HIGH COURT PLANNING CHALLENGES: PROCEDURE AND COSTS

Richard Turney[1]

1. In this paper I intend to provide an update and overview of recent developments in the procedural aspects of High Court planning challenges, with a particular focus on costs. I will also consider interim relief and the promptness requirement.

2. Much of this paper will necessarily be focused on the continuing influence of Community law, and in particular the implications of the incorporation into Community law of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention"). It might have been thought that procedural law is a matter for the Members States to decide upon, but this paper will show that that orthodoxy no longer exists in the planning and environmental context.

COSTS

3. For most people, litigation is expensive and all lawyers know that their clients' desire to win is tempered by their desire to minimise the costs risks of doing so. Further, the rules relating to the costs of public law litigation 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. They affect the decisions of developers as to whether to fight to preserve a planning permission which they have been granted, or to challenge an adverse appeal decision.

4. 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

[1] The costs element of this paper is largely based upon a paper written by Dan Kolinsky (also of Landmark Chambers) and myself and published in the UK Environmental Law Association publication "E-Law" and at [2010] 6 Environmental Liability 231. I am therefore indebted to Dan for his work on that paper. I am also indebted to James Maurici (also of Landmark Chambers) for his comprehensive updated on Aarhus Access to Justice given at the UK Environmental Law Association Conference in June 2011.

law simply be transposed to public law cases?[2] 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, and the "arguability" threshold at the permission stage in the case of judicial review, 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?

5. It is against this background[3] that any analysis of the costs regime must be undertaken. However, beyond those issues the primary driving force for change has come from the Aarhus Convention which, in the long-winded Article 9,[4] utters the words that remedies should be made available for the review of environmental decision-making which are "not prohibitively expensive". That of course begs the question: what is, or is not, prohibitively expensive? And moreover, how can our costs rules accommodate that stricture in a coherent and fair way?

6. It is helpful at the outset to set out a chronology of the key events in the development of the recent jurisprudence:

Summary of recent events

October 2001	Aarhus Convention comes into force
May 2003	Directive 2003/35/EC ("the Public Participation Directive") amends Directive 85/337/EEC ("the EIA Directive") and Directive 96/61/EEC ("the IPPC Directive") so that new articles in each Directive mirror Article 9 of the Aarhus Convention

[2] 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].

[3] 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.

[4] Set out in full – for those who can face reading it – as an Annex to this paper.

Feb 2005	Aarhus convention formally ratified by UK[5] government and also by EC
1 March 2005	Court of Appeal's judgment in R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 (CA), confirming and clarifying the jurisdiction to make Protective Costs Orders (PCOs)
April 2008	Commission expresses concern as to whether the UK has failed properly to implement the amended Directives by ensuring that High Court procedures are not prohibitively expensive.
May 2008	Report of the Working Group on Access to Environmental Justice published (the Sullivan report) concludes that the costs regime in High Court environmental cases inhibits compliance with the Aarhus principles. Recommends the use of PCOs on a modified (i.e. liberalised) basis in environmental cases to avoid the UK being "taken to task" for its failures.
16 July 2009	Judgment of ECJ in Commission v Ireland [2010] ELR 8, finding that Ireland did not comply with the Aarhus principles simply because there was an after the event discretion as to costs.
14 January 2010	Lord Justice Jackson publishes review of Civil Litigation Costs (recommending "qualified one way costs shifting in all judicial reviews" (i.e. environmental and non-environmental).
18 March 2010	European Commission issue warning to UK about unfair costs of challenging environmental decisions
29 July 2010	Judgment of the Court of Appeal in R (Garner) v Elbridge Borough Council [2010] EWCA Civ 1006 provides a comprehensive review of the PCO regime in environmental cases.
6 September 2010	Update report published by the Working Group on Access to Environmental Justice (Sullivan update report) – backs (modified version of) qualified one way costs shifting in all JR cases
September 2010	Aarhus Convention Compliance Committee – a UN committee with no direct legal effect in the UK – make adverse findings in respect of the UK's costs regime

[5] In line with the Convention's procedures the UK became a full party to the Convention in May 2005, 90 days after ratification

15 November 2010 Ministry of Justice publish (for consultation) its proposals for the Implementation of Lord Justice Jackson's recommendations[6]

15 December 2010 Supreme Court judgment in R(Edwards and Pallikaropoulos) v The Environment Agency, making a reference to the CJEU in respect of a costs decision

6 April 2011 Commission announces that it intends to take infraction proceedings against the UK in respect of costs in environmental cases and the requirement for cross-undertakings for interim injunctions.

