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CHAMBERS

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PROTECTIVE COSTS ORDERS IN JUDICIAL REVIEW

BEN JAFFEY[1]

Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW

Tel: +44(0)20-7583 1770 Fax: +44(0)20-7822 7350 Email: clerks@blacksonechambers.com

www.blackstonechambers.com

[1] Lord Lester of Herne Hill QC and Ben Jaffey were instructed by Corner House. Monica Carss-Frisk QC and Brian Kennelly were instructed by the Secretary of State for Trade and Industry.

1. **Importance.**

Costs are of fundamental importance to Judicial Review. The costs rules usually adopted by in public law follow the private law model: costs are determined and the end of the case, and the *'loser'* pays the costs of the '*winner'*. This approach encourages litigants to think carefully before bringing or defending a claim. But the costs rules also represent a formidable barrier to litigants wishing to challenge a public decision.

2. Recent research by the Environmental Justice Project summarised the view of many Claimants: "*the current costs rules represent the single largest barrier to environmental justice. Concerns primarily focus on the application of the usual rule that costs follow the event (i.e. the loser payers the winner's costs, public funding for environmental cases and the current level of lawyers' fees)*"[2].

3. **General rule**

CPR Rule 44.3 sets out the Court's discretion relating to costs and the general rule:

> (1) the court has discretion as to-
>
> > (a) whether costs are payable by one party to another;
> >
> > (b) the amount of those costs; and
> >
> > (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs-
>
> > (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> >
> > (b) the court may make a different order.

4. Rule 44.3 must be read and applied in accordance with the overriding objective in CPR 1. Whilst a departure from the general rule must be justified, there is nothing in the CPR that requires exceptional circumstances or a compelling reason for a departure. Since the introduction of the CPR, the Courts have been creative in applying the costs rules at the end of the case to ensure that substantial justice is done between the parties. See the examples given by Brooke LJ in **R (Refugee Legal Centre) v SSHD** [2004] EWCA Civ

[2] **Environmental Justice** Environmental Justice Project (2004), para. 68. See also *Whose Cost the Public Interest?* Chakrabarti et al [2003] PL 697

1239 at [21]. Indeed, in some public law cases, unsuccessful claimants have persuaded the Court not to make any adverse costs order[3].

5. Protective Costs Orders

The risk of losing a claim, and then failing to persuade the judge that the general rule should not apply, itself has a chilling effect on Judicial Review claims. Many claims are never brought because the potential Claimant cannot obtain legal aid but also cannot afford to run the risk of an adverse costs order. The solution is the '*protective costs order*'. At an early stage in the litigation, the Court can be invited to make an order prospectively affirming that the Claimant will not, regardless of the outcome of the case, be required to pay the costs of the Defendant or any third party.

6. These orders have been recognised in public law since **R v Lord Chancellor, ex parte CPAG** [1999] 1 WLR 347 where Dyson J set down restrictive guidelines, but refused to grant protective costs orders on the facts. In 2002, the Divisional Court made a partial protective costs order (capping costs to £25,000) in CND's challenge to the legality of the Iraq war (**Campaign for Nuclear Disarmament v Prime Minister & others [**2002] EWHC 2777 (Admin)). And in 2004, the Court of Appeal granted a protective costs order by consent to allow the Refugee Legal Centre to challenge the fast-track asylum system at Harmondsworth (**R (Refugee Legal Centre) v SSHD** [2004] EWCA Civ 1296 and 1239). Similar protective orders have also been made as a condition of granting permission to appeal. See, for example, **Chief Constable of the North Wales Police v Evans** [1982] 1 WLR 1155.

