

COSTS PROTECTION FOR DEFENDANTS

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1. Judicial review proceedings can be expensive. As well as meeting their own costs as the litigation progresses, public authorities are likely to have to pay the Claimant's costs should the claim be successful. Of course, the best way to avoid these costs is by making robust decisions and/or conceding cases at the appropriate point. Those matters have been dealt with already and are outside the scope of this paper.
2. One further way a defendant can minimise its liability in costs even if unsuccessful is by arguing for an issue based costs award. Thus if the claimant has won on some issues but lost on others, it should only recover costs in relation to those grounds on which it was successful. This is provided for in the CPR (r44.3(4)(b) and (6)(a)) and is commonplace in judicial review proceedings. It is not covered in detail here.
3. The costs situation is often asymmetrical. Defendants generally have the means to pay their own costs and the claimant's costs should they be unsuccessful. The situation frequently arises, however, where claimants may not be able to afford the Defendant's costs bill as well as their own. Thus even a successful Defendant may be left bearing a substantial bill for its own costs. This paper addresses some of the ways in which that risk can be minimized. In particular:
 - a. Applications for Security for Costs
 - b. Dealing with Incorporated Claimants
 - c. Responding to Applications for Protective Costs Orders
 - d. Implications of the Aarhus Convention and the Sullivan Report

Security for Costs

4. The classic response to dealing with impecunious litigants is through requiring security for costs. The concept is that one party will, either by agreement or by order of the court, make available a sum which can be used to cover the other's costs should it be required. The courts recognize, however, that there is a danger of preventing access to justice through requiring such security to be paid. Therefore it will only be available in certain circumstances.

On what grounds can security for costs be obtained?

5. The rules on security for costs are contained in¹:
 - a. CPR r25;
 - b. CPR r3; and

¹ The provisions in the Companies Act 1985, s726, which were similar to the rules in the CPR, are repealed with effect from 1 October 2009.

- c. The Arbitration Act 1996, s38.
6. The provisions in the Arbitration Act, as the name suggests, apply only to arbitrations. Despite indications from the court on the importance of ‘alternative dispute resolution’ in the public law context (see, for example, Lord Woolf CJ’s comments in *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803) this is an avenue which is rarely pursued by parties in judicial review proceedings.
 7. The CPR provisions are therefore the main subject of consideration here. Rule 25.12 provides for the court to make an order for security for costs on the defendant’s application. Such order must include the amount of security, the manner in which it is to be provided and the time within which it must be given.
 8. Such an order cannot be made, however, unless the conditions in r25.13 are satisfied. These are as follows:

(1) The court may make an order for security for costs under rule 25.12 if–

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b)

- (i) one or more of the conditions in paragraph (2) applies, or*
- (ii) an enactment permits the court to require security for costs.*

(2) The conditions are–

(a) the claimant is—

- (i) resident out of the jurisdiction; but*
- (ii) not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;*

(b) [omitted]

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

9. In order to make an order for security for costs, therefore, the Court must be satisfied that the claimant falls within one of the categories set out in r25.13(2).
10. It is apparent at once from the categories set out that there is no provision to require security of costs from an individual claimant who is simply not very well off. The principal elements which are relevant to judicial review are those concerning impecunious incorporated claimants and evasive claimants.
11. The provisions on incorporated claimants formed more or less specifically for the purpose of the action are dealt with below. However, the situation may also arise whereby there is some doubt over whether or not a small business or NGO may be able to pay the defendant's costs if it loses, particularly in larger and high profile cases. The burden is on the defendant to satisfy the court that the criteria applies. However, there is no requirement to show that the claimant *will not* be able to pay the defendant's costs, only that 'there is reason to believe' it will not be able to do so.
12. Conditions (d), (e) and (g) largely speak for themselves, and are triggered by actions of the claimant. It is worth noting that in relation to (g), there is no need to show a conscious intent to evade a costs order, just that the steps taken would in fact make enforcement harder: see *Aoun v Bahri* [2002] EWHC 29 (Comm) at [25]. In this the requirement is equivalent to that in (e). However, if the defendant *can* show an element of deliberate evasiveness, this will obviously be relevant to the exercise of the court's discretion (on which, see below). This might include evidence of dishonesty, a record of unreliable behaviour, or, most conclusively, statements of intent by the claimant (see White Book commentary at 25.13.18).
13. Falling within one of the categories specified is a necessary but not a sufficient requirement, however; the Court must also be satisfied that the making of an order is "just", having regard to all the circumstances of the case. This is a very broad discretion. Relevant factors will include:
 - a. **Ability of claimant to comply:** the courts have long recognised that an application for security for costs should not be allowed to stifle a legitimate claim nor to prevent access to justice. This attitude finds support in the ECHR article 6(1) on the right to a hearing; this militates against 'disproportionate' interference with a party's ability to pursue a claim. The concern is, if anything, all the more keenly felt in public law such that special rules have been developed to deal with the problem of costs exposure in general (see below on PCOs and the Aarhus Convention). This factor is also highly relevant to the question of the amount of the security.
 - b. **Strength of claim:** the courts have been very clear that an application for security should not occasion a lengthy examination of the merits of the case. However, for cases which are demonstrably at either end of the spectrum this factor is highly relevant; obviously there is a greater interest in the claimant being able to pursue a very strong claim, and a greater need to protect the defendant from very weak or spurious claims.

