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Cost protections in Aarhus claims

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The third pillar: access to justice

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- Article 9
  - Article 9(1): review of refusals to provide information, "*where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law*"
  - Article 9(2): review of decisions subject to article 6
  - Article 9(3): access to administrative or judicial procedures to challenge acts and omission by private persons and public authorities which contravene provisions of national law relating to the environment
  - Article 9(4): "*the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*".

- Given effect in domestic law through CPR rr.45.41 – 45 and 52.19A (applied in the Supreme Court by Practice Direction 13 para 2)
- Not otherwise directly enforceable in domestic courts: ***R (Venn) v SSCLG* [2015] 1 WLR 2328**

What claims are included? (1)

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- Costs protections for “Aarhus Convention claims”
  - Defined in CPR r.45.41
  - “*a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998*”;
  - “Members of the public” to be construed in accordance with the Aarhus Convention.
    - Does not include local authorities: see **ACCC/C/2014/100 & 101** (LB Hillingdon not a “member of the public”
    - Community/Parish councils included: see **ACCC/C/2012/68** & ***Crondall Parish Council v Secretary of State for Housing, Communities and Local Government* (2018)**
  - Applies to claims for judicial review, statutory review, appeals under s.289 TCPA 1990 and appeals against listed building enforcement appeals (s.65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990

What claims are included? (2)

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- Common assumption applies to any/all planning claims

- See now: ***R (Lewis) v Welsh Ministers*** **[2022] EWHC 450 (Admin):**
  - Focus must be on the nature of the claim rather than the nature of the decision challenged
  - Requires consideration of whether claim is within the scope of Art 9(3)
  - For a case falling under Art 9(3) that requires consideration of the provision of national law which is said to have been breached
  - If limit imposed by CPR r.45.43 applies to a claim it applies to the entirety of the claim (no issue based cost caps)
  - Only Ground 3 which triggered cost protection. Court was satisfied it was included in good faith, but left open the possibility that if a different view were to be reached in a different claim there might be a different outcome.

- D/IP can challenge whether claim is an Aarhus Convention claim – r.45.45 – but court will normally award costs against D/IP (not included in costs cap) if challenge is unsuccessful (r.45.45(3)(b) & see also ***R (Kent) v Teeside Magistrates' Court*** **[2020] Costs LR 195**)

What claims are not included?

- CPR r.45.41 – 45 do not apply to claims for private nuisance, even if raising issues to which the Aarhus Convention applies: ***Austin v Miller Argent (South Wales) Ltd*** **[2014] EWCA Civ 1012**

- Unsuccessful D also unable to rely on the Aarhus Convention to limit its costs liability in a private nuisance claim: see ***Coventry v Lawrence*** **[2014] UKSC 46**

- Suggestion it does not apply to a s.288 challenge to a costs award by PINS: ***Halton Borough Council v SSLUHC*** **[2023] EWHC 293 (Admin)** at [106]

Obtaining costs protection

- C must state in claim form whether or not claim is an Aarhus Convention Claim and whether C does / does not want the costs limits in CPR r.45.43 to apply (CPR r.45.42(1) and (2))
  - On importance of timeliness, see ***R(Ibrar) v SSLUHC*** **[2022] EWHC 3425 (Admin)**
- For costs provisions in CRP r.45.43-45 to apply, C must file a schedule of financial resources with the claim form, verified by a statement of truth, and setting out details of:
  - C's significant assets, liabilities, income and expenditure; and
  - In relation to any financial support which any person has provided or is likely to provide to C, the aggregate amount which has been provided and which is likely to be provided
- That includes monies which C may reasonably expect to receive through eg Crowdfunding, but fact more monies received after schedule filed does not mean that information provided by C is necessary deficient: see eg ***Lewis*** at [16]
- But material increase in funding position might be relied on by D/IP in arguing for a variation of the costs limit (either subsequently or on an appeal): see, eg, ***R (RSPB) v Secretary of State for Justice*** **[2018] Env LR 13** at [34] & [39]-[40].

