Protective Costs Orders in UK Environmental and Public Law Cases

John Litton QC

Introduction

1. Litigation in the United Kingdom can be expensive, and potential costs can be difficult to predict. The general principle is that a losing party to litigation should pay the winner's reasonable legal costs. Some of the general principles of common law litigation (the strictly adversarial nature, the duty to disclose documents which may assist the other side's case, etc.) push up potential costs liabilities.

2. High costs can have a 'chilling effect' on litigation: the risk of an adverse costs order may dissuade a claimant (even one with a meritorious case) from bringing legal proceedings. Furthermore, the ability to obtain public funding (i.e. legal aid) has been dramatically reduced in the UK by the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

3. One of the mechanisms available to the Court to ensure access to justice in public interest cases is the grant of a Protective Costs Order (PCO). These limit, at an early stage of the litigation, the amount which a party can expect to have to pay to the other side if the litigation is unsuccessful.

4. PCOs are contentious because they mean that a winning party is likely not to receive all (and in some cases none) of their reasonable legal costs, even if they win. This has the result that they will be out of pocket for standing on their legal rights. A compromise solution is often that the court, when granting a PCO, will impose a 'reciprocal cap', i.e. that a party seeking to cap the costs it would have to pay the other side will in turn be limited in the sums it would be able to recover if it is successful.

5. The structure of this paper will start by briefly overviewing the development of PCOs. It will then look at the particular role the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention') has played in terms of environmental cases in the UK. The paper finishes by considering recent developments in the field in the UK, including procedural rules in the environmental context, and legislation to regulate PCOs in judicial review cases, which has been enacted, but is yet to be brought into force.

Development of Protective Costs Orders: the *Corner House* Case

6. The starting point in any discussion about PCOs is the English Court of Appeal's decision in ***R (on the application of Corner House Research) v Secretary of State for Trade and Industry*** [2005] 1 WLR 2600. In that case, the Court of Appeal set out guidelines for the grant of PCOs. In doing so it considered the previous guidance which Dyson J had set out in the earlier case of ***R v Lord Chancellor, ex p Child Poverty Action Group*** [1999] 1 WLR 347 and rejected the requirement proposed by Dyson J that "the court must be satisfied, following short argument, that it has a

sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order". The Court of Appeal's view was that this would encourage "heavy and time-consuming ancillary litigation". It then laid down the following principles for the granting of a PCO (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.

(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.

7. In ***Corner House*** itself, the court found that the test for the imposition of a PCO was satisfied, reversing the decision of the first-instance judge, describing it as "one of those exceptional cases in which an order should be made" (para. 144).

The Early Application of *Corner House*

8. Although no order was granted on the facts, Collins J in ***R (Ministry of Defence) v Wiltshire and Swindon Coroner*** [2006] 1 WLR 134 made the perhaps surprising finding that there could be cases in which a defendant in a public law challenge could have the benefit of a PCO. Collins J identified the principle behind ***Corner House*** as being the court's power to make necessary orders regarding costs as required by the needs of justice. Collins J found (para. 34):

i) There is no reason in principle why in an appropriate case, the power to make a PCO should not apply to protect a defendant;
ii) In public law cases it is unlikely that a PCO will be necessary in the interests of justice;
iii) A PCO may be required, for example, in circumstances where an individual has a public law role and there would be no protection given in relation to costs by any other person.

9. Given that, in this case, the Coroner had the financial backing of the county council, there was no need for a PCO.

10. The Court of Appeal took a very strict approach to the criteria for a PCO in ***Goodson v HM Coroner for Bedfordshire and Luton*** [2006] CP Rep 6 and refused to make a PCO. The Claimant's father had died following surgery in hospital to remove gall stones. The Claimant had been unsuccessful in the High Court in relation to a Coroner's decision not to hold an inquiry into a death under Article

2 of the ECHR, and not to have an independent medical expert. The Claimant sought a PCO in the Court of Appeal protecting herself against having to pay the hospital's costs. This was refused.

11. The Court of Appeal noted the judgment in ***Corner House***, but described it as establishing guidelines, rather than hard and fast rules (para. 14). The Court of Appeal found:

    i) It was not really in issue that the matters to be considered were of general public importance.
    ii) There was little dispute that the Claimant would discontinue the appeal if a PCO was not granted.
    iii) The Claimant's representatives were acting *pro bono*.

12. The Court of Appeal's view was the fact that an issue is of general importance does not mean that the public interest requires it to be resolved. It took into account the fact that the issue in question may have been about to be heard shortly by the Court of Appeal (para. 21).