- c. **Admissions by defendant:** the extent of any open admissions made by the defendant can be taken into account as, in effect, vouchsafing the strength of the claim. However, the courts have been clear that a defendant should not be prejudiced because he has negotiated, and “without prejudice” correspondence should not be admitted in evidence without consent: *Kristjansson v R Verney & Co Ltd* (1998, unrep, CA).
 - d. **Legal expense insurance:** if a claimant is appropriately insured then that may be held to provide all the security that is required. This will, of course, depend on the terms of the policy and the issues in the case. In *Belco Trading Ltd v Kordo* [2008] EWCA Civ 205 the court ordered the provision of security by way of a payment into court, or a bank guarantee or in the form of an ‘after the event’ insurance policy. The Court of Appeal upheld a requirement that the policy should provide “equal or better security” than the more conventional methods.
 - e. **Delay:** if an application for security has not been made promptly, it may not be fair on a claimant to require the raising of large sums of money at a late stage in the litigation.
14. It should also be remembered that the court has more general case management powers under CPR Part 3. This includes the power to make an order conditional on the paying of money into court (r3.1(3)) and the power to require a party to pay money into court if it has failed to comply with a rule, practice direction or a relevant pre-action protocol (r3.5(5)). On the face of it, these significantly extend the court’s power to order security for costs. The principles for requiring security for costs under r3.3(5) were set out in the case of *Ali v Hudson* [2003] EWCA Civ 1793 by Clark LJ, with whom the other Lords Justices agreed, at [40]:

The correct general approach may be summarised as follows:

i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;

ii) in any event,

*a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ put it [in *Olawatura v Abiloye* [2002] EWCA Civ 988]) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and*

b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party’s case will ordinarily be relevant only where he has no real prospect of succeeding.

15. These powers can thus be understood as part of the array of powers the court has to deal with hopeless or insincere claims, which perhaps fall slightly above the threshold for strike out or summary judgment. The terms in which Clark LJ set out the principles (a want of good faith, no real prospect of succeeding) do not encourage reliance on them by defendants.

Amount of security for costs

16. Just as the making of an order is a matter of discretion, so too is the amount of any order. The court will fix the amount considered to be just in all the circumstances of the case. It is by no means normal practice to order security for all the defendant's anticipated costs in defending the claim. Nor is there any longer a 'rule of thumb' that any particular amount will be ordered (it used to be common practice to order two thirds of the defendant's total estimated costs).
17. The court will need evidence on which to base its judgment. Ideally, detailed evidence should be provided of the amount of costs already incurred, and the extent of further costs likely if the litigation proceeds. Thus if an application is made at permission stage (see below), the costs incurred will be reasonable and proportionate preparation costs (see *R (Davey) v Aylesbury Vale District Council* [2007] EWCA Civ 1166 at [21], [30]), the costs of preparing the acknowledgment of service, and the costs to be incurred will be those of contesting the full hearing if permission is granted. As the costs of attending a renewed application for permission are usually not recoverable, then it will not be appropriate to include that cost in the sum sought by way of security.
18. As mentioned above, the court will be unwilling to set an amount that the claimant cannot raise. However, it is important for defendants to remember that if the claimant relies on his own lack of funds, it will be for him to produce evidence of that fact. The claimant is required to provide "full, frank, clear and unequivocal evidence" of his circumstances. It is also established that it is appropriate for the claimant to seek help from friends and relatives who might be expected to support him; if he says there are none, it is still for him to show this: *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 at [31] – [32]. In the context of a challenge to the decision of a public body, it may often be the case that the claimant is part of a wider group who are dissatisfied with the decision, and it may therefore be appropriate for the claimant to seek support from that group in providing security for costs.
19. If it is not felt that the claimant has made such a full and frank disclosure of his position (if, for example, he simply denies that he will be able to afford a certain sum without providing any documentary verification of that claim) then the court is entitled, in its discretion, to set a sum reflecting its own 'best estimate' of what the claimant could afford: *Al-Koronky v Time Life Entertainment Group Ltd* [2006] EWCA Civ 1123 (the appeal from the decision cited above) at [28] – [29]. This in practice is the sanction against claimants who are not fully open and honest.

