APPLICATIONS FOR PCOs POST GARNER

FROM THE CLAIMANT'S PERSPECTIVE

1. As recently as 2007, it was assumed that there should only be a handful of PCO cases in total in every year. Yet PCOs are now a key element in making possible many environmental judicial reviews and statutory challenges. As CLS funding becomes yet tighter (and unless and until there are rule changes following on from the *Jackson Review* - most notably in this context Qualified One Way Costs Shifting), those wishing to challenge the legality of environmental decisions will be increasingly dependent on the PCO regime for making such challenges possible. In what follows I consider some key issues which a claimant for a PCO can/should stress - the opposite angle to which you have just heard – but the points that arise are largely the same.

The Correct Starting Point – access to justice seen as fundamental to ensuring environmental laws are complied with

2. An ability to challenge potentially flawed public law decision making is regarded at the highest level as key to ensuring the efficacy of environmental laws. So the logic goes, rigorous public involvement at all stages contributes to ensuring the purposes of environmental legislation are secured. That way lies more careful application of the relevant statutory scheme, closer compliance with it and better quality decision making all in the name of better environmental protection.

3. This is the basic premise (and core purpose) of the relevant part of the *Aarhus Convention (*and the EU's implementation of its underlying principles in Art 10A of the EIA Directive[1]). By ensuring that members of the public concerned, have access to a procedure which is "fair, equitable, timely and not prohibitively expensive", these provisions are designed to contribute directly to the public interest by ensuring that environmental laws are not contravened.

4. Procedures which are prohibitively expensive prevent those members of the public concerned from taking such challenges and are thus directly contrary to the underlying purpose.

5. Applications for PCOs (whether under art 10A or not) should stress this fundamental starting point. Environmental litigation by individuals/groups (and PCOs to facilitate) can and do serve a valuable public interest. That basic point tends towards a more generous approach to the making of PCOs.

6. It means that a different mind-set needs to be applied – not "how can it be fair to expose the public authority or developer to the costs of local pressure groups or a single individual

[1] And analogous provisions in art 15A of the Directive on Integrated Pollution Prevention and Control (96/61/EC)

bringing environmental litigation?" but "it is necessary to achieve the underlying environment aspirations of the legislation that individuals and groups have the ability to bring (meritorious) claims before the Courts and are not put off by the costs of so doing."

7. So the Courts must, in appropriate cases, secure access to judicial review in a way which members of the public can realistically use.

How far does that obligation go? The limits of the approach

8. The *Aarhus convention* applies the above formulation (including "prohibitively expensive") to require access to a court to challenge the substantive or procedural legality of:
   - **a.** A decision to permit an activity or development likely to have a significant effect on the environment – broadly the same categories as in sch 1 and sch 2 of the EIA Regs – now covered by Art 10A; **and**
   - **b.** much more widely, acts or omissions by private parties and public authorities which contravene provisions of its national laws relating to the environment (art 9(3)) – what I shall term purely domestic law challenges.

9. The 2008 Report of the Working Group on Access to Environment Justice ("the Sullivan Report") advocated changes to the PCO regime to ensure that both of the above limbs were covered - so the "prohibitively expensive" formulation would be applied to both Art 10A cases and purely domestic law challenges. In effect, all environmental challengers would be protected by the "not prohibitively expensive" formulation.

10. That has not yet happened - and absent changes to the rules following the *Jackson review* - will not now happen (at least below the Supreme Court): see the acceptance in the Sullivan Update Report (Aug 2010) that the *Garner* type approach will **not** apply in purely domestic law challenges.

11. In such cases the *Cornerhouse* principles continue to apply as explained in *R(Morgan) v. Hinton Organics [2009] EWCA Civ 107* at [47].

12. There are thus two effectively separate PCO regimes:

   - **a.** the first for cases within art 10A which will follow the *Garner* approach; and
   - **b.** the second for all other environmental cases where the *Cornerhouse* approach continues to apply.

