COSTS IN PLANNING AND ENVIRONMENTAL CASES

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1. This paper is intended to provide a short overview of the recent legal developments in this field, together with a review of how we got to the present position[1]. Whilst costs are always a "hot topic" for the fee paying client, it is also a hot topic in the recent jurisprudence. Further, it needs to be seen in the context of wider developments of changes to the public funding of civil litigation.

2. 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.

3. 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?[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?

[1] I am very grateful to my colleague Richard Turney at Landmark who produced a paper on this subject from which I drawn extensively in preparing this talk.

[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].

4. It is against this background[3] that I consider the specific context of costs in planning and environmental cases. Firstly, I consider recent developments in the protective costs order following the seminal case of Garner. I then consider wider issues about the compliance of the English costs regime with the Aarhus Convention. In doing so I hope I will provide an update as to the latest proposals for reform.

5. Before I launch into that discussion however, I thought it would be helpful to provide a single reference point for some of the key emerging threads which I discuss below. A chronology of recent changes might be a useful reference tool.

Summary of recent events

Feb 2005	Aarhus convention ratified by UK[4] 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)
May 2008	Report of the Working Group on Access to Environmental Justice published (the Sullivan report)
16 July 2009	Judgment of ECJ in Commission v Ireland [2010] ELR 8
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

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

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

15 November 2010 Ministry of Justice publish (for consultation) its proposals for the Implementation of Lord Justice Jackson's recommendations [5]

6. I address matters in the following order:-
    a. Protective Cost Orders (PCOs): The position prior to Garner
    b. Aarhus Convention– basic principles and framework
    c. Proposals for reform (of costs regime in UK)
    d. Judicial treatment of Aarhus (domestically)
    e. The Court of Appeal decision in Garner
    f. Aarhus Convention Compliance Committee (based in Geneva)
    g. Post Garner judicial developments
    h. Summary and conclusions
        i. Where are we now?
        ii. Where are we going?
        iii. Key issues along the way.

Part 1: Protective Cost Orders (PCOs): The position prior to *Garner*

7. 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**

[5] 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

(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 (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.

8. 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.

9. 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".

10. 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.

Part 2: Aarhus – basic principles and framework

11. The UN Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters is better known as the Aarhus Convention. It is an international treaty which does not have immediate legal effect in English law. However, by virtue of the amendment of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive") to give effect to elements of the Aarhus Convention, certain provisions of that Convention do have direct effect in English law. Article 9 of the Aarhus Convention is incorporated in Article 10a of the EIA Directive, which provides:

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

a. having a sufficient interest, or alternatively,

b. maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article 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.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provision of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Part 3: Proposals for reform

12. In May 2008, the "Sullivan Committee" produced its first report, *Ensuring access to environmental justice in England and Wales*.[6] The report found that the application of the Corner House principles in practice appeared to be inconsistent with the Aarhus Convention. In particular, the report found that the need for the claim to raise issues of "general public importance" and for the claimant to have "no private interest" would be likely to lead to non-compliance with Aarhus. The report proposed an "Aarhus PCO regime" with the following features:[7]

[6] http://www.unece.org/env/pp/compliance/C2008-23/Amicus%20brief/AnnexNjusticereport08.pdf

[7] Appendix 4

• No additional public interest/importance requirement, since access to environmental justice is made unconditional by Aarhus and because, by virtue of the Aarhus Convention, protecting the environment is recognised as inherently a matter of public interest/importance.

• The claimant is entitled to a PCO (level to be set according to criteria below) where otherwise, and acting reasonably in the circumstances, the claimant would be prohibited by the level of costs or cost risks from bringing the case.

• For the proper conduct of the case a PCO should be sought with the application for permission for JR and should wherever possible be decided at the same time as permission.

• Provided that the PCO application is made at the same time as the application for permission for JR, the costs of the claim including any injunction or other interim relief application will be limited to Mount Cook costs until permission and PCO applications have been finally determined.

• Wherever a claimant would be prevented from commencing proceedings by the exposure to Mount Cook costs/costs of applying for a PCO, they will be able to seek an interim PCO limiting their costs exposure (including to zero) pending the determination of permission/PCO.

• The process of applying for a PCO itself must not expose the claimant to a "prohibitively expensive" risk of costs. The Corner House figures for costs exposure at this stage will not therefore apply and instead we consider a maximum figure of £500 to be consistent with these principles.

• Applying the Bolton guidelines, the claimant is still at risk of being liable for third party costs. However small the risk, it exposes the claimant to a "prohibitively expensive" risk of costs which provides a serious deterrent to

environmental litigation. Save in exceptional circumstances, the order should make clear that there will be no claimant exposure to third party costs.

• The claimant's private (pecuniary) interest will not be a bar to making a PCO, but may be a factor to be taken into account in determining the level at which the PCO will be set in the circumstances of the case.

• The level of PCO must not make litigating "prohibitively expensive" for the member of the public or non-governmental organisation such as reasonably to deter such a person from embarking on the challenge in question.

• The court may impose a cap on the claimant's costs at the request of the defendant/third party in order to ensure that the defendant does not face an unreasonable costs exposure and that the defendant has some degree of certainty about its exposure from an early stage.

• It will not be relevant if the claimant's lawyers are acting pro bono.

• The claimant will submit a summary of its costs to date and anticipated costs to trial as part of its PCO application, to allow the court reasonably to assess the appropriate level of any cap to be imposed on the defendant's potential liability to the claimant.