7. Corner House

The leading authority is now the decision of the Court of Appeal in **R (Corner House Research) v Secretary of State for Trade and Industry** [2005] EWCA Civ 192. **Corner House** was an expedited challenge to the Export Credits Guarantee Department's decision to change its anti-corruption procedures at the request of various exporters and banks. Corner House, an anti-corruption NGO, complained that that the procedures had been weakened and that it had not been consulted brought a claim for judicial review and sought a protective costs order. It was common ground that Corner House would be unable to continue with the claim unless an order was granted. The Court of Appeal granted a full protective costs order protecting Corner House from having to pay any costs if it lost and observed "*if we had not taken that course, the issues of public importance that arose in the case would have been stifled at the outset, and the courts would have been powerless to grant this small company the relief that it sought*" [145]. The claim was eventually settled, with the ECGD conceding the claim and agreeing to hold the

[3] **R v SSETR, ex parte Challenger** [2001] Env LR 209 (Harrison J), **R (Friends of the Earth & Greenpeace) v SSEFRA** [2001] EWCA Civ 1950, **R v Commissioner of Police of the Metropolis, ex parte Blackburn** *(No. 3)* [1973] 1 QB 241, **New Zealand Maori Council v Attorney General of New Zealand** [1994] 1 AC 466 and **R v Secretary of State for the Environment, ex parte Shelter** [1997] COD 49.

consultation sought by Corner House [2]. In **Corner House**, the Court of Appeal set down the following guidance on the grant of protective costs orders:

- **A PCO may be made at any stage of the proceedings on such conditions as the court thinks fit, provided that the court is satisfied that:**
    - **The issues are of general public importance.**
    - **The public interest requires that those issues should be resolved.**
    - **The Claimant has no private interest in the outcome of the case.**
    - **Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order.**
    - **If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in so doing.**
- **If those acting for the Claimant are doing so *pro bono* this will be likely to enhance the merits of the PCO application.**
- **It is for the Court, in its discretion, to decide whether it is fair and just to make the order in light of the above considerations [74].**

8. If a protective costs order is made, it may take many forms. There is considerable possibility for variation to suit the circumstances of individual cases. The type of order made in **Corner House** was generous to the Claimant who was protected from the risk of any adverse costs order, but who was permitted to recover costs (including a conditional fee agreement uplift) if it won. A more limited order would be that there would be no order as to costs, whatever the outcome of the case. This was the order made in **Refugee Legal Centre**, where the Claimant's lawyers were acting *pro bono*. The most limited form of order is that made in **CND** where the Claimant successfully obtained an order capping (at £25,000) its maximum liability for costs if it lost. In general, the Court is more likely to make more limited forms of order (see **Corner House** at [146]) although a more generous order will be made when the interests of justice require.

9. Where the Court grants a protective costs order that may permit the Claimant to recover its costs if successful, the Court will impose a cost capping order that will prescribe, in advance, a total amount of recoverable costs. The Court of Appeal made clear that Claimants should not expect the capping order to provide for anything more than *"solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest… The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly"* [76].

10.

Procedure

In **Corner House** the Court of Appeal also gave guidance on the procedure relating to protective costs orders (an application should be made with the Claim Form including full evidence and a schedule of proposed costs) [78], and on the costs consequences of an unsuccessful application. To provide legal certainty, the Court of Appeal indicated that if a protective costs order application failed, the Claimant could expect to pay the costs of the Defendant and other parties defending the application. If the application was considered on the papers, the Court indicated that no more than £1,000 would normally be recoverable. It appears that this figure is *in addition* to the costs recoverable by a Defendant under **Mount Cook**. If the order is refused on the papers and the application is renewed at a hearing the Court indicated that the hearing should be limited to one hour and recoverable costs should not exceed a further £2,500. These figures were increased to £2,000 and £5,000 in respect of cases where there are multiple Defendants or third parties with an entitlement to recover their costs. Whilst this may be a fair approach to take in some cases, there will be cases in which the Claimant cannot afford to take *any* costs risk, and certainly not risk in the order of £5,000. This was the position in **Corner House** and accordingly the High Court and the Court of Appeal both made interim protective costs orders, ensuring that Corner House would have no liability in the event that its protective costs order application failed. It is suggested that subsequent cases are likely to illustrate that the **Corner House** guidelines must be applied with care, with the objective of securing the Claimant's right of access to the Court. Slavishly applying the **Corner House** guidelines, without consideration of the facts of individual cases may also lead to injustice.

11. **Commentary**

The decision in **Corner House** represents an important step forward in the law. Although the Court of Appeal emphasised that exceptional circumstances were required before an order was made, appellate approval has been given to protective costs orders and it is to be expected that more orders will now be made. Of particular importance is the Court of Appeal's holding that the Claimant need only prove an arguable case. The Court also accepted that anti-bribery and anti-corruption rules operated by a public authority were matters of real public interest. Also, the one-sided consultation that ECGD conducted with industry, deliberately excluding all the anti-corruption campaigning groups, was held to be a matter of public interest. The Court of Appeal confirmed that procedural unfairness can be as much a matter of public importance as the substance lying behind the case.