13. The Court also found that the Claimant had a private interest in the outcome of the proceedings: not so much because victory in the Court of Appeal would mean that she could overturn a costs order against her, but because she had an interest in quashing the verdict in the inquest into her father's death. The Court noted that, in ***Corner House***, this requirement was expressed in unqualified terms. Even though the Claimant did not have a financial interest in the outcome, she did have a private interest. Furthermore, even though the costs of the appeal would be modest compared to the hospital's budget, money which it spent on legal fees could not be spent on its ordinary operations.

14. Sir Mark Potter P took a different approach in ***Wilkinson and Kitzinger v Attorney-General*** [2006] EWHC 835 (Fam). Although he dismissed the PCO, he found the requirement that there be a lack of private interest "a somewhat elusive concept", and struggled to see why, in cases in which an individual is acting as a representative of others, it should be a bar for a PCO. He found that the requirement should be applied flexibly (para. 54).

15. In ***R (England) v LB Tower Hamlets*** [2006] EWCA Civ 1742[1] the Court of Appeal also expressed concern regarding the private interest requirement, but noted the restrictive approach taken by the Court of Appeal in ***Goodson***. The Court of Appeal hinted that the situation may be different in environmental cases where the Aarhus Convention applies.

16. Claimants sought to challenge threats to hospital services in ***R (Bullmore) v West Hertfordshire Hospitals NHS Trust*** [2007] 6 Costs LR 844. They were refused a PCO, and appealed to the Court of Appeal. They had raised funds in case of an adverse costs order, and sought to have their potential costs liability be capped to the sum they had raised. Hughes LJ noted the importance of the PCO jurisdiction:

> "I proceed on the basis that protective costs order applications, though interlocutory, are important. They go well beyond mere case management. Particularly that is so

[1] A permission application where reference in other proceedings was authorised.

> because they may be determinative of the litigation. They have, nevertheless, to be considered in comparatively summary fashion and indeed at strictly limited expense."

17. The Claimants challenged the refusal of a PCO by the High Court on the basis that the Judge had used the criterion of exceptionality as an overarching test, rather than the detailed criteria at para. 74 of ***Corner House***. Hughes LJ found that the Judge had not done so. The Appeal was refused. Although Hughes LJ agreed with the Claimants that the fact that they were a pressure group should not be held against them, he found that the Judge was entitled to find that the matter was *not* one of general public importance. The issues to be determined in the judicial review were essentially narrow and substantially factual.

Re-Evaluation of the Principles: *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749

18. The debate as to the need for an applicant to demonstrate that the question in issue in the litigation was of general public importance which it was in the public interest to resolve and that the applicant should have no private interest was reconsidered in ***Compton*** which concerned a decision to close a hospital. The Court of Appeal went into considerable detail in considering the principles behind the making of a PCO. Having referred to two reports considering access to justice by groups chaired by Maurice Kay LJ and Sullivan J respectively[2], Waller LJ held at paras. 21 and 23:

> "it seems to me that when considering whether a PCO should be granted the two stage tests of general public importance and the public interest in the issue being resolved are difficult to separate…
>
> …
>
> 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 are not, in my view, to be read as statutory provisions, nor to be read in an over-restrictive way."

19. Waller LJ also held:

i) The paragraphs in Corner House (setting out the principles) were not to be read as a statute or in an overly-prescriptive way and found support for a non-rigorous approach in Lloyd Jones J's first instance judgment in the ***Bullmore*** case.
ii) Exceptionality is a prediction, not a test (Buxton LJ dissenting on this point);
iii) The requirement of "general" public interest does not require that it is of interest to the public nationally;
iv) A local group may be so small that the issues with which they are concerned are not of general public importance;

[2] *Facilitating Public Interest Litigation* (July 2006) and *Access to Justice in Environmental Cases* (9 May 2008).

v) Where a PCO has been granted on paper and the other side is applying for it to be set aside there must be a compelling reason for doing so, but it is obviously a "compelling reason" that it is plain that a PCO should not have been made (para. 46).

20. By contrast to iii), Smith LJ held that *"a case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome"* (para. 77).

21. The PCT sought to appeal against the decision in ***Compton***, but was refused permission to appeal by the House of Lords.

PCOs for Respondents to Appeals

22. The Court of Appeal dealt with an unusual situation in ***Weaver v London Quadrant Housing Trust*** [2009] 6 Costs LR 875. The case concerned the application of human rights principles to social housing landlords. The Divisional Court had held that the Housing Trust was a public body for the purposes of the Human Rights Act 1998. The Housing Trust was appealing against this decision. The possession order against the tenant was however not in question. The tenant had legal aid funding for the Housing Trust's appeal, but it was conditional on the Legal Services Commission not being liable for the Housing Trust's costs if the appeal was successful.

