Civil Procedure Rules amended to reflect the introduction of environmental review proceedings

Environment analysis: Freya Foster, barrister at Henderson Chambers, discusses the new regime for environmental review proceedings, introduced in the Civil Procedure (Amendment No 2) Rules 2022.

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Background

The Environment Act 2021 (EA 2021) created the Office for Environmental Protection (OEP), a new environmental watchdog with a broad remit and jurisdiction over persons and bodies carrying out functions of a public nature. The OEP has a range of investigatory and enforcement powers—at the apex is the ability to bring court proceedings in a new procedure called environmental review (ER). An ER can only be brought by the OEP where it has already taken certain regulatory steps (issuing an Information Notice and a Decision Notice) and enables the High Court to adjudicate on whether there has been a failure to comply with environmental law.

EA 2021 received Royal Assent in November 2021, and the OEP's enforcement powers came into force on 24 January 2022. Prior to this, the Department for Environment, Food & Rural Affairs ran a consultation on the CPR that should be used for ER proceedings, proposing to largely mirror the existing CPR Part 54 provisions for judicial review (JR). The consultation concluded in September 2021. The responses were largely supportive of the proposed approach, including a costs model that provides that, subject to the court's discretion to award otherwise, parties bear their own costs (see: LNB News 26/07/2022 7 and LNB News 03/03/2022 54).

A notable outcome of the consultation appears to have been the proposal that the mandatory procedural steps set out in EA 2021, which the OEP must carry out before an ER is commenced, meant that compliance with a further Pre-Action Protocol (PAP) was unwarranted. In its response, the government suggested that there would be no specific ER PAP and the general PAP (Practice Direction—Pre-Action Conduct and Protocols) would be amended to reflect this. However, the amendments introduced by the 149th Practice Direction (PD) Update do not appear to do this (see News Analysis: 149th Practice Direction update—changes in force 1 October 2022 and 1 December 2022). Parties to an ER may still be advised to consider the General PAP, although arguably the steps of issuing and responding to an Information and Decision Notice would seem to be sufficient to fulfil the objectives of paragraph 3 of that PD.

The CPR regime for environmental reviews

The new regime for ERs, introduced by the Civil Procedure (Amendment No 2) Rules 2022, Regulations, SI 2022/783, and the 149th update, comes into force on 1 October 2022. It is largely contained in the new Section VII of CPR 54 and in CPR PD 54E, with costs dealt with in CPR 46.

As foreshadowed by the consultation response, new CPR 54.26 provides that ER claims are to be assigned to the Planning Court. A modified CPR Part 8 procedure is provided for—the OEP is required to include specified information in the claim form, including identifying any interested party

directly affected by the claim. CPR PD 54E confirms that the claim form, which is to be served within seven days of issue, must include a statement of facts and grounds. The claim itself must be issued no later than six months after the deadline to respond to a Decision Notice has elapsed—the PD provides that any application to extend that time limit, which will be granted if reasonable, is to be filed with the claim form itself.

The defendant and any interested party that wants to participate in the ER must file an acknowledgement of service (AoS) and detailed grounds (DGs) 35 days after the claim form is served—this time limit cannot be extended by agreement. Failure to file an AoS and DGs as required by CPR 54.31 and CPR 54.32 bars the party from participating in proceedings unless the court grants permission and the party files and serves appropriate documents and evidence. Interveners must make a CPR Part 23 application promptly and serve it on all parties.

All parties are required to file and serve the evidence that they wish to rely on with the claim form or AoS and DGs. The pleading documents are each subject to 40-page limit and, while there is no page limit on the bundles of documents and evidence to be filed in support, parties should bear in mind that a hearing bundle longer than 400 pages requires the permission of the court by virtue of the application of CPR PD 54A, para 15.1 (CPR PD 54E, para 10).

Notably, notwithstanding that the government noted the role experts could play in the work of the OEP, suggestions for increased flexibility with regard to expert evidence do not appear to be reflected in the new ER regime. It seems that applications to rely on such evidence will continue to be required and that parties will still need to comply with the requirements of CPR Part 35.

In line with standard JR, disclosure is not required unless the court orders otherwise. The new PD confirms that the Duty of Candour applies, bolstering the statutory duty to co-operate with the OEP in EA 2021, s 27.

CPR 54.35 also provides for the cross-application of CPR 54.10 and CPR 54.16–54.20, subject to certain modifications. This appears to give the court power in an ER to make general case management directions (CPR 54.10(1)) and, notably, power to order that the claim continues other than as an ER (CPR 54.20).

Finally, CPR 46.23 provides that no party, including an intervener or an interested party, is generally entitled to an order for costs against any other party. However, the court can still order costs if it is satisfied that the conduct of the party or that party's legal representative, before or during the proceedings, was unreasonable or improper. Accordingly, there appears to be a slight overlap with traditional wasted costs jurisdiction (CPR 46.8), albeit with no suggestion that this will sound against legal representatives themselves without meeting the usual rigorous tests. Further, all parties should take note of the express reference to conduct before proceedings—this suggests that the court may take into account, for example, the degree to which a defendant has cooperated with the OEP throughout the enforcement proceedings that ultimately led to the ER claim.