Costs in Planning & Environmental Cases

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Introduction

1. This paper looks at recent cases on costs in the planning and environmental fields. In particular, it focuses on protective costs orders (PCOs) because it is in this area that there have been a number of recent and important developments.

What is a PCO?

2. In broad terms, a PCO is a court order, generally made at an early stage in the proceedings, which limits the costs liability of one or more parties engaged in public law litigation. Most usually it is applied for by a claimant and seeks to limit the amount of costs he will have to pay the defendant if his claim fails.

Development of PCOs

3. **R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600** marks a watershed in the development of PCOs. PCOs had been made prior to **Corner House**[1] but it was in that case that the CA set out a series of principles to be applied by the court when deciding whether or not to make a PCO. The **Corner House** principles are:-

   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.

4. In addition to these principles, the Court of Appeal also indicated: (i) if those acting for the applicant were acting *pro bono* this was likely to enhance the merits of the application for a PCO; (ii) that there was a *quid pro quo* to obtaining a PCO and that was that it was likely that a cost capping order for the applicants' costs will be required i.e. that if the applicant won its challenge it should not expect to recover more than the costs of modest representation.
5. The Court of Appeal also gave extensive procedural guidance for applying for a PCO emphasising that PCO applications should be made at an early stage and that the costs of making a PCO application should be limited to no more than a few thousand pounds.

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[1] E.g. **R v Lord Chancellor, ex parte CPAG [1999] 1 WLR 347**; **R (Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2712**; and **R (Refugee Legal Centre) v SSHD [2004] EWCA Civ 1296**.

6. There was disquiet following **Corner House** in relation to the public importance/interest requirements and that an applicant should not have a private interest in the outcome of the case. In a series of cases the position was reached that the **Corner House** requirement for the issues to be of public importance, which it was in the public interest to resolve, and that a claimant should have no private interest remained intact. However, the courts decided that principles were not to be read as statutory provisions and it should apply a "flexible" approach to them[2].

The Aarhus Convention and PCOs

7. Aarhus as an International Convention does not have any direct effect[3]. However, the parties to the Convention have established a Compliance Committee to investigate complaints. Moreover, the Article 9 requirements of the Convention as regards access to environmental justice are now incorporated into (1) the EIA Directive[4]; and (2) the IPPC Directive[5], which do have direct effect in relation to any case within the scope of those Directives. Thus, there is now a directly enforceable right for access to justice to be "fair, equitable, timely and not prohibitively expensive".

8. Many of the earlier cases made reference to the Aarhus Convention and the Sullivan Report[6] foreshadowed that the availability of PCOs at an early stage in the proceedings could provide an important mechanism in meeting the requirements for access to justice in environmental matters to be fair, equitable, timely and not prohibitively expensive. Since then, the significance of Aarhus has gained momentum. In particular, there have been the following developments:-
   (1) the Judgment of the ECJ on 17 July 2009 in **Commission v Ireland** (Case C-427/07);
   (2) the Review of Civil Litigation Costs (the Jackson Review) published in December 2009;
   (3) the August 2010 Update Report into Ensuring access to justice in environmental cases in England and Wales[7];
   (4) the Court of Appeal's judgment in **R (Garner) v Elmbridge Borough Council [2010] EWCA Civ 1006**;
   (5) the judgment in **Coedbach Action Team Limited v Secretary of State [2010] EWHC 2312**;
   (6) the findings of the Aarhus Convention Compliance Committee in respect of complaints ACCC/C/2008/23, ACCC/C/2008/27 & ACCC/C/2008/33; and

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2 See e.g. **R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749**; **R (Buglife) v Thurrock Thames Gateway Development Corporation [2008] EWCA Civ 1209**; and **Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107**.

3 See **Morgan v Hinton Organics** per Carnwath LJ at paragraph 22.

4 Article 10a of 85/337/EEC (as amended).

5 Article 15a of 96/61/EC (as amended).

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

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

(7) the hearing in November by the Supreme Court in **R (Pallikaropoulos) v Environment Agency**[8].

Garner v Elmbridge BC

9. **Garner** was concerned with a challenge brought by way of judicial review of a planning permission granted by Elmbridge Borough Council for the development of a site on the River Thames opposite Hampton Court Palace. The claimant, Mr Garner, was not a resident of the borough nor a local elector but he did have a particular interest in Hampton Court having worked for Historic Royal Palaces and objected to an earlier version of the development that was granted planning permission.

10. When filing his claim form, Mr Garner also indicated that he would be seeking a PCO. The application for permission was refused on the papers but was renewed. At the hearing before Nicol J on 2 March 2010, it was agreed that the application for permission should be adjourned to a rolled up hearing but that he should determine the PCO.