7. It is clear from that history that the PCO has been seen as the solution to the challenge laid down by Aarhus. I do not intend to provide a complete history of the judicial debates and proposals for reform, but instead address the following matters:-

   a. Protective Cost Orders (PCOs): The position prior to Garner;
   b. Judicial treatment of Aarhus;
   c. The Court of Appeal decision in Garner and subsequent judicial developments;
   d. Where are we going now, domestically and beyond?

Protective Cost Orders (PCOs): The position prior to *Garner*

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. 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.**

[6] The Ministry of Justice also published (for consultation) on 24 November 2010 its proposals in respect of cross-undertakings in damages in environmental judicial reviews

(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 (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. This has been clarified in R (Compton) v Wiltshire PCT [2009] 1 WLR 1436 as not requiring an overly restrictive approach to the extent of the public interest at stake.

10. 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".

11. 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.

Judicial treatment of Aarhus

12. In Morgan & Baker v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107, Carnwath LJ made the following observations:

> **47. It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:**
>
> **i) The requirement of the Convention that costs should not be 'prohibitively expensive' should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.**
>
> **ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.**
>
> **iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary 'loser pays' rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.**
>
> **iv) This court has not encouraged the development of separate principles for 'environmental' cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to**

environmental and other public interest cases. The Corner House statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied 'flexibly'. Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the CPR Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the Convention requires remedies to be 'adequate and effective' and 'fair, equitable, timely'. The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving objectives

13. In Commission of the European Communities v Ireland, Case C-427/07 [2010] ELR 8 (16th July 2009), the European Court of Justice considered the effect of directives implementing the Aarhus Convention. The Court held that procedural rules must be sufficiently certain in their operation, in order to avoid prohibitive expense. The fact that the Irish courts had discretion not to order the unsuccessful party to pay the other party's costs was not sufficient to achieve compliance: see paragraphs 92 to 94.

Garner and beyond

(a) Garner

14. In R (Garner) v Elmbridge BC [2010] EWCA Civ 1006, the Court of Appeal considered the conditions for the grant of a PCO in environmental cases. In particular, the Court considered the effect of the Aarhus Convention on such orders. That Convention has direct effect by virtue of its incorporation into the EIA Directive (Directive 85/337/EC). Where a claimant can be considered to be the "public concerned" for the purposes of Article 10a of the EIA Directive, the provisions of the Aarhus Convention will come into play. In brief summary, Garner establishes that in such a case:

    a. It is not necessary to show that the case is one of "general public importance" or that there is a "public interest requiring resolution of those issues" (Garner, [39]);

b. In respect of the means of the claimant, "Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of "the public concerned"" (Garner, [46]). The Court imposed a test which is partly objective: would the proceedings be prohibitively expensive for an ordinary member of the public (i.e. one earning the average national wage)? This makes it much easier for a JR claimant to obtain a PCO. (But see the discussion below about R (Coedbach Action Team Ltd) v Secretary of State for Energy and Climate Change).

c. The imposition of some form of reciprocal limit upon a respondent's liability for costs is not necessarily inconsistent with Article 10a (Garner, [54]);

15. Garner therefore updates the PCO framework in light of Aarhus, and liberalises the regime to make it of wider application in environmental cases.

(b) R (Coedbach Action Team Ltd) v Secretary of State[7]

16. In between Nicol J's and the Court of Appeal's judgments in Garner, the issue of whether a PCO should be granted in an environmental case again arose in CAT.

17. In that case, the SoS granted consent under s 36 Electricity Act 1989 for construction and operation of 100Mw biomass generating station at Avonmouth in Bristol to Helius Energy Plc. Planning permission under section 90(2) Town and Country

[7] John Litton QC, from Landmark, acted for the Interested Party in this caser and contributed to these comments on the case.

