



Francis Taylor Building

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## Acting for Interested Parties in Interveners in Judicial Review

21 June 2021



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## Overview

- When and why to take an active role
- Procedure, costs and costs protection
- Duty of candour and its implications
- Co-operation with the Defendant
- Tactical considerations
- Consent Orders, quashing and re-determination



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## When and why to take an active role (1)

- Potential reasons to get involved on D's side:
  - Separate interests, separate representation
  - D 'wobbly' or not defending claim
  - Resources
  - Knowledge of the facts
  - Different lines of argument



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## When and why to take an active role (2)

- Assisting the C
  - A party might be directly affected by the claim (and thus an IP) and support it
  - E.g. a landowner where C is the developer (see e.g. *R (Legard) v. RBKC* [2018] EWHC 32 (Admin))
  - CPR 54.14(1): IP wishing to support claim on additional grounds must file and serve detailed grounds for doing so and any written evidence within 35 days after service of order giving permission



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## When and why to take an active role (3)

- Potential reasons not to get involved:
  - Is it necessary, and is it going to help?
  - Costs (yours and liability for theirs)
  - Duty of Candour



## Procedure, costs and costs protection (1)

- Procedure
  - Pre-action protocol
    - Response optional, but relevant to award of costs at permission stage (*R (Mount Cook) v. WCC* [2003] EWCA Civ 1346, Auld LJ at [76])
    - Costs not recoverable, but advantages generally make it worthwhile
  - Acknowledgement of Service (CPR 54.8)
    - Mandatory if IP wishes to take part
    - Filed within 21 days of service
    - Includes summary grounds of defence
    - Benefits of deploying all arguments at the outset (incl. costs for IPs)
  - Detailed Grounds and evidence (CPR 54.14)
    - Filed within 35 days after service of order giving permission



## Procedure, costs and costs protection (2)

- Costs in favour of IP:
  - *R (CPRE – Kent Branch) v. SSCLG* [2019] EWCA Civ 1230
    - C may be liable for more than one set of costs at (paper) permission stage
    - No need for IP to show exceptional or special circumstances
    - Costs must be reasonable and proportionate
    - Has the court been assisted by the IP?
  - Generally no costs at oral renewal hearing (CPR PD54A [8.6])
  - *Bolton MDC v. SSE* [1995] 1 WLR 1176 on costs at the substantive stage not overruled by *CPRE* (and see Admin. Ct. Guide at [23.6.1])



## Procedure, costs and costs protection (3)

- Costs against IP:
  - Unusual but recoverable in appropriate circumstances, e.g.:
    - IP takes additional points;
    - IP bearing main burden of defence (see e.g. *R (Easter) v. Mid Suffolk DC* [2020] EWCA Civ 1378); or
    - IP contesting Aarhus protection (see *R (Kent) v. Teesside Magistrates' Court* [2020] EWHC 304 (Admin)).



## Procedure, costs and costs protection (4)

- Costs protection
  - IP cannot apply for Aarhus costs protection or a judicial review costs capping order
  - Implications if C protected:
    - D entitled to full costs, with no apportionment
    - IP entitled to recover reasonable and proportionate costs, up to the limit of the cap
    - D's entitlement may mean that IP's costs are squeezed by the cap
  - IPs subject to the Aarhus principle, and so entitled to seek variation in C's costs cap (*R (Bertoncini) v. Hammersmith & Fulham LBC* [2020] 6 WLUK 174)



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## Duty of candour and its implications (1)

- The duty of candour
  - Parties must ensure that all relevant information and all material facts are put before the court, whether it supports or undermines their case
  - Includes material which may reveal additional potential grounds
- Application to IPs
  - See Admin. Ct. Guide 2020 at [14.1.5]
  - Limited caselaw, but see *Belize Alliance v. DoE* [2004] UKPC 6
  - Why should a party with a distinct interest in the outcome of public interest litigation be allowed to avoid disclosing relevant material?



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## Duty of candour and its implications (2)

- Implications
  - Applies at permission stage, so rapid assessment needed
  - A continuing duty, revisited at each stage
  - Particular obligation where IP is a public authority
  - Court will take seriously any failure or suspected failure
  - Consider what you may need to disclose and/or explain if you choose to get involved



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## Co-operation with the Defendant

- The benefits of co-operation
- The limits on co-operation
- Practicalities
  - Avoiding duplication of written material
  - Sharing draft pleadings
  - Co-ordination of oral submissions



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## Tactical considerations

- Taking different and additional points
- Making best use of your time in court
- Appeals
- Finding the quickest route to a safe decision



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## Consent Orders, quashing and re-determination

- Consent Orders
  - IP involvement (CPR PD54A [17.1] “signed by all the parties”)
  - Contents
- Quashing and re-determination
  - Seeking to achieve a ‘soft landing’
  - Judicial guidance for re-determination
  - D now the decision-maker, so relations with IP must reflect that

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## Thank you

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## Third Party Interventions in Judicial Review Proceedings

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Jasveer Randhawa, Herbert Smith Freehills LLP

### Introduction to Interventions

#### Examples of Interventions

- *R. (on the application of Miller) v Prime Minister* [2019] UKSC 41
- *RR v Secretary of State for Work and Pensions* [2019] UKSC 52
- *Re McLaughlin's Application for Judicial Review* [2018] UKSC 48
- *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17

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## Deciding whether to Intervene

1) Public Interest Interventions

2) Interventions by Public Bodies

3) Private Interest Interventions

## What are you bringing to the table?

*“The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.”*

- Lord Woolf

*Re Northern Ireland Human Rights Commission*  
[2002] UKHL 25

## Procedure for Intervening

### 1) Timing

- “Prompt”

### 2) Notification to the Parties

- Parties to the claim
- Other potential interveners

### 3) Application to the Court

- i. Identifies the claim
- ii. Explains who the applicant is
- iii. Indicates why and in what form the applicant wants to participate
- iv. Sets out any prospective costs order

## Procedure for Intervening: Recent Changes

### Practice Direction 54 – Changes came into force 31 May 2021

#### Permission to make Representations at the hearing

Summary of the representations must be included in the application notice

#### Permission to file and serve Evidence

Copy of the evidence  
+  
Explanation of the relevance of the evidence

must be provided with the application notice

## Costs

### Possible Costs Consequences (Section 87 Criminal Justice and Courts Act 2015)

**General Presumption:** Intervener should bear their own costs

#### Other possible Outcomes:

- 1) Main party to proceedings to pay the intervener's costs *in exceptional circumstances*
- 2) Intervener to pay other party's costs in following scenarios:
  - i. Intervener's evidence and representations did not significantly assist the court
  - ii. Significant part of interveners' evidence and representations were irrelevant
  - iii. Intervener has acted as a sole or principal party
  - iv. Intervener has acted unreasonably

## Intervening in the Supreme Court

### 1) Intervention in the Application for Permission to Appeal

- Application by written submissions
- Copy of submissions to be served on:
  - each appellant
  - each respondent; and
  - any person who was an intervener in the court below

### 2) Intervention in the Substantive Appeal

- After permission to appeal has been granted
- Can be made by anyone (including parties intervening in the court below)
- Application by relevant form to be considered by panel of judges

## View from the Supreme Court....

*E v The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66, [2009] 1 AC 536 (Lord Hoffmann)

"2. It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years **the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance**. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. **The House is grateful to such bodies for their help.**

3. **An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made.** An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. **It is not the role of an intervener to be an additional counsel for one of the parties.** This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way."



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