11. Nicol J refused the PCO applying the principles in **Corner House** because:-
    (1) the challenge was not one where the issues were of general public importance and which the general public interest requires to be resolved (para. 27); and
    (2) Mr Garner had not provided any evidence of his financial resources and it was therefore impossible to reach a conclusion that it would be fair and just to make a PCO or that it would be reasonable for him to discontinue the proceedings if a PCO was not made. Although reliance was put on Article 10a of the EIA Directive, the absence of any financial information did not take the matter any further [32] & [34 – 36].

12. Mr Garner appealed[9]. Sullivan LJ delivered the Judgement of the Court and, given his earlier conclusions in his Report, unsurprisingly allowed the appeal. He held that:-
    (1) although they had to be applied flexibly, the principles set out it **Corner House** were settled. However, the Court had not had to consider in that or any other case whether those principles complied with the requirements of Article 10a of the EIA Directive [32];
    (2) the EIA Directive had direct effect and as the CA recognised in **Morgon** some more specific modification of the costs rules might be required [32];
    (3) the planning application was one which required EIA and the case was one to which the Directive applied and therefore it was necessary to modify the **Corner House** principles to secure compliance with the Directive, but only insofar as it was necessary to secure compliance [33];
    (4) Mr Garner was a member of "the public" who had a sufficient interest because of his involvement over many years with applications that affected the setting of Hampton Court Palace;

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8 Judgment is awaited.

9 **R (Garner) v Elmbridge BC [2010] EWCA Civ 1006**.

(5) in an Article 10a case there was no justification to show that the case is one of "general public importance" or that there is a public interest which required resolution of those issues because both the Convention and the Directive were based on the premise that it was in the public interest that there should be effective public participation in those cases to which the EIA/IPPC Directives applied. I.e. it is axiomatic that in relation to such cases that it was in the public interest that decisions are taken lawfully and that the public should be able to challenge the decisions taken in an effective review process [39]. Therefore, Nicol J was not entitled to refuse the PCO on the basis that Mr Garner's application did not raise any issues of general public importance which it was in the public interest to resolve [40];

(6) the case raised an important point of principle, namely was the question whether the procedure is or is not prohibitively be answered by applying an objective or a subjective test (i.e. by reference to what costs an "ordinary" member of the public would be able to pay to meet the potential costs liability or by reference to the means of the particular claimant) or a combination of the two tests [42];

(7) whatever the test was it was not a purely subjective one, as Nicol J had applied, as such a test would frustrate the intention of the Directive that members of the public concerned should have access to a review procedure that was not prohibitively expensive unless it considered what would be prohibitively expensive for an ordinary member of the public concerned [46];

(8) the costs liability of £60,000 plus VAT was, if anything, an underestimate and most ordinary members of the public would be deterred from proceedings where the potential costs liability was twice the gross national average wage of £25,500 pa [50];

(9) a purely subjective test which necessarily required the applicant to disclose publicly his personal financial circumstances might have a chilling effect of the preparedness of ordinary members of the public to challenge environmental decisions [51] & [52];

(10) an applicant for a PCO can't have it both ways and expect not to have to pay cost if he loses but have unlimited recovery if he wins [53] and a reciprocal costs cap was not necessarily inconsistent with Article 10a [54]. However, whether a reciprocal costs cap was appropriate and the level would have to be decided on a case by case basis [54].

Coedbach Action Team Ltd v Secretary of State

13. 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 v Secretary of State**.

14. 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.

15. 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 Coeadbach 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.

16. 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.

17. 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 Nicoll J's judgment in **Garner**, in particular CAT's failure to disclose any financial information.

18. 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.

19. 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.

20. 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. Helius argued that:-

    (1) **Garner** only modified the **Corner House** principles by (a) disapplying the public importance/interest requirement; and (b) applying a test which was not purely subjective when having regard to the financial resources of the applicant/respondent and to the amount of costs that were likely to be involved in a case;

    (2) **Garner** did not decide that a purely objective test should be applied in assessing whether the costs were prohibitively expensive and some consideration could and should be given to the financial circumstances of the claimant in determining whether the costs in any particular case were prohibitively expensive;

    (3) Article 10a was not engaged unless the Claimant could demonstrate that it was a member of the public with a sufficient interest even though the case was one to which the EIA Directive applied;

(4) if Article 10a was not engaged, e.g. because the Claimant didn't have a sufficient interest, then the **Corner House** principles applied in their unmodified form.

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

(1) 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];

(2) 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];

(3) there was a dirth of reliable information about the state of the CAT and those who directed its activities [20];

(4) 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];

(5) 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

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

22. 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].