Planning Act 1990 was also deemed to be granted. There had been no objections to the development. Consequently, on 26 March 2010 the section 36 consent was granted without any Public Inquiry being held.

18. At the end of the 3 month period for judicial review, a claim challenging the SoS's decision was lodged. The claimant, CAT, was a private limited company set up to object to 2 biomass generating stations proposed to be built in Swansea and Coedbach in Wales. It had 26 members. The 2 Welsh schemes it had objected to were unrelated to the Avonmouth scheme. Planning permission for those schemes had been refused and appealed with the appeals to be determined at Public Inquiries. CAT was concerned that certain paragraphs in the Avonmouth decision letter would be relied on by the developers of the Welsh schemes to prevent CAT from presenting evidence at those Inquiries on the sustainability of the biomass fuel to be used to fire the power stations. CAT had not objected to or otherwise participated in the section 36 consent process for the Avonmouth scheme.

19. CAT also sought a Protective Costs Order (PCO) limiting its liability for costs to the SoS and Interested Parties to £2,500. It sought to justify the claim on the basis that it was a public interest case; that it wanted certainty as to the potential cost outcome; and that the claim was an environmental claim to which the EIA Directive and Aarhus Convention applied. It did not disclose any financial information nor indicate what the consequences for the legal proceedings would be if it was not given costs protection.

20. The Secretary of State and Helius both filed AoSs and Summary Grounds. Both submitted that permission to apply for judicial review should be refused because, *inter alia*, CAT lacked standing. Both relied on Corner House and on Nicol J's judgment in Garner, in particular CAT's failure to disclose any financial information.

21. In July 2010, Beatson J refused CAT's PCO on the basis that it had not furnished sufficient information about (a) its resources; and (b) the consequences for the proceedings if no PCO was made.

22. In August 2010, CAT renewed its application for a PCO relying on the CA's Judgment in Garner. Shortly before the hearing, CAT served a Witness Statement stating that the individual members of the company did not wish to disclose their personal financial circumstances and that if a PCO was not granted it could not afford to continue with the litigation and would withdraw from the proceedings.

23. CAT argued that whether costs were prohibitively expensive had to be assessed objectively and that the failure to disclose its financial circumstances was not therefore a reason to refuse the PCO.

24. Wyn Williams J dismissed CAT's application with the reasoned Judgment being handed down on 16 September 2010. He held:

    a. the EIA Directive did not proceed on the basis that every member of the public should have wide access to justice, only those who had a sufficient interest or maintained an impairment of a right [12];

    b. on the facts of the case CAT did not have a sufficient interest [29] and the EIA Directive was not therefore material to his decision whether to grant a PCO [33];

    c. there was a dearth of reliable information about the state of the CAT and those who directed its activities [20];

    d. in any event, the proceedings were not prohibitively expensive. In particular he concluded that the likely total costs of approximately £70,000 would not be prohibitively expensive for either a limited company and/or that if one looked to the membership of the company (about 25 people) a costs liability of approximately £3,000 per member would not be prohibitively expensive [36] & [37];

    e. the Claimant was a private limited company and, therefore, a PCO was unnecessary because as a company it could limit or extinguish its potential costs liability [39] & [40]; and

f. it would be unjust to make a PCO on the facts of the case [42].

25. In concluding that CAT did not have a sufficient interest, Wyn Williams J took into account the fact that (a) CAT had neither objected to, nor participated in, the Avonmouth consent procedure; (b) the aims and objects of CAT were to protect its particular local environment (i.e. the Gwendraeth Valley); (c) CAT's sole purpose in challenging the Avonmouth decision was to prevent that decision being a material consideration in the determination of the Welsh schemes which CAT had objected to; and (d) CAT would be able to challenge those decisions under section 288 Town and Country Planning Act 1990 if legally flawed [29], [30] & [31].

26. An appeal in respect of the CAT case was considered by Carnwath LJ in the Court of Appeal on 29 November 2010. The Court of Appeal dismissed the appeal and upheld Wyn Williams J's approach as a legitimate exercise of his discretion.

