Judicial Review: an overview for commercial practitioners

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Introduction

1. Judicial review was once a remedy seen as being confined to immigration, planning, housing and other areas of law where individuals sought to challenge the State in pursuance of their fundamental human rights.

2. Now, the tides have turned. With the increasing regulation of industry and commerce, companies and other commercial entities are bringing judicial review challenges to protect their business interests. Those practising in the commercial world, or advising those in industry, need to have a solid understanding of judicial review in order to properly serve their clients and offer practical, cost-effective solutions to the impact of increased regulation.

What is judicial review?

3. Judicial review is the way in which the courts supervise the exercise of public powers, those being either powers exercised by public authorities (the Secretary of State for Business, Energy and Industrial Strategy, the Financial Ombudsman Service, etc) or where a body is carrying out a public function.

4. The types of challenges that can be brought include:

    - The introduction of a new Government policy that would harm a company's business interests. For example, in *R (Sinclairs Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, the claimant company which owned 20,000 of the 50,000 tobacco vending machines in the country, sought to challenge new regulations which prohibited the sale of tobacco from automatic vending machines.

    - Regulatory decisions that impact on a company's operations. For example, in *R (British Gas Trading Ltd) v Gas and Electricity Markets Authority* [2019] EWHC 3048 (Admin),

the claimant challenged the price cap which Ofgem imposed on the energy prices charged by suppliers to consumers under the Domestic Gas and Electricity (Tariff Cap) Act 2018.

- Procurement decisions made under the Public Contracts Regulations 2015. For example, a third party, non-economic operator who does not have a statutory cause of action under the regulations.
- Subsidy control/state aid decisions. For example, in *R (Tate & Lyle Sugars Ltd) v Secretary of State for Energy and Climate Change* [2011] EWCA Civ 664, the claimant challenged the level of subsidy allocated to its renewable energy technology.
- Sanctions decisions. For example, in *R (LLC Synesis) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWHC 541 (Admin) the claimant issued a challenge to a sanctions listing under s38 of the Sanctions and Anti-Money Laundering Act 2018.

The available remedies

5. There are six discretionary remedies available through judicial review, all of which could have commercial application:
    - A Quashing Order: this quashes the defendant's decision and requires the defendant to reconsider it lawfully.
    - A Mandatory Order: this requires the defendant to take certain action.
    - A Prohibitory Order: this requires the defendant not to take certain action.
    - A Declaration: this is a public statement that the defendant has acted unlawfully.
    - An Injunction: this requires something to be done, or not done.
    - Damages: they can be sought in judicial review but not alone. Typically, they will only be ordered where a private law cause of action can also be made out.

Standing

6. Potential claimants must have a "sufficient interest in the matter to which the application relates" (Senior Courts Act 1981, s31(3)).

7. The question of when a sufficient interest arises was revisited recently in *R ((1) Good Law Project (2) Runnymede Trust) v (1) The Prime Minister & Ors* [2022] EWHC 298 (Admin) which provided 4 key principles in respect of standing:

   - Sufficient interest is context dependent. A wide range of factors may be taken into account including the duties in question and the nature of the alleged breach.
   - In most contexts the claimant will need to demonstrate a particular, specific interest to prove that they are not a mere busybody.
   - Standing can be taken into account by the court when considering whether to exercise its discretion in respect of remedies.
   - Not everyone who has a strong interest will have standing. The court will consider whether there are any obviously better placed challengers.

Potential grounds of challenge

8. There are, broadly, four traditional grounds of judicial review open to claimants, albeit there can be significant crossover between them. Of note is that the court will not look at the underlying merits of the decision, instead, it will focus on the way in which the decision was made.

9. The potential grounds of challenge are (non-exhaustively):

   - Illegality: this challenges whether the decision maker had the power to make the decision, whether it took into account the statutory requirements it was required to, misdirected itself in law, exercised a power incorrectly or for an improper purpose, or breached a legitimate expectation.
   - Irrationality: this can challenge the decision on the basis of it being *Wednesbury* unreasonable, that the decision maker took into account irrelevant considerations or failed to take into account relevant, non-statutory, considerations, or the decision was illogical.
   - Procedural impropriety: this can include challenging the decision on the basis that the decision maker was biased, failed to follow proper procedure or failed to give adequate reasons for the decision.

Timing

10. The limitation period for the majority of judicial review challenges is "promptly and in any event not later than 3 months after the grounds to make the claim first arose" (CPR 54.5(1)). the emphasis is on bringing a claim "promptly". Even if a challenge is brought within 3 months but not promptly, it may get refused permission to proceed.

11. In judicial reviews of planning decisions, developers need to bring challenges within 6 weeks (CPR 54.5(5)) and challenges under the Public Contracts Regulations 2015, must be brought within 30 days (CPR 54.5(6)).

12. These time limits cannot be extended by agreement between the parties.

Procedure

13. Judicial review claims are brought by way of a modified Part 8 procedure, governed by Part 54 of the CPR. Broadly speaking, it is a two-stage process. Below, the process of a typical, non-urgent, claim is explained.

Stage one: Obtaining permission

(a) Having taken counsel's advice, the claimant decides that there is merit in proceeding with a challenge.

(b) The claimant prepares a claim form (form N461), a Statement of Facts and Grounds (settled by counsel) and collates all the evidence it wishes to rely upon, including the decision under scrutiny.

(c) The aforementioned documents are filed with the court and served on the defendant.

(d) The claimant files a certificate of service within 7 days of service.

(e) The defendant, within 21 days of service, files an Acknowledgement of Service and Summary Grounds of Resistance explaining why it opposes the challenge.

(f) The court considers both parties' arguments and makes a decision as to whether the challenge is arguable.

(g) If arguable, permission will be granted and the claim proceeds to stage 2.

(h) If not arguable the claim will be refused permission and the claimant can seek permission at a renewal hearing (unless it is certified as totally without merit which precludes an oral renewal hearing).

Stage 2: Substantive hearing

(a) Upon receipt of the order granting permission, the defendant will have 35 days to file Detailed Grounds of Resistance.

(b) Both parties consider their respective cases and decide if they need to amend their grounds and/or file further evidence.

(c) Bundles get prepared and filed.

(d) Counsel prepares a Skeleton Argument, List of Issues, Chronology and List of Essential Reading.

(e) Bundles of Authority get prepared and filed.

Factors for commercial practitioners to bear in mind

14. Alongside the usual factors that need to be considered when litigating on behalf of commercial clients, judicial review flags up a multitude of specific factors that must be borne in mind:

- The need to preserve relationships with Government and regulators. It is in most company's interests to have a good working relationship with their regulators and the Government. In the case of Government organisations, they can typically maintain long lasting, potentially fruitful relationships with clients. In the case of regulators, they can put a stop to the client's operations entirely. Therefore, being respectful and non-confrontational in correspondence can be helpful.
- Time is of the essence. Many commercial clients will be used to litigation dragging on for many years, both in terms of the litigation itself, and the time spent preparing to issue. The limitation in judicial review claims is very short – with an emphasis on acting promptly – and therefore, advisers cannot afford to sit on matters.
- Negotiation potential. The judicial review process is in two stages. Permission being granted to proceed with an application is demonstrative of at least one ground of challenge being arguable. This can amount to positive leverage in any ongoing negotiations with the defendant.
- Duty of candour. Parties in judicial review proceedings have a duty of candour that goes beyond the usual rules of disclosure. It requires that all information relevant to the issues in the claim is drawn to the court's attention, whether helpful to the disclosing

party or not. Proceedings can therefore result in the disclosure of helpful documentation.

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