Response to the Ministry of Justice's consultation on Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenges

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 proposals.

PRELIMINARY OBSERVATIONS

UKELA notes the constitutional importance of judicial review and its function as the sole means of redress in a number of important areas. Lord Hoffman in R (Alconbury) v Secretary of State [2001] described the significance of Judicial Review '*The principles of Judicial Review give effect to the Rule of Law. They ensure that administrative decisions will be taken rationally in accordance with a fair procedure and within the powers conferred by Parliament*'.

UKELA has responded to previous government consultations on proposed changes to judicial review costs rules. In its responses one of UKELA's main concerns has

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been that the costs rules or any proposed changes to the costs rules should meet the requirements of the Aarhus Convention and in particular that access to justice in environmental cases should not be 'prohibitively expensive' Article 9(4). Those concerns remain unaltered.

Section VII of Part 45 of the Civil Procedure Rules (the CPR), related parts of the CPR and associated Practice Directions (the Environmental Costs Protection Regime) have now been implemented and this consultation is seeking views on further changes to the rules relating to costs protection in certain environmental challenges, governed by the Costs Protection Regime.

The consultation document presents no evidence about the costs of environmental claims, and their impact on proceedings or access to justice generally, to support the proposed changes to the existing rules. Rather, the case for changes appears to be based almost exclusively on the government's own interpretation of the recent judgements in the following cases: -

(a) the Court of Justice of the European Union (CJEU) in case C-260/11 *Edwards v. Environment Agency* [2013] 1 W.L.R. 2914;

(b) Supreme Court in the same case: *R (Edwards) v. Environment Agency (*No.2) [2014] 1 W.L.R. 55; and

(c) the judgment of the CJEU in case C-530/11 *Commission v. UK [2014]*

UKELA's view is that the government's interpretations of these judgements even if they are correct (which is not accepted) are one-sided and in themselves are not justifiable reasons to support its current proposals to change the existing rules.

UKELA would have expected the government to put forward far stronger, more compelling evidence in support of proposals to make such significant changes.

The government claims that the proposals contained in the consultation are aimed at providing greater flexibility, clarity of scope and certainty within the regime. UKELA considers that if the proposed changes are implemented they will serve only to create uncertainty amongst all parties in litigation including developers and respondents as well as applicants and will put the UK at odds with EU legislation and compliance with Aarhus and the Public Participation Directive. Many of the proposed changes pose a risk of bringing back the 'satellite litigation' over costs which led to the adoption of the current rules and therefore amount to a retrograde step.

Currently a claim is eligible for costs protection under the Environmental Costs Protection Regime if it is an 'Aarhus Convention claim' as defined at CPR 45.41(2) as:

> "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

The consultation focuses on the following areas: -

- the regime in terms of the types of cases that are eligible for costs protection and whether the regime should be extended to apply to certain reviews under statute;
- the types of claimant eligible for costs protection;

- the levels of costs protection available and whether they should remain fixed or should be variable; and
- the factors which the court should consider when deciding whether cross-undertakings in damages for interim injunctions are required in cases which fall within the scope of the regime.

UKELA has a number of concerns about the proposals if they are implemented which are set out in our responses to the Questions below. UKELA's concerns are mainly focused on the uncertainty to all parties to litigation, delays in the court system and the prospect of the UK finding itself yet again in breach of EU law and the Aarhus Convention and all the implications that flow from that.

CONSULTATION QUESTIONS

Q1. Do you agree with the revised definition proposed for an 'Aarhus Convention claim'. If not how do you think it should be defined? Please give your reasons.

UKELA would suggest that the government uses this opportunity to widen the costs regime further to include statutory reviews concerning all matters within the scope of Article 9(3) Aarhus Convention. This is currently the case in Northern Ireland: see The Costs Protection (Aarhus Convention) Regulations NI 2013 S2 (1) (b).

Q2. Do you agree with the proposed changes to the wording of the rules and Practice Directions regarding eligibility for costs protection? If not, please give your reasons.