Procedure for seeking security for costs

20. The first step should always be, if possible, to write to a claimant (or potential claimant) requesting security for costs, justifying that request as fully as is possible and requesting further information upon which the situation can be assessed more fully (bearing in mind the claimant's responsibility of full and frank disclosure if he relies on impecuniosity). It is self-evidently preferable that matters relating to security for costs should be resolved by agreement where possible so that it does not become the subject of satellite litigation, serving only to increase the overall costs of the action.

21. If it is necessary to apply to the court because the claimant refuses to give security or offers it in an amount or form which is unacceptable, then the application should be made as soon as possible. It must be supported by written evidence (CPR r25.12(2)) and will be subject to the usual rules on applications contained in Part 23 of the CPR. It may be easiest to make the application as part of the acknowledgement of service/grounds of resistance so that it can be considered by the court at permission stage. This forms a natural break in the proceedings and the claimant will be able to evaluate in the light of the permission decision and accompanying decision on security whether he wishes to continue with the claim.
22. If, as the case develops, circumstances change in some significant and relevant way, it is possible to re-apply to alter the court's order. For example, it may become clear that the hearing will take a lot longer than was originally assumed at permission stage, making it necessary to revise the estimates of costs given when the application for security was made.

Dealing with Incorporated Claimants

23. Judicial review proceedings are often brought by incorporated bodies. Commercial companies often bring a judicial or statutory review of a decision favourable to a competitor. A recent example is the case of *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin) where the claimant glass company successfully reviewed the City Council's failure to take enforcement action against the glass works of a rival, Quinn Glass Ltd., obtaining a mandatory order. Similarly, large campaigning organisations frequently bring judicial review proceedings in the public interest. A recent example is the action brought by Friends of the Earth and Help the Aged over the government's failure to reach its targets for tackling fuel poverty: *Friends of the Earth v Secretary of State for Business Enterprise and Regulatory Reform* [2008] EWHC 2518.
24. Claimants such as these do not generally raise any concern regarding costs. They will normally be able to pay any award made against them (although the latter may, of course, apply for a PCO as discussed below). This section of the paper deals with a different sort of incorporated claimant: that formed more or less specifically for the purpose of the litigation (or the campaign of which the litigation is a part) and having very limited assets as a result.
25. The first point to acknowledge is that the courts recognise that such a limited company can be a legitimate vehicle for legal proceedings. This has been firmly established so as to be put beyond serious doubt in a series of decision, which reflect the generally permissive attitude the courts take to the question of standing in public law.
26. In *R v Leicestershire County Council, ex parte Blackfordby and Boothorpe Action Group Ltd* [2001] Env LR 2, the council alleged that a limited company had been formed solely to pursue the litigation and to achieve costs protection. It was said to be contrary to public policy to allow such a company to have standing. Richards J did not accept the council's allegations regarding the company, as there was unchallenged evidence from one of the residents that the company had been formed in order to

provide a proper constitution for the group and in order to represent local people in a more democratic manner.

27. Richards J held as follows on the issue of standing (at [37]):

*In my view the incorporation of a local action group ought not to be a bar to the bringing of an application for judicial review. Technically, it may be said, the company does not have a relevant interest of its own; but in substance it represents the interests of local residents who, or many of whom, do have a relevant interest. Incorporation has a number of advantages, some of which motivated incorporation of the action group in this case. It is true that **another advantage is the avoidance of substantial personal liability of members for the costs of unsuccessful legal proceedings**. But that should not preclude the use of a corporate vehicle, at least where incorporation is not for the sole purpose of escaping the direct impact of an adverse costs order (**and possibly even where it is for that purpose**). (emphasis added)*

28. The case thus concluded that there was no issue in principle with a company composed of those who themselves have a relevant interest. The judge left open the question whether it should be allowed standing if it had been formed for ‘the sole purpose’ of avoiding costs consequences.

29. This question was answered to some extent in the case of *R (Residents against Waste Sites Ltd) v Lancashire County Council* [2007] EWHC 2558 (Admin). In that case, the evidence was much stronger that the main aim of the formation of a limited company was to avoid costs liability. The group’s website apparently stated that “We can limit our own liability by becoming a company limited by guarantee” ([15]). Irwin J nevertheless found that the company had standing, relying on the passage cited above and adding this observation:

If the true objection to the grant of standing to a company, formed in circumstances such as this, is the costs protection afforded to those who might otherwise have a starker choice as to whether to take legal action or not, then the proper approach must surely be to address the costs problem, rather than seek to undermine the standing of the company.

30. That sets out the position as regards judicial review. Curiously, however, the court appeared to draw a distinction between judicial review and statutory review of a planning decision under s288 of the Town and Country Planning Act 1990. These two causes of action are considered to be practically equivalent in terms of the substantive grounds of challenge that may be pursued (see the approach of the House of Lords in *R (Alconbury Developments Ltd) v SSETR* [2003] 2 A.C. 295). There is some difference in who can bring such a challenge, however, as s288 is only available to a ‘person aggrieved by any order’.

