission to apply for judicial review.

It is common for the Secretary of State to indicate that he is "minded to" grant planning permission subject to specific matters being resolved to his satisfaction, so the introduction of a standard four week period for any procedural complaints to be raised could be regarded as a simple extension of that custom.

This would enable many potential claims to be satisfactorily resolved (if necessary by returning the matter to committee to correct the alleged error) without the need to proceed with a claim for judicial review and would be entirely consistent with the overriding objective of the Civil Procedure Rules of enabling the court to deal with cases justly and at proportionate cost.

It would also be useful for the law to be changed so as to allow local planning authorities to correct certain errors in planning decisions, equivalent to the power that the Secretary of State has in relation to decisions containing a correctable error pursuant to section 56 of the Planning and Compulsory Purchase Act 2004.

11. *Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?*

It is rare for a settlement to be reached between the claimant and the defendant in planning cases, due to the binary nature of claims against the grant of planning permission and the lack of an effective procedure for dealing with claims once planning permission has been granted (as explained in our response to question 10 above).

The Committee does have some experience of claimants using the judicial review process to leverage a commercial advantage as part of a wider commercial negotiation. In such cases, if the developer wishes to implement a planning permission which is the subject of a claim, he may choose to negotiate with the claimant to agree terms to secure the withdrawal of the claim rather than face months of uncertainty whilst the claim proceeds through the courts. Such cases represent only a very small proportion of the judicial review claims that members of the Committee are involved with however.

12. *Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in judicial review proceedings? If so, what type of ADR would be best to be used?*

ADR is in principle difficult to apply to potential claims for judicial review where what is at issue is not a dispute between two private individuals (for example a contractual dispute), but matters of public law which by definition have wider implications. We also have some experience of ADR being suggested by claimants as a device for achieving further delay to the development that they are fundamentally opposed to.

There may be some scope for mediation to be utilised before a claim is issued in order to facilitate a greater understanding of the decision making process or to narrow the issues in dispute, but the Committee does not consider that this should result in any extension to the six week period (following the grant of planning permission) for a claim to be made and is therefore likely to be useful in only a limited number of cases.

13. *Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?*

The Committee's experience is that issues of standing have become much less prevalent over the last decade and in planning cases, issues of standing seldom arise. The sufficient interest requirement is case specific and the Committee therefore believes that the court is best placed to determine whether a claimant is directly and adversely affected by the decision in question or whether the claim is in the public interest.

The Committee does not believe that the rules of public interest standing are applied too leniently by the courts. Should further guidance on standing nevertheless be considered necessary, the Committee believes that this should be done through the Civil Procedure Rules or the Administrative Court Judicial Review Guide.

POINT OF CONTACT

Should you have any queries or require any clarifications in respect of our response or any aspect of this letter, please feel free to contact me at stephen.webb@clydeco.com

Yours faithfully

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