UKELA considers that the rules should make expressly clear that costs protection is available to 'members of the public' as defined under Article 2(4) of the Aarhus

Convention. Absent such clarification, there is a risk that the rules could be applied too narrowly: only to individual members of the public (each being 'a member of the public'); and to the exclusion of NGOs, campaign groups, claimants in group actions, community groups and other organisations. The consultation wording does not give any examples of what category of person or persons which are currently eligible for costs protection under Rules 45.41 and 45.43 but would be excluded as a result of the adoption of this wording. It is therefore impossible to answer the question properly as the implications are entirely unclear.

Throughout the Aarhus Convention there is reference to 'public participation' and members of the public. Article 2(4) clearly defines the meaning of 'members of the public'.

> "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;
>
> "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

As the stated in the consultation document, the same definitions are used in Article 1 of the EIA Directive and Article 3 of the Industrial Emissions Directive.

The proposed change to the wording to Rules 45.41 and 45.43 could give rise to legal arguments in relation to the definition of what is a member of the public. It could result in NGOs and community groups being excluded from costs protection which could lead to non-compliance with the convention and satellite litigation. The whole purpose and aims of the Convention is that there is public involvement in

environmental decisions. See reference to Article 9 of the Convention 'to provide procedures and remedies to members of the public so they can have rights enshrined in the convention on access to environmental information and environmental decision making as well as national laws relating to the environment enforced by law'.

The definition of members of the public and public concerned under the terms of the Convention are intended to be wide and not limited to 'a member of the public' as held in the case of *R v (HS2 Action Alliance Ltd) V Secretary of State for Transport* 2015 EWCA CIV 203.

Q3. Should claimants only be granted costs protection under the Environmental Costs Protection Regime once permission to apply for judicial review or statutory review (where relevant) has been given? If not, then please give your reasons.

No. UKELA is of the view that claimants making claims that fall under the Aarhus Convention should continue to be granted the benefit of costs protection under the Environmental Costs Protection Regime at the point that the claim is issued.

The proposed change will create uncertainty for claimants, and will deter a large number of potential claimants from seeking permission for fear they will be at risk of (severe) costs if permission is not granted. The change to the rules could encourage public bodies - who are normally in a better position in relation to financial resources than the claimant – to act in a way (up until the point permission stage is dealt with) that increases costs thereby leaving a claimant who has no personal interest in the claim vulnerable. A large company could easily run up costs of £50,000 prior to the grant of permission, which is far beyond most people's means.

As a consequence the proposed changes risk greatly restricting access to justice in environmental matters and placing the UK in breach of the Aarhus Convention.

There is already adequate provision in the rules to deal with unmeritorious claims.

Q4. Do you agree with the proposal to introduce a 'hybrid' approach to govern the level of the costs caps? If not, please give your reasons.

No. UKELA's preference is for a fixed cap for claimant's costs liability. As commented in our response to MoJ's October 2011 consultation, rules that enable the caps to be modified add a degree of uncertainty (when applying for the costs protection); possible further cost/delay (in particular given that costs would be payable for 'non-default' costs protection orders); and difficult questions of assessment, interpretation and judgement for the court (under the present proposals, in deciding whether variation would make the costs prohibitively expensive, applying the principles in draft rule 45.44).

Q5. Do you agree that the criteria set out at proposed rule 45.44(4) at Annex A properly reflect the principles from the Edwards cases? If not, please give your reasons.

UKELA considers the criteria reflect a rather one-sided interpretation of the Edwards principles that favours defendants over claimants. For example, rule 45.44(3) provides that the principles in rule 45.44 will only be met for *increasing* a claimant's costs protection in 'exceptional' cases; whereas there is no such requirement for cases to be 'exceptional' when considering whether to reduce a claimant's costs protection.

In any event, for the reasons given in answer to questions 4 and 7, UKELA does not agree with setting detailed criteria. Rather UKELA's preference is for a fixed cap.

Q6. Do you agree that it is appropriate for the courts to apply the Edwards principles (proposed rule 45.44 at Annex A) to decide whether to vary costs caps? If not, please give your reasons.