31. Irwin J rejected, in *Lancashire*, a suggested approach to incorporated claimants based on an analogy with the ‘person aggrieved’ test. He said (at [17]):

The “persons aggrieved” test is designed precisely to afford rights of challenge to individuals whose private interests are affected and which very often do not turn

on any suggested illegality or “public wrong” by a public body. The situations are not the same.

32. With respect, it would seem that Irwin J was right to reach the decision he did on the facts of *Lancashire*, rejecting any argument which sought to prevent incorporated claimants from bringing judicial review claims. However, insofar as he was suggesting that a different approach should be taken in s288 applications that is difficult to understand; a company formed of and representing persons aggrieved would seem to be in the same position as a company formed of those who would themselves have sufficient interest to have standing in judicial review proceedings.
33. However, given the approach taken by the Court of Appeal in *Eco-Energy Ltd v First Secretary of State* [2004] EWCA Civ 1566 it may be that a different approach would indeed be taken in a s288 challenge. In that case, the court held that the rights of the disappointed appellant as a person aggrieved could not be transferred to a separate legal body. Therefore if the application under s288 is pursued by an incorporated claimant formed *after* the residents have participated in the planning process, there may be an argument that it cannot benefit from their rights as persons aggrieved. The correct position is likely to be that there is no distinction between judicial review and s288 for these purposes.
34. It will be futile, then, to object in principle to the involvement of a limited company. The correct response is to ‘address the costs problem’. This has generally been done through an application for security of costs (or an agreement by the claimant to provide the same). The general approach to security for costs has been discussed above.
35. In this specific context, the following points should be born in mind:
 - a. It is standard for the Court to require a claimant in these circumstances to provide security, which therefore puts the public authority in a strong negotiating position and predisposes the court to exercise its discretion to make an order. In effect those standing behind the claimant company must accept this as the price to pay for the costs protection that the company affords;
 - b. When it comes to the amount, the remarks of Richards J in the *Leicestershire* case cited above are instructive. He said that “The costs position can be dealt with adequately by requiring the provision of security for costs in a **realistically large sum**” (at [37]) (emphasis added). That is a helpful phrase to have in mind when negotiating over the amount;
 - c. Given that it is reasonable for a claimant to seek financial support from others, the means of group members and backers will be highly relevant in assessing the amount of security: see *R v Westminster City Council ex parte Residents Association of Mayfair* [1991] COD 182 where it was held to be “highly likely” that “those behind the application” could find the resources to provide security. The conclusion may be different for residents associations from less affluent areas, of course.
36. This deals, of course, with cases where the claimant is incorporated, i.e. has independent legal personality. The courts have been prepared (in the context of judicial review at least) that *unincorporated* bodies can also bring proceedings (see,

e.g. *R v Traffic Commissioners for the North Western Area, ex parte Brake* [1996] COD 248 – ‘Brake’ being a road safety group rather than a Mr Brake). In that case, the CPR would seem to preclude the making of an application for security for costs on the normal basis, as the claimant would not appear to fall within r25.13(2)(c): “the claimant is a company or other body (whether incorporated inside or outside Great Britain)...”.

37. This being so, the court held in *R v MAFF ex parte British Pig Industry Support Group* [2000] EuLR 724 that the correct approach was to make the grant of permission conditional on the joining of another party who did have legal personality. This was another decision of Richards J following shortly on the heels of *Leicestershire*. The court does not appear to have considered the potential to use its more general powers under Part 3 of the CPR to make the grant of permission conditional upon the paying in of a sum of money, i.e. a requirement to provide security.
38. Following the route proposed in the *British Pig* case would mean that the additional claimant being added would either be an individual or an incorporated association and the normal rules would then apply. However, public authorities cannot necessarily rely on the court to spot this point and “should be alert to the possibility of asking the court to impose such a condition at the permission stage” (at [108]). That should be borne in mind in pre-action correspondence and when drafting an acknowledgment of service.
39. If this step is not taken at the permission stage then there are other means by which the defendant can seek its costs at the conclusion of proceedings. The defendant will be able to seek costs orders against members of the unincorporated body who have been maintaining and financing the proceedings (*R v Darlington Borough Council ex parte Association of Darlington Taxi Owners (No.2)* [1995] COD 128) provided that it is clear that the association itself will not meet the costs order (*R v Secretary of State for Foreign and Commonwealth Affairs, ex parte British Council of Turkish Cypriot Associations* [1998] COD 336).
40. The situation was reversed in *R (Westminster) v The Mayor of London* [2002] EWHC 2440 Admin. This was a challenge brought by Westminster Council and by two local residents. The individual claimants were backed by an unincorporated association. The Court made an order that either the individuals should pay the costs awarded against them within a certain time, or, if that were not done, that the names of the members of the organisation should be provided to the defendant so that it could seek costs directly from them.