(c) R (oao Edwards and Pallikaropoulos) v The Environment Agency

27. The Pallikaropoulos case concerned an appeal to the Supreme Court from a decision of the Supreme Court Costs Officers in the case of the same name. The underlying litigation concerned the Rugby cement works: a complex claim which was finally disposed of by the House of Lords in 2007 ([2008] 1 WLR 1587). Following the defeat in the House of Lords, the claimant was ordered to pay the respondents' costs to be certified if not agreed. Following a hearing on 4 December 2009, Registrar Di Mambro and Master O'Hare handed down their decision on 15 January 2010 on 2 preliminary issues which arose during the detailed assessment of the costs to be paid by Mrs Pallikaropoulos and concerned the application of Articles 10a and 15a of the EIA and IPPC Directives. The preliminary issues were identified as being:

a. Whether the Costs Officers assessing the costs of the litigation had any discretion to consider and implement the IPPC and EIA directives where the principle of costs had been settled; and

b. If so, whether in the particular circumstances of the case, the Costs Officers should implement the Directives.

28. On the first issue the Cost Officers held that compliance with the Directives was a relevant factor for them to take into account on the detailed assessment of costs to which those Directives applied unless the Court making the costs order had already taken them into account when making the order. Thus in deciding what costs it was reasonable for a party to pay it was appropriate to disallow any costs that the Costs Officers considered were "prohibitively expensive". In the absence of any authority on what was "prohibitively expensive", they adopted the test proposed in the Sullivan Report before saying:

> **That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance of costs we make must be made in the light of all the circumstances. We presently take the view that we should also have regard to the following:-**
> **i) The financial resources of both parties.**
> **ii) Their conduct in connection with the appeal.**
> **iii) The fact that the threat of an adverse costs order did not in fact prohibit the appeal.**
> **iv) The fact that a request to waive security money was refused and security was in fact provided.**
> **v) The amount raised and paid for the Appellant's own costs.**

29. The second issue concerned whether Mrs Pallikaropoulos was prevented by issue estoppel from relying on the Aarhus Convention given that she had raised the issue on two occasions in the House of Lords and on both occasions had had her arguments rejected. However, the Costs Officers took the view that in refusing to waive security and the PCO and in making the costs order against Mrs Pallikaropoulos, the House of Lords had not reached any decision on the implications of the Directives [23] – [25] & [27].

30. With the agreement of the parties the Costs Officers deferred any assessment of what costs Mrs Pallikaropoulos should reasonably pay taking account of the Aarhus Convention pending any appeal.

31. An appeal against the Cost Officers' decision was heard by the Supreme Court on 11 November 2010. In a judgment given by Lord Hope, handed down on 15th December 2010, the Supreme Court held that:

    a. The cost officers' ruling that they had jurisdiction to implement the Directives should be set aside.

    b. A reference should be made to the CJEU for a preliminary ruling to ascertain the correct test to be applied when determining whether the proceedings in question are 'prohibitively expensive'.

    c. The order for costs dated 18th July 2008 should be stayed pending the resolution of the reference to the CJEU.

32. The Supreme Court concluded that the proper function of the cost officers is to carry out the detailed assessment of costs and that the question of whether the review procedure is prohibitively expensive is a matter that should be addressed by the Court itself. In an appeal, an application for a protective costs order on the basis that without one the proceedings would be prohibitively expensive should be made when permission to appeal is being sought, or at the earliest opportunity thereafter. The refusal of a protective costs order at this stage does not prevent further consideration by the Court at the end of the proceedings. For example, the Court could set a limit on the paying party's liability.

33. The Supreme Court also found that there is no clear and simple answer to the question of which test should be applied in order to determine whether proceedings are prohibitively expensive. In particular, whether the test is a 'subjective' one, which looks to the means of the particular claimant (as was argued by the EA), or an 'objective' one, which looks to the ability of an 'ordinary' member of the public to meet the potential liability for costs (as argued by Mrs Pallikaropoulos). Whilst Lord Hope suggested that the balance appeared to lie in favour of an 'objective' test, he

reasoned that this had yet to be finally determined.[8] The Court also concluded that it was unclear whether a different approach is permissible at the second appeal from that which is required to be taken at first instance.

34. Therefore a reference will be made to the CJEU for a preliminary ruling on these issues under article 267 TFEU (ex article 234 EC). As a result of the Supreme Court's decision, it will be at least 18 months to 2 years before any definitive ruling is given on the matter.

