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Getting Aarhus in order

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count the costs of environmental JR

In Brief

- The government plans to make it easier to obtain a protective costs order in environmental cases.
- The proposals would increase certainty for claimants, but would also reduce judges' flexibility to treat each case individually & may open the floodgates for environmental claims.

The Ministry of Justice is currently consulting on protective costs orders (PCOs) in environmental judicial review claims. While the proposals set out in the consultation might be expected to be part of the current drive to reform litigation costs after the recent Jackson review on the subject, the trigger in fact appears to be the many criticisms that have been made of the UK for failing fully to implement the provisions of the Aarhus Convention on Environmental Justice. The consultation, which closes on 18 January 2012, expressly states that it relates to cases that fall within the scope of the Aarhus Convention, which aims to enhance (in the context of the environment) public access to information, public participation in decision making and access to justice. (See consultation in full at *http://www.justice.gov.uk/downloads/consultations/cost-protection-litigants-consultation.pdf*)

THE SCOPE OF AARHUS

In respect of access to justice, the scope of the Aarhus Convention is broad. It provides that "each Party shall ensure that...members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment". Furthermore, Art 9(4) provides that such procedures "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".

It is the requirement that obtaining environmental justice must not be "prohibitively expensive" that has caused the UK particular difficulty recently. Rather than amend the rules relating to litigation costs and procedure following its ratification of the Convention in 2005, the UK kept the existing costs regime, including the general rule that, by default, the loser pays the costs of litigation.

Despite substantial movement in recent years in the case law relating to the grant of PCOs in cases with an environmental element, the existing provisions have prompted suggestions that the UK has failed effectively to transpose the Aarhus Convention and has led to criticism from the European Commission, which, since the EU ratified the Convention in 2005, has the power to ensure that member states comply with its obligations.

In April 2011, the European Commission announced that it would refer the UK to the European Court of Justice (ECJ) under Art 258 of the Treaty on the Functioning of the European Union, stating that: "In the United Kingdom, 'protective costs orders' can be granted to limit the amount a public authority can recover from a challenger at the end of the case. But the Commission is concerned about the lack of clear rules for granting such orders, and at their discretionary and unpredictable nature, which is not in line with the requirements of the Directive. Although such orders are now granted more frequently than in the past, it is still the norm in UK litigation for the losing party to pay the winning party's costs.

"The Commission is also concerned that under UK law applicants for interim measures and injunctions suspending work on projects have to provide a 'cross undertaking in damages', promising to pay damages if the injunction turns out to be unfounded. This puts applications for such orders beyond the reach of most applicants...In reply to previous letters from the Commission, the UK authorities had agreed to amend their legislation...But as... no legislative provisions are in place, the UK is being referred to the Court."

CONVENTION BREACH

Meanwhile, in October 2010, the Aarhus Compliance Committee declared the UK to be in breach of the Aarhus Convention following a complaint brought by Client Earth and the Marine Conservation Society, two UK environmental NGOs. The Compliance Committee found that the UK's costs rules were prohibitively expensive, stating that it "considers that the considerable discretion of the courts of [England and Wales] 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 CURRENT SYSTEM

Under the current system, a PCO may be granted at any stage in judicial review proceedings. The effect of a PCO is to limit the amount of adverse costs that a claimant might have to pay if his challenge fails. Historically, under principles set out in the case of *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, a PCO was only awarded in exceptional circumstances, and a claimant had to show that the issues raised by the claim are of general public importance, that he has no private interest in the matter and that, having regard to the financial resources of the parties and the likely costs of the case, it is fair and just to make the order. Over the last few years, however, these requirements

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have been adapted significantly in cases with an environmental aspect, principally because of the Aarhus Convention. Support for the idea that environmental cases deserve special treatment was also contained in a report produced by Sullivan LJ in May 2008 entitled *Ensuring Access to Environmental Justice in England and Wales*, which suggested that the use of PCOs to cap potential exposure to costs would be one means of complying with the requirements of the Convention.

The cases of *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209, [2008] All ER (D) 30 (Nov) and *R (Compton) v Wiltshire PCT* [2008] EWCA Civ 749, [2009] 1 All ER 978 briefly arrested the trend towards making PCOs easier to obtain in environmental cases by suggesting that there should be no difference in principle between the approach to PCOs in cases that raise environmental issues and those that raise other serious issues.

However, in *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006, [2011] 3 All ER 418, the Court of Appeal set the environmental PCO ball rolling again, confirming that in environmental cases:

(i) the public interest conditions do not apply;

(ii) a PCO may be granted where the potential cost liability would prevent ordinary members of the public from bringing a judicial review, without having to consider the individual's financial means; and

(iii) it may be appropriate to impose a reciprocal cap on the defendant's liability.

CONSULTATION PROPOSALS

The current consultation notes that "case law has now moved to develop a strong presumption that a PCO will be granted where an environmental case is brought in the public interest" and proposes a number of amendments to codify the sentiment behind *Garner*.

The principal proposals set out in the consultation are as follows:

(i) The rules are to apply to all claimants in the same way, regardless of whether the claimant in a particular case is a natural or legal person.

(ii) Applications for PCOs need not be supported by evidence or grounds, and must normally be made at the same time as the application for permission.

(iii) Where granted, a PCO will limit the liability of the claimant to pay the defendant's costs to £5,000 and the liability of the defendant in respect of the claimant's costs to £30,000 (although these cap levels are the subject of consultation questions). The consultation suggests that setting the cap at £5,000 is justified on the basis that anyone who would be deterred from litigating by that level of cost would qualify for legal aid although, particularly in the context of the current legal aid reforms, this assumption is questionable.

(iv) By way of exception, the defendant may apply for the cap to be removed where information on the claimant's resources is publicly available, and where that information shows that the claimant has such resources available for litigation that access to justice is not in issue and no costs protection is required. This exemption seems likely to apply to well-funded interest groups.

The proposals will, if accepted, make obtaining a PCO much easier and seem highly likely to encourage an increase in the number of environmental judicial reviews in matters ranging from the protection of great crested newts to planning, major infrastructure and atomic or renewable energy projects. The practical result of this will be to stretch the budgets of taxpayer funded public authorities even more than is currently the case. This effect will be even greater if, as the consultation suggests, the cap should also apply to costs incurred in any subsequent appeal.

CONCERNS OVER THE PROPOSALS

While the current PCO regime under legislation and case law would suggest that there is political and judicial support for the proposals set out in the consultation, there is likely to be some wariness about the reduction of flexibility, and the further curtailing of judicial discretion, that the proposals would engender.

In particular, the fixed cap on liability seems likely to be controversial, particularly in light of recent cases (see, for example, *Badger Trust v Welsh Ministers* [2010] EWCA Civ 807, [2010] All ER (D) 125 (Jul)) where PCOs have been set at more than £5,000. It is certainly questionable whether this "one size fits all" approach succeeds in effectively transposing the Convention: by ruling out consideration of a claimant's circumstances, some claimants may still be put of bringing a judicial review by the potential to incur £5,000 of costs, whereas to other claimants-particularly well-funded NGOs-such a sum may be nowhere near what they consider to be "prohibitively expensive".

What is beyond doubt, however, is that for authorities and businesses that frequently find themselves the subject of judicial review claims with an environmental element, these proposals will raise serious concerns about both the costs position in individual cases and the likelihood of the floodgates being opened to many more such claims.

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