23. The Court of Appeal noted that, had the tenant not been represented before the Court of Appeal, then the Equality and Human Rights Commission would have had to resist the Housing Trust's appeal, or an *amicus* would have to have been appointed. The Housing Trust would not have been able to recover costs against either body.

24. It was submitted by the Trust that the applicant had a private interest. Elias LJ held at para. 12:

> "I do not accept that that is the kind of private interest which the court was talking about in the **Corner House** case. In the **Goodson** case, to which I have made reference, at para 28 reference was made to the fact that, in some cases, a personal litigant who has standing to apply for judicial review may have a private interest in the outcome of the case in the sense that there will be some benefit, but it is no more than the interest that will apply to the population or a section of the population as a whole. That seems to me to be the position here. The appeal is being conducted in the public interest at the behest of the Trust, not to assert a private interest of the applicant. The possession order against her will stand come what may, and any personal interest she may derive is no greater than that which will accrue to the benefit of all tenants in the same position as she is."

25. The Supreme Court considered a PCO in ***In re appeals by Governing Body of JFS*** [2009] 1 WLR 2353. As with ***Weaver***, the Legal Services Commission had refused to provide funding for a previously funded person ('E') to resist an appeal unless there were no risks of the Legal Services Commission being subject to an adverse costs order. The Supreme Court distinguished ***Weaver***:

i) In ***Weaver***, had the LSC withdrawn their support, it was inconceivable that any adverse costs order would have been made against the tenant. There was a risk of adverse costs order against E.
ii) E maintained that he had a personal interest in the outcome of the appeal.

26. Rather than granting a PCO, the Supreme Court granted a declaration that E was entitled to public funding for the appeal by the LSC.

Environmental Cases Prior to Specific Rules in the English CPR

27. Fairly soon after the decision in ***Corner House*** a further debate began as to whether a different approach should be taken to the grant of PCOs in environmental cases to non-environmental cases in light of the UK's treaty obligations and, in particular, the UK's ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)[3]. In ***R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp*** [2008] EWCA Civ 1209 the Master of the Rolls agreed with Waller LJ said in ***Compton*** i.e. that there should be no difference in principle between PCOs in environmental cases, and those in non-environmental cases.

28. PCOs and the ***Corner House*** principles in an environmental context subsequently came up in ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] Env LR 30, a case concerned with a claim for an injunction in nuisance proceedings. At the trial, the judge ruled that the Defendant's expert evidence was inadmissible. The Defendants appealed against this decision. The Claimants also appealed against a decision awarding the Defendants their costs in relation to an interim injunction arguing that the award of costs was contrary to the Aarhus Convention, in that the order was unfair and prohibitively expensive.

29. Although it was not directly in issue in ***Morgan***, the Court of Appeal nevertheless gave its view on the private interest requirement. The Court noted the strictness of the approach in ***Goodson***, but had regard to the criticisms of such a strict approach. Regarding the application of the Aarhus Convention, the Court assumed for the sake of argument that it was applicable to private nuisance actions. It however held that it was not directly applicable, and therefore could at most be taken into account in resolving ambiguities or exercising discretions. Carnwath J, giving the judgment of the Court, also said that the principles governing the grant of PCOs "apply alike to environmental and other public interest cases" albeit that the ***Corner House*** principles should be applied flexibly.

30. PCOs in the environmental context arose again in ***R (Garner) v Elmbridge BC*** [2012] PTSR 250. In that case, the matter was within the scope of the EIA Directive. As amended, the Directive included a requirement that litigation within its scope should not be prohibitively expensive. The Court of Appeal held that the rules regarding PCOs were to be altered when a case was within the scope of the Directive, but only to the extent necessary to secure compliance with the Directive.

31. Given the importance given to the protection of the environment by European Union law, there was no justification for a separate requirement that the matter be one of general public

[3] Article 9 of the Arhus Convention contains what is frequently referred to as the "third pillar", including the requirement that signatories to the Convention should have in place procedures allowing members of the public with a sufficient interest to challenge environmental decisions in a court of law which are not prohibitively expensive.

importance, or in the public interest that the issues be resolved. When a case was within the scope of the EIA Directive, this was to be assumed. At para. 39, Sullivan LJ held:

> *"…under EU law it is a matter of general public importance that those environmental decisions subject to the Directive are taken in a lawful manner, and, if there is an issue as to that, the general public interest does require that that issue be resolved in an effective review process."*

32. The Court of Appeal also held that a purely *subjective* approach to the question of whether proceedings were prohibitively expensive was not appropriate when the matter was within the scope of the Directive. It was necessary to consider whether bringing the proceedings would be prohibitively expensive to anyone of "ordinary" means. Sullivan LJ noted the possibility that a public assessment of an individual's means for the purpose of applying for a PCO would be likely to have a "chilling effect" on the making of such applications (para. 52). A PCO limiting the Claimant's liability to £5000 was imposed. The Court of Appeal also imposed a reciprocal cap.

