

# LITIGATING THE PUBLIC INTEREST

REPORT OF THE WORKING GROUP ON  
FACILITATING PUBLIC INTEREST LITIGATION

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

THE  
CIVIL  
LIBERTIES  
TRUST



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**Liberty** (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to protect and promote basic rights and freedoms by a combination of public campaigning, test case litigation and parliamentary lobbying.

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The Nuffield Foundation is a charitable trust established by Lord Nuffield. Its widest charitable object is 'the advancement of social well-being'. The Foundation has long had an interest in socio-legal issues and has a special programme of grant-making in Access to Justice. The Foundation has supported this project to stimulate public discussion and policy development. The views expressed are however those of the authors and not necessarily those of the Foundation.



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July 2006



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## FOREWORD

by Lord Justice Maurice Kay

It is now widely accepted that there is something recognisable as “public interest litigation”. Developments in substantive and procedural law in recent years have done much to facilitate its pursuit. However, it remains the case that there are public interest cases which merit litigation but which are excluded from the courts for reasons of cost. There are limits to the availability of funding from the Legal Services Commission and, in the area of judicial review, it is difficult to find insurers who will back conditional fee agreements for an affordable premium. The courts are attempting to assist by the development of protective costs orders but here, too, there are claimants, both individual and organisational, who find it difficult to fulfil the present requirements. Recognition of these matters resulted in the establishment of the working group which has now produced this report. We very much hope that it will make a contribution to further developments. Whilst it would be churlish not to acknowledge the extent to which public funding is made available for litigation against public authorities in this country, there is still a significant amount of potential public interest litigation which is deterred by the operation of our traditional approach to litigation costs.

I would like to express my personal thanks to Shami Chakrabarti, who asked me to chair the Working Group, to all the members of the Working Group and, particularly, to James Welch, who has co-ordinated our meetings and upon whose shoulders fell the task of drafting this Report.

Sir Maurice Kay

15th June 2006

## SUMMARY

With funding from the Nuffield Foundation and under the chairmanship of Lord Justice Maurice Kay, Liberty brought together a group of senior government lawyers, lawyers acting for claimants and representatives of other interested bodies to discuss and make representations in relation to costs in public interest cases.

The Group's deliberations focused on whether and when it is appropriate for the courts to make protective costs orders (PCOs).

The Group also discussed concerns about the operation of the legal aid scheme, though without reaching any consensus.

### **The Group's conclusions in relation to PCOs were:**

1. The courts should be prepared to grant PCOs *in public interest cases*;
2. A public interest case for this purpose is one where:
  - (i) the issues raised are ones of general public importance, and
  - (ii) the public interest requires that those issues should be resolved.
3. It should not be a condition for obtaining a PCO that the person or body applying for it have no private interest in the outcome of the case;
4. Nonetheless, the nature and extent of an applicant's private interest was a factor relevant to the decision whether to grant a PCO;
5. Three types of PCO could be identified:
  - (i) an arrangement where the party benefiting from the PCO will not be liable for their opponent's costs if they lose but will be entitled to recover their costs if successful (a Type 1 PCO),
  - (ii) an arrangement where neither side will be liable for the other's costs (a Type 2 PCO), and
  - (iii) an arrangement where the benefiting party's liability for their opponent's costs if they lose is capped in advance (a Type 3 PCO);
6. All three types of order were orders that the circumstances of a particular case might justify and should therefore be options available to the courts;

7. Agreement could not be reached on whether a cap should be placed on the costs incurred by the party benefiting from a Type 1 or Type 3 PCO;
8. In deciding whether to grant a PCO the courts should place little emphasis on the fact that the lawyers for the applicant are acting or are prepared to act pro bono;
9. It should not be a condition for obtaining a PCO that the person or body applying for it would not proceed with the substantive proceedings if not granted one – this was, however, an issue that a court could properly take into account;
10. The public interest in a case and the disparity of resources between the parties might justify granting a PCO even though the person or body seeking one might still be able to pursue the case without one;
11. There was no reason in principle why a PCO should not be granted for an appeal;
12. (With some dissent) There should be a presumption on an application for a PCO that there should be no order as to costs, this rule only to be departed from where a party acts unreasonably.

