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Protective costs orders

Procedure & Practice

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PCOs are not a green light for environmental challenges. Deirdre Lyons & Colleen Theron explain why

Protective costs orders (PCOs) are intended to promote access to justice. They are often sought in judicial review applications containing a public interest element where claimants with limited resources are pursuing a claim that may benefit others.

R (Corner House) v SoS for Trade and Industry [2005] 4 All ER 1 stated that PCOs should only be made in exceptional circumstances, where:

- the issues raised are of public importance;
- the public interest requires that those issues should be resolved;
- the applicant has no private interest in the outcome of the case;
- having regard to the financial resources of the applicant, the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
- if the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.

In *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006, the Court of Appeal made a radical departure from those principles in cases involving Art 10a requires legal proceedings involving a challenge to environmental decisions to not be "prohibitively expensive" and that the financial position of the claimant should be examined. The Environmental Impact Assessment, (EIA directive) has also incorporated the principles of the Aarhus Convention into domestic law. The UK is therefore obliged to ensure that the procedure for challenging lawfulness of an action is not prohibitively expensive because of the risk of adverse cost orders.

In *Garner*, the Court of Appeal held that the usual PCO principles must be modified in environmental cases to ensure that the Aarhus principles are given proper effect. Modification was justified only insofar as it was necessary to secure compliance with the directive. Both Aarhus and the directive state that effective public participation in the decision-making process in significant environmental cases is in the public interest.

The ruling outlined new principles, applying specifically to environmental cases:

- **Public interest tests do not apply:** the "general public importance" and "public interest requiring resolution of those issues" conditions in *Corner House* are effectively disapplied

- **Prohibitively expensive test not "purely subjective":** purely subjective tests based on a particular claimant's means are not longer appropriate in determining whether proceedings would be "prohibitively expensive" without a PCO. A PCO may now be granted where most "ordinary" members of the public would be deterred from proceeding by the potential cost liability

Reciprocal limits are not necessarily incompatible: the imposition of a reciprocal limit upon a respondent's liability for costs may be fair, proportionate, and not prohibitively expensive and therefore compliant with the directives. This reflects an attempt by the court to "level the playing field".

This was the first time that the Court of Appeal has had to consider the application of the *Corner House* principles in a case in light of the EIA Directive or Integrated Pollution Prevention and Control (IPPC directives). In modifying the normally applicable principles, at the time the judgment suggested to some commentators that PCOs might more readily be granted in environmental cases.

However, in the first case to apply *Garner*, the High Court has emphasised the limitations of that modification. In *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change* [2010] EWHC 2312 (Admin), the judge determined that a local community group which sought to challenge the grant of planning permission for a biomass fuelled power station was not a member of the public concerned, and not a person having a sufficient interest.

The judge also ruled that the proceedings were not prohibitively expensive, and that the claimant did not qualify under the rules laid down in *Corner House* for a PCO. In doing so, the judge took into account the fact that the group had constituted itself as a limited company.

Coedbach emphasises the limited availability of PCOs as a means of promoting access to environmental justice and a judicial move back towards the narrower rules deriving from *Corner House* in 2005. However, as these matters are due for consideration by the Supreme Court in *Edwards v The Environment Agency* [2006] EWCA Civ 877, *Coedbach* is unlikely to be the final word on this issue.