33. The significance of the EIA Directive is clear from the result in ***Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change*** [2011] 1 Costs LR 70. Although this decision followed shortly after ***Garner***, the Directive did not apply and the result was different. Wyn Williams J held that the Claimant was not a "member of the public concerned", and did not have a sufficient interest. The Claimant was a company which had been established for the purposes of the litigation. At para. 29, Wyn Williams J held:

> "The claimant is a limited company whose aims and objects are made clear, unequivocally, in its Memorandum of Association. Its aim is to protect a particular local environment. The claimant played no part in the decision-making process leading to the grant of the consents to the Interested Party. But for the coincidence that the planning appeals with which the claimant is concerned were in progress at a time when the defendant's decision was made it is clear, in my judgment, that the claimant would have shown no interest in challenging the lawfulness of the defendant's decision."

34. The Judge also found that the proceedings would not be prohibitively expensive, bearing in mind that they were brought by a limited company and that if one looked beyond incorporation to its members an individual outlay of approximately £3,000 per person was not prohibitively expensive in relation to litigation which was of importance to them (para. 36). The application for a PCO therefore stood to be considered (and failed) on the classic ***Corner House*** principles.

35. In ***Edwards v Environment Agency*** [2011] 1 WLR 79, the Claimant had made an application for a PCO in appealing to the House of Lords. This was rejected, and an award of costs was made against her. The Supreme Court costs officers held that compliance with the EIA Directive and Integrated Pollution Prevention and Control Directive (that proceedings not be prohibitively expensive) was a matter for them to take into account on detailed assessment. The Defendants applied for a review of this decision. The Supreme Court held that this was not a matter to be taken into account by the costs officers in determining what constituted reasonable costs. However, the Supreme Court referred to the CJEU the question of what "prohibitively expensive" means.

36. This reference was considered by the CJEU in Case C-260/11 ***R (Edwards) v Environment Agency*** [2013] 1 WLR 2914. The CJEU laid down the following propositions:

i) The requirement that judicial proceedings should not be prohibitively expensive does not prevent orders of costs against losing parties, in principle (para. 25);
ii) The requirement that litigation should not be prohibitively expensive relates to all of the costs of the litigation (para. 27);
iii) The assessment of whether litigation is prohibitively expensive is not a matter for national law alone (para. 30);
iv) The objective of the EU legislature is to give the public 'wide access to justice' (para. 31);
v) The assessment of whether litigation would be prohibitively expensive "cannot be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since… members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable" (para. 40);
vi) Assessment cannot be based exclusively on the "average" applicant (para. 41);
vii) The court may also take into account (para. 42):
    a) the situation of the parties concerned;
    b) whether the claimant has a reasonable prospect of success;
    c) the importance of what is at stake for the claimant and for the protection of the environment;
    d) complexity of the relevant law and procedure;
    e) the potentially frivolous nature of the claim at its various stages;
viii) The fact that the claimant has not in fact been deterred from bringing the claim is not conclusive (para. 43);
ix) There is to be no distinction between first instance proceedings and proceedings on appeal (para. 44).

37. After the reference, the Supreme Court gave judgment on the matter: [2014] 1 WLR 55. The Claimant had previously made a payment into court of £25,000 by way of security for costs. It could not be said that this was subjectively unreasonable. Given the unusual nature of the case, neither could it be said to be objectively unreasonable. The Claimant's costs liability was therefore capped at that sum.

38. Lord Carnwath JSC considered the judgment of the CJEU. He noted the CJEU's requirement that costs must not be objectively unreasonable "in certain cases". He considered that it may have been better expressed in the German version, which translates as "in individual cases" (para. 23). He noted that there was no description of what was objectively unreasonable, but exclusive reliance on the resources of the average applicant would not suffice.

