



The whole truth? The duty of candour in judicial review

In judicial review proceedings, the parties are under what is known as a ‘duty of candour’ which, in more layman’s language, might be called an obligation to put all their cards on the table.

This reflects the nature of judicial review proceedings in that usually the issues in dispute relate to legal issues rather than factual issues. In these circumstances, rather than the laborious standard disclosure process in typical civil litigation, conventionally the court relies on the parties to be open as to facts and events to allow it to make a determination on the legal issues. Where some degree of factual evidence is in issue, the court has tended to take the position that witness statements, affidavits, voluntary disclosure or limited specific disclosure orders will suffice. The duty of candour therefore translates to a duty not to mislead the court either by failing to disclose relevant facts or documents or to identify the significance of them.

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The consequences of a lack of candour

The duty of candour is therefore a duty not to mislead the court either by failing to disclose relevant facts or documents or to identify the significance of them.

However, despite the ‘administrative’ view of the judicial review process taken by the courts, for the parties involved it can still seem every bit as adversarial as ordinary civil litigation. Consequently the common law is littered with cases where the parties have not been as open as they should have been. The temptation to hold back on the duty of candour however should be avoided as the consequence of a failure to comply with the duty of candour may ultimately be fatal to a party’s case. Even if what is held back is not a ‘smoking gun’, the inferences that can be drawn by the court from a miserly approach to the duty of candour can be enough to tilt the balance of probability. From an administration point of view, the consequences of breach need to be serious to make the upfront duty of candour work.

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The Defendant’s duty of candour

Since most of the cards on the table inevitably lie with the defendant (which took the relevant act or omission being challenged), it is the defendant’s duty of candour which tends to be focussed upon and is the most extensive. Described variously as the need to make a “full and frank disclosure” of facts or present a “true and comprehensive” account of the decision-making process, the defendant’s duty of candour is ultimately to lay bare its own decision-making process including disclosure of relevant documents. In recent years, there have been a spate of cases where defendants have been less than forthcoming or have attempted to ‘spin’ events which have rightly attracted censure from the court. This appears to be behind the court’s recently issued **consultation** on the duty of candour which proposes, amongst other things, making express reference to the requirements of the defendant’s duty of candour in the Civil Procedure Rules (PD54A).

The Claimant’s duty of candour

The consultation will also touch briefly on the claimant’s duty of candour but seemingly to do not much more than remind claimants that there is one. The claimant’s duty of candour in judicial review proceedings also requires disclosure of all material facts. However, classically (unless interim or without notice remedies are sought), it is not particularly onerous save in respect of setting out clearly and openly their particular circumstances, how it is said that they have been affected and why they are entitled to seek the last resort remedy of judicial review. Nevertheless, where there are material facts or documents (favourable or adverse) to be drawn to the attention of the court, claimants should equally be aware that they have a primary duty of candour to the court. Claimants cannot adopt an approach of leaving relevant adverse

points to be taken by the other side as illustrated by the recent Court of Appeal decision in *Mohammad Shahzad Khan* where there was a glaring inconsistency in the claimant's disclosed documents as to his own personal circumstances but which none of the parties had drawn to the attention of the court. The Court of Appeal had no difficulty overturning a decision to grant permission for judicial review on the basis of the claimant's failure to comply with his duty of candour, notwithstanding that the defendant also failed to spot the inconsistency.

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In short, the judiciary's consultation on the duty of candour will be seeking to clarify and reinforce the duty of candour but it is also a timely reminder to parties that the duty exists, requires a different way of approaching and presenting their cases and that there are serious consequences of failing to comply.

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