

JR costs protection: the Aarhus Convention and PCOs

**Luke Wilcox,
Landmark Chambers**

Aarhus costs

- Article 9(4) of the Aarhus Convention
- Access to judicial procedures to challenge “acts and omissions of private persons and public authorities which contravene provisions of national law relating to the environment” must not be prohibitively expensive

What is a law “relating to the environment”?



- Term not defined in Aarhus Convention
- But...
- Art 2(3) suggests there are three “categories”:
 - Elements of the environment
 - Factors affecting the elements
 - The social environment

Aarhus in the CPR – costs protection in practice



- CPR Rules 45.41 – 44
- CPR Practice Direction 45, para 6

Scope



- CPR 45.41
- Aarhus fixed costs applies to:
 - A claim for judicial review
 - Of a decision act or omission all or part of which is subject to the Convention
 - Including claims proceedings on the basis that the decision etc is so subject

- Statutory challenges are excluded from the protection:
- ***Venn v Secretary of State for Communities and Local Government*** [2015] 1 WLR 2328

Opting out (/in...)

- CPR 45.42
- Costs protection can only apply if the claimant positively asks for it
- Section 6 of N461
 - Tick box to claim Aarhus protection
 - Must give grounds

The caps

- CPR 45.43
- Costs in Aarhus claims capped as per PD 45 para 6
- At present:
 - £5,000 for individual claimants
 - £10,000 for other claimants
 - £35,000 reciprocal cap
- Unless...

Challenges to Aarhus status

- CPR 45.44
- Defendant can dispute entitlement to Aarhus protection
 - Must do so in the Acknowledgment of Service, with grounds
- Court will then determine if claim is an Aarhus claim at the earliest opportunity (usually at paper permission stage)
- If court finds the claim is not an Aarhus claim:
 - Normally no order for costs
- If court find the claim is an Aarhus claim:
 - Defendant pays costs of Aarhus determination
 - On indemnity basis
 - Can take D's total costs liability over the reciprocal cap

Protective Costs Orders generally

- Rarer than Aarhus costs caps
- Test is per Lord Phillips of Worth Matravers MR in ***R (Corner House Research) v Secretary of State for Trade and Industry*** [2005] 1 WLR 2600
- Para 74:

“(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.”

PCOs - procedure



- Application on face of claim form
- Supported by requisite evidence (including strictly a schedule of the claimant's future costs of JR)
- If D wishes to resist, it should set out its reasons in the AoS
- Application then considered by judge on the papers. If refusal, C can request an oral hearing on the PCO issue
- A common current practice – order on the papers including provision a) expressly enabling either side to request a review of terms at a hearing; and b) imposing a costs cap on that hearing

Interveners

- Criminal Justice and Courts Act 2015 s. 87 creates cost risk for interveners in JRs at High Court and Court of Appeal level.
- Interveners at risk where:
 - Intervener acts in substance as a principal party
 - Intervener's contribution not of significant assistance to the court
 - Significant part of intervener's contribution relates to matters not necessary for the court to resolve
 - Intervener acts unreasonably

Forthcoming reform...

- PCOs will be changed by the Criminal Justice and Court Act 2015
- Ss. 88-90
- New comprehensive code for costs protection
- More restrictive for non-Aarhus PCOs, e.g.:
 - Cannot be made pre-permission
 - No power for the court to make order of its own initiative
 - Must include reciprocal cap
- Not yet in force



lwilcox@landmarkchambers.co.uk