COSTS IN ENVIRONMENTAL AND PLANNING CASES AFTER *GARNER*

Recent developments

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.

The position prior to *Garner*

2. 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.
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> (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.
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> (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.
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> (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.
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> 75 A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimant's lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (*2625 R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1296); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (R (Campaign for Nuclear

Disarmament) v Prime Minister [2002] EWHC 2712 (Admin)); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (R v Lord Chancellor, Ex p Child Poverty Action Group [1999] 1 WLR 347); and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).

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

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

23 Where someone in the position of Mrs Compton is bringing an action to obtain resolution of issues as to the closure of parts of a hospital which affects a wide community, and where that community has a real interest in the issues that arise being resolved, my view is that it is certainly open to a judge to hold that there is a public interest in resolution of the issues and that the issues are ones of general public importance. The paragraphs in the Corner House

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

> "19. This particular requirement as formulated in [the Corner House case] has been diluted in the later case law. I have in mind particularly Wilkinson v Kitzinger [2006] 2 FLR 397 , where Sir Mark Potter P said, at para 54: 'As to (1)(iii), I find the requirement that the applicant should have "no private interest in the outcome" a somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings, is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case it is difficult to see why, if a PCO is otherwise appropriate, the existence of the applicant's private or personal interest should disqualify him or her from the benefit of such an order. I consider that the nature and extent of the "private interest" and its weight or importance in the overall context should be treated as a flexible element in the court's consideration of the question whether it is fair and just to make the order. Were I to be persuaded that the remaining criteria are satisfied, I would not regard requirement 1(iii) as fatal to this application. I note that passage was approved by the Court of Appeal in R (England) v Tower Hamlets London Borough Council [2006] EWCA Civ 1742 at [14].'"

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

4. 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".

5. 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.

Aarhus

6. The UN Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters 1998 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:
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> 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.

Proposals for reform

7. In May 2008, the "Sullivan Committee" produced its first report, *Ensuring access to environmental justice in England and Wales*.[1] 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:[2]

    • No additional public interest/importance requirement, since access to environmental justice is made unconditional by Aarhus and because, by virtue of the Aarhus Convention,

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

[2] Appendix 4

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.

8. The Review of Civil Litigation Costs (the Jackson Review)[3] was published in December 2009. The final report stated:

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

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) As stated in the FB paper, 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.

(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.

9. 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."

10. Jackson LJ's proposals have since been endorsed by the Sullivan Committee, which has called for urgent amendments to the CPR to give effect to Jackson LJ's recommendations.[4]

Judicial treatment of Aarhus

11. 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:
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> 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.
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> 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.
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> 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.
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> 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.

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

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

12. 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.

Garner

13. 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" (*Garne*r, [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;

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]);

d. Some subjective assessment of means may however be appropriate: *R (Coedbach Action Team Ltd) v Secretary of State for Energy and Climate Change* (unreported, following *Garner*).

14. The practical implications of *Garner* will be considered by other speakers.

Aarhus Convention Compliance Committee

15. Following *Garner*, the Aarhus Convention Compliance Committee in respect of complaint ACCC/C/2008/33.[5] The Committee found that the UK system is likely to be "prohibitively expensive" absent, among other things, changes to the approach taken to PCOs:[6]

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

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

[6] Emphasis added

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. 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.

16. We await seeing if the European Commission will accept the findings of the Aarhus Committee and whether the Rules Committee will make the changes called for by the Aarhus Committee and the Sullivan and Jackson reports.

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