

COSTS IN JUDICIAL REVIEW

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1. The rules relating to the costs of judicial review are of practical and theoretical significance. In practical terms, they affect the decision of claimants to bring judicial review proceedings and the decision of defendant public authorities to resist proceedings. Potential costs liabilities, particularly in times of public sector spending restraint, have tactical consequences in terms of applying pressure to defendant authorities, as well as the obvious filter on unmeritorious claims (at least where parties are properly advised).
2. In more theoretical terms, there is a burning question as to whether costs in public law should operate differently from costs in private law. Can the costs rules for private law simply be transposed to public law cases?¹ Does the public interest in (meritorious) public law challenges mean that those who seek to question the legality of governmental conduct should be immune from the normal risks associated with civil litigation? Do the procedural safeguards such as the requirement for standing (such that it exists), and the “arguability” threshold at the permission stage, provide an adequate filter on those cases which should not be allowed to proceed, such that the justification for the “loser pays” principle falls away?
3. It is against this background² that I consider, necessarily in outline, the current position on costs in judicial review. I will do so by addressing the matter sequentially, from pre-action to the final disposal of the case.

Pre-action

4. The Judicial Review Pre-Action Protocol provides for a prospective claimant to write to the prospective defendant setting out details of the impugned decision and the reasons why it is said to be unlawful. Although in certain cases urgency may prevent

¹ See for example *R (Davey) v Aylesbury Vale DC* [2008] 1 WLR 878, where the application of private law rules to public law disputes was doubted by Sedley LJ at [18].

² For further discussion of the principles relating to costs in judicial review proceedings, see: *Rethinking Costs in Judicial Review*, Fordham & Boyd, [2009] JR 306 and *Rethinking Costs in Judicial Review – A Response*, James Maurici, [2009] JR 388.

such a letter being written³ and in other cases the defendant may not be able to change the impugned decision,⁴ it is good practice to inform the other side as soon as possible of a party's intentions to bring proceedings. In all civil litigation, pre-action correspondence can affect the ultimate costs liabilities of the parties. Express provision is made for costs sanctions for non-compliance in the Practice Direction on Pre-Action Protocols (at 4.6).

5. In the context of judicial review, it has been acknowledged by the courts that a failure by a defendant to reply to pre-action correspondence may have costs consequences.⁵ It is also self-evident that if a convincing explanation can be given by the defendant, the claimant is better placed knowing that explanation prior to issuing proceedings because it can either revise its grounds, or it can avoid costs consequences by not proceeding with the claim. If permission is refused, the costs of preparing a pre-action protocol letter can in practice often be recovered from the claimant as part of the costs of acknowledging service, the acknowledgment of service often reflecting the contents of the pre-action protocol response.

Funding actions and protection from costs consequences

6. I do not propose to consider legal aid in respect of judicial review proceedings. I simply note that public law proceedings remain an area where legal aid is available, subject to the normal criteria being met. In practical terms, that provides an attractive solution to claimants in group challenges, who may be able to identify one lead claimant who is eligible to have their costs funded from the public purse.
7. One important and growth area in terms of judicial review costs has been the protective costs order. A protective costs order (PCO) seeks to limit or completely remove the costs risk to a claimant in bringing a judicial review claim. It provides an important means of allowing genuine "public interest" litigation to proceed, especially where actions are brought by charities or community groups with little funding and pro bono legal representation. PCOs also reflect the fact that at the "cutting edge" of public law, there may be considerable risk and uncertainty in mounting what may be important, but ultimately unmeritorious challenges.

³ Referred to in the Judicial Review Pre-Action Protocol, paragraph 6

⁴ See *Davey*, above, at [14]. Note also the comments in *The Judicial Review Pre-Action Protocol*, Charles Banner, [2008] JR 59.