Making the most of the Cornerhouse Principles in purely domestic law environmental challenges

13. Thus, claimants in such cases have to demonstrate:
   a. issue of general public importance;
   b. public interest requires those issues to be resolved;
   c. no private interest;
   d. having regard to the financial resources of the applicant and the respondent and to the amount of costs involved it is fair and just to make a PCO;

e. absent a PCO, applicant will probably discontinue the proceedings; and
f. if a person is being represented pro bono this will enhance the merits of the PCO application.

14. However, in *Hinton Organics,* LJ Carnwath left the door, if not open, then slightly ajar, for reliance on art 10A principles and purposes in the exercise of the discretion in non-Art 10A cases.

> ***"The principles of the convention are at most a matter to which the court may have regard in exercising its discretion" [47(iii)].***

15. Whilst we know that the *Cornerhouse* principles apply it remains well arguable that:
    a. the underlying purpose of the *Aarhus* convention which I have highlighted above; and
    b. the compelling logic on the quantum of costs in *Garner*

    are relevant to the exercise of the discretion in non-Art 10A cases.

16. If the underlying purpose as set out above applies (even if it is not directly effective) then why is that not a highly material factor to take into account in determining whether there is an issue of general public importance and whether the public interest requires that issue to be resolved? Given that purpose, should not the "no private interest" approach be applied in an increasingly relaxed way (as is happening)?

17. If £x is "prohibitively expensive" in an Art 10A case, and *Garner* for compelling reasons sets £x at a relatively low level (compared to many earlier PCOs) why is it "fair and just" to make a PCO at a higher level than £x under *Cornerhouse*?

18. It remains to be seen how far the underlying rationale in *Garner* crosses over to non-Art 10A cases but on the current state of the case law, claimants can seek to draw parallels between the art 10A approach and that which would be appropriate under domestic rules.

Art 10A Cases – Making the most of Garner

19. To rely directly on the Garner approach it is necessary to:
    a. Fall within art 10A; and
    b. To have standing.

20. Once those pre-requisites are met, how should a PCO application be framed to best advantage? I first deal briefly with the pre-requisites before giving some hints on how best to use the PCO regime.

Claims falling within art 10A

21. Art 10A only applies to "decisions, acts or omissions subject to the public participation provisions of the [EIA directive]". In short that means it will apply to decisions which require

environmental impact assessment before they are made. As a result it will cover most major planning permissions and equivalent development consent procedures (and, potentially, matters such as approval of reserved matters for such developments where there is an EIA element).

22. The "screening" stage (reg 4 EIA Regs 1999) is not subject to the public participation provisions of the Directive and so may not be within the words of art 10A. <u>*Query*</u> though whether on a purposive construction, a challenge to an unlawful failure to require EIA at the screening stage would trigger Art 10A.

23. Whilst the development has to be EIA development in order to trigger Art 10A, the grounds of challenge do not have to be EIA related grounds: see art 10A; *Garner* [5] and *Ashton [*37]– in both cases the grounds of challenge were not limited to EIA grounds.

24. So, you have to be within Art 10A to benefit from *Garner* but once you are within art10A your case does not have to be on EIA related grounds.

<u>Standing</u>

25. It is not any potential claimant who may benefit from Art 10A. It only applies to members of the public who have a sufficient interest[2].

26. It is for the member states to determine what constitutes a sufficient interest. However:

    a. the "domestic requirements on standing must conform with article 10A": see *Ashton v. Secretary of State for Communities and Local Government* [2010] EWCA Civ 600 at [39]; and
    b. the rules must be consistent with the objective of giving the public concerned wide access to justice": *European Communities v. Ireland* (C-427/07 – 16th July 2009) at [82] (although note the wide margin of appreciation given to the state in that case).

27. The approach of the English courts to "standing" is regarded as generous and it is unlikely that that approach will fall foul of EU law. I cannot think of any situation where a person would not have standing under UK law but for whom Art 10A would give them standing[3].