39. Lord Carnwath JSC found the reference to the "merits" of the case somewhat unclear. He however made the following suggestions (para. 28):

> "Taking the points in turn I would suggest the following: (i) *A reasonable prospect of success.* Lack of a reasonable prospect of success in the claim may, it seems, be a reason for allowing the defendants to recover a higher proportion of their costs. The fact that "frivolity" is mentioned separately (see below), suggests that something more demanding is envisaged than, for example, the threshold test of reasonable

> arguability. (ii) *The importance of what is at stake for the claimant.* As indicated by Advocate General Kokott, this is likely to be a factor increasing the proportion of costs fairly recoverable. As she said, a person with "extensive individual economic interests" at stake in the proceedings may reasonably be expected to bear higher risks in terms of costs. (iii) *The importance of what is at stake for the protection of the environment.* Conversely, and again following the Advocate General's approach, this is likely to be a factor reducing the proportion of costs recoverable, or eliminating recovery altogether. As she said, the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest. (iv) *The complexity of the relevant law and procedure.* This factor is not further explained. Its relevance seems to be that a complex case is likely to require higher expenditure by the defendants, and thus, objectively, to justify a higher award of costs. Although mention is only made of complexity of law or procedure, the same presumably should apply to technical or factual complexity. (v) *The potentially frivolous nature of the claim at its various stages.* The defendants should not have to bear the costs of meeting a frivolous claim. In domestic judicial review procedures, whether at first instance or on appeal, this issue is likely to be resolved in favour of the claimant by the grant of permission."

40. In ***Eaton v Natural England*** [2013] Env LR 37, Sullivan LJ refused permission to appeal against a refusal of a PCO, in an environmental claim falling within the scope of European Union law. Sullivan LJ put considerable weight on his view that the substance of the claim was hopeless. He also found that the Judge below was entitled to find that the matter was in truth a private law claim, and that the issues were not of general public importance which it was in the public interest to resolve: *"it was simply one stage in a local attempt to prevent the construction of a windfarm"* (para. 19).

41. Further consideration of costs in environmental cases was provided by the CJEU in Case C-530/11 ***Commission v UK*** [2014] QB 988. As this case concerned infraction proceedings, the CJEU was considering the compliance of UK law with EU law at a particular point in time (which was before the decision of the Court of Appeal in ***Garner***, and before the reform of the CPR to implement the Aarhus Convention judicial reviews). The CJEU recalled its decision in ***Edwards***. It then found that European Union law had not been transposed correctly, since the courts were not obliged by a rule of law to ensure that proceedings are not prohibitively expensive.

42. The Commission's argument contesting reciprocal costs caps (on the recoverability of costs by successful claimants) was rejected by the CJEU on the basis of insufficient information (para. 62).

Civil Procedure Rules in Certain Environmental Challenges

43. The English Civil Procedure Rules were amended from 1 April 2013 so as to provide specifically for environmental judicial review cases (CPR Part 45.41 – 44). These provide automatic costs protection in Aarhus Convention claims (defined as a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention) limiting the costs that can be recovered against a claimant who is an individual to £5,000 and other persons (e.g. a company) to £10,000. A claimant receiving costs protection is limited in the costs he can then recover from the defendant to £35,000.

44. The scope of the new rules was considered by Lang J and the Court of Appeal in ***Venn v Secretary of State for Communities and Local Government*** [2014] JPL 448 where the Claimant sought to challenge the grant of planning permission by the Secretary of State.

45. Lang J considered whether the claim was an Aarhus claim for the purposes of the CPR, and secondly the consequence of the fact that the claim was not one by way of judicial review but rather a statutory challenge under s.288 of the Town and Country Planning Act 1990. She also considered in the alternative whether a PCO should be granted outside the CPR regime.

46. When considering whether the claim fell within the scope of the Aarhus Convention, Lang J noted that there was no definition of "environmental" in the Aarhus Convention. There was however a definition of "environmental information", which could apply. Lang J also found that there was a distinction to be drawn between pure planning issues and environmental issues, and that not *"every planning decision will engage environmental matters falling within the Convention, even taking into account the broad meaning given to environmental matters in the Convention"* (para. 15). Lang J however found that the Claimant's first ground, which related to preventing 'garden grabbing' development (development of new residences in gardens of other homes) fell within the scope of environmental matters.

47. Nonetheless, Lang J held that the claim fell outside the scope of CPR r.45.41, since it was a statutory challenge rather than a claim by way of judicial review. She however granted a PCO, on the basis that the ***Corner House*** criteria should be relaxed to give effect to the requirements of the Aarhus Convention, despite the Convention being an unincorporated treaty. She considered the Claimant's means (including that she would have to take out a loan to pay the Secretary of State's costs using her house as collateral but would have difficulty servicing a large loan) and imposed a maximum liability of £3,500.

48. The Secretary of State appealed against this decision: [2015] 1 WLR 2328. The Secretary of State did not dispute that, for the purposes of determining the scope of Article 9(3) of the Aarhus Convention, the meaning of "environmental information" was an indication of the intended ambit of the meaning of the term "environmental". The Aarhus Convention Implementation Guide was also of assistance in interpretation. The Secretary of State also conceded that the meaning of "environmental" in the Aarhus Convention was "arguably broad enough to catch most, if not all, planning matters" (para. 11).

