Cost protection for litigants in Environmental Judicial Review Claims: Outline Proposals for a cost capping scheme for cases which fall within the Aarhus Convention. Ministry of Justice consultation, October 2011

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the environmental litigation working party.

UKELA makes the following comments on the proposed cost capping scheme.

Background

This consultation document follows the MOJ's consultation November 2010-February 2011 on the possibility of moving to qualified one-way costs shifting in England and Wales.

UKELA responded to that consultation in February 2011. A copy of our response is available from our website, at: http://www.ukela.org/rte.asp?id=66 and we attach a copy here.

We pointed out a number of problems with the government's proposals for qualified one-way costs shifting, concerning compliance with the Aarhus Convention and

lack of certainty. We set out our preferred approach: namely the (unqualified) one-way costs shifting rule set out by the Working Party on Access to Environmental Justice, or a variant which is close to it.

We welcomed the government's proposal to codify the rules for Protective Costs Orders. We pointed out ways in which the principles for PCOs set out in the *Corner House* case fail to meet the requirements of the Aarhus Convention.

Current proposals: general comments

We welcome the decision to drop the November 2010 proposals for qualified one-way costs shifting, given the problems inherent with those proposals.

We welcome the present initiative to codify the rules on PCOs. We note that the proposed PCO rules are now the government's full solution to current *Aarhus* compliance problems: additional un/qualified costs shifting has been dropped completely. As such, it is important that the PCO rules fully address *Aarhus* compliance problems associated with current costs rules.

The proposals have the potential to meet some of our previous concerns, in particular as regards certainty. Whether the potential is realised is dependent upon the approach that the MoJ takes to modification of the cap on the costs recoverable by a defendant.

We have some concerns about what is proposed, bearing in mind that it is now the full solution to *Aarhus* under consideration.

CONSULTATION QUESTIONS

1. **Have you been deterred from bringing a judicial review within the scope of the Aarhus Convention because you considered that costs were prohibitive? If so, please provide details, including specifics about the matter you wished to challenge.**

As an organisation, no: given UKELA's aims and objectives, we are not generally in the business of bringing judicial review challenges.

The answer to this question is already well documented - see for example CAJE research, to which UKELA members contributed.

2. **Would the proposed codification of PCOs enable you to bring a judicial review in a case within the scope of the Aarhus Convention if you wished to challenge a decision in the future? Please explain your reasons**.

Certainly, having a PCO regime codified would help to reduce time spent on obtaining an order, which can be as hard fought as the substantive claim. We welcome anything that will cut down the scope for argument about PCOs.

3. **Do you agree with the proposal to set the presumptive (i.e. default) PCO limit at £5,000? If not what should the figure be? Please give reasons**.

We have no real objection in principle to a **fixed** default sum to be paid by an unsuccessful claimant. (But see our comments below on a presumptive cap that can be raised/removed.)

We consider £5,000 to be a challenging amount for many claimants. In particular, it is important to have regard to the fact that a Claimant will also have to fund his or her own legal advice and advocacy. We are aware of cases which would not and did not proceed even at this level of costs exposure. Those points having been made, we do not consider, on balance, that £5000 is an unreasonable limit when

balancing the interests of potential defendants.

4. Do you agree that challenges to the presumptive cap limit of £5,000 should be permitted?

In our response to the November 2010 consultation we commented at paragraph 17 that:

> The proposal would perpetuate all that is most undesirable about the PCO regime: unpredictability; cost; delay etc. The 'fixed amount' would not in fact be a fixed amount at all, as the exceptions could operate to raise or lower the amount payable. Moreover, the questions of whether a claimant is 'so wealthy' or the defendant of 'such modest means relative to the claimant' raise difficult issues of assessment, interpretation and judgment. We share the concerns of the Working Party on Access to Environmental Justice about the undesirability of requiring judges to carry out time consuming, detailed assessments of the means of the parties. …

The same concerns inform our attitude to the present proposals for challenges to the presumptive cap limit of £5000. We consider the present proposals are an improvement on those in the November 2010 consultation, from this perspective. But they would inevitably add a degree of uncertainty (when applying for the PCO, and if an uncapped PCO is granted); possible further cost/delay (in particular given that costs would be payable for 'non-default' PCOs); and difficult questions of assessment, interpretation and judgement for the court (deciding whether 'the claimant has such resources available for litigation that access to justice is not an issue and no costs protection is required').