Where are we going now?

35. As the law stands today (and pending changes to the CPR which are said to be in pipeline), there are 3 categories of approach for PCOs in domestic law.

    a. First, where the case is within article 10A of the EIA directive then the modifications to the Corner House principles set out by the Court of Appeal in Garner apply.

    b. Secondly, in cases which are within the scope of Aarhus (but not within article 10A of the EIA directive) then the position is that Corner House applies subject only to the observation of Carnwath LJ in paragraph 47(iii) of Morgan that "The principles of the [Aarhus] Convention are at most a matter to which the court may have regard in exercising its discretion". See also R (Dullingham PC) v East Cambridgeshire DC [2011] EWCA Civ 204 and Austin v Miller Argent (South Wales) Limited [2011] EWCA Civ 928. However, I also note Case C-240/09 Lesoochranarske Zoskupenie VLK, where the ECJ held that it was for the national court to "interpret its national law in a way which, to the fullest extent possible, is consistent with the

[8] It is worth noting here the criticism of the Court of Appeal in *Austin v Miller Argent (South Wales) Limited* [2011] EWCA Civ 928 of the failure to support a submission that costs were "prohibitively expensive" without adducing any evidence to establish what expense would be prohibitive: see paragraph [53]. A requirement for evidence would tend to suggest a subjective test (although it might be said that evidence could be provided of what was objectively expensive). That case did not concern the Directives, but as in *Morgan*, the Court proceeded on the basis that Convention was relevant to the costs jurisdiction.

objectives laid down in [Article 9] of the Aarhus Convention" (see further below).

c. Thirdly, ordinary judicial review cases to which the Corner House principles apply.

36. However, there are two significant pressures for further reform: one of domestic origin, and the other from beyond our borders.

37. In the Jackson Report[9] 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.[10] These issues merit a seminar in themselves, but represent potentially significant changes to the future of costs rules in judicial review. The Government appears minded to at least partially accept Jackson's proposals [11] albeit that there are indications that the proposals will be watered down.

38. Jackson LJ's proposals have since been endorsed by the Sullivan Committee (in its updated report dated 6 September 2010), which has called for urgent amendments to the CPR to give effect to Jackson LJ's recommendations.[12] The Sullivan Committee strongly endorsed the big idea of Jackson LJ to shift to a position of qualified one-way costs shifting. It also endorsed the Jackson LJ approach that the changes should not be limited to environmental judicial reviews but should apply to all judicial review (subject to special cases). The Sullivan LJ committee considered that this approach would be Aarhus compliant and he much simpler and more satisfactory than

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

[10] http://www.ukela.org/content/page/1017/Justice%20report.pdf

[11] http://www.justice.gov.uk/consultations/jackson-review-151110.htm

[12] http://www.unece.org/env/pp/compliance/C2008-33/correspondence/FrCAJE_updatedSullivanReport_2010.09.14.pdf

reliance on judicial discretion. The rule proposed in the updated Sullivan LJ committee report is:

> **"An unsuccessful Claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in brining or conducting the proceedings".**

39. November 2010 saw the publication of consultation proposals from the Ministry of Justice:-

    a. It is consulting on the Jackson LJ proposal of qualified one way cost shifting but concerns about extending qualified one-way costs shifting to judicial review claims. The consultation response indicates that if extended, it will only apply to individuals and will contain rules to limit liability rather than exclude liability.

    b. The consultation response in respect of Jackson LJ's proposals notes (at paragraph 168) that:

> **"the Government is working to amend the Civil Procedural Rules in order to codify the current case law on PCOs for environmental judicial review proceedings. These new rules will make the law and procedure more certain and transparent for those who may wish to consider applying for a PCO and will more clearly meet concerns expressed by respondents to the Review in relation to costs in such cases. The rules will encourage applications early in proceedings to be considered alongside permission for a hearing and will limit the claimant's liability for the costs of the PCO application. These rule changes are expected to come into effect by April 2011".**

40. Secondly, the Aarhus Convention Compliance Committee has made determinations in respect of complaint ACCC/C/2008/33**.**[13] The Committee found that the UK system is likely to be "prohibitively expensive" absent, among other things, changes to the approach taken to PCOs:[14]