23. The **CAT** case is currently subject to an application for permission to appeal to the Court of Appeal against the refusal of the PCO and of permission to apply for judicial review[10].

R (oao Edwards and Pallikaropoulos) v The Environment Agency

24. 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[11]. Having taken her case to the House of Lords and lost her appeal, 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

[10] The oral hearing is fixed for 29 November 2010.

[11] **[2008] 1 W.L.R. 1587**

which arose during the detailed assessment of the costs to be paid by Mrs Pallikaropoulos[12] and concerned the application of Articles 10a and 15a of the EIA and IPPC Directives. The preliminary issues were identified as being [9]:-

(1) where a cost order has been made, whether the court assessing those costs has any jurisdiction to implement the EIA/IPPC Directives; and

(2) if so, whether in the particular circumstances of the case, the Costs Officers should implement the Directives.

25. 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 [13]. 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 [17]. However, in the absence of any authority on what was "prohibitively expensive", they adopted the test proposed in the Sullivan Report [18] before saying:-

> "19. 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:-
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> i) The financial resources of both parties.
>
> ii) Their conduct in connection with the appeal.
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> 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."

26. 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[13]. 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].

27. 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. However, they did say [25] that:-

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[12] The Environment Agency claimed £55,810 and the Secretary of State a further £32,290 i.e. approximately £88,000 in total.

[13] The first occasion was in respect of her application for a waiver of security monies and a PCO. The second was when the HL made the costs order which led to the assessment before the Costs Officers.

> "Whilst it is difficult to imagine circumstances in which it would be appropriate for us to allow less than £25,000 if the Respondents' costs would otherwise reasonably exceed that sum, it is not in theory impossible that we should do so."

28. 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.

ECJ and Aarhus Compliance Committee findings

29. In this paper I have focused on the domestic cases. However, the ECJ's decision in **Commission v Ireland** should be read because in that case the ECJ found that the Republic of Ireland had failed to transpose the requirements in Articles 10a and 15a of the EIA/IPPC Directives and the Commission has sent the UK a letter of possible infraction proceedings for similar non-compliance following a complaint made by CAJE. Should those procced it is hard to think that the outcome would be any different.

30. Similarly, the Compliance Committee's findings in relation to the complaints are important because in each case it found a breach of Article 9 of the Convention. In the complaint by Cultra Resident's Association (ACCC/C/2008/27) the Committee found that an order for it to pay £39,454 to the defendant following the dismissal of its claim for judicial review of the decision to expand Belfast City Airport was prohibitively expensive. However, at the other end of the spectrum, in the complaint by Morgon (ACCC/C/2008/23) the Committee found that an order for him to pay £5,130 was not prohibitively expensive.

Where do these developments leave us?

31. Had the position stood still after **Garner** there might have been a reasonable degree of certainty as regards the availability of PCOs in environmental cases and prospective claimants might reasonable have expected that the chances of securing a PCO had improved significantly. However, the decision in the **CAT** case, decided within days of the approved transcript in **Garner** being made available, demonstrates that applications for PCOs will not be granted as a matter of course and that the particular facts of each case remain highly relevant to the discretion the Court has whether or not to make such orders. Moreover, if the SC does make a reference to the ECJ in the **Pallikaropoulos** case it is likely to be at least many months, and possibly years, before definitive guidance is provided as to what is "prohibitively expensive" and whether the test is an objective or a subjective one or a mixed test. In the meantime, claimants will continue to apply for PCOs in cases to which the EIA and IPPC Directives apply and in non-environmental cases. Conversely, defendants and interested parties will continue to resist them.

32. What approach is taken to such applications will largely depend on (a) whether the case is one to which the EIA/IPPC Directives apply; and (b) on which side of the argument the party to the litigation stands.

Non-environmental cases[14]

33. The position here is relatively straight forward. PCO's should be determined against the full suite of **Corner House** principles albeit that they should be applied flexibly and **Garner** does nothing to modify those principles. Thus reference should be made by those who seek a PCO and those who want to resist one to the **Corner House** case and the more recent decisions in cases such as **Compton**, **Buglife** and **Hinton Organics**.

Environmental cases to which the EIA/IPPC Directives apply

34. In these cases **Garner** has modified the **Corner House** principles such that there is no requirement to demonstrate that the issues raised are ones of public importance which it is in the public interest to resolve and whatever the test is in determining the financial circumstances of the applicant for the PCO in deciding whether the proceedings are likely to be prohibitively expensive the test is not a purely subjective one. Otherwise, the **Corner House** principles apply.

35. In these cases, the strategy and arguments are less clear cut and I offer the following thoughts depending on which side of the litigation line you fall.

