PRACTICE & PROCEDURE IN THE ADMINISTRATIVE COURT

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DEVELOPMENTS IN DISCLOSURE

During the 1980s and 1990s:

- Facts "seldom relevant for judicial review": O'Reilly v Mackman [1983] 2 AC 237 per Lord Diplock at 282 (despite observations in O'Reilly on Anisminic v Foreign Compensation Commission [1969] 2 AC 147, at 278 and 280).

- No general duty of disclosure and general culture of not ordering specific disclosure unless claimant could show defendant's evidence inaccurate, inconsistent or incomplete:

  R v Secretary of State for the Environment ex parte Islington London Borough Council & London Lesbian & Gay Centre (1992 - reported [1997] JR 121, at 126 and 128-129 ("no fishing", and no basis for suspicion of improper motive));

  R v Secretary of State for Foreign & Commonwealth Affairs ex parte World Development Movement [1995] 1 WLR 386 at 396 (disclosure refused where no extraneous basis for questioning accuracy of written evidence).

- Reliance on free-standing and self-policing duty of candour:
  R v Lancashire County Council ex parte Huddleston [1986] 2 All ER 941 per Donaldson MR at 945: the authority should have no axe to grind.

- Calculated to cause injustice?

Introduction of CPR Pt 54- 2000

- Continuing reliance on "duty of candour":
  Eg Belize Alliance of Conservation NGOs v Department of the Environment [2004] UKPC 6, [2004] Env LR 761 per Lord Walker at [86] (duty of candour, co-operation and disclosure of relevant facts & reasoning)

  R(Banks) v Secretary of State for Environment, Food & Rural Affairs [2004] EWHC (Admin) per Sullivan J at [10-11] (candour means the whole truth, including so much of it as assists the applicant for judicial review).

- Right to inspect documents mentioned in statements of case, witness statements/ summaries/affidavits (CPR Pt 31.14).

- The "Overriding Objective" in CPR Pt 1 includes ensuring the parties on an equal footing, but also saving expense, and dealing with cases proportionately.

- Towards a change of culture:

  - Introduction of the Human Rights Act 1998 and more nuanced analysis necessary/more situations where adverse inferences likely to be drawn from non-disclosure (see Elias J in R v Secretary of State for Education ex parte Williamson at first instance);

- Some defendants suggesting they do have an axe to grind;
- Criticisms of defendants failing properly to discharge duty of candour in some high-profile cases (eg Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd [2002] EWCA Civ 1409 per Laws LJ at [49-55]; R(Wandsworth LBC) v Secretary of State for Transport [2005] EWHC 20 at [250] per Sullivan J and costs penalty post-judgment at [71]; R(Gillan) v Commissioner of Police for the Metropolis [2004] EWCA Civ 1067 at [53- 57] - though contrast praise for disclosure of even highly embarrassing documents in R(Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [2001] QB 1067 per Laws LJ at [63].

- Twin rationales for general rule of non-disclosure falling away?

- A wider change of culture?

  - Closer analysis of policy/demand for access to material: Human Rights Act 1998 + Article 13;
  - Freedom of Information Act 2000 (relevance irrelevant);
  - Calls for more liberal approach: eg Law Commission Report: Administrative Law: Judicial Review & Statutory Appeals, LC 226, HC 669 (1994) at 7.12), though see far earlier JUSTICE/All Souls Report Administrative Justice: Some Necessary Reforms (1988) at pages 166-167.

2007: A significant change of culture. Tweed v Parades Commission for Northern Ireland [2006] UKHL 53, [2007] 2 WLR 1.

- House of Lords re-framed scope of duty of disclosure in judicial review cases generally (of application to England & Wales too).

- Challenge to defendant's determination of limitations upon route of proposed Orange lodge procession in predominantly Catholic town; claimant alleging disproportionate infringement of rights under Articles 9, 10 and 11 ECHR.

- Chairman of Commission's affidavit explained the decision and summarised effect of documents including police reports, internal memoranda and situation reports, but did not exhibit them.

- Trial judge (Girvan J) ordered disclosure on apparently broad basis that disclosure necessary where issues of proportionality at stake. Reversed by Court of Appeal. House of Lords restored order for disclosure, on narrower conceptual basis.