⁵ *R (Mount Cook Land Ltd) v Westminster CC* [2004] JPL 470 (per Auld LJ at [74]) and

8. The pre-conditions for a PCO were set out in *R (Corner House) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 although it should be noted that the scope of PCOs has seemingly expanded since that decision. At [74] onwards the Court of Appeal held:

74 We would therefore restate the governing principles in these terms.

(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

75 A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimant's lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (**2625 R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1296); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (*R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin)); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*R v Lord Chancellor, Ex p Child Poverty Action Group* [1999] 1 WLR 347); and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).

76 There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is

likely that a cost capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in *King v Telegraph Group Ltd* (Practice Note) [2005] 1 WLR 2282 , paras 101-102 will always be applicable. We would rephrase that guidance in these terms in the present context. (i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. (ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest. (iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.

9. The particular element of *Corner House* which has been the subject of some change relates to the requisite public interest in the litigation. In *R (Compton) v Wiltshire PCT* [2009] 1 WLR 1436, the Court of Appeal held:

23 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. The paragraphs in the *Corner House* case [2005] 1 WLR 2600 are not, in my view, to be read as statutory provisions, nor to be read in an over-restrictive way. Indeed, it seems to me there is already support for a non-rigorous approach exemplified by para 19 of Lloyd Jones J's judgment in *Bullmore's case* [2007] EWHC 1350 (Admin) where he said in relation to the criteria of "no private interest":

"19. This particular requirement as formulated in [the *Corner House* case] has been diluted in the later case law. I have in mind particularly *Wilkinson v Kitzinger* [2006] 2 FLR 397 , where Sir Mark Potter P said, at para 54: 'As to

(1)(iii), I find the requirement that the applicant should have “no private interest in the outcome” a somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings, is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case it is difficult to see why, if a PCO is otherwise appropriate, the existence of the applicant's private or personal interest should disqualify him or her from the benefit of such an order. I consider that the nature and extent of the “private interest” and its weight or importance in the overall context should be treated as a flexible element in the court's consideration of the question whether it is fair and just to make the order. Were I to be persuaded that the remaining criteria are satisfied, I would not regard requirement 1(iii) as fatal to this application. I note that passage was approved by the Court of Appeal in *R (England) v Tower Hamlets London Borough Council* [2006] EWCA Civ 1742 at [14].”

24 Furthermore, I would agree with Holman J that “exceptionality” was not seen in the Corner House case as some additional criterion to the principles set out in para 74 but a prediction as to the effect of applying the principles. Finally, I do not read the word “general” as meaning that it must be of interest to all the public nationally. On the other hand I would accept that a local group may be so small that issues in which they alone might be interested would not be issues of “general public importance”. It is a question of degree and a question which the Corner House case would expect judges to be able to resolve.

10. I will touch on questions of access to environmental justice below, but I note at this stage that it should not be assumed that there is public importance in all environmental cases: see *Dullingham Parish Council v East Cambridgeshire DC* [2010] EWHC 1307 (Admin) and *R (Garner) v Elmbridge BC* [2010] EWHC 567 (Admin).
11. The courts have also grappled with a number of difficult issues around the terms of any PCO. For example, there are important issues regarding reciprocity: should the defendant's liability to the claimant should the claim succeed be limited? If so, at what level should it be limited. In *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2009] CP Rep 8, the Court of Appeal held the terms of any conditional fee agreement should be disclosed by the Claimant in their application for a PCO. The Court held (at [27]) that “[t]he agreed success fee is relevant to the likely amount of the liability of the defendant to the claimant if the

claimant wins. It is therefore relevant to the amount of any cap on that liability. In our opinion the court should know the true position when deciding what the cap should be”.

12. There is, of course, a cost associated with applying for and resisting PCOs. The Court of Appeal in Corner House (at [78]) recognised that protection may be granted for the making of the application, at a cost of up to £1,000. In practical terms, if the principle of a PCO cannot be disputed, parties may be best placed to negotiate the terms of the PCO in correspondence. This can lead to a satisfactory outcome for both claimants and defendant public authorities, not least because of the certainty in terms of the expense of litigation that a reciprocal PCO can provide.