> **Costs - prohibitively expensive (article 9, paragraphs 4 and 5)**
>
> **126. When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner.**

[13] http://www.unece.org/env/pp/compliance/C2008-33/DRF/C33DraftFindings.pdf

[14] Emphasis added

127. The Committee considers that the "costs follow the event rule", contained in rule 44.3(2) of the Civil Procedure Rules, is not inherently objectionable under the Convention, although the compatibility of this rule with the Convention depends on the outcome in each specific case and the existence of a clear rule that prevents prohibitively expensive procedures. In this context, the Committee considers whether the effects of "costs follow the event rule" can be softened by legal aid, CFAs and PCOs as well as by the considerable discretionary powers that the courts have in interpreting and applying the relevant law. At this stage, however, at least four potential problems emerge with regard to the legal system of E&W. First, the "general public importance", "no private interest" and "in exceptional circumstances" criteria applied when considering the granting of PCOs. Second, the limiting effects of (i) the costs for a claimant if a PCO is applied for and not granted and (ii) PCOs that cap the costs of both parties. Third, the potential effect of cross-undertakings in damages on the costs incurred by a claimant. Fourth, the fact that in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration is not in and of itself given sufficient consideration.

128. While the courts in E&W have applied a flexible approach to Corner House criteria when considering the granting of PCOs, including the "general public importance", "no private interest" and "exceptional circumstances" criteria, they have also indicated that, given the ruling in Corner House, there are limits to this flexible approach. The Committee notes the numerous calls by judges suggesting that the Civil Procedure Rules Committee take legislative action in respect of PCOs, also in view of the Convention (see paragraph 22 above). These calls have to date not resulted in amendment of the Civil Procedure Rules so as to ensure that all cases within the scope of article 9 of the Aarhus Convention are accorded the standards set by the Convention. The Convention, amongst other things, requires its Parties to 'provide adequate and effective remedies' which shall be 'fair, equitable [...] and not prohibitively expensive'. The Committee endorses the calls by the judiciary and suggests that the Party concerned amend the Civil Procedure Rules in the light of the standards set by the Convention.

129. Within such considerations the Committee finds that the Party concerned should also consider the cost that may be incurred by a claimant in those cases where a PCO is applied for but not granted, as suggested in Appendix 3 to the Sullivan Report. The Committee endorses this recommendation.

130. The Committee also notes the limiting effect of reciprocal cost caps which, as noted in Corner House, in practice entail that "when their lawyers are not willing to act pro bono" successful claimants are entitled to recover only solicitor fees and fees for one junior counsel "that are no more than modest". The Committee in this respect finds that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel.

131. A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the law of E&W, courts may, and usually do, require claimants to give cross-undertakings in damages. As shown, for example, by the Sullivan Report, this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4.

132. Moreover, in accordance with its findings in ACCC/C/2008/23 (UK) and ACCC/C/2008/27 (UK), the Committee considers that in legal proceedings within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to be given sufficient consideration in the apportioning of costs by the courts.

> **133. <u>The Committee concludes that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that the considerable discretion of the courts of E&W in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest.</u> The Committee also notes the Court of Appeal's judgment in Morgan v. Hinton Organics, which held that the principles of the Convention are "at most" a factor which it "may" (not must) take into account, "along with a number of other factors, such as fairness to the defendant". The Committee in this respect notes that 'fairness' in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.**
>
> **134. In the light of the above, the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial […] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider.**

41. In addition recent findings of the Aarhus Compliance Committee's which give some guidance as to what size of adverse costs liability will be "prohibitively expensive". In the Cultra Residents' Association complaint (ACCC/C/2008/27) in relation to the expansion of Belfast City Airport, the Committee found that an order for the claimant to pay £39,454 following the dismissal of its claim for judicial review was prohibitively expensive. However, in the Morgon complaint (ACCC/2008/23) the Committee held that an adverse costs order of £5,130 was not prohibitively expensive.

42. These findings have in due course led to the Commission announcing that it intends to take infraction proceedings against the UK.