No. For the reasons given in answer to questions 4 and 7 UKELA does not consider it appropriate for the courts to be involved in difficult questions of assessment, interpretation and judgement.

Q7. Should all claimants be required to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings? If not, please give your reasons.

UKELA objects to this proposal on the grounds that it is unnecessarily intrusive, will be unworkable and will create significant unintended consequences. This point was made by the Court of Appeal in *R (Garner v Elmbridge BC [2010] EWCA, Civ 1006 §52*

> "52 The more intrusive the investigation into the means of those who seek PCO's and the more detail that is required of them, the more likely that it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection of a PCO would afford) to challenge the lawfulness of environmental decisions.

Requiring Claimants to file and serve a schedule of their financial resources at court will require them to disclose personal and revealing information about themselves to the Respondent, interested parties and to the court with no such disclosure from the other parties. This contradicts the principle of equality of arms and this alone is a significant reason not to require such disclosure.

Secondly, requiring claimants to file and serve a schedule of their financial resources at court will amount to a significant administrative burden for them and may in fact be unworkable if, for instance, the Claimant is a charity and does not have that kind of financial information readily to hand. The picture may be further complicated if the charitable claimant is, for instance, supported by a well wisher who has pledged financial support for the claim. Will the well-wisher's financial resources need to be disclosed as well? UKELA is additionally concerned that the proposal will be unworkable because it will raise difficult questions of assessment, interpretation and judgment as to whether a claimant is 'so wealthy' or the defendant of 'such modest means relative to the claimant'. 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.

Thirdly, if this proposal is effected, there is a risk that satellite litigation will ensue whereby Defendants or Interested Parties will seek to cross examine or otherwise challenge a Claimant about their financial status. This will result in the judge having to spend excessive time considering this issue rather than assessing the substantive claim. The threat of such an action may also be used by Defendants/Interested Parties as a tactic for intimidating Claimants, through intrusive cross-examination of financial information, in an effort to persuade them to withdraw their claim. The government has stated an aim of speeding up the consideration of judicial reviews and grants of planning permission and has put in place measures in the court system to enable that. Bringing back potential satellite litigation over costs will frustrate that aim.

In summary, UKELA objects to this proposal because it will be unduly intrusive for the Claimant, it will be an administrative burden for the Claimant, will add to their

costs and may, in fact, be unworkable, and it will result in extensive further involvement by the judge who will be obliged to make difficult non-legal assessments about the relative financial positions of the parties. The existing system, by contrast, has the merit of simplicity and certainty and should be retained.

Q8. Do you agree with the proposed approach to the application of costs caps in claims involving multiple claimants or defendants? If not please give your reasons.

It is possible that in certain cases involving multiple claimants the cumulative effect of the proposal could risk rendering the proceedings prohibitively expensive. There is no increase in effort involved in defending a claim brought by multiple claimants and as this is judicial review there is no question of additional damages to be paid. There is therefore no justification for increased caps for multiple claimants. The current rules ensure that the totality of a claimant's liability is capped at £5000, the court can decide how that liability is apportioned. We suggest that this is a proper approach and should be continued.

Q9. At what level should the default costs caps be set? Please give your reasons.

UKELA maintains the view expressed in its response to the Ministry of Justice's October 2011 consultation that, on balance, £5,000 is not an unreasonable limit when balancing claimant's interests with those of public defendants (see UKELA's response to the October 2011 consultation: answer to question 3).

In the same response, UKELA expressed support for a cross-cap of £30,000 plus VAT, i.e. £36,000 gross (see UKELA's response to the October 2011 consultation: answer to question 9). UKELA made clear that it must be possible to raise, without difficulty, the cross-cap otherwise claimants in costly cases would be put in a worse position than those without costs protection (see UKELA's response to the October 2011 consultation: answer to question 10).

UKELA would point out that the figures of £5k (individual claimant) and £35k (defendant's liability) was approved by the Court in *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006.

UKELA does not consider changes to the costs caps proposed in paragraph 47 to be appropriate. No evidence is given to justify the changes. Yet they would reduce significantly the level of a claimant's costs-protection.

