

Protective Costs Orders and Costs Capping Orders: The new law

David Lock QC, Landmark Chambers

There has been considerable litigation in recent years about the circumstances in which individuals and non-profit organisations can use the courts to challenge unlawful decisions by public bodies without exposing themselves to the possibility of adverse costs orders. These orders have been known as “Protective Costs Orders” or PCOs but are now to be known as Costs Capping Orders or “CCOs”.

Lawyers have very different perspectives about CCOs in judicial review claims, depending on whether they act mainly for claimants or public bodies. At one extreme, claimant lawyers see them as an essential tool to enable claimants to get justice. At the other extreme defendant lawyers see CCOs as a licence for unelected guardians of the public interest and their lawyers to litigate on a risk free basis.

The CPR gave Judges considerable discretion on costs including the ability to make PCOs. Guidance about when a discretionary decision could be made to make a PCO developed in cases such as *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 (“*Corner House*”). In *R v Lord Chancellor, Ex p Child Poverty Action Group* [1999] 1 WLR 347, Dyson J had said that the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances and this was adopted by the Court Appeal in *Corner House*. The Court of Appeal in *Corner House* then sought to define what constituted the type of “exceptional circumstances” which justified a PCO.

These judge made rules no longer apply in judicial review cases following the implementation on 8 August 2016 of sections 88 to 90 of the Criminal Justice and Courts Act 2015. However much of the judicial thinking has been incorporated into the statutory scheme.

Sections 88 to 90 of the Criminal Justice and Courts Act 2015 contain a comprehensive statutory code which governs the circumstances in which a PCO, now called a CCO, can be made. The general effect of the new rules is to define, but almost inevitably limit, the circumstances in which a CCO can be made and to place limits on the costs that can be recovered by a successful claimant who litigates with the benefit of a CCO.

It is worth noting the scope of the new provisions. They apply only to judicial review claims, and therefore do not include claims equivalent to judicial review which are in fact non-judicial review statutory challenge (such as under s.288 of the Town and Country Planning Act 1990). The difference between these procedures has been recognised by the Court of Appeal in *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539; [2015] 1 WLR 2328.

No CCO without permission.

Section 88(3) provides that a CCO can only be made if permission has been granted. Thus, in practice, a CCO cannot be made in any urgent case which is directed to be considered at a rolled-up hearing. This gives rise to 2 practical problems. First, considerable costs are likely to be incurred by a claimant before a decision is given permission and, potentially, a considerable adverse cost liability will arise. Accordingly, every claimant will have to litigate at risk until permission is granted.

Secondly, it seems highly likely that the absence of any power to make a CCO prior to permission being granted will dissuade claimants from seeking a rolled up hearing if, in order to prepare for the hearing, the claimant needs the protection of a CCO.

Thirdly, if the CCO is refused and the claimant serves notice of discontinuance, there is a presumption under CPR 38.6 that the claimant will become liable for the defendant's costs. Accordingly, as part of any application for a CCO, lawyers acting for the claimant should consider whether also to seek a direction from the court that, in the event that the claimant serves a notice of discontinuance following an unsuccessful application, the claimant will not become liable for the defendant's costs.

The Claimant must make an application.

Section 88(4) provides that the court cannot make a CCO unless the claimant makes an application in accordance with the CPR. These are set out in CPR 46.16-19, which were introduced by the Civil Procedure (Amendment No. 2) Rules 2016.

CPR 46.17 provides that an application will be made in accordance with Part 23, albeit with some amendments. The application must be made on notice (r. 46.17(1)(a)). Although the court may direct an applicant to provide further information or evidence (r. 46.17(4)), an application should be supported by evidence setting out (r.46.17(1)(b)):

- (i) why a judicial review costs capping order should be made, having regard, in particular, to the matters at sub-section (6) to (8) of section 88 of the 2015 Act and sub-section (1) of section 89 of that Act;
- (ii) a summary of the applicant's financial resources;
- (iii) the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings; and
- (iv) if the applicant is a body corporate, whether it is able to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings.

Although an application and supporting evidence must generally be served upon every other party, the court on application may dispense with this requirement in relation to a summary of the applicant's financial resources (r. 46.17(2)-(3)).

The factors that the Court is required to take into account when considering a CCO application.

Section 88(6) provides:

“The court may make a costs capping order only if it is satisfied that—

- (a) the proceedings are public interest proceedings,
- (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and
- (c) it would be reasonable for the applicant for judicial review to do so”

The court must be satisfied on each of these factors before it has power to make a CCO.