• It will be assumed by the claimant that all relevant/significant material has been disclosed by the defendant/interested party, to allow the claimant to prepare a schedule of work to be done for the assessment of the costs cap. In the event that subsequent disclosure is made by the defendant/interested party, resulting in an application for an increased cap in the light of unforeseeable additional work being required, the defendant/interested party will be required to pay the cost of the further application, unless the earlier non-disclosure can be justified.

• The evaluation of any cap on the defendant's potential liability to the claimant will reflect the normal principles embodied in the Civil Procedure Rules (CPR) and developed by the Supreme Court Costs Office that the costs to be recovered are those reasonably incurred in prosecuting the action. This will include choice of solicitors and use of leading counsel, which will be considered on the normal basis.

• The level of the base costs included within the capped figure will not be reduced to take account of the fact that the claimant's lawyers are acting under a CFA, and the capped figure will include a notional 100% success fee.

• The PCO may take the form of a 'walk away' or 'no order for costs' order.

13. The Review of Civil Litigation Costs (the Jackson Review)[8] was published in January 2010. The final report stated:

> **Having considered the competing arguments advanced during Phase 2 as well as the factors set out in PR chapters 35 and 36, I am quite satisfied that qualified one way costs shifting is the right way forward. There are six principal reasons for this conclusion:**
>
> **(i) This is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases.**
>
> **(ii) For the reasons stated by the Court of Appeal on several occasions, it is undesirable to have different costs rules for (a) environmental judicial review and (b) other judicial review cases.**
>
> **(iii) The permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims.**
>
> **(iv) It is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved.**
>
> **(v) One way costs shifting in judicial review cases has proved satisfactory in Canada: see PR paragraphs 35.3.8 and 35.3.9.**

[8] http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

(vi) The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value.

14. Jackson LJ therefore proposed a new Civil Procedure Rule in the following terms:

> **"Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:**
>
> **(a) the financial resources of all the parties to the proceedings, and**
>
> **(b) their conduct in connection with the dispute to which the proceedings relate."**

15. 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.[9] 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 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".**

16. 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

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

only apply to individuals and will contain rules to limit liability rather than exclude liability.

b. A separate consultation exercise has been launched in respect of the requirements for cross-undertakings as to damages to be provided in respect of injunctions sought in environmental cases.

c. 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".**

Part 4: Judicial treatment of Aarhus

17. 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

18. In Commission of the European Communities v Ireland, Case C-427 07 (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.

Part 5: Garner

19. 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]);

Part 6: Aarhus Convention Compliance Committee

20. Following Garner, the Aarhus Convention Compliance Committee in respect of complaint ACCC/C/2008/33.[10] The Committee found that the UK system is likely to

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

be "prohibitively expensive" absent, among other things, changes to the approach taken to PCOs:[11]

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.

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

[11] Emphasis added

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. 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. 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.

21. 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.

Part 7: Post Garner Judicial Developments

(a) R (Coedbach Action Team Ltd) v Secretary of State[12]

22. 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.

23. 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 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.

24. 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.

25. 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

[12] My thanks to John Litton QC, Counsel for the Interested Party on whose thoughts I have drawn in preparing this sectiobn of the paper.

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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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].

31. 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].

32. 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.

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

33. The Pallikaropoulos case concerns 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.

34. 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.**

35. 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].

36. 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.

37. An appeal against the Cost Officers' decision was heard by the Supreme Court on 11 November 2010 and judgment is awaited. The arguments included whether the test of "prohibitively expensive" was a purely subjective one (as argued by the EA) or a purely objective one (as argued by Mrs Pallikaropoulos). However, Mrs Pallikaropoulos has asked for a reference to the ECJ as to the meaning of "prohibitively expensive" and there is a very real possibility that the SC will accede to that request. If it does it will be at least 18 months to 2 years before any definitive ruling is given by the ECJ.

Part 8 Summary and Conclusions

(A) Where are we now?

Categories of PCO cases

38. I would suggest that 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".

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

(B) Where are we going?

Bigger changes on the horizon?

39. In the Jackson Report[13] 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

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

Report.[14] 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 [15] albeit that there are indications that the proposals will be watered down.

40. Expect more movement in this area in the coming months. In particular I note that we can expect developments through:

    a. The Supreme Court decision in Pallikaropoulos

    b. The Ministry of Justice consultations on cross-undertakings in damages in environmental judicial review claims[16] and the Jackson report.

    c. Proposals to amend the CPR rules to codify PCO application process (as indicated in paragraph 168 of MofJ proposals on the implementation of the Jackson report. These rules changes are "expected to come into effect by April 2011".

(C) Key issues along the way

41. What remains to be seen is:-

    a. Whether PCO will be workable in practice or simply a source of satellite litigation.

    b. Whether the ECJ and Aarhus Compliance committee's will be satisfied with the various attempts to tinker with the existing system to make it Aarhus compliant (and the speed of change).

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

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

[16] http://www.justice.gov.uk/consultations/cross-undertaking-cp241110.htm

c. Whether environmental justice will be hived off as a special category to which special rules apply or the Aarhus convention will be a catalyst for a wider reform of costs in judicial review cases.

d. If environment justice is a special category, where the boundary between environmental justice and land use planning will be drawn and if a perceptible boundary can be maintained.

e. How procedures for PCOs can be integrated into the procedure for statutory planning appeals and whether this may lead to the introduction of a permission stage in s.288 challenges (as advocated by Sullivan LJ in his report but for which amendments to primary legislation (rather than rule changes) would be necessary).

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