Gimme shelter

Meyric Lewis examines the ins and outs of protective costs orders in environmental judicial reviews

A claimant in a judicial review claim can seek the benefit of protection under a protective costs order (PCO) – i.e. an order excluding or limiting their exposure in costs to the defendant – if they satisfy certain criteria. But there are important variations on these which apply in 'environmental' judicial reviews and potential significant changes to the courts' approach to PCOs are heralded by the recommendations of Jackson and Sullivan LJJ in their respective reports, *Civil Litigation Costs* and *Access to Environmental Justice*.

The basic criteria are:

(1) The issues raised are of general public importance.

(2) The public interest requires that those issues are resolved.

(3) The applicant has no private interest in the outcome of the case (although this criterion is to be applied 'flexibly' (see *Morgan v Hinton Organics* [2009] EWCA Civ 107).

(4) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs likely to be involved it is fair and just to make the order.

(5) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing (see *R (Buglife) v Thurrock Thames Gateway DC* [2008] EWCA Civ 1209 citing *R (Corner House Research) v SoSTI* [2005] EWCA Civ 192).

Even though PCOs may be made at any stage of the proceedings, they should normally be applied for in the claim form, supported by evidence including a schedule of the claimant's future costs of and incidental to the full judicial review application (*Corner House*).

To resist the making of the PCO, or any of the sums in the claimant's schedule, the defendant should include that in their acknowledgment of service under CPR 54.8. The claimant will be liable for the court fees for pursuing the claim, and also for the defendant's reasonable costs incurred in successful resistance of the PCO application, which should not normally exceed £1,000 (*Corner House* again). If refused on the papers, the application can be renewed in court.

Reciprocal capping

It was pointed out in *Corner House* that, because the purpose of the PCO is to limit or extinguish the liability of claimants if they lose, then, as a 'balancing factor', the liability of the defendant for the claimant's costs if the defendant loses should be restricted to a "reasonably modest amount".

Note that *Buglife* says that it should not be assumed that the defendant's liability to the claimant will be capped at the same level as the claimant's to the defendant. Also, the existence of CFAs should be disclosed to assist the process of assessing the level of the reciprocal cap.

Environmental claims

PCO applications in judicial reviews involving challenges to projects covered by the EC directives on environmental impact assessment and integrated pollution prevention and control are subject to a different approach from other JRs, even where the challenge is not based on alleged failure to comply with the requirements of those directives (see *R (Garner) v Elmbridge BC* [2010] EWCA Civ 1006).

These cases are subject to the requirement that members of the public must have "access to a [judicial] review procedure before a court of law" which is "not prohibitively expensive" (see for example article 10a of the EIA Directive, EC Directive 83/337/EEC (as amended) which gives effect to principles in the Aarhus Convention on Access to Environmental Justice etc).

Garner concerned development proposals on the opposite side of the Thames from Hampton Court Palace. The grounds of challenge did not allege a breach of the EIA Directive. But, because the development was of a scale and 'significance' which required environmental impact assessment, it was subject to the public participation provisions of the directive including article 10a.

In relation to *Corner House* criteria (1) and (2), the Court of Appeal held that in article 10a cases there was no justification for their application, given that under community law it is a matter of general public importance that "environmental decisions" subject to the directive are taken in a lawful manner.

The court also held that the question whether proceedings would be prohibitively expensive should be resolved more 'objectively' (by reference to a person of ordinary means) than purely 'subjectively' (i.e. looking at the means of the particular claimant – see *Corner House*).

But the court did impose a reciprocal cap on the defendant's liability in costs if the claim succeeded, holding that the imposition of such a cap would not be inconsistent with article 10a.

All change?

Practitioners also need to be aware of the MoJ consultation on the recommendation in Jackson LJ's report that "costs ordered against the claimant in any claim… for judicial review shall not exceed the amount (if any) which is reasonable for him to pay…" and Sullivan LJ's proposed rule that "an unsuccessful claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings".

These recommendations have yet to be reflected in any changes to the CPR. Also, a reference is to be made to the ECJ in *Edwards v EA* [2010] UKSC 57 to determine the correct test to be applied – objective/subjective etc. – in deciding whether costs are "prohibitively expensive".

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