Accordingly, the question as to whether a court should exercise its discretion to make a CCO cannot arise unless and until the court determines each of these three factors.

1. Public interest proceedings

The first matter must be satisfied before a CCO can be made is that the judicial review proceedings are “public interest proceedings”. This term is exclusively defined in section 88(7) which provides:

“The proceedings are “public interest proceedings” only if—

- (a) an issue that is the subject of the proceedings is of general public importance,
- (b) the public interest requires the issue to be resolved, and
- (c) the proceedings are likely to provide an appropriate means of resolving it”

These are 3 criteria which must be satisfied in every case before the court has a discretionary power to say that a judicial review application constitutes “public interest proceedings” and thus a CCO could be made. Section 88(8) provides a series of factors the court is required to consider to determine when reaching a decision as to whether a judicial review case satisfies the test of being “public interest proceedings”. Section 88(8) provides:

“The matters to which the court must have regard when determining whether proceedings are public interest proceedings include—

- (a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,
- (b) how significant the effect on those people is likely to be, and
- (c) whether the proceedings involve consideration of a point of law of general public importance”

Proceedings cannot be classified by the court as “public interest proceedings” unless all three limbs of the section 88(7) test are satisfied and may not be classified as “public interest proceedings” depending on the factors set out in section 88(8).

The section 88(7) tests.

The first limb of the section 88(7) test is whether the proceedings are of “general public importance”. Practice Direction 3 issued by the Supreme Court provides that the test for permission to appeal to the Supreme Court is whether the proposed appeal:

“Raise[s] an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time”

The phrase “general public importance” is restrictively interpreted by the Supreme Court and, if that approach were taken to CCOs, they would only be granted on very rare occasions. However, the requirement that proceeding should raise an issue of general public importance was formulated by the Court of Appeal in *Corner House* at §74(ii) and the subsequent cases show that a much interpretation has been given to the meaning of “a case of general public importance” in the context of a PCO/CCO than in the context of an appeal to the Supreme Court.

By way of example, a challenge to the closure of a community hospital was considered to satisfy this test in *R (Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749; [2009] 1

WLR 1436. The closure of the minor injuries unit in that case potentially affected 30,000 to 50,000 people. Waller LJ said:

“Where someone in the position of Mrs Compton is bringing an action to obtain resolution of issues as to the closure of parts of a hospital which affects a wide community, and where that community has a real interest in the issues that arise being resolved, my view is that it is certainly open to a judge to hold that there is a public interest in resolution of the issues and that the issues are ones of general public importance”

That flexible approach was supported by Smith LJ said:

“It seems to me that a case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome. Because it is impossible to define what amounts to an issue of general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general.”

The factors identified by the Court of Appeal in *Compton* are now required to be considered as a result of section 88(8).

In *R (Litvinenko) v. Secretary of State for the Home Department* [2013] EWHC 3135 (Admin) the Divisional Court decided that the complaint by Mrs Litvinenko that the Secretary of State had not set up a public enquiry into the death of her husband satisfied the test of “general public importance” even though this involved the death of a single individual. However, the death of Mr Litvinenko occurred in highly unusual circumstances, namely a suspected extrajudicial killing of a foreign national in the UK by agents of a foreign security service. Hence, the public importance of the case arose from its individual facts as opposed to its effect on the public generally.

The “general public importance” test was also held to be satisfied in *R (The Plantagenet Alliance Ltd) v Secretary of State for Justice* [2013] EWHC 3164 (Admin) which concerned the decision as to where the remains of King Richard III should be buried. Haddon-Cave J rejected a submission that the challenge did not have a general public importance because there was no general public importance in determining whether a lawful procedure had been followed in making this decision. He said:

“The more important the decision, the more important the public interest in adherence to the proper and lawful process. It makes no sense to suggest that the fate of Richard III's remains may, *per arguendo*, be a question of “general public importance”, but the manner in which that decision was arrived at is not. The Claimants readily acknowledged that it was not a matter at the highest end of the scale of public importance, but it was nevertheless of considerable public importance (*c.f.* Smith LJ in *Compton* , *supra* , at [85])”

This approach probably continues to be relevant guidance despite the fact that it is not entirely replicated by the wording of section 88(8)(c). That subsection requires the court to focus on the importance of the legal issue raised in the case. However as these are non-exclusive factors the court is also entitled to look to the wider public interest in the underlying subject matter of the litigation when making the decision whether a case constitutes public interest proceedings.