Applicants seeking a PCO in environmental cases

36. Applicants ought to consider the following:-
    (1) highlight the basic purpose and public interest in environmental litigation and the protection that Aarhus is intended to confer in those cases to which the EIA/IPPC Directives apply. By definition these are cases which raise issues of public importance in respect of which it is in the public interest to ensure that there is wide access to justice so that decisions taken in such cases are lawful;
    (2) be careful about selecting the claimant. The court may take a different view as to whether the proceedings are prohibitively expensive if the claimant is a limited company (as it did in **CAT**) or an unincorporated association than if it is an individual. If the claimant is an individual, their financial circumstances are likely to be relevant even if they are not the sole determinant;
    (3) carefully consider whether the claimant has standing. Even if the case is one to which the Directives apply, Articles 10a/15a are not engaged and the applicant will not benefit from the more relaxed approach to the grant of PCOs set out in **Garner** unless they have standing (see **CAT**). Remember, that for the purposes of Articles 10a/15 non-governmental organisations are deemed to have standing;

[14] Non-environmental cases includes those cases which might well engage environmental issues but do not engage the EIA or IPPC Directives.

(4) applications for PCOs ought to explain in detail why a PCO is required (including any persuasive subjective financial information);

(5) recognise that the Court may well impose a reciprocal costs cap and explain clearly why any such cap has to be set at a sufficiently high level for there not to be a deterring effect; and

(6) make the PCO application at the earliest possible stage to maximise the protection afforded by it (it is not unknown for a claimant to get the prospective defendant to agree to a PCO even before a claim has been lodged).

Resisting PCOs in environmental cases

37. For those that are resisting PCOs the following matters ought to be borne in mind:-

(1) don't assume that in the light of **Garner** that PCO will be difficult to resist. The **CAT** case demonstrates that they can be resisted;

(2) the **Corner House** principles are only modified by **Garner** in relation to those cases where the EIA/IPPC Directive applies;

(3) don't assume that in a case to which the EIA/IPPC Directives apply that Articles 10a/15a are engaged. Even if the claim is one to which the Directives apply, Articles 10a/15a are only engaged if the claimant is a member of the public with a sufficient interest;

(4) the Court in **CAT** did not make a distinction between the test of "sufficient interest" for the purposes of Article 10a; and section 31(3) of the Senior Courts Act 1981. Therefore, if there is real doubt over the sufficiency of the claimant's interest to bring judicial review proceedings in the first place he is unlikely to have a sufficient interest for Articles 10a/15a to be engaged;

(5) there is a distinction drawn in Articles 10a/15a between non-governmental organisations promoting environmental protection who meet any requirements under national law. Such NGO's are deemed to have an interest and rights capable of being impaired (see e.g. Articles 10a and 1(2)). Other organisations and individuals have to demonstrate that they have an interest or an impaired right;

(6) carefully consider what financial information has been disclosed – **Garner** did not hold that whether proceedings are prohibitively expensive is to be judged purely objectively. It only decided that the test was not a purely subjective one;

(7) carefully consider the claimant's legal capacity and his interest (e.g. individual, company or unincorporated association). Even if the claimant has a sufficient interest to engage Article 10a, its legal capacity has a bearing on whether the costs in the case are prohibitively expensive. If the claimant is a company, it is questionable whether a PCO should be made at all because of its ability to extinguish or limit its potential costs liability. Even if the inherent costs protection a limited company enjoys is not sufficient to resist a PCO in principle[15], in **CAT**, Wyn Williams J concluded that a total costs bill of £70,000 would not be prohibitively expensive to

[15] In **Garner**, the CA granted a PCO to all three appellants including Keith Garner Limited notwithstanding Sullivan J's (as he then was) conclusions as regards the liability of limited companies and whether in such cases security for costs should be ordered – see paragraphs 56 – 58 of the Sullivan Report.

many limited companies or if one looked beyond the company to a potential outlay of about £3,000 to each of its members;

(8) if the claimant is a limited company and it applies for a PCO carefully consider whether it should be asked to provide security for costs[16];

(9) critically look at the evidence and ask whether if a PCO is not made the applicant will probably discontinue the proceedings and whether it would be reasonable for him to do so. Similarly, ascertain whether the applicant's representatives are acting pro bono or under some other costs arrangement – these **Corner House** principles are left untouched even if Article 10a is engaged;

(10) if a claimant applies for a PCO, consider making an offer agreeing to a PCO with a reciprocal costs cap and or asking the Court to impose a reciprocal costs cap. Sullivan LJ in **Garner** said that the claimant in that case could not have it both ways *"... the requirement in Article 10a is that the review procedure shall not be prohibitively expensive, not that it shall be prohibitively expensive for only one of the parties engaging in the review process."*;