49. The Secretary of State argued that the matter fell outside the scope of Article 9(3) of the Aarhus Convention on the basis that the claimant was not challenging "an act or omission by a public authority which contravened a provision of national law relating to the environment". It was said that the Claimant was alleging a failure to take into account a policy of the development plan. Whilst the policy may have related to the environment, s.70(2) of the Town and Country Planning Act 1990 (which required it to be taken into account) was not a "law relating to the environment".

50. The Court of Appeal described this argument as "ingenious", but rejected it. The UK has chosen to implement much of environmental law through the planning system. It would weaken the effect of Article 9(3) in the UK if a distinction was to be drawn between law and policy. The claim therefore fell within the scope of Article 9(3) of the Aarhus Convention.

51. However, the Court of Appeal decided that this did not assist the Claimant. The proposal was not EIA development, and therefore the principles in ***Garner*** did not apply. There should be no different principles in cases which were within the scope of the Aarhus Convention, but not within the scope of the European EIA Directive. The one exception was that, where a claimant has a private interest, then if a challenge falls within the scope of the Aarhus Convention then the private interest is not a bar to the grant of a PCO.

52. The fact that the changes to the CPR deliberately granted costs protection for judicial review, but excluded statutory challenges, meant that the courts should not seek to provide such protection by the back door, still less when the reason for doing so would be an unincorporated treaty. Consequently, the appeal was upheld and Lang J's decision to grant a PCO reversed. However, Sullivan LJ found that the costs regime which was confined to claims for judicial review and excluded statutory appeals and applications was systemically contrary to the Aarhus convention (para. 34):

> "A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the legal principles on which it may be challenged, but on the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance."

53. The Court of Appeal considered an application for a PCO in a private nuisance claim in ***Austin v Miller Argent (South Wales) Ltd*** [2015] 1 WLR 62. CPR 45.41 could not assist the Claimant, given that the matter was not a judicial review. The Court of Appeal considered whether to impose a PCO in the exercise of its case management powers.

54. The Court of Appeal held that private nuisance actions did not necessarily fall outside the scope of Art 9(3) of the Aarhus Convention, although some will relate only to a claimant's private property. The Court of Appeal held that two requirements must be met before a claim will fall within the scope of the Aarhus Convention (para. 22):

    i) The nature of the complaint must have a close link with the environmental matters regulated by the Convention;
    ii) The claim must, if successful, lead to significant public environmental benefits.

55. The EIA Directive was not applicable to a claim of private nuisance, and therefore the Claimant could not benefit from that route. The Court of Appeal also rejected the submission that a court was required to exercise its discretion compatibly with the Aarhus Convention, since this would go beyond the acceptable role of an unincorporated treaty, as set out by the House of Lords in ***R v Secretary of State for the Home Department, ex p Brind*** [1991] 1 AC 696. Instead, the Court of Appeal stated at para. 39:

> "the article 9(4) obligation is no more than a factor to take into account when deciding whether to grant a PCO. It reinforces the need for the courts to be alive to the wider public interest in safeguarding environmental standards when considering whether or not to grant a PCO."

56. The Court of Appeal held that the fact that the Claimant had a private interest in the litigation did not prevent the grant of a PCO. However, the public benefit was both relatively limited and uncertain. The fact that there was no satisfactory evidence of the possibility of enforcement action being taken by the Council counted against the grant of a PCO to bring a claim in private nuisance (para. 47). The fact that the Defendant was a private body using its own resources to defend a claim was also relevant to the question of whether a PCO should be granted.

57. There are a number of questions which arise from the costs protection regime for environmental judicial reviews in the CPR. In ***R (Botley Parish Action Group) v Eastleigh Borough Council*** [2014] EWHC 4388 (Admin), Collins J considered how to approach the costs caps in circumstances where there is more than one claimant. Do the costs caps apply cumulatively (so the number of claimants does not affect the potential recoverability by the defendant), or separately?

58. Collins J held that the answer will depend on the circumstances of the case:

> "One must of course bearing in mind that the singular includes the plural, and so it is possible to construe 5(1) as £5,000 where the claimants are claiming as individuals. That may be appropriate in a given case – it may equally be appropriate if, for example, individual claimants are separate and maybe have separate points upon which they focus – to decide that each claimant should be looked at separately, and that the £5,000 cap should apply to each, and the same applies to legal persons and the £10,000 cap. But that will depend upon the facts and the circumstances of the individual case. I have no doubt that it is within the meaning of the Practice Direction entirely proper to consider the circumstances of each individual claimant."

59. Collins J noted that *"the whole purpose behind the Aarhus Convention claims is that individuals or legal entities should not be precluded from legal challenges because of financial considerations. They should be kept at a low level"*. Nevertheless, he found that separate caps were appropriate on the facts of the case before him.