---

[2] A person who does not have sufficient interest in EU law terms, will probably not have standing in domestic law either and, even if they do, will not be covered by art 10A and will not, thereby, be entitled to the *Garner* approach on a PCO.It is therefore essential for consideration to be given at the outset as to whether the prospective claimant has sufficient standing from a domestic and an EU perspective

[3] However, by way of aside, for potential claimants under s.288, it is essential that careful consideration is given to the *Ashton* judgement. In that case, a member of a pressure group who took part in some meetings of that pressure group and who lived relatively close to the development but who played no role in the inquiry process did not have standing to bring a s.288 challenge. This case highlights the potential danger of a pressure group finding and nominating one of their number (without substantial assets) to lead proceedings – that individual has to satisfy the requirements for standing in their own right.

28. Art 10A does however provide a potentially valuable deeming provision which may assist those wishing to challenge decisions in which they were not actively involved.

Non-Government Organisations – deemed standing

29. "Non-governmental organisations promoting environmental protection and meeting any requirements under national law" are deemed to have sufficient interest. That is a statutory construct – they are given "sufficient interest" whether or not they qualify under the domestic law approach to standing. This deeming provision is potentially very powerful.

30. England and Wales currently do not have any "requirements under national law" which limit the nature of non-governmental organisations which can apply for JR. In any event, such "requirements under national law" cannot be drafted so widely as to render this deeming provision nurgatory: see Judgment of the ECJ in *Djuragden-Lilla v. Stockholm* C – 263/08 (15th October 2009 at [40] – [45]. In that case the rules for "requirements under national law" were too strict from an EU law perspective and so could not be relied on to oust the deeming provision. Thus, national legal requirements cannot be drafted so as to undermine the purposes of the directive – namely "wide access to justice".

31. It is likely that:

    a. local pressure groups (even small ones); and
    b. national charities

    which have as their objects "the protection of nature and the environment" [45] will be deemed to have sufficient standing to bring challenges under Art 10A even if they do not have the requisite "standing" for the purposes of challenge under domestic law.

32. It is, thus, not impossible to conceive of circumstances in which, in the absence of a claimant with standing, a local "NGO" which has environmental protection objectives could lead litigation on an environmental decision in respect of which it has previously been silent – relying on this deeming provision and through it securing a PCO. This is as yet an untried or untested approach (and the deeming was not relied on in *Coedbach*) but there is no obvious reason why in a *Coedbach* look alike case in the future, reliance could not be placed on the deeming provision.

Making the most of Garner

33. Once one is within art 10A and has standing, the question is how best to present a case for a PCO or otherwise best secure costs protection.

LSC Funding

34. The ideal position is, of course, where a claimant entitled to LSC funding has taken an active part in proceedings and meets the merits test. In such cases no PCO is required: costs protection arises automatically upon award of LSC funding. But:

a. Such funding is difficult to obtain in public interest cases (and will become yet more difficult in the future);
b. The LSC will require contributions from alternative sources of funding from members of the community who will benefit from the outcome of the case (see appendix 2 to the 2008 Sullivan Report); and
c. *Ashton* shows the limits to which picking a claimant who will secure LSC funding can work.

35. One point is worth noting from the LSC funded claimant. Given that if there was an LSC funded claimant, the local authority or developer would have no recourse in costs, query whether much (if any) weight can be attached to the regular heard complaint that a PCO *unjustifiably* passes the cost of environmental litigation to public authorities and developers. In a very real sense, one of the key things that PCOs are doing is going some way to filling the gap left by the retreat of LSC funding. In other words, Claimants should not concede and should challenge the basic argument that a PCO is an indulgence at the cost of others – on the contrary it can be said to be a necessary response to the absence of any other means of bringing (meritorious) cases to Court.

A private individual

36. Absent eligibility to LSC funding, the ideal position is an individual of limited means who played an active part on his own account in the decision making processes. Such a person who passes the "permission" threshold can expect a PCO in a relatively limited sum (albeit with a reciprocal costs cap). They would be in a classic *Garner* situation. Such a person could choose to set out their means (although they are not compelled to do so). The advantage of course is that such evidence will tend to favour a PCO in a modest sum especially if the subjective means indicate a lower level of PCO than in *Garner.*

    Query – how *Garner* would be applied if the individual was in effect acting on behalf of a large number of individuals or an unincorporated association (see below).

