United Kingdom Environmental Lawyers Association

Public Interest Environmental Cases: Costs of litigation

POSITION STATEMENT

UKELA recognises that the current costs rule, whereby the loser generally pays the winner's costs, acts as a barrier to commencing environmental judicial review cases brought in the public interest.
UKELA endorses the statement made by Lord Justice Carnwath (then Sir Robert Carnwath) in 1999 in the context of environmental litigation; a statement UKELA considers to be as relevant today:

> "Litigation through the Courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds"

The general principle on costs in environmental judicial review, which is that the loser must pay the winner's costs, can mean that claimants in public interest cases face prohibitive orders for costs, particularly when interested third parties become involved in proceedings. The position is made worse for claimants by the uncertainty throughout the judicial process as to their potential exposure on costs. Decisions on costs are usually made at the end of proceedings, after the substantive hearing.

Both the Government and the judiciary have a responsibility to work towards removing this barrier.
The Government has signed and is committed to ratifying the Aarhus Convention, which includes a requirement that access to justice in environmental matters must be 'fair, equitable and not prohibitively expensive'. Senior judges from around the world have adopted the Johannesburg principles on the role of law and sustainable development, which includes a recognition that "members of the judiciary are crucial partners for promoting compliance with and the implementation and enforcement of environmental law."

Costs protection and costs certainty should be available to individuals and NGOs bringing environmental public law cases where those cases satisfy a public interest and merits test.
Where a claimant can demonstrate, to the satisfaction of the judiciary, that the issues raised in an application have a significant wider importance to the environment and the court has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to order costs protection, there should be a presumption in favour of providing costs certainty and protection to individuals and NGO claimants. The nature and extent of the costs protection may vary depending upon the circumstances of the case, including the possibilities of each side paying its own costs, capped costs protection for the claimant and complete costs protection for the claimant.

The judiciary should broaden the application of pre-emptive costs orders to extend to environmental public interest cases which satisfy a merits test.
The public interest and merits test form the basis for pre-emptive costs orders (PECOs). The judiciary should build on a recent judicial initiative to broaden the application of PECOs beyond their use in exceptional circumstances to a rebuttable presumption that costs protection will be awarded in cases which satisfy a public interest and merits test. Lord Justice Carnwath has recently supported the

Deleted:

Deleted: (*refer to the Birkett statement + mention Lord Brook + Carnwath article*

greater use of PECOs in environmental public interest litigation [1]. Lord Justice Brooke, Vice-President of the Court of Appeal, has indicated the need to focus on a "contemporary concern…that an unprotected claimant…if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm"[2].

To fully protect individuals and NGOs from costs risk and to give costs certainty, UKELA suggests that potential claimants seek a legal ruling on the nature and extent of their costs protection even before issuing their substantive legal challenge ("a pre-application submission for a PECO").

The ruling in Mount Cook[3] has placed individuals and NGOs at a costs risk even if they apply for costs protection at the permission stage of judicial review. UKELA suggests that to overcome the barriers to justice created by this ruling, individuals and NGOs adopt the following three stage approach

- *Apply to the court, on an ex parte basis, for an order that they will not be at risk of paying the other side's costs in a hearing to decide on a PECO.* To increase the openness and transparency of this pre application submission for a PECO and to protect the rights of the potential defendant(s), applicants should give informal notice of their ex parte application to the potential defendant(s) and invite comment on it.
- *Apply to the court for a hearing, involving the potential defendant, on the submission for a PECO. Each side will pay its own costs of this hearing.*
- *Issue the application for their substantive legal challenge (if the applicant has obtained a PECO)*

It is only by this three stage approach that individuals and NGOs can fully protect themselves. The outcome of this procedure will be that applicants will know, with certainty and without costs risk, whether they have costs protection for their legal challenge before they start making the challenge

UKELA supports the principles underlying the CAJE proposal for costs protection save that UKELA suggests that, to fully protect claimants, costs protection needs to be sought at an earlier stage than the permission stage.

UKELA supports the principles underlying the CAJE proposal, namely that there should be a presumption in favour of costs protection in environmental cases which satisfy a public interest and merits test [4]. UKELA considers the suggestion that protection be sought at the permission stage of judicial review may still expose claimants to a costs risk following the Mount Cook decision. UKELA therefore suggests that claimants follow the "pre-application submission for a PECO" procedure described above**.**

November 2004

[1] *Judicial Protection of the Environment: at Home and Abroad* Journal of Environmental Law Vol 16 No 9 pg 321, referring to the approach in *CND v The Prime Minister* [2002] EWHC 2759

[2] *R v LB Hammersmith and Fulham exp Burkett* [2004] EWCA (Civ) 1342

[3] [2003] EWCA Civ 1346. The Court held that whilst the general guidance in the CPR is that a defendant who attends and successfully resists the grant of permission at a renewal hearing should not generally recover from the claimant his costs of doing so, a court may depart from this guidance if he considers there are "exceptional circumstances" for doing so. The judgment stated that the court should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant, and can consider in exercising this discretion the merits of the claim, whether the unsuccessful claimant has had, in effect, an early substantive hearing of the claim, and the financial resources available to the claimant.

[4] UKELA has been invited to lend its support to proposals by the Coalition for Access to Justice for the Environment (CAJE), in relation to costs in environmental public interest judicial reviews. The Coalition consists of NGO's including ELF, Friends of the Earth, RSPB, Greenpeace and WWF. In summary, the Coalition argues that the adverse costs rule in environmental judicial review cases (the loser pays the winner's costs) is the most significant barrier to access to justice in environmental matters. The Coalition proposes a solution whereby claimants in environmental law cases demonstrated to be pursued in the public interest could be awarded a costs certificate at the start of the proceedings which would either protect them from liability for any adverse costs or limit the adverse costs payable if they are unsuccessful.

Deleted: ot