Responding to applications for Protective Costs Orders

41. This paper is entitled ‘costs protection for defendants’. Protective Costs Orders (PCOs) have been developed to address the opposite issue by protecting claimants from ruinous costs consequences should they lose. They are made by the court under

its discretionary costs powers and as such do not have clear basis in statute or the CPR.

42. The court first acknowledged that it had power to make an order in public law proceedings limiting the amount the defendant might recover even if successful in *R v Lord Chancellor ex parte Child Poverty Action Group* [1999] 1 WLR 347. The first PCO was made some years later in *R v The Prime Minister ex parte CND* [2002] EWHC 271 (Admin), the next, two years later, in *R (Refugee Legal Centre) v Home Secretary* [2004] EWCA Civ 1239. In 2005 the Court of Appeal set out the principles to be applied in the grant of PCOs in *R (Corner House Research) v SSTI* [2005] 1 WLR 2600 (“*Corner House*”).
43. Since that seminal case, PCOs have become more common. The court in *Corner House* said that they would only be made in ‘exceptional’ circumstances. It has since been clarified that that is not a further hurdle for applicants to pass, but simply “a prediction as to the effect of applying the principles” (*R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 (“*Compton*”) per Waller LJ at [23]). Nevertheless, the prediction appears to have been correct, as in the years since *Corner House* relatively few PCOs have been made. This may stem from the expense of seeking one; particularly if it is not granted on the papers then pursuing one can significantly increase the costs involved in a small judicial review claim. The prominence of PCOs perhaps stems from the fact that there is no clear procedural guidance, which has resulted in numerous cases finding their way to the Court of Appeal.
44. PCOs remain, therefore, a relatively unlikely occurrence. The costs consequences for a defendant if one is made can, however, be severe. They are considered here from the defendant’s perspective. Principles are addressed first, then procedure.

Principles

45. The court in *Corner House* set out the certain principles governing the making of PCOs. It is clear from subsequent judicial consideration that the principles are there to guide the Court’s discretion, and are not rules to be strictly applied before a PCO can be granted: see unanimous judgments of the Court of Appeal in *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1290 (“*Buglife*”) and *Morgan v Hinton Organics* [2009] EWCA Civ 107. The first point to note, therefore, is that the court does have a wide discretion regarding whether to make a PCO and in what terms it should be made. The amount of protection provided for the claimant can vary significantly, as can the amount the claimant may be entitled to recover, depending on the circumstances of the case.
46. The principles were as follows (set out at 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.*

47. These principles are considered in turn below, including updating on how the position has changed since 2005.

48. **Public importance/interest requirements** (i and ii). These principles raise similar issues (indeed, Waller LJ said in *Compton* that he found it difficult to separate them), and insofar as there is any distinction consideration tends to focus on i. This is perhaps because it is inherently likely that the public interest will require that issues of general public importance be resolved. In *R (Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172 the Court of Appeal held that, although the issues involved were of general public importance, the public interest did not require that they be resolved *in an appellate court*. The first instance judgment was held to be clear, with no demonstrable problems arising from its interpretation, and the issue in the case was likely to be resolved in another appeal already before the court in any event. As such a PCO was refused (there were also considerations of ‘private interest’ which are discussed below).

49. The issue of general public importance must be approached very much on a case by case basis. However, it is worth remembering the two respects in which judicial review proceedings may be ‘important’. Firstly, they may be of importance because of the legal principle that is raised, for example an issue of statutory construction. Secondly, they may be of importance because of the significance of the substantive decision under challenge.

50. Deciding whether or not an issue is of general public importance is a matter for the first instance judge. Two judges may reach different views without either being wrong (*Compton* at [75]). Attempts to limit the scope of the judge’s discretion by reference to the word ‘general’ have not been successful. The Court of Appeal has accepted that local issues (e.g. arising from the grant of planning permission) can be of ‘general importance’, even though only a small number of people may be directly affected: *Compton* per Smith LJ at [77]. The number of people affected will be relevant, but not determinative. It is therefore worth pointing out, if appropriate, that there is no evidence of a significant number of people being affected (see *Wilkinson v Kitzinger* [2006] EWHC 835 Fam where Potter P held there was no general public importance for this reason among others).

51. **No private interest** (iii). The phrasing of this requirement in *Corner House* makes it sound like an absolute preclusion to the obtaining of a PCO. Interestingly, the question of private interest was not at issue in that case, it having been admitted that

the applicant campaign group had no private interest in the outcome. However, it was at issue in *Goodson* and there the Court of Appeal upheld a strict reading of the principle in *Corner House*, acknowledging that an applicant with standing for judicial review would normally also have a private interest in the outcome (per Moore-Bick LJ at [28]). In that case the ‘private interest’ in question was a daughter’s interest in discovering the true cause of her father’s death.