Conclusions on costs

43. Whilst the PCO is starting to take centre stage in the battle to comply with Aarhus, it still tends to generate satellite litigation (or at least interim skirmishes). Further, it may not be enough to satisfy the Commission that the UK's famously expensive legal system is compliant with the Convention. Further, it is not clear how any further systemic reform in environmental cases will affect public law more widely: is there to be one rule for the environment and another for all other cases? Finally, it is tolerably clear how the PCO regime works in a judicial review claim, but less clear how it works in statutory planning challenges. Again, that raises an issue of how the reform

driven by a need to comply with the Aarhus Convention will affect the Administrative Court more widely.

OTHER PROCEDURAL ISSUES

44. In this section, I consider two further procedural issues:

    a. Interim relief

    b. Promptness.

45. An application for interim relief can be a "make or break" moment in a High Court planning challenge. If a developer is prevented from commencing its development, it may lose funding or another important deadline and its project may be permanently scuppered. If a claimant seeking to stop a development fails to prevent it being built whilst the claim progresses, it may be faced with a *fait accompli* and nothing more than declaratory relief despite being victorious. Further, challenges to ongoing processes (e.g. quarrying or waste tipping operations) often produce interim relief applications which can have disastrous financial consequences for the operator.

46. The traditional answer to these potential adverse consequences is the cross-undertaking in damages. The case for interim relief will be boosted if the claimant can show that it can compensate the defendant (or, if appropriate, the interest party) should the claim fail. Indeed, a cross-undertaking is presumed to be the normal rule: see R v Inspectorate of Pollution ex p Greenpeace [1994] 1 WLR 570, 577. However, that presumption is being undermined by the effects of the Aarhus Convention. In this section I will consider the likely changes on the horizon as a result.

46. Firstly, it is worth looking at the principle of injunctive relief.[15] In general, injunctive relief against third parties does not sit comfortably with the nature of public law

[15] It is also likely to be a consequence of the fact that many developers will not act on a planning permission or other consent which is subject to judicial review proceedings to prevent abortive expenditure and later enforcement action, as recognised at paragraph 24 of the Consultation Paper.

proceedings. In R vs MAFF ex p Monsanto [1999] QB 1161, the Divisional Court held (at 1172F):

> **In our judgment, although *American Cyanamid* principles are to be applied in the present case, this must be in the context of the public law questions to which the judicial review proceedings give rise. Such proceedings are, generally speaking, intended to provide swift relief against abuse of executive power. They are neither intended for nor well suited to inhibiting commercial activity, particularly over an indefinite, substantial period of time. Monsanto's request for interim relief must, as it seems to us, be judged in that context.**

47. The cardinal administrative law principle of "valid until quashed" is also of significance here. Private parties are entitled to rely on an administrative act, even if another person seeks to quash that act. The circumstances in which the Court should interfere and grant interim relief are therefore necessarily limited in any event.

48. In some cases, other powers will exist for statutory bodies which can prevent environmental harm being caused in the interim. For example, if proceedings are taken by a member of the public seeking to compel the relevant statutory body to take enforcement action against a third party, there may be actions which the statutory body can take in the interim which would achieve the same effect as interim relief.[16] In those circumstances, it could be argued that the court should not grant interim relief as to do so would be to usurp the statutory powers of the relevant body.

49. In short, the circumstances in which interim relief against third parties should be granted in environmental and planning cases are restricted.

50. With regard to cross-undertakings, it is worth remembering that the Court cannot compel the giving of a cross-undertaking. The presence or absence of a cross-undertaking is merely a factor in deciding whether or not to grant the relief sought: see e.g. R (Save Britain's Heritage) v Gateshead Metropolitan Borough Council [2010] EWHC 2919 (Admin) at [25]. There is unlikely to be a pre-condition of a cross-undertaking where there is no risk of prejudice to the defendant or interest party: R (Pascoe) v Liverpool City Council [2007] EWHC 1024 (Admin) at [35].

[16] See for example prohibition notices under s 14 Environmental Protection Act 1990; stop notices under s 183 Town and Country Planning Act 1990 and injunction under s 187B TCPA 1990.