If cases such as *Compton* continue to define the meaning of “general public importance” under section 88, the bar to satisfy this test appears to be set at a moderate level. Any judicial review application which raises issues of importance to a significant number of citizens would be capable of satisfying this test. However, whether any particular case does or does not satisfy the test will be an intensely fact sensitive judgment based on the individual circumstances of the case.

2. Withdrawal by the Claimant in the absence of a CCO.

The second requirement under section 88(7) is that the court is satisfied that, if no CCO is made, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings. Applications for CCO's are dealt with by way of witness statements (CPR Rule 46.17(1)(a) provides that they are to be made under a modified version of Part 23) and accordingly it should be relatively straightforward for a claimant to assert their intention to withdraw from the proceedings if no CCO is made. It will always be open to a defendant to challenge that assertion but, in practice, a challenge under the third limb is likely to be more productive.

3. The reasonableness of the claimant's decision.

The third matter that the court must be satisfied about is that it would be reasonable for the applicant for judicial review to withdraw if not granted a PCO. In *Litvinenko* the court considered that Mrs Litvinenko had sufficient assets to be able to take the risk of litigating without a PCO. A PCO was therefore refused because it was not considered to be reasonable for her to withdraw if no PCO was made. As it happens, Mrs Litvinenko did not withdraw and proceeded with her application which was successful: see *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin); [2014] HRLR 6.

It seems inevitable that an applicant for a CCO will need to explain their own financial circumstances in some detail and will have to explain who is providing financial support for the application, and possibly details of the financial background of the backers of the litigation. This may be difficult in cases funded by crowdfunding.

Where the applicant for a CCO is a company, and the evidence indicates a likely lack of financial resources to meet liabilities for the proceedings, then CPR 46.18 provides:

‘the court must consider giving directions for the provision of information about the applicant's members and their ability to provide financial support for the purposes of the proceedings.’

The court must consider giving such directions, although the making of such directions itself is not mandatory. This power may be employed to avoid claimants hiding behind companies without substantial assets, set up for the purposes of bringing a claim.

Factors that are not part of the statutory test.

There are 2 significant elements from the *Corner House* case which have not been transposed into the statutory scheme. First, there is no bar to a claimant with a personal interest in the outcome of the case applying for a CCO. This element was always problematic because a claimant without a personal interest may have difficulties showing standing whereas a claimant with a personal interest appeared to be barred from applying for a PCO/CCO. A claimant who has a personal interest in the outcome of the judicial review is not barred from making application for a CCO under the new scheme. However the extent of the individual's personal interest is a factor in the discretionary test under section 89(1).

Secondly, is not part of the statutory scheme that a claimant needs to demonstrate exceptionality before a CCO can be considered. The exceptionality test has, in effect, been substituted for a general public importance test. This is to be welcomed. Exceptionality can cause significant problems as the as a legal test see see *Huang v. Secretary of State for the Home Department* [\[2007\] 2 AC 167](#) at §20.

The exercise of judicial discretion in deciding whether to make a CCO.

If the court decides whether it has power to make a CCO applying the tests under section 88, the court next has to decide (a) whether to make a CCO and (b) if so, what terms should be set for a CCO. Section 89 sets out a series of non-exclusive factors which the court is required to consider when making the discretionary decision as to whether a CCO should be made and, if an order is to be made, the terms of the order. Section 89(1) provides:

“The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include—

- (a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;
- (b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
- (c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;
- (d) whether legal representatives for the applicant for the order are acting free of charge;
- (e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally”

These tests appear to be substantially focused on preventing individuals with resources using an impecunious litigant as a nominal claimant to obtain a CCO. Where a community joins together to fund a judicial review challenge, any successful application for a CCO may now require a measure of disclosure of the financial circumstances of those members of the community who are backing the legal action. That may be feasible in the case of a community challenging the closure of a community hospital, library or other public facility. It becomes substantially more difficult where funds are raised through crowdfunding where, almost by definition, nothing is known about the financial circumstances of those who make contributions.

The scope of s.89(1)(a) is broad, as it includes those who ‘may provide’ financial support. It is likely that this scope will require some judicial clarification. A mere potential to provide financial assistance to a claimant would a clear pledge of support seems unlikely to be taken into account. If section 89(1)(a) is interpreted narrowly its scope could be virtually limitless.