The proposals would mean doubling the costs exposure of an unsuccessful claimant, from £5k to £10k (individual claimants) and UKELA is of the view that £10k would be a challenging amount for many claimants. It should be remembered that an unsuccessful claimant is also responsible for the court fees, (which now come close to £1000 in a standard judicial review in the High Court) and their own legal costs which can be high even when the claimant's lawyers are acting on reduced fees or CFAs.

A cross-cap of £25k represents a reduction of £10k or nearly 30% of the costs that a successful claimant can recover. This impact would be made worse if, as is proposed, the level of protection could only be raised in 'exceptional' cases (paragraph 39 of the consultation document). Many claimants could be put in a worse position than they would have been without costs protection. This would render the costs protection entirely counter-productive in complex cases, which environmental challenges commonly are. Moreover, many claimants would be

forced into applying to the court for their case to be considered as an 'exceptional' case which would result in yet further applications coming before the court and occupying court time.

Given the average cost of environmental cases and the upward trajectory of costs and legal fees UKELA proposes that the existing cap of £5,000 for individual claimants, £10,000 for other claimants and £35,000 for defendants remains in place but would increase annually in line with inflation so as to ensure that the caps remain appropriate.

Q10. What are your views on the introduction of a range of default costs caps in the future?

UKELA does not agree that there should be an introduction of a range of default caps. This would serve only to increase the problems of uncertainty, satellite litigation etc referred to in response to questions 4 and 7.

Q11. Do you agree that where a defendant unsuccessfully challenges whether a claim is an Aarhus Convention claim, costs of that challenge should normally be ordered on the standard basis? If not please give your reasons.

UKELA's view is that there is no need for the rule to be changed and doing so would simply encourage further satellite litigation about this point.

The provisions in respect of a defendant being penalised through the imposition of paying costs on an indemnity basis if it unsuccessfully challenges the designation of a claim as an Aarhus claim has worked, in that it has discouraged defendants from challenging the designation of a claim as an Aarhus claim without very good grounds for doing so. This disincentive to challenge without good grounds avoids blocking up the courts with unmeritorious challenges.

The consultation document does not present any evidence to indicate that defendants have failed to bring well-founded challenges against Aarhus designation, or otherwise been prejudiced, as a result of this rule.

Q12. Do you think the Environmental Costs Protection Regime should make specific provision for how the courts should normally deal with the costs of applications to vary costs caps? If so, what approach should the rules take?

UKELA makes no comment as it does not support the introduction of applications to vary cost caps, see the answer to Q10 above.

Q13. Do you have any comments on the proposed revisions to Practice Direction 25A?

For the reasons given below, UKELA considers that the requirement for cross-undertakings to be given should be removed. Should the requirement be retained, UKELA notes that the specific proposals mirror the proposed changes to the costs protection rules. UKELA's comments on those rules apply here: see response to questions 2 (need to make clear that the rules apply to claims by 'members of the public' as defined under Article 2(4) of the Aarhus Convention); and responses to questions 4-7.

UKELA suggests that the government should consider changing the law for the courts to adopt a precautionary approach when dealing with applications for interim relief for Aarhus claims. An interim injunction could be granted in cases where there is evidence before the court to show that there is a significant risk of irreparable harm to the environment unless the interim injunction is granted. These types of cases as in most other forms of injunctive relief could be expedited by the court and a full substantive hearing be held in a matter of weeks.

UKELA considers that the requirement for cross undertakings to be given should be removed. As shown, for example, when considered in the Sullivan Report, "*Aarhus provides a robust justification for the removal of the need to provide cross undertaking in damages for environmental cases. We recognise that this may prejudice third parties in cases that can take many months to come to trial, and it is clear that timeliness has a critical role to play in environmental cases where interim injunctive relief is sought and indeed is one of the express requirements of Aarhus. We recommend that the requirement to provide a cross-undertaking in damages should not apply in environmental cases falling within Aarhus where the court is satisfied that an injunction is required to prevent significant environmental damage and to preserve the factual basis of the proceedings. In such cases it will be incumbent on the court and its administration to ensure that the full case is heard promptly*"

