clerks@ftbchambers.co.uk 020 7643 5000

Specific Disclosure of Ministerial Submissions: the Cumbria Coalmine Case

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When is specific disclosure of ministerial submissions appropriate in the context of a section 288 appeal? This was the question with which the court had to grapple in *Friends of the Earth Ltd v SSLUHC and others* [2023] EWHC 3255 (KB).

In this case, it was held specific disclosure of the Ministerial Submission could not assist the Claimant in respect of either the grounds of challenge for which disclosure was sought, nor was disclosure necessary for their fair disposal. The Claimant's application was therefore dismissed. [1]

In arriving at this conclusion, Sir Duncan Ouseley, sitting as a High Court judge, made several general observations on (i) the role of disclosure in planning statutory reviews, (ii) the duty of candour and (iii) the role of ministerial submissions as part of the planning process. The decision – and the court's observations on these points – are essential reading for any practitioner applying for, or resisting, specific disclosure.

This blog provides a brief overview of the judge's observations and conclusions.

1. **Factual background**

This application arose in the context of an ongoing challenge to the grant of planning permission by the Secretary of State for the mining of coking coal at Whitehaven in Cumbria. The Secretary of State had called in the decision and accepted the report of the Inspector and recommended that conditional planning permission be granted. The Claimant, Friends of the Earth, challenged that decision under s.288 of the Town and Country Planning Act 1990. This challenge will be heard at a rolled-up hearing at a future date. However, for the purposes of that challenge, Friends of the Earth made an application seeking specific disclosure of the submission made by the Planning Casework Unit of the Department of Levelling Up to the Secretary of State (the Ministerial Submission). It is this application that is discussed in this blog.

2. **The role of disclosure in a planning statutory review**

The first observation made by the judge is that the generally applicable disclosure tests are not applicable on an application for specific disclosure. The judge reasoned as follows:

> *"[T]he disclosure provisions of CPR 31, which play a limited role in conventional judicial review claims anyway, have been explicitly disapplied in relation to statutory planning review by CPR Part 54 in the Practice Direction, Annex D 4.42. This provides that disclosure is not required unless ordered by the court […] The CPR and Practice Direction set out no principles as to when such disclosure should be ordered, but there is little point in this specific provision in the Practice Direction, if the generally applicable disclosure tests are to be applied to an application for its specific disclosure."[2]*

The reason for this, Sir Duncan continued, is that the Decision Letter, or the combination of the Inspector's Report and the DL (in the case of a review of a decision taken by the Secretary of State), should provide the complete reasoning of the decision-maker on the significant controversial issues, or those upon which the Secretary of State sought the Inspector's Report in its call-in letter.[3]

It was also relevant that in the context of a planning statutory review challenge, the Secretary of State's defence:

> "stands or falls by what the Decision Letter says, and by the reasons it gives for the conclusions reached […] It is not open to the Secretary of State to defend the decision, when challenged, by supplementary Decision Letters or witness statements saying that a factor was in fact considered […]" [4]

3. **The duty of candour**

As for the duty of candour, this was a *"related but separate duty"* which is owed to the court and the parties. It is *"not about the disclosure of documents as such, nor does it necessarily require any particular level of disclosure of documents, save perhaps where a purportedly accurate summary of a document is furnished instead of the document itself"*.[5]

Rather, the duty is directed at "t*he duty to provide a full account of the decision-making process including the material considerations taken into account, a duty which arises in response to the grant of permission to proceed with a claim."* The duty to provide reasons for the decision *"encompasses and embodies the duty of candour"*.[6]

Sir Duncan also expressed caution about the possible breadth of language in *Ball v Secretary of State for Communities and Local Government* [2012] EWHC 3090 (Admin) at [66] (Stuart-Smith J), in treating relevance under the duty of candour as the touchstone for disclosure:

> *"Of course, relevance is required but it seems to me wrong to say that because the Ministerial Submission has something to say about the issues, which is likely to be the case, it is therefore disclosable in a s288 case. Where there is a Decision Letter dealing with the issues as far as or in the way the Secretary of State has chosen to deal with them, or a Decision Letter and an Inspector's Report, that is far too broad an approach".[7]*

4. **Ministerial Submissions**

Drawing on the points he had made in relation to the role of disclosure and the duty of candour, Sir Duncan Ouseley observed that it was difficult to see the relevance of the Ministerial Submission in the present case:

> *If the Secretary of State agrees with the Inspector's Report, and adopts its reasons, it is hard to see how disclosure of the Ministerial Submission could even be useful, let alone necessary, for the fair resolution of issues, a good test of relevance. If the Ministerial Submission disagrees with the reasoning or conclusions of the Inspector's Report, whether as to weight or some other point, but the Secretary of State agrees with what the Inspector has said or has some view which differs from both, it is again difficult ot see how the Ministerial Submission could be of relevance". [8]*

Further, Sir Duncan noted the "real risk" that the deployment of Ministerial Submissions on a routine basis would lead to an irrelevant and costly collateral debate about what Ministerial Submissions meant, in trying to see what an arguably unclear decision letter meant – or leading to arguments that a clear Decision Letter was unclear or failed to deal with points raised in the Ministerial Submission.[9] In addition:

> *"The Ministerial Submission could readily become the focus of a debate as to what it meant, and then whether the Secretary of State actually agreed with it – or had rejected it, where he used different language from that of the Ministerial Submission".[10]*

The court also accepted the point made by the defence counsel that the Secretary of State should be able to receive advice in confidence from civil servants.[11]

Notwithstanding the above, Sir Duncan acknowledged that there is no blanket ban on the disclosure of Ministerial Submissions: rather, there is no general rule that they should be disclosed. In all cases, applications should be tabled on the facts and issues in the case in question. The appropriate test is whether disclosure is "necessary to resolve the matter fairly and justly" (*Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 at [3], with emphasis placed on the word "necessary". Sir Duncan also referenced a bias claim, as one potential example of where disclosure might be necessary for its just disposal.[12]

Importantly, a Ministerial Statement was not disclosable merely because it forms part of the decision-making substance and process: see [21].

5. The application and the substantive challenge

With that background, Sir Duncan considered how the application related to Grounds 1 and 2 of the substantive challenge.

By Ground 1, the Claimant contended that the Secretary of State erroneously took into account the irrelevant claim by the developer of the coal mine to have achieved net zero for the purpose of the carbon budget and erred in concluding that the offset proposal was supported by the Climate Change Committee Report on the 6th Carbon Budget and the Industrial Decarbonisation Strategy. The Ministerial Submission was said to be relevant to whether the Secretary of State misunderstood what the developer was claiming, and because it would illuminate what was in the Secretary of State's mind in the Decision Letter and whether it involved a misunderstanding of the factual position.

The judge held that in essence this was a dispute as to what the Decision Letter and Inspector's Report meant – and perhaps a dispute as to whether what constitutes net zero for planning purposes is also net zero for Carbon Budget purposes and whether s106 offsets are admissible for one purpose but not another. However, Sir Duncan found the Ministerial submission could not assist in resolution of those issues.

By Ground 2, the issue was whether paragraph 217 of the NPPF excludes or applies to the international carbon emissions impacts of the proposal or whether its scope is confined to national impacts. As put

succinctly by Sir Duncan, *"[t]hat is a matter of interpretation to which the Ministerial Submission can be of no use, whichever way it went. The interpretation of the NPPF is a matter for the Court".* [13]

If, however, the international effects were relevant or considered on some other basis than NPPF paragraph 217, this would be a matter of the interpretation of the Decision Letter and Inspector's report – and not something that could be determined by what was said to him in the Ministerial Submission.[14]

6. Commentary

The introduction to this blog set out the main findings of this case and I have examined the key observations made by the Court in arriving at its conclusion. By way of concluding remarks, I wish to make two observations on what this case does *not* do. First, as Sir Duncan expressly notes, it does *not* find that Ministerial Submissions would *never* be subject to specific disclosure. Rather, it was held that Ministerial Submissions are not disclosable *in general* and the test of whether disclosure is necessary to resolve the matter fairly and justly must be applied in relation to each ground for which disclosure is sought. Second, this case does not set down rules in relation to specific disclosure *generally*: it considers the particular context of planning statutory reviews, in relation to which there is a specific exclusion of disclosure. This leaves some scope for a wider approach in the context of judicial review or potentially other statutory reviews where disclosure is not expressly excluded.

Stephanie Bruce-Smith is a Barrister at Francis Taylor Building, specialising in Planning and Environmental Law.

Richard Honey KC acted for the Secretary of State in this matter. He has had no involvement in the drafting of this post.

[1] Permission to appeal this decision was sought by the Claimants but refused by order dated 13 February 2024.
[2] At [5]
[3] At [6]
[4] At [8], see also [9]
[5] At [7]
[6] Ibid
[7] At [18]
[8] At [10]
[9] At [11]
[10] At [11]
[11] At [14]
[12] At [17]
[13] At [36]
[14] Ibid