13. It should also be remembered that defendants can seek costs protection in the form of orders for security for costs (see CPR Part 25). The reality is that security for costs is unlikely to be ordered prior to a decision on permission (in light of the limited potential recovery, discussed below), and if permission is granted a defendant may struggle to convince the court to order such security. The court must have regard to “all the circumstances of the case” and consider that it is just to make the order, as well as the other conditions of CPR 25.13 being satisfied.⁶

To permission stage

14. If the case is settled after proceedings are issued, difficult issues may arise about which party actually “won”. The fall back position adopted by the courts is that there should no order as to costs: R (Boxall) v Waltham Forest LBC (2001) 4 CCLR 258. For those settling claims out of court, protection can be achieved by ensuring that the consent order makes precise provision for the costs order to be made. It may be prudent to agree quantum and enshrine that in the consent order, to avoid the costs of detailed assessment should a dispute later arise.

15. The general principle is that if permission is refused, the defendant is entitled to the costs of his acknowledgment of service: R (Mount Cook Land Ltd) v Westminster CC [2004] JPL 470. That order is made as a matter of course, and only in exceptional cases is there a departure from it. An application for those costs should be made in the acknowledgment of service.

⁶ For further discussion of this point see *Security for Costs and (Un)Incorporated Claimants*, Ormondroyd, [2010] JR 92

16. Interested parties who also file an acknowledgment of service may not be so fortunate. The general rule is that two sets of respondents' costs are not awarded: see Bolton MDC v SSE [1995] 1 WLR 1176 (in the context of planning decisions) and, for example R (Smeaton) v Secretary of State for Health [2002] EWHC 886 (Admin). That general rule may be displaced where the interested party contributes something to the proceedings that the defendant chose not to (or was not able to) cover themselves.
17. It should also be noted that the costs of oral hearings at permission stage may be in issue if the reason for an oral hearing was because of an application for interim relief or expedition. If an oral hearing is occasioned because the defendant fails to agree in pre-action correspondence to a reasonable interim position (such as a stay of the relevant decision) it is proper that the claimant who succeeds in obtaining interim relief makes an application for costs at that stage. The court will often order costs to be in the case, but in many cases it is appropriate for an order to be made on that application.

To substantive disposal

18. The first observation is that the grant of permission may often be the point at which the cost/benefit of defending the decision points in favour of the defendant consenting to judgment. For claimants, this is the time to test the nerve of the defendant, if necessary by proposing no order as to costs. Correspondence to that effect would serve a successful claimant well in respect of a costs application at a later date.
19. At a substantive hearing, the general rule will be that the loser pays. Again, the unsuccessful claimant will normally only be liable for one set of costs: Bolton, above. The following general points should be noted:
- a. The court may make an issues based order (CPR 44.3(6)) such that a claimant may not recover all (or any) costs if it succeeds on one but not other grounds of review;
 - b. The conduct of the parties is important in determining liability. Indemnity costs may be ordered where, for example, the defendant acts carelessly or fails to make appropriate disclosure: see e.g. R (O) v SSHD [2010] EWHC 709 (Admin);

- c. A successful defendant may not recover its costs at all if some conduct on its part meant that the case was prolonged or the claimant misled as to the merits of the claim.

20. The general rules as to summary or detailed assessment of costs apply equally to judicial review as they do to other claims.

Future developments

21. I note in closing that in the Jackson Report⁷ on the funding of civil litigation, a proposal has been made for “qualified one-way costs shifting” to ensure that claimants are not put off bringing meritorious claims by the costs risks of doing so. He considered that that would ensure compliance with Aarhus Convention, as considered by the Sullivan Report.⁸ These issues merit a seminar in themselves, but represent potentially significant changes to the future of costs rules in judicial review.

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⁷ http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf

⁸ <http://www.ukela.org/content/page/1017/Justice%20report.pdf>