51. However, those features of the English system have not prevented the Commission from commencing infraction proceedings in respect of the need for a cross-undertaking. This was inspires by the findings of the Aarhus Convention Compliance Committee referred to above (see e.g. paragraphs 108-109, and 133). The Ministry of Justice has recently consulted on removing the requirement by amending the CPR, and the Sullivan Committee has welcomed that proposal. The MoJ's final proposals are awaited, but developers may have something to fear.

52. "Promptness" in judicial review proceedings (as opposed to statutory appeals where a fixed time limit applies) refers to the requirement to commence proceedings "promptly" and in any event within three months (CPR 54.5). The promptness requirement provides a classic judicial discretion, and a constant stress for those who advise and represent claimants.

53. In C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority (which concerned the Public Contracts Regulations 2006 rather than any environmental issue), the CJEU considered that the promptness requirement in English law was contrary to Community law because the effectiveness of Community law would be harmed unless there was certainty as to the period available to a claimant to challenge a procurement decision. The principle of legal certainty precluded a generalised promptness requirement. The question then was whether Uniplex was a case limited to the procurement context, or one of wider significance.

54. I do not intend to review the various cases which have considered Uniplex but note three decisions of the High Court:

    i. In R (Buglife) v Medway Council [2011] EWHC [746] (Admin), HHJ Anthony Thornton QC found that Uniplex applied in the context of a planning challenge:

> **The requirement of certainty and the application of that requirement to limitation periods imposed on those seeking to enforce their rights arising under the directive in a national court has general application to such enforcement proceedings arising out of any directive. In those**

circumstances, it is clear that there was a failure of the legislature to transpose the Environment Directive into domestic law in a way which avoids uncertain time limits arising from the requirement of promptness. That requirement is not now enforceable in English courts following the Uniplex decision.

However, the Judge found that on the facts the Claimant was prompt in any event.

ii. In R (U & Partners) v Broads Authority [2011] EWHC 1824 (Admin), Collins J found that a claim had not been brought promptly but did not refuse permission because of (a) the strength of the case and (b) Uniplex. The Judge held:

44 It was suggested that Uniplex and Ireland were limited to Directive 89/665 . As the citations from those cases show, this limitation cannot be justified. The Court was making the point that the principle of effectiveness was breached by a limitation provision which lacked certainty and so such a provision could not represent a proper transposition of a Directive which required that a person who claimed that action adversely affecting him was in breach of the Directive could take proceedings to challenge it. That was the conclusion reached by HH Judge Thornton Q.C. in R(Buglife) v Medway Council [2011] EWHC 746 (Admin) : see paragraph 63 of his judgment. Miss Busch unsurprisingly did not feel able to put forward any submissions to the contrary.

45 I am far from persuaded that the Court's decisions are satisfactory. It said that it had put before it arguments based on the importance of case law in the common law system. The judge's discretion is not exercised arbitrarily and Finn-Kelcey makes the position clear. But the court seems to have thought that any possibility of the exercise of discretion by a judge contravened the principle of effectiveness. With hindsight, it is unfortunate that Laws J's attempt to limit the time within which a claim should be brought so as not to fall foul of promptness to six weeks was disapproved by the House of Lords. Having regard to the importance of promptness in challenging grants of planning permission, serious consideration should in my view be given to amending CPR 54.5 so as to impose a six week limit for all such challenges.

46 Mr Jones argued that in any case to which the Directive 85/337 applied the Uniplex approach should prevail even if there was compliance with the Directive but a challenge was made on other

grounds. That argument I reject. Apart from anything else, it would be contrary to the decision in Finn-Kelcey and to the provisions of CPR 54.5.

iii. In refusing permission in R (Macrae) v Hertfordshire DC (unreported, 8 September 2011), David Elvin QC (sitting as a Deputy High Court Judge) rejected the argument that Uniplex could apply beyond challenges based on Community law. He rejected the argument that the comments of the CJEU in Lesoochranarske Zoskupenie VLK mandated any different approach.

55. In short, if a challenge based on Community law should succeed on legal merit, it should not be forced to fail on the basis that it was not brought promptly. Again, Community law can be seen to be changing our domestic procedures.

Richard Turney

rturney@landmarkchambers.co.uk

September 2011

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.

ANNEX: Article 9 of the Aarhus Convention

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible. 5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.