Accordingly, our preference is for a fixed cap.

However, we recognise that there may be cases where it ought to be possible to depart from a £5,000 cap. We consider it crucial that the rules avoid adding undue

cost, delay, complexity etc.

Present proposals: the consultation document indicates that the aim of the proposals is to allow cap to be raised or removed *only in 'exceptional cases'* (para 28). The ground seems to be that: 'the claimant has such resources available for litigation that access to justice is not an issue and no costs protection is required'. (condoc para 31). UKELA understands this to be directed to this sort of scenario: there is commercial competition between supermarkets for a planning permission; one seeks to JR the grant of permission to another on the basis of an unlawful approach to environmental assessment; that is an Aarhus issue so a PCO is theoretically available; but, nobody would sensibly expect the supermarket to obtain costs protection. In reality, we consider it rather unlikely that such an issue would arise. If it did, it would fall into the exceptional category which the consultation speaks of, but beyond the type of scenario set out above, UKELA considers that fixed should mean what it says.

5. If so, do you think that defendants should only be entitled to apply only to remove the cap or should it also be possible for defendants to make applications to raise the cap? Please give reasons.

Allowing the cap to be lifted *or* raised introduces more complexity: more issues of interpretation, assessment and judgment for the court (and evidence: see qu 6 below). This would be contrary to UKELAs' primary position which is that certainty is very important.

In our response to the November 2010 consultation we commented that 'We share the concerns of the Working Party on Access to Environmental Justice about the undesirability of requiring judges to carry out time consuming, detailed assessments of the means of the parties' (para 17). UKELA remains of that view.

6. In considering exceptions to the grant of a PCO in the presumptive amount, should the court only consider information that is publicly available? If not, what other information should be taken into account?

By limiting the information to be considered, this perhaps goes some way towards meeting our concern about the undesirability of requiring judges to carry out time consuming, detailed assessments of the means of the parties. However, such assessments based on 'partial' information are very unlikey to be fair and hence we do not consider them to be an attractive proposal.

7. Should challenges be permitted only against organisations, or should challenges also be permitted against wealthy individuals? Please give reasons.

The objective of any rule re challenge should be to eliminate the obvious commercial challenge. We do not consider that is likely to occur, but if it did, it would be obvious.

8. If it were necessary to disclose financial information to obtain a PCO or vary it, would that fact deter you from seeking a PCO? Would your answer differ depending on the information you needed to disclose?

In the experience of our members, such a requirement would be a significant deterrent factor and would act to undo the benefits of the proposed regime.

9. Do you agree with the proposal to set the automatic cross-cap at £30,000? If not what should the figure be?

Yes. We would, though, suggest that the figure be clarified as £30,000 plus VAT. Without such clarification, the cross-cap would in effect only fund £25,000 of the costs of claimants that are not registered for VAT.

10. Should it be possible to challenge the cross cap of £30,000? If yes, what should the basis of that challenge be? Please give reasons.

Clearly a fixed cross-cap (with no scope for challenge) would put a successful Claimant in a costly (>£30k) case in a worse position than where there is no PCO. A failure in the rules to raise, without great difficulty, the cross-cap, will result in a real problem. In our member's experience it would render a PCO entirely counter-productive in a complex case, which environmental cases commonly are. It would be perverse for the Claimant to be worse off winning than losing.

11. Do you think that if a challenge were introduced to the cross cap that the £5,000 cap ought to be reviewed at the same time?

To do so would increase the complexity of the assessment quite considerably. Further, the objective is to provide certainty as to the total exposure to costs which C would face if the case was lost. The key, therefore, is to fix the PCO.

12. Should the default cap as proposed earlier (in the sum of £5,000 although consultees' views have also been sought on the amount), be applied to all proceedings including those on appeal?

Yes - the purpose of the PCO would be defeated if a claimant were not able, on costs grounds, to defend a win at first instance or to pursue an arguable ground on appeal. There would, however, be a need to re-visit any cross-cap and the outcome of that determination would be quite fact-sensitive having regard to which party was appealing and the view of the judge granting permission as to the prospects and reasons for granting permission.

13. If not, should an additional application be possible to set a PCO for an appeal? Should the limit be set by the court or should a presumptive limit apply? Please give reasons.

N/a. See our response to question 12.

14. Should the position differ according to whether it is the claimant or defendant (at first instance) who is appealing? If so, in what way?

N/a. See our response to question 12.

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