(11) if you are not the first defendant, or are an interested party, be realistic about your prospects of being awarded a second set of costs. If a second set of costs is unlikely to be awarded, consider undertaking not to seek to recover some or all of your costs if a PCO application as it made may help to persuade the Court that the potential costs are not prohibitively expensive – the fact that the interested parties in **Garner** did not undertake not to claim their costs at the rolled up hearing was a factor which Sullivan J appears to have taken into account in granting the PCO. In **CAT**, Helius gave an undertaking not to seeks its costs of the rolled up hearing, thereby giving greater certainty to the likely costs; and

(12) don't lose sight of (a) the overriding objective which is to enable to the Court to deal with cases justly (CPR 1.1) – if a claim is manifestly without merit, it would be unjust to limit the costs exposure of a claimant; (b) the general costs rule (CPR 44.3) that the unsuccessful party will be ordered to pay the costs of the successful party; and/or (c) that it is for the court in its discretion to decide whether it is fair and just to make a PCO in the light of the **Corner House** principles.

Other costs cases

38. The principles applied to awards of costs in planning cases are long established and too well known to rehearse here. However, **R (oao English) v East Staffordshire Borough Council [2010] EWHC 2744** contains a timely reminder of what costs are ordinarily recoverable by a defendant or interested party who successfully resist the grant of permission for judicial review.

39. PD54 8.6 states that where a defendant or any party attends a hearing on the question of permission to proceed with judicial review, the court will not generally make an order for

[16] See **R v Leicester County Council, ex parte Blackfordby and Boothorpe Action Group Ltd [2001] Env. L.R. 2**; and **Residents Against Waste Site Ltd v Lancashire County Council [2007] EWHC 2558**.

costs against the claimant. However, in **Mount Cook**[17], the Court of Appeal held that in a case to which the Pre-Action Protocol applies and where a defendant or other interested party has complied with it, a successful defendant or other party at the permission stage who has filed an acknowledgment of service pursuant to CPR 54.8 should generally recover the costs of doing so from the claimant, whether or not he attends any permission hearing. Thus, it is normal practice for the defendant and any interested party to include a claim for costs, and attach a schedule of those costs, in the acknowledgment of service so that the judge determining the application can make an appropriate costs order if permission is refused.

40. In **English**, the grant of planning permission by East Staffs BC to National Football Centre Ltd for 28 detached houses as enabling development for a national football centre of excellence for training and development was challenged by Mr English. The council and NFC Ltd, as an interested party, filed acknowledgments of service and summary grounds resisting the grant of permission for judicial review.

41. The Court ordered an expedited oral hearing attended by the parties. At that hearing permission for judicial review was refused and both the council and the interested parties made applications for costs limited to their preparation costs and acknowledgment costs and, in the case of the interested party only, the costs of preparing evidence.

42. The claimant resisted any order for costs which went beyond the acknowledgement costs relying on 2 earlier decision of the Court of Appeal[18]. However, the judge concluded that:-

> "59 Whilst in a straightforward case, it can legitimately be said that the defendant or an interested party should limit himself to summary grounds of resistance, this is not a straightforward case. The planning decision which is under attack is of national importance given its impact on the viability of the proposed centre of excellence. Furthermore, the grounds raised by the Claimant were ones which required some detailed analysis and dissection by both the Council and the FA/NFC Ltd if they were to be challenged effectively. NFC Ltd was also entitled to put into its grounds submissions about lack of promptness.
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> 60 I reject the suggestion on behalf of the Claimant that it would have been sufficient or even appropriate to put in just summary grounds of resistance. However, I am not convinced that it was necessary for NFC Ltd to go beyond the detailed grounds of resistance which they did file, by also filing the witness statements they produced.
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> 61 In my judgment, the right order is that the Council and NFC Ltd should recover from the Claimant both their reasonable preparation costs and their acknowledgment costs

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17 **[2003] EWCA Civ 1346**.

18 **R (Roundham & Larling Parish Council) v Breckland Council [2008] EWVA Civ 714**; **R (Davey) v Aylesbury Vale District Council [2007] EWCA Civ 1166**. The **Davey** case is particularly important because at paragraph 21 Sedley LJ set out the principles that should be applied in determining whether, in addition to acknowledgment costs, the pre-permission or preparation costs of a successful defendant/interested party were ordinarily recoverable.

(which for the avoidance of doubt should include the summary grounds actually filed but exclude any witness statements), those costs to be assessed if not agreed."

Dated 19 November 2010

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