Costs limits

- CPR r.45.43
- Default:
  - £5,000 where C is claiming as an individual and not as, or on behalf of, a business or other legal person
  - £10,000 for C in all other cases (note: this would include public interest groups incorporated as a company for the purpose of bringing the claim)
  - £35,000 for D
- Can be varied under CPR r.45.44
- Limits (as in potential costs liability to other party/ies) apply to individual Cs or Ds: r.45.43(4)
- Costs limits are inclusive of VAT: ***R (Friends of the Earth) v Secretary of State for Transport*** **[2021] EWCA Civ 13**
- No default limits specified where costs cap sought on appeal: CPR r.52.19A

Varying the default limits (1)

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- CPR r.45.44(6)-(7):
  - Court may vary or remove limits in r.45.43 (r.45.44(1))
  - But may only do so on application made in accordance with r.44.44(5)-(7) and if satisfied that
    - To do so would not make the costs of proceedings prohibitively expensive for C; and
    - In the case of a variation which would reduce C's maximum liability or increase that of a D, without the variation the costs of proceedings would be prohibitively expensive for C
  - Timing:
    - If application is made by C, must be made in claim form and provide C's reasons why proceedings would be prohibitively expensive if variation not made
    - If made by D, must be made in the AoS and provide D's reasons why, if variation were made, costs of proceedings would not be prohibitively expensive for C
    - Note: application for variation can also be made by IP: ***R (CPRE Kent) v SSCLG*** **[2019] EWCA Civ 1230** at [46]-[48] applied in ***R(Bertoncini) v Hammersmith & Fulham LBC*** **[2020] 6 WLUK 174**
    - Court must determine at earliest opportunity

Varying the default limits (2)

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- CPR r.45.46: Application to vary may be made at a later stage if there has been a “significant change in circumstances” (including evidence that the schedule of the claimant’s resources contained false or misleading information) which means that that the proceedings would now:
  - be prohibitively expensive for C if the variation were not made; or
  - not be prohibitively expensive for C is the variation were to be made.

- If application is made by C, C must provide a revised schedule of financial resources or confirmation that financial resources have not changed + reasons why proceedings would be prohibitively expensive if variation not made
- If application is made by D, provide reasons why proceedings would not be prohibitively expensive if variation were to be made

- Variation applications are heard in private: CPR r.39.2(3)(c)

Prohibitively expensive?

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- Test is in r.45.44(3). Proceedings are likely to be prohibitively expensive if the likely costs (including any court fees payable by C) either
  - (a) Exceed C's financial resources, or
  - (b) Are objectively unreasonable having regard to:
    - (i) The situation of the parties
    - (ii) Whether C has reasonable prospects of success
    - (iii) The importance of what is at stake for C
    - (iv) The importance of what is at stake for the environment
    - (v) The complexity of the relevant law and procedure
    - (vi) Whether the claim if frivolous
- Where court is considering C's financial resources, it must have regard to any financial support which any person has provided or is likely to provide to C (r.44.44(4))
- In considering whether proceedings would be prohibitively expensive, the court may properly have regard to C's own costs in bringing the claim: ***R (RSPB) v Secretary of State for Justice*** **[2018] Env LR 13** at [58]

Assessing costs

- ***R (CPRE Kent) v SSCLG* [2019] EWCA Civ 1230** at [49] – [52]
  - No separate caps for permission / substantive stages
  - No difference in usual approach to summary assessment of costs

- Note: no Aarhus cap sought in ***R (Richards) v Environment Agency* [2022] Env LR 14.** See in that regard Fordham J at [68] as to extent to which his order as to costs was (or more pertinently, was not) influenced by (inter alia) EA's reference to cost-caps in Aarhus claims. C was legally aided in that case.

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Thank you for listening

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