60. In ***R (HS2 Action Alliance Ltd) v Secretary of State for Transport*** [2015] PTSR 1025, the Court of Appeal considered whether a public authority could take advantage of the costs caps under the CPR. There were two claimants in a judicial review of safeguarding directions for phase 1 of the High Speed Two railway. One was a local action group, the other was a local authority. The Judge at first instance capped the costs liability of each at £10,000. The Secretary of State appealed against this decision, arguing that there was no power under the CPR to cap the costs liability of a public authority. The appeal failed: the Rules in the CPR mean what they say, which is that claimants can have the benefit of costs caps, regardless of whether they are public authorities.

61. The Aarhus Convention Compliance Committee has since determined that, public bodies cannot bring complaints to the Compliance Committee. In ACCC/C/2014/100, it decided (7 August 2015):[4]

> "the Committee considered that, since the London Borough of Hillingdon exercised

[4] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2014-100/Correspondence_with_Party_concerned/ToPartiesC100_07.08.2015.pdf

> administrative decision-making powers, it was a public authority within the definition of article 2, paragraph 2(a) of the Convention. While under domestic law of the Parties, municipalities might exercise their right to self-government and other subjective rights, even before courts, in the context of the Convention and international law in general, a "public authority" under article 2, paragraph 2(a) of the Convention was an emanation of the Party concerned. Hence, an allegation brought to the Committee by the communicant would give rise to an internal dispute between authorities of a Party concerned which was not within the remit of the Committee. The Committee therefore found that the London Borough of Hillingdon was not a member of the public for the purposes of article 15 of the Convention and was thus unable to submit a communication to the Committee under paragraph 18 of the annex to decision I/7 of the Meeting of the Parties."

Legislative Proposals

62. There is legislative provision for the PCO regime to be put on a statutory basis, but it is yet to be brought into force. Section 88 of the Criminal Justice and Courts Act 2015 provides that PCOs may not be granted in connection with judicial review proceedings unless in accordance with ss.88-90. A 'Costs Capping Order' (as it is known in the 2015 Act) may not be granted unless leave to apply for judicial review has been granted. An application must have been made by the applicant in line with rules of court. Section 88(6) imposes conditions which must be satisfied before a CCO is granted:

    (a) the proceedings are public interest proceedings;
    (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings; and
    (c) it would be reasonable for the applicant for judicial review to do so.

63. Subsection 88(7) defines "public interest proceedings" as:

    (a) an issue that is the subject of the proceedings is of general public importance;
    (b) the public interest requires the issue to be resolved; and
    (c) the proceedings are likely to provide an appropriate means of resolving it.

64. In considering whether proceedings are public interest proceedings, the court must have regard to:

    (a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review;
    (b) how significant the effect on those people is likely to be; and
    (c) whether the proceedings involve consideration of a point of law of general public importance.

65. Section 89(1) sets out matters to which the court must have regard when determining whether to make a CCO, and what the terms of such an order should be:

    (a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

(b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
(c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;
(d) whether legal representatives for the applicant for the order are acting free of charge;
(e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

66. Section 90 empowers the Lord Chancellor to make regulations to the effect that ss.88-89 do not apply to judicial review proceedings which have as their subject an issue relating entirely or partly to the environment.

Recent Non-Environmental Public Interest Litigation

67. In an immigration context, in ***R (Medical Justice) v Secretary of State for the Home Department*** [2011] 1 WLR 2852, the Claimant sought to judicial review an aspect of the Secretary of State's policy. It had the benefit of a PCO in bringing the action. The Claimant succeeded, and the Judge awarded the Claimant its costs. The Secretary of State sought to appeal against this decision. The first-instance Judge granted permission to appeal, on condition that the costs order already made would not be disturbed, and the Secretary of State would pay the Claimant's costs of the appeal. The Secretary of State appealed against this order, or sought to vary it.

68. The Court of Appeal held that the Secretary of State could only seek to remove the condition of the grant of permission that she pay the costs, if she abandoned the grant of permission. She would have to start again in the Court of Appeal, seeking permission to appeal. As Lord Neuberger MR (as he then was) held at para. 8:

> "Where a first instance judge (a "judge") grants a party permission to appeal on terms, and the party is unhappy with those terms, he has three options. The first is to abandon the prospective appeal; the second is to accept, no doubt reluctantly, the terms; the third course is to treat the conditional permission as a refusal of permission to appeal, and to make a fresh application for permission to the appellate court. What the party concerned cannot do is to treat the permission to appeal granted by the judge as tucked under his metaphorical belt, and seek to improve his position by appealing to the appellate court against some or all of the terms."

