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Briefing note December 2012

Judicial Review: Changes proposed to halt a "growth industry"

The Ministry of Justice (MoJ) has issued a consultation paper[1] on proposals for reforming the judicial review process to counter what the Prime Minister recently called a "growth industry" in judicial review. The MoJ seeks changes on time limits, rights to request an oral hearing and court fees.

Judicial review has in recent years become the favoured option for many objectors to policies and proposals for large infrastructure and development. Among the key drivers for this is the introduction by the courts of Protective Costs Orders (which can protect claimants against full exposure to paying the other side's costs if they are unsuccessful). In addition, the making of Government policy on major infrastructure, which approves the developments in principle, increasingly leaves objectors feeling that their consultation response has been ignored and legal challenge is the only remaining option. The Government has suffered successful challenges in respect of its energy policy and airports policy; and most recently, its changes to the tariffs for solar power generation were ruled unlawful. At a more local level the resources required and expense of objecting at a public inquiry means that judicial review is seen as a better way of postponing or halting a project. It is in this context that the proposed changes are being proposed.

Key issues

- New 6 week time limits for commencing planning JRs
- New 30 day limit for commencing procurement-related JRs
- Right to oral renewal hearings removed where:
  - substantially same matter already decided; or
  - case is totally without merit
- New court fee for oral renewal hearings

Shortened Time Limits for Planning cases

Currently judicial review against decisions of local planning authorities has to be commenced promptly and in any event within three months of the grounds of claim arising (usually the grant of planning permission)[2]. For planning cases, the MoJ intends to restrict the time limit to "*6 weeks from the date when the claimant knew or ought to have known of the grounds of the claim*"[3]. This reduction to 6 weeks will be beneficial to developers although it will also reduce the time for the claimant to seek some form of agreement with the developer and this will not always be in either's best interests.

In cases involving "continuing or multiple" breaches, the MoJ seeks to impose a different time limit of 3 months. This is intended to apply to cases where there might be a number of different points at which a claim might be started, such as

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[1] Judicial Review: proposals for reform (Ministry of Justice, December 2012).

[2] In cases where EU law is applicable (e.g. environmental impact assessment cases), the "promptly" criterion no longer applies.

[3] The 6 week time limit has been chosen to mirror the deadline for statutory legal challenges against decisions of the Secretary State (e.g. on planning appeal or call-in or Development Consent Orders under the Planning Act 2008) but there is no court discretion to extend the time in these cases.

when challenging ongoing implementation of government policies or delays in making decisions. Based on the proposal, the time limit would run from the initial decision where grounds of the claim first arises (rather than any later instance of the grounds). There is a risk of confusion with the above-mentioned 6 week rule given that the planning process often gives rise to multiple breaches which could each be challenged (e.g. in the resolution to grant planning permission, the later grant of permission and reserved matters approval). The drafting of the relevant rule changes will need to be scrutinised to ensure there is no ambiguity for such cases.

Shortened Time Limits for Procurement Cases

The time limit for commencing a judicial review action which is associated with a public procurement decision under the Public Contracts Regulations 2006 is similarly to be reduced from 3 months to 30 days, in line with the 30 day deadline for seeking to have an agreement struck down under those Regulations. This will, for example, prevent a developer from challenging the conclusion of a Section 106 agreement and/or grant of resulting planning permission to a rival on procurement grounds at a later date.

Removing rights for Oral Hearings for permission to seek Judicial Review

The MoJ proposes two significant changes to the right for a claimant to seek permission for judicial review. The current process is as follows:

- Application for permission is made to the High Court and dealt with initially on the papers.
- If refused, the claimant can seek an oral renewal hearing before the High Court.
- If refused, the claimant can appeal the refusal of permission to the Court of Appeal (and then potentially on to the Supreme Court).

The Government believes this provides too many opportunities for claimants with weak cases and now seeks to deal with the consequent delays and costs. The changes would remove the right to an oral hearing (in front of the High Court and Court of Appeal) where either:

- there has already been a judicial process which has previously heard *substantially the same matter* (this might include, for example, a case where an objector has sought to challenge a planning permission on grounds of inadequate transport assessment, and the objector then seeks to challenge a reserved matters approval on essentially similar grounds); or
- a judge, based on written submissions, has determined the case to be *totally without merit*.

The restriction of rights to oral renewal hearings will be welcomed by scheme developers as it should reduce costs and delays of the proceedings. There will, no doubt, be room for debate on what "substantially the same matter" will amount to. Also how willing the courts will be to label a case as "totally without merit" also remains to be seen.

Fees for Oral Renewal Hearings

In addition to restricting rights to an oral renewal hearing, the MoJ plans to impose a court fee such hearings (of around £235 [4]) to discourage weak claims. This would be credited against the existing similar court fee for the full judicial review hearing if permission was ultimately granted. In practice, legal fees are much more likely than court fees to dictate whether a claimant will want to pursue an oral renewal hearing.

[4] Based on a recent fees consultation.

Analysis

The uncertainty, delay and costs caused by judicial review are not new problems for infrastructure or real estate developers. However, objectors contemplating using judicial review have been emboldened by successful high profile challenges against the Government in recent years and encouraged by the availability of Protective Costs Orders.

The proposed changes will reduce the period of uncertainty for developers following the granting of permission and streamline the process for those who are challenged. They will also help to weed out hopeless cases. However, they are unlikely to lead to a significant reduction in the number of judicial reviews affecting development schemes. More radical changes would be required to halt this growth industry.

Responses to the consultation should be made by 24 January 2013.

If you would like to discuss the implications of these proposals for developers in more detail, please contact Nigel Howorth or your usual Clifford Chance contact.

Authors

Nigel Howorth
Nigel is a Partner in the firm's Environment & Planning Group

E: nigel.howorth@cliffordchance.com

Ben Stansfield
Ben is a Senior Associate in the firm's Environment & Planning Group

E: ben.stansfield@cliffordchance.com

Michael Coxall
Michael is a Senior Professional Support Lawyer in the firm's Environment & Planning Group

E: michael.coxall@cliffordchance.com