52. Understandably, the approach seemingly approved by the Court of Appeal in *Goodson* attracted considerable criticism in first instance decisions and in the Court of Appeal. In *Morgan v Hinton Organics* [2009] EWCA Civ 107 the Court of Appeal acknowledged these criticisms and, whilst not strictly overruling *Goodson*, made it clear that the third criterion was to be applied in light of the fact that the *Corner House* principles were guidelines rather than rules. Therefore, the extent and nature of the claimant’s private interest, if any, were matters to take into consideration, but there was no absolute bar.
53. This is not good news for defendants. Nevertheless, the extent of the claimant’s private interest in the outcome of the claim remains relevant and should be addressed in response to an application for a PCO.
54. **Financial resources/reasonable to discontinue without PCO** (iv and v): There is no requirement that the claimant be impecunious in order to be awarded a PCO. Relatively wealthy campaign groups have been granted them in the past. Nor is it necessary that “failure in the litigation would be financially fatal” (*R (BUAV) v SSHD* [2006] EWHC 250 Admin per Bean J at [13]). The resources available to the claimant will of course be relevant to the extent of the costs protection provided by any PCO that is granted.
55. Defendants should put pressure on the claimant to disclose their assets and the availability of any other sources of funding (e.g. from other interested members of their community). Claimants need not do so, but if they do not then the court will be “in the dark” about how damaging an award of costs would be (see *River Thames Society v First Secretary of State* [2006] EWHC 2829 Admin per Underhill J at [11]). This may make them more reluctant to make a PCO.
56. **Claimant’s funding arrangements:** *Pro bono* representation was said to increase the claimant’s chances of a PCO in *Corner House*. The rationale for this is not entirely clear, but may reflect the fact that in such cases the claimant is not incurring any costs so there will be no necessity for the defendant to bear its costs if it should lose. Since the implementation on 30 June 2008 of s194 of the Legal Services Act 2007, the court is able to make a *pro bono* costs order, under which an unsuccessful opponent of a *pro bono* represented litigant must pay a sum in respect of the *pro bono* representation to the Access to Justice Foundation. The court would therefore need to make clear in the PCO that there was to be no such order.
57. In a second case also involving *Corner House*, *R (Corner House & CAAT) v Director of the Serious Fraud Office* [2008] EWHC 71 (Admin) (*Corner House 2*), the argument was raised (but left expressly undetermined by the court because it had been raised too late) that the claimant should have to adduce evidence that it had tried and failed to obtain *pro bono* representation before a PCO could be granted. This may be

an avenue for defendants to pursue but it would seem that it makes the issue of *pro bono* representation far too central, and that there is no justification in the *Corner House* principles (interpreted as guidelines) to impose any rigid pre-condition such as this on the grant of a PCO.

58. Another possibility is that the claimant may be funding the litigation by way of a conditional fee agreement (CFA). The combination of a CFA and a PCO potentially makes for an iniquitous situation. The defendant, as a result of the PCO, may be limited as to the amount of costs it can recover, if any, if it is successful but may have to pay an enhanced sum to the claimant if it is not successful. This is dealt with further below under the issue of capping the Claimant's costs.

Procedure

59. The normal procedure would be for the claimant to apply for a PCO in the claim form, and for the defendant to resist in the acknowledgement of service. An application can, of course, be made at any stage (see the *Corner House* principles cited above). If it is made later in the proceedings then a defendant will be able to argue that it has already incurred costs in the expectation of recovering them from the claimant, so that any PCO should only cover costs incurred *after* that point.
60. An application for a PCO itself clearly incurs cost. In *Corner House* the Court of Appeal held that the costs recoverable for an application on the papers should be no more than £1,000, and if an unsuccessful application were renewed at an oral hearing then the costs recoverable should be limited to £2,500.
61. A PCO, if made, will of course limit the claimant's exposure to costs to a specified amount. However, the court in *Corner House* also indicated that it should usually include some cap on the costs recoverable by the claimant in the event that the claimant wins. The court said that this amount should be inclusive of any CFA uplift and should be limited to solicitors' fees and a fee for junior counsel which should be "no more than modest". In *Corner House 2* the parties negotiated on the basis of claimant's solicitors' fees 5-10% less than the Supreme Court Costs Office guideline rates to reflect the fact that they should be 'modest'.² That may provide a good rule of thumb by which to assess such fees in future.
62. The rules set out on the amount the claimant may recover is obviously a subject of some considerable interest to defendants as it deals with their costs exposure should they be unsuccessful. The line taken by the Court in *Corner House* has been eroded somewhat in later cases, as follows:
- a. The Court of Appeal held in *Buglife* that there can be no absolute rule limiting the claimant to the costs of junior counsel, as this might be unjust (per Clarke MR at [25]). However, it did say that the principle set out in *Corner House* should be adhered to, albeit flexibly. It is suggested that such a costs cap will form the 'starting point' from which the claimant must justify a departure in individual cases;

² I am indebted for these points to a paper by Ben Jaffey, Blackstone Chambers, who appeared for the claimants in *Corner House 2*.