12. However, **Corner House** leaves a number of important uncertainties and problems. In particular, the Court of Appeal's finding that an application is more likely to be successful if the Claimant's lawyers are acting *pro bono* (as opposed to acting under a conditional fee agreement) is poorly reasoned and difficult to understand. The purpose of a protective costs order is to provide equality of arms between the parties. A CFA is a mechanism approved by Parliament to allow the poor access to justice in circumstances where legal aid is not available. A CFA guarantees that a Claimant will not have to bear

the costs of his own lawyers. A protective costs order exists to remove the other potential barrier to access to justice – liability for the costs of the Defendant. To say that a protective costs order should not normally go with a CFA is to give with one hand and take with the other. The practical difficulty is that although it is relatively straightforward to find counsel prepared to act *pro bono*, many solicitors firms specialising in public law challenges are unable to routinely act *pro bono* as such challenges form the major part of their practice. It is perhaps encouraging that on the facts of **Corner House**, costs protection was ordered, despite a CFA being in place.

13. Similarly, the imposition of cost-capping orders on Claimants will have the effect that in some of the most important cases that come before the Courts, the Claimant will not be able to instruct a QC. However, no such restriction will be placed on the Defendant.

14. **No private interest**

The Court of Appeal in **Corner House** left untouched the requirement first set down in **CPAG** that the Claimant must have no private interest in the outcome of the case. This condition has been subject to powerful criticism both before and after the Court of Appeal's judgment (see **Chakrabarti et al** [2003] PL 697 and **Stein & Beagent** [2005] JR 206). Private individuals who cannot obtain public funding or take the risk of an adverse costs order are often affected severely by public decisions and it is difficult to understand why, if legal aid is unavailable, a protective costs order should not be available to ensure that important public law decisions which may be unlawful or flawed can be subject to review by the Courts.

15. Further, the *'no private interest'* requirement is to be interpreted narrowly and restrictively. In **Goodson v HM Coroner for Bedfordshire** [2005] EWCA Civ 1172 the Court of Appeal dealt with an application for a protective costs order. Mrs Goodson sought a full coroners enquiry into the circumstances of her father's death. The Court of Appeal held that this was a private interest and accordingly her application failed. The Court of Appeal went as far as to say *"a personal litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case"* [28]. The only exceptions appear to be for pressure groups (such as Corner House) or *"a public-spirited individual… in relation to a matter in which he has no direct personal interest separate from that of the population as a whole"* [28]. **Goodson** will have the effect of excluding most Claimants from eligibility for a protective costs order, especially in environmental cases.

16. It is strongly arguable that **Goodson** was wrongly decided:

a) In **Goodson** the Court of Appeal reasoned "*the court in the Corner House case was well-placed to decide where to draw the line in terms of public interest. The requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have formulated this part of the guidelines in more qualified terms… if it had thought it appropriate to do so*" [27].

However, in *Corner House*, the private interest issue was irrelevant and not the subject of argument. It was common ground that Corner House had no private interest and this issue was not addressed in the submissions of either party or in the Court's judgment. The Court in **Corner House** was not asked to, nor did it consider the private interest issue. At the highest, the private interest *"requirement"* in **Corner House** is an *obiter* comment, not a binding rule.

b) **Corner House** was treated as setting down binding *"requirements"* as to when a protective costs order should be made. In fact, **Corner House** contains *guidance*, which can be departed from where the interests of justice so require.

c) The subject matter of **Goodson** is also notable. Mrs Goodson sought a proper enquiry into the circumstances of her father's death. This forms part of the right to life under Article 2 of the European Convention on Human Rights. If that right is frustrated by an inability to access the courts, Article 2 (and the Article 6 right of access to justice) is also infringed.

17. **CPR amendments**

It is expected that the Civil Procedure Rules Committee will shortly make amendments to the CPR to codify the principles set down by the Court of Appeal in **Corner House** (see **Corner House** at [81]).