37. The main issues for private individuals of limited means will be: (1) the costs risk up to the grant of the PCO; and(2) funding their own case;

38. To mitigate the risk in (1), such a person should:
    a. Set out as fully as possible the grounds of challenge in a PAP including a statement along the lines of "the Claimant expects you to provide full details of the defence to this claim (including any documents relied on) in response to this letter. To the extent that new arguments or information are relied on in a challenge which are not covered in your PAP response, the Claimant will refer to this on the question of costs";
    b. Raise the need for a PCO in the PAP letter – setting out what sum (based on *Garner*) would be appropriate and seeking advance agreement – some local authorities and government departments appear to now be taking a realistic view of what PCO will be imposed by the Courts;

c. At the end of the PAP correspondence, robustly check whether there remains a good case – afterall winning is the best protection against adverse costs orders;
d. apply for a PCO in the claim form with evidence as to means[4] and as to the implications for the continuation of the claim if a PCO is refused;
e. state in the claim form that if permission is refused, costs of the acknowledgement of service should be limited to a modest sum relying on e.g. *Mount Cook* and saying what that sum should be – what may appear modest to a court as a generality may be far from modest on the facts of a particular case. The Courts are increasingly alive to the implications of high costs of "acknowledgements of service".

39. In respect of the funding of the Claimant's case, my impression to date is that Claimants are (with the exception of the claimants in *Garner)* insufficiently careful in addressing the level of any reciprocal costs cap. The Claimant should proactively (in their application for a PCO) resist an inappropriately low reciprocal costs cap (and suggest and explain the logic for a figure they are offering) on the following basis:
    a. CFA arrangements are the practical means by which individuals of limited means can bring environmental challenges. For the reasons given by the Sullivan Report and Update Report it is rarely possible for such claims to be initiated and prosecuted *pro bono.* It would be an affront to art 10A to assume that the rights there provided can be vindicated through *pro bono* representation. Evidence to explain what has been done to obtain pro-bono representation could be provided to show that it is not a practical option. Any element of pro-bono input should be highlighted.
    b. It is necessarily implicit in CFA arrangements, that the litigation will be run by solicitors and counsel just as any other litigation. Environmental litigation is often complex as demonstrated by interested parties costs claims in such cases. If third parties spend £y, how can it be concluded that a claimant can pursue litigation for a fraction of that sum. Setting a reciprocal costs cap at too low a sum will render the art 10A rights nugatory because the Claimant will have to find the means to pay their own team even if successful. It is inconsistent with "wide access" to environmental justice, for a successful claimant to be out of pocket after having justifiably challenged an environmental decision. Similarly, it is not possible for solicitors and counsel to "subsidise" such litigation (give evidence);
    c. An uplift is an inevitable element of a CFA arrangement. Any reciprocal costs cap needs to take this into account; and
    d. Consistent with art 10A, any cap has to be set at a level which does not prevent the litigation continuing. The £35,000 in *Garner* may come to be seen as a good benchmark.

A wealthy individual

40. Such a claimant will rely on the emphasis on the objective test in *Garner.* In the light of the observations of Sullivan LJ in that case [51-52] such a claimant should resist a "means test in

[4] Whilst on *Garner* subjective assessment of means is not central, in a case where a subjective assessment would strongly favour a low PCO figure, there is nothing to stop "inadequate means" being relied on.

a public forum". The upshot though will be a less generous approach on a reciprocal costs cap.

A limited company

41. It is not clear why a limited company would need a PCO. However, similar considerations apply in the context of the security for costs regime. The issue arises in the following way.

42. The Courts have endorsed the practice of some campaigning groups of forming a company to run the campaign and to be the claimant in any JR or statutory challenge. Such companies, even if formed at the last minute before issuing proceedings, have been found to have standing (and the possibility of them being a "member of the public concerned" for the purposes of art 10A was assumed in *Coedbach* [36]).

43. A key and explicit purpose of establishing such companies has been to ensure individuals are protected from full costs exposure and this is a well established route to securing costs protection: *R v. Leicestershire CC ex parte Blackfordby* [2001] Env LR 2 (Richards J).

44. The First Defendant will be able to apply for security for costs (it is doubtful whether a second defendant could justify doing so in the light of *Bolton*).