- b. The importance for claimant solicitors firms in recovering CFA uplifts has been expressly recognised by the Divisional Court in *Corner House 2*.³ In *Buglife* the Court of Appeal made obiter comments to the effect that the amount of any CFA uplift should be disclosed to the court, as it would be relevant in assessing the amount of the costs cap to be imposed. The latter remarks are treated as suspect by some commentators as they contravene the normal principle that a CFA success fee (which relates to the legal adviser's estimates of prospects of success) should not be disclosed in proceedings. Nevertheless, it is guidance from the Court of Appeal and can be reasonably relied on by defendants facing a CFA funded challenge unless and until it is overruled.
- c. The Court of Appeal in *Buglife* made clear that there should be no assumption that the claimant's costs should be capped so as to mirror the costs recoverable by the defendant.
63. Once a PCO has been made, it is very difficult to have it set aside. This reflects the court's general reluctance to entertain satellite litigation over issues of costs. The Court of Appeal in *Corner House* said that there must be a "compelling reason" for doing so. An unmeritorious application to set aside a PCO would be met with an order for indemnity costs to which any cap in the PCO would not apply. Similarly, an appeal against a decision to make a PCO will only be successful if the order is "plainly wrong" (see *Compton* at [78]). It is therefore advisable for a defendant to approach the task of opposing a PCO on the papers with great seriousness as there will not be a second chance.
64. Guidance on the grant of PCOs in appeal proceedings is set out in *Compton*. The fact that a PCO has been obtained and relied on at first instance does not guarantee that it will be continued on the same terms on an appeal. A fresh application will have to be made unless the first instance court has made it a condition of granting leave to appeal that the defendant, for example, undertake to bear its own and the claimant's costs. If the claimant is the appellant and is applying for a PCO, this should be done with the application for permission, the defendant/respondent then having a chance to make representations in writing. The application will be determined on the papers with an opportunity for the claimant/appellant to renew the application at an oral hearing before the main appeal hearing.

The Aarhus Convention, the 'Sullivan Report' and the Jackson Review

65. The United Nations Economic Committee for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is better and more easily known as the Aarhus Convention. It has been ratified by the United Kingdom. It has also, interestingly, been ratified by the European Community.
66. The key provision of the Convention for present purposes is Article 9, which deals with access to justice. Art 9(2) provides that members of the public (defined so as to include NGOs) with a 'sufficient interest' shall have access to a review procedure to challenge decisions to permit certain specified operations listed in Annexe I. The list

³ Ditto.

is similar to that in the Environmental Impact Assessment regime under community law. Art 9(3) is also of relevance, providing that members of the public who ‘meet the criteria laid down in national law’ have access to judicial proceedings to challenge the acts and omissions by “private persons and public authorities which contravene provisions of its national law relating to the environment”. The Convention clearly applies, therefore, to judicial review proceedings which relate to environmental subject matter.

67. Most crucially, in the specific context of the costs regime, Art 9(4) provides that the procedures referred to in Art9(2) and (3) “shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and **not prohibitively expensive**” (emphasis added).
68. A self-convened group of lawyers, the ‘Working Group on Access to Environmental Justice’, produced in May 2008 a report entitled ‘Ensuring access to environmental justice in England and Wales’. The group was chaired by Mr Justice Sullivan (as he then was) and became known as the Sullivan Report. Although the group who produced it had no official remit, given the involvement of Sullivan J its conclusions have nevertheless been taken very seriously.
69. A one sentence summary would be that the report concluded that environmental justice was currently prohibitively expensive for ordinary people, and that more must be done to ensure compliance with the Aarhus Convention.
70. This conclusion was based on an analysis of the costs of taking legal action that included costs exposure (and the risk of costs exposure), not just court fees. That seemed to contradict an Irish authority, *Sweetman v An Bord Pleanala and the Attorney General* [2007] IEHC 153. The report considered the position of a member of the public who was neither very rich nor very poor (and therefore ineligible for legal aid). It found that the simple ‘loser pays’ costs regime which applied to judicial review would be prohibitively expensive for such a person, unless moderated by a PCO or the use of a limited company (as discussed above). It also identified the further problem in costs capping in that this would undermine the viability of CFAs (as these rely in the recovery of an uplift in successful cases to cover the losses made in unsuccessful cases). If CFAs were no longer available, the claimant’s own costs could be ‘prohibitively expensive’.
71. The report recognised the value of PCOs, however, and recommended their more widespread use in the environmental field. However, it took issue with the ‘general public importance’ and ‘no private interest’ tests. Under the Aarhus Convention, there was an inherent public interest in protecting the environment and enabling members of the public to take legal action to do so. There was no exclusion in Aarhus for members of the public who also had a ‘private interest’ and the report considered that the concept as then interpreted failed to differentiate between different types of interest. The use of limited companies was recommended as long as the amount of security for costs required was set with Aarhus’s requirements in mind.
72. The courts have considered the Convention and the Report in several cases. The most comprehensive treatment was given by the Court of Appeal in *Morgan v Hinton Organics* [2009] EWCA Civ 107 (“*Morgan*”). This was a private action in nuisance,