The issue of cross undertakings in injunctive relief was also raised by the European Commission which argued that the UK had failed to transpose fully and apply correctly Directive 2003/35/EC ("the Public Participation Directive") partly due to the requirement on applicants to provide cross-undertakings damages seeking interim relief. In addition following a complaint to it, the Aarhus Compliance Committee adopted its findings on 18th October 2010 2 and stated that "*A particular issue before the Committee are the costs associated with requests for injunctive relieve. Under the law of England and Wales courts may and usually do require claimants to give cross –undertakings in damages. As shown for example by the Sullivan Report where cross undertakings may entail potential liabilities for claimants of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4*.

The consequences of a claimant not being able to afford a cross-undertaking are illustrated in the case of *R v Secretary of State for the Environment, ex p. RSPB* [1997] Env L.R. 431, in which the claimant sought an interim injunction to restrain the Sheerness Port Authority from proceeding with development on an internationally important wetland habitat. As the RSBP could not agree to a cross-undertaking in damages the House of Lords refused interim relief. Two years later the ECJ gave judgment ruling in favour of the RSPB on the substantive merits, but it was too late for the protected wetland habitat which by then had sustained irreparable damage.

The Aarhus Compliance Committee in the Port of Tyne case was critical of the UK's practice in relation to cross-undertakings in damages. It said:

> "*Cross-undertakings for damages regarding interim injunctions*
> *69. The communicants contend that courts in England and Wales generally require claimants seeking an interim injunction to protect the relevant environmental interest pending the substantive trial to provide a "cross-undertaking" in damages before an injunction will be granted. The communicants and CAJE submit that the potential requirement to give a cross-undertaking for damages means that injunctive relief may not be available without risking prohibitive expense to claimants as required under article 9, paragraph 4, of the Convention".*

There have been incidences when the court has also held that a cross-undertaking is not essential for the grant of an interim injunction in environmental judicial review cases: see e.g. *Belize Alliance of Conservation Non- Governmental Organisations v Department of the Environment of Belize* [2003] 1 W.L.R. 2839;. There have also been environmental cases where injunctions have been granted despite no cross-undertakings being offered see *R. (Save Britain's Heritage) v Gateshead MBC*

[2010] EWHC 2919 (Admin) ([2010] EWCA Civ 1500); and *R. (Pascoe) v Liverpool City Council* [2007] EWHC 1024 (Admin).

Q14. Are there other types of challenge to which the Environmental Costs Protection Regime should be extended and if so what are they and why?

The Aarhus costs regime should cover all environmental judicial reviews and statutory reviews as set out in the Aarhus convention: see our answer to question 1, above. This would include reviews concerning matters such as flooding, tree preservation orders, proposals involving strategic environmental assessment, expansion of waste transfer facilities, changes of land use within a National Park.

In order to meet the requirement of the Convention that costs should not be prohibitively expensive, costs caps should apply when a case is heard in Court of Appeal and the Supreme Court, and not just in the High Court. This point was considered in *Commission v UK* : "Lastly as regards the question as to whether or not the costs are prohibitively expensive ought to differ according to whether the national court is deciding on costs at the conclusion of the first instance proceedings, an appeal or a second appeal – no such distinction is envisaged in Directives 85/337 and 96/61 nor would such an interpretation be likely to comply fully with the objective – which is to ensure wide access to justice and to contribute to the improvement of environmental protection. The requirement that judicial review should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at conclusion of first instance proceedings an appeal or a second appeal."

Q15. From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals to revise the Environmental Costs Protection Regime?

Members of the public who bring a claim either individually or as a group could find themselves undergoing intrusive examination of their financial circumstances by the court and the defendant. This could also apply to members of charities, who could find themselves having to disclose their financial details. Members of charities include a wide range of people who could be classed as vulnerable such as children and the elderly. People may be deterred from supporting or becoming members of environmental charities, thereby placing the charities in financial difficulties due to loss of charitable donations and membership fees.

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