69. By contrast, if a prospective respondent to an appeal is unhappy with the terms on which permission is granted, then it can apply to the appeal court for an appropriate PCO (para. 25).

70. In ***R (IS) v Director of Legal Aid Casework*** [2014] EWCA Civ 886, the Court of Appeal considered an application for a PCO by a vulnerable individual seeking to challenge the refusal of the Defendant to grant legal aid for an immigration status application. The Court of Appeal granted the PCO, with a reciprocal cap. Beatson LJ made an observation (with which Gloster LJ agreed) concerning the third of the ***Corner House*** principles, at para. 31:

> "It is clear in the light of the subsequent decisions…that the nature and extent of the private interest and its weight or importance in the overall context is to be treated as a flexible element for the court's consideration of the question of whether it is fair and just to make the order. While all the Corner House principles are overarching principles applying regardless of context, the extent of the flexibility may vary accordingly to context and the circumstances of a particular case. For example, in an environmental case in which the Aarhus principles apply, as was stated in Morgan at paragraph 38(iv), the influential 2008 Sullivan Report considered that the private interest requirement was inconsistent with those principles. In other contexts, it remains a requirement, albeit diluted and to be applied flexibly."

71. The widow of Alexander Litvinenko applied for judicial review of the Home Secretary's decision to reject a Coroner's request that a public inquiry should be ordered into the alleged murder of Mr Litvinenko. She applied for a PCO in respect of her application, but her application was dismissed: ***R (on the application of Litvinenko) v Secretary of State for the Home Department*** [2013] EWHC 3135 (Admin).

72. Goldring LJ found the public importance of the application to be "self-evident" (para. 15). He also distinguished ***Goodson*** on the point of Mrs Litvinenko's private interest:

> "The facts in Goodson were very different. There was little question fo any public interest in bringing the case. The final two sentences of paragraph 28 of the judgment made it clear that Moore-Bick LJ was not expressing any binding opinion on a claim which might have both a private and public capacity. He emphasised that Corner House promulgated guidelines and that they were not inflexible. The more recent cases do in my judgment se out the correct approach.
>
> In short, in my view Mrs Litvinenko's private interest in her claim is a factor to take into account when balancing the other Corner House criteria. In the circumstances, having regard to the public interest in her claim, it is not a factor which would prevent me making an order." (paras 25-26)

73. However, a PCO was not granted: Mrs Litvinenko's means were too great, and so she could bring the claim without the benefit of a PCO if she chose to do so (para. 31).

74. Haddon-Cave J granted a PCO in ***R (the Plantagenet Alliance Ltd) v Secretary of State for Justice*** [2013] EWHC 3164 (Admin), a case concerning the discovery of the corpse of King Richard III and proposal to re-bury him. Haddon-Cave J found that the case was of general public importance: it did not matter that the law was settled and that the final resting-place of a former monarch is arrived at in the proper manner was an important matter in the public interest (para. 35). It was not legitimate to divide a decision from its process. The argument that the claim was of parochial, rather than public, interest was rejected. The public debate surrounding where Richard III should be buried was no substitute for a lawful decision (para. 38). The fact that the Claimant was a limited company did not prevent the grant of a PCO and the Court, having examined the resources of the Company (and the controlling mind behind it), found them to be modest. Furthermore, Haddon-Cave J held at para. 46:

> "I do not accept Miss Proops' submission that a PCO is inappropriate because the Claimant 'could and should' have raised funds from the public. This is speculative and runs contrary to the evidence the fund-raising position has not improved. Nor do I accept her submission that PCOs should not be granted unless applicants prove they have taken 'diligent steps' to obtain pro bono legal representation in the first place. If lawyers are prepared to act free of charge in particular cases all well and good; but it cannot be a sine qua non to the grant of a PCO that applicants are required to prove that they have trawled the legal market for pro bono representation. This would be contrary to the principle of free choice of representation."

75. The grant of a full PCO to the Claimant was appropriate in all the circumstances (para. 55). However, the Claimant was subject to a reciprocal costs cap of £70,000 (at Treasury rates because these were a more suitable benchmark of modesty).

Conclusion

76. In all public interest cases falling outside the ambit of the Aarhus Convention the position in England in relation to the grant of PCOs is that the Court will apply the principles in ***Corner House*** but in a flexible manner such that, for example, the existence of a private interest in the litigation will not necessarily prevent the Court from granting a PCO. In environmental cases, the Aarhus Convention and its (partial) implementation by the CPR now provides significant costs protection for claimants challenging decisions by way of judicial review. Proposed legislative reforms will put the ***Corner House*** principles on a statutory footing in non-environmental public interest proceedings.

John Litton QC

18 September 2015