and the application for a PCO was made too late for it to be determined as all the costs had already been incurred. Nevertheless, a powerfully constituted Court of Appeal (composed of Laws, Carnwath and Maurice Kay LJ, the latter of whom had chaired his own working group on 'Litigating the Public Interest' more broadly) considered the issues touching PCOs systematically.

73. The court agreed that the overall costs should be assessed in deciding whether proceedings would be 'prohibitively expensive'. That interpretation had also been adopted by the Advocate General in proceedings taken by the Commission against Ireland. The ECJ has now confirmed that interpretation: *Commission v Ireland* (C-427/07). However, the court rejected any consequent attempt to carve out a separate approach for PCOs in environmental cases. As the Aarhus Convention was not incorporated into domestic law it was not binding on domestic courts but "at most a matter to which the court may have regard in exercising its discretion" (para [47](iii)). Further action was a matter for "legislation or the Rules Committee".
74. The Sullivan Report's comments on 'no private interest' have to some extent been met by the insistence in *Morgan* that that requirement was to be read 'flexibly'.
75. That seems to spell the end of any attempt to persuade the courts to take any general action to implement Aarhus Convention immediately. Defendants can meet any reliance on Aarhus with the argument that it is 'at most' a factor to be considered.
76. The possible exception is in the field of community law. As the Convention has been ratified by the European Community, the European Commission has the right to enforce compliance with it in areas of community competence. Given that it deals with the environment, a subject matter "in very large measure regulated by Community legislation" (*Commission v France*, C-239/03) it would seem that its provisions do fall within community competence. More particularly, the Environmental Impact Assessment and Integrated Pollution Prevention and Control Directives (85/337/EEC and 96/61/EC) have been amended so as to include the Aarhus requirement that procedures should not be 'prohibitively expensive'.
77. In the case of *Commission v Ireland*, mentioned above, the ECJ upheld the Commission's complaint that Ireland had not implemented these amendments (at [94]). This was because the Irish system (very like the English system) relied on the judge's discretion when deciding costs awards, and it is clear that a discretion which may or may not be exercised in a way compliant with the requirements of a directive cannot be relied on to implement that directive. A similar conclusion would seem to be inevitable in relation to this jurisdiction, a possibility which was acknowledged in *Morgan*.
78. A more radical argument based on community law would be to rely on article 300(7) of the treaty, which provides that international agreements ratified by the community "shall be binding on the institutions of the Community and Member States". This could open the door to an argument that the provisions of the Aarhus Convention are binding on Member States and of direct effect (therefore being enforceable in the national courts). That was the finding of the ECJ in relation to the Barcelona Convention in the *Pêcheurs de l'étang de Berre* case (C-213/03). The Court of Appeal, dealing with the status of the Aarhus Convention in community and domestic

law, held in *Morgan* that “in the absence of a Directive ... there is no directly applicable rule of Community law” (at [44]). This conclusion appears to have been reached without reference to article 300 or the *Pêcheurs* case. The argument may therefore be revisited on another occasion.

79. The Court of Appeal suggested that the Jackson review of costs in civil proceedings (initiated by the Master of the Rolls and led by Jackson LJ) would be a good chance to review the position. Lord Justice Jackson’s final report is due in December this year. His preliminary conclusions were that there appeared to be a need for “radical reforms” in order to ensure compliance with Aarhus (Chapter 36, para 4.8). Several options are mentioned, including ‘one way costs shifting’ (i.e. that claimants should never be liable for defendants’ costs). The preferred option of Jackson LJ seems to be that PCOs should become the norm, allowing for recovery of limited costs from claimants and basic costs (i.e. without a CFA uplift) from defendants. Interestingly, he seems to suggest that the way to maintain consistency within the costs rules for judicial review is to apply the criteria for PCOs relevant in environmental cases to all judicial review proceedings. That possibility, if it were to materialise, would have to be addressed in another paper, on another day.

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