45. However, the Courts have traditionally set the security for costs at a level which reflects the likely costs - and not by reference to *art 10A* considerations.

46. The Sullivan Reports have stressed the need for any SFC decision in such cases to reflect Art 10A considerations [58]:

> ***"As far as we are aware the level of security for costs in such cases has been based on conventional costs principles and not by reference to the requirements of Aarhus. We recommend that where a limited company is the claimant in a case to which* Aarhus applies, judicial consideration is given to the level at which security for costs is set so as to ensure compliance with the requirements of the Convention. Provided this is done, we see no fundamental difficulty with that approach."**

47. Whilst this has not yet received judicial endorsement (it was referred to *obiter* in *Coedbach* [39-40]) it is strongly arguable that the SFC should be set by reference to Art 10A considerations. If the company has standing and it is an Art 10A claim, then the "prohibitively expensive" formulation applies. Given the security for costs jurisdiction, a limited company with an Art 10A compliant SFC order may avoid an reciprocal costs cap.

48. This could be a major advantage of pursing a limited company route.

49. However, in the light of *Coedbach* (pending appeal) the "prohibitively expensive" test has to be applied for a limited company. It will be far harder to demonstrate that that test is

breached for a limited company than for an individual and evidence will be required[5].will require evidence. Further and perhaps more importantly, where the company is in effect the vehicle of a number of individuals, what is "prohibitively expensive" will take into account the fact that each can contribute a *Garner* like sum. In *Coedbach* the Court looked behind the corporate veil at the members of the company and – "there is nothing in the evidence in this case which persuades me that these proceedings are prohibitively expensive for the Claimant [company] or in context perhaps more importantly, the individuals who have an interest in the activities of the claimant". Thus, limited companies applying for a PCO (or more likely resisting security for costs) may have to demonstrate: (1) their lack of means; and (2) the lack of means of those individuals with an interest in the claimant company.

Unincorporated Associations

50. This latter point also applies to UAs. The Courts have, on occasion, taken a relatively relaxed approach to UA's issuing proceedings for JR as long as the Defendants are protected in respect of any costs order they might obtain.

51. If a UA is accepted as having standing, there does not appear to be any bar in principle to them being able to apply for and secure a PCO but a UA has no legal personality of its own and it is no more than a group of individuals acting under a joint name. Thus in such circumstances, there appears to be much force in Wyn Williams J observation that *Garner* cannot be applied without some modification. One would have here a large number of individuals each of whom could be expected to make contributions. The total of those contributions would be taken into account in setting the PCO.

52. Thus it is at present difficult to see any advantage of a claim being brought by a group rather than by an individual with standing.

Summary

53. Thus, Claimants can continue to push on PCOs on the following points:
    a. highlighting the basic purpose and public interest in environmental litigation – as summarised above; to show that PCOs are not a claimants' lawyers' charter but a response to a real public need (including by reference to the LSC point);
    b. showing the extent to which the underlying logic of the Art 10A cases should impact on the discretion in non Art 10A cases. There is scope for seeking to rely on that logic in seeking PCOs on more generous terms than would otherwise be the case;
    c. in a case where standing may be an issue, obtaining standing and a PCO for a non-government organisation through the deeming provisions;
    d. explaining in detail why a PCO is required (including any strong subjective financial information) and why a reciprocal costs cap has to be set at a sufficiently high level;

[5] To rebut the point made by Wyn Williams J that: "My experience suggests that many limited companies would not regard an overall costs bill in the region of £70,000 as prohibitively expensive in relation to litigation about which they felt strongly."

e. making sure that a claimant has standing and that one does not inadvertently undermine the prospects of getting a PCO by having a large number of claimants or an UA with a large number of members as the claimant;
f. considering establishing a limited company and offering security for costs based on Art 10A considerations thereby potentially avoiding any reciprocal costs cap; and
g. raising PCO issues at the earliest opportunity to maximise the protection obtained, minimising the risk in the interim and creating a strong basis for resisting costs even if unsuccessful in the litigation if new arguments raised in defence late.

David Forsdick
25th October 2010