Section 89(1) appears to give the court encouragement to look more favourably on applications for a CCO where the lawyers for the claimant are acting pro bono. This would appear not to include CFAs or for discounted fees: s.89(6) provides that acting ‘free of charge’ means ‘otherwise than for or in expectation of fee, gain or reward’. Whilst whether representatives are being paid is just one factor, the courts must be careful to ensure that *pro bono* representation is only capable of being a positive factor weighing in favour of a grant of a CCO, as was provided by the Court of Appeal in *Corner House* (para. 74(2)). The fact that representatives are being paid should not be a negative factor which prevents the grant of a CCO. There is, of course, a substantial tradition of both barristers and solicitors acting pro bono but there is no professional obligation to do so. Refusing CCOs on the basis that the claimant’s lawyers are acting in the expectation that they may be paid would be in tension with the approach adopted by the Supreme Court in *Re appeals by Governing Body of Jewish Free School* [2009] UKSC 1; [2009] 1 WLR 2353 where Lord Hope said:

“It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at *inter partes* rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable”

It seems legitimate to recognise that lawyers who assist community groups or public interest organisations to hold public bodies to account for the lawfulness of their decisions are in a substantially analogous position to lawyers who undertake publicly funded work (and often the same individuals). If one substitutes “*publicly funded work*” for “*acting for community groups in public law challenges*” in the above quotation, the practical effect of

using section 89 is to encourage CCOs only to become available where lawyers are acting in a way which, to adopt the words of Lord Hope, is “*financially unsustainable*”.

Those who act for claimants will be watching with interest whether defendant lawyers use the fact that the Claimant lawyers may be paid if, for example, they are working under a CFA to dissuade the court from granting a CCO, and whether the court is prepared to follow that course.

The quid pro quo: capping the claimant’s ability to recover costs if successful.

The requirement that the claimant’s lawyers must be operating in a way that is financially unsustainable is further emphasised by section 89(2) which provides:

“A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is”

This subsection does not give the court any discretion. A CCO must limit or remove the costs that a successful claimant can recover from the public body. A judge could, course, restore the balance between the parties by providing that a successful claimant could only recover 95% of his or her costs. However, such an order appears to be extremely unlikely in practice and may not be a lawful exercise of judicial discretion.

This appears to be an example of the executive persuading the legislature to make it more difficult for citizens of modest means to challenge the executive. That appears hard to justify on any rational basis given the disparity in resources between individuals and government bodies.

It is unclear how these provisions will interact with s.194 of the Legal Services Act 2007 and CPR 46.7. Section 194 covers litigation where the lawyer is acting “free of charge, in whole

or in part” and allows the court to make a costs order in favour of a prescribed charity. The prescribed charity is the Access to Justice Foundation. Rule 46.7 sets out some procedural provisions with respect to such a case.

Accordingly, where lawyers act pro bono either wholly or in part in a judicial review, obtain a CCO, and the case is successful, the public body could still be required to make a full costs order, albeit that, for those parts of the order where the claimant’s lawyers are acting pro bono, the beneficiary will be the Access to Justice Foundation and not claimant.

Henry VIII provisions.

The sections allow the decision-making process which judges are required to follow to be amended by way of a statutory instrument. Section 88(9) provides:

“The Lord Chancellor may by regulations amend this section by adding, omitting or amending matters to which the court must have regard when determining whether proceedings are public interest proceedings”

This is supplemented by section 89(3) which provides:

“The Lord Chancellor may by regulations amend this section by adding to, omitting or amending the matters listed in subsection (1).”

Environmental cases.

The present rule in CPR 45.43 is:

“Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45”

Accordingly, it is not usually necessary for a claimant in an environmental case to apply for a CCO because the CPR prevents adverse costs order made even if the claim is unsuccessful.

The court does not make an order imposing a PCO (or CCO) under the Aarhus Convention provisions in the CPR; the position is set by the Rules themselves. Therefore, the prohibition on the making of an order under section 88(1) does not apply.

That position is not affected by the new rules but section 90(1) provides:

“The Lord Chancellor may by regulations provide that sections 88 and 89 do not apply in relation to judicial review proceedings which, in the Lord Chancellor's opinion, have as their subject an issue relating entirely or partly to the environment”

No regulations have yet been made under section 90 and it is perhaps questionable whether they are required. Such regulations would presumably be made only in circumstances where the Aarhus costs protection rules in CPR 45.41-44 were to be revoked or amended.

DAVID LOCK QC

18th August 2016.

Landmark Chambers
180 Fleet Street,
London. EC4A 2HG.

This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Landmark Chambers accept no responsibility for the continuing accuracy of the contents.