- Time to abandon the presumption against disclosure - ie that unless a prima facie case that evidence relied upon by defendant inadequate or incorrect, no orders for disclosure of documents only to challenge accuracy of affidavit evidence.

- Adoption of "a more flexible and less prescriptive principle".

- Disclosure to be determined taking into account the requirements of the facts & circumstances of individual cases.

- It would still be the situation that most JR applications did not call for disclosure, so orders for disclosure would not be routine.

- However, in cases concerning proportionality, whilst disclosure should still be limited to issues which required it in interests of justice, it was more likely than not that public authorities would be called upon to disclose the essential documents as part of a "best evidence" rule.

- A party whose affidavits/witness statements contained reference ot documents should therefore generally exhibit them in the absence of a sufficient reasons such as length, volume, confidentiality or PII.

- If disclosure were refused, the judge could decide whether to order it bearing in mind that disclosure would only be ordered where necessary for fair disposal of the matter or saving costs; to comply with the overriding objective; confidentiality considerations.

- Issues of proportionality being in play was only a factor in the exercise of judicial discretion, albeit one of "some significance".

- Though in the instant case, the duty of candour had been fulfilled, it was not always possible, from summaries, to obtain the full flavour of the content of documents:

  > "… there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge".

- In order to assess difficult issues of proportionality in this case, the court should have access, so far as possible, to the original documents.

- Initial disclosure to judge alone.

- Will have wide ramifications for defendants' practice concerning exhibiting documents; and applications for disclosure.

Other emerging disclosure issues

- Overlap with FOIA (but sufficiently speedy?) and other disclosure regimes;

- Decline in deference: see eg disapproval of general "policy of non-production" of submissions to ministers in R(National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154 per Sedley LJ at [49].

- Questions of redaction.

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PROTECTIVE COSTS ORDERS - LATEST DEVELOPMENTS

- Leading authority on the conditions for the grant of a PCO R (Corner House Research Ltd) -v- Secretary of State for Trade & Industry [2005] EWCA Civ 192; [2005] 1 WLR 2600:

  - o PCO made "only in the most exceptional circumstances" (paragraph 72).
  - o Only to be made, on such conditions as the court thinks fit, if court satisfied (paragraph 74) that:

    i. Issues raised of general public importance;
    ii. Public interest requires that they should be resolved (ie point of law is likely to arise in a large number of cases and so which needs to be resolved in the near future (para 69, citing HL in R -v- Secretary of State for the Home Department ex parte Salem, [1999] 1 AC 450, 456-7).
    iii. Claimant has no private interest in the outcome of the case;
    iv. Having regard to financial resources of Claimant and Defendants and amount of costs likely to be involved, it is fair and just to make the order; and
    v. If order is not made, Claimant will probably discontinue the proceedings and will be acting reasonably in doing so; and
    vi. the court considers it is fair and just to make such an order in the light of these considerations.

- "No private interest in outcome" criterion has proved especially problematic - see R(Goodson) v Bedfordshire & Luton Coroner [2005] EWCA 1172, [2005] All ER (D) 122 (Oct) (no PCO for bereaved relative to judicially review coroner's decision as private interest in outcome).

- Criterion criticised in Justice Report chaired by Maurice Kay LJ, Litigating in the Public Interest.

- Broader approach applied (in Family Division, but in "public law type" context) in Wilkinson v Kitzinger & A-G (Lord Chancellor intervening) [2006] EWHC 835 (Fam) per Potter P at para [54]. The President expressed the view that this was an elusive concept in proceedings where the claimant pursued a personal remedy, albeit with an essentially representative purpose. He regard the nature and extent of the "private interest" and its weight and importance to be a flexible element in the court's consideration of what fairness and justice required.

- In R(England) v London Borough of Tower Hamlets [2006] EWCA Civ 1742, the Court of Appeal refused relief in a challenge to demolition of a historic wharf on the basis that the matter had become academic. However, the Court of Appeal considered whether it would have granted a PCO, and doubted the workability of the "no private interest" criterion. It observed that different considerations may apply to a case where the interest in question was not a private law interest but simply one which the claimant shared with other members of a group, and called upon the Civil Procedure Rules Committee to review the situation in the light of the findings & recommendations of the Kay report.