## INTRODUCTION

- 1 In Winter 2003 Public Law published an article entitled “Whose cost the public interest?”<sup>1</sup> by Shami Chakrabarti, Director of Liberty, and two others<sup>2</sup>. The article reviewed the law on protective costs orders (PCOs) and called for these to be more widely available in public interest cases.
- 2 The problem which the article identified is that, while a legally-aided litigant is to a considerable extent protected against being ordered to pay his opponent’s legal costs if he loses the case, an individual who cannot get legal aid, usually because he is outside the scope of financial eligibility, or a concerned organisation, which cannot get legal aid because legal aid is only available to individuals, is exposed to a considerable costs risk if the case is unsuccessful. Costs on both sides in contested cases can run to several thousand pounds and the usual rule is that the unsuccessful party will pay the successful side’s legal costs. While a claimant in a public interest case may be able to argue at its unsuccessful conclusion that there was sufficient merit in the challenge to justify the court not making the usual costs order<sup>3</sup>, the uncertainty caused by this after-the-event approach has a very considerable chilling effect.
- 3 A protective costs order is an order made either at the outset or early on in proceedings which either provides that the party in whose favour it is made will not be liable for his opponent’s costs even if he is unsuccessful or limits his liability. It removes the uncertainty inherent in the usual approach to costs.
- 4 Following publication of the article the Nuffield Foundation very generously agreed to fund Liberty to bring together a working group to discuss means of facilitating public interest litigation.
- 5 Liberty is very grateful to Sir Maurice Kay (Lord Justice Maurice Kay) for agreeing to chair the meetings.
- 6 The terms of reference agreed with Sir Maurice were as follows:
  - (i) To review and assess current law and practice in relation to costs in “public interest” cases.
  - (ii) To consider whether further developments in law and/or practice are necessary or desirable and what lessons can be learnt from other jurisdictions.
  - (iii) To make such recommendations for changes in law and/or practice as the working party agrees are appropriate.
- 7 The working group (hereafter referred to as “the Group”) was made up of senior lawyers from the Government Legal Service (attending in a personal capacity), lawyers working for non-governmental

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<sup>1</sup> [2003] PL 697, included as an appendix to this report.

<sup>2</sup> Julia Stephens and Dr Caoilfhionn Gallagher

<sup>3</sup> See, for example, *New Zealand Maori Council v Attorney-General of New Zealand* [1994] 1 AC 466 at page 485.

organisations (NGOs), a solicitor in private practice, and representatives of the Law Society, the Constitutional and Administrative Law Bar Association (ALBA), the Legal Services Commission and the Department for Constitutional Affairs. Meetings were held on four dates. Details of the members of the Group and the meetings they attended are set out in an appendix to this report. Liberty is very grateful to the members of the Group for giving of their time and energy. We also owe thanks to the Law Society for agreeing to host the meetings.

- 8 Despite the Group's broad terms of reference much of the Group's discussion focused on protective costs orders. Between the time when Liberty applied to the Nuffield Foundation for support for the project and the Foundation agreeing to support it, the Court of Appeal gave its judgment in *Corner House*<sup>4</sup>. Given the significance of the judgment to the issue of PCOs, it is unsurprising that it featured heavily in the Group's deliberations.
- 9 The Group also discussed issues around legal aid. There was, however, much less agreement in this area than there was in relation to PCOs. This report records the points that were made but it should be noted that these did not meet broad agreement.
- 10 This report will start with a review of the context in which the Group's deliberations took place before reporting on the Group's discussions and conclusions. It will conclude by recording the concerns expressed around legal aid.

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<sup>4</sup> *R (Corner House Research) v the Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 W.L.R. 2600

## THE CONTEXT

### The courts' discretion as to costs

- 11 The courts are obliged by CPR 1.1(1) to give effect to the overriding objective "to deal with cases justly."  
CPR 1.1(2) states that
- "Dealing with a case justly includes, so far as is practicable –
  - (a) ensuring that the parties are on an equal footing;
  - ...
  - (d) ensuring that it is dealt with [...] fairly"
- 12 The courts' discretion as to costs is governed by section 51 Supreme Court Act 1981 and by CPR 44.3.
- 13 Section 51 provides:
- "(1) Subject to the provisions of this and any other enactment and to rules of court, the cost of and incidental to all proceedings in –
  - (a) the civil division of the Court of Appeal;
  - (b) the High Court; and
  - (c) the county court
- shall be in the discretion of the court.
- (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings [...].
  - (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."
- 14 CPR 44.3 provides:
- "(1) The court has discretion as to –
  - (a) whether costs are payable by one party to another;
  - (b) the amount of those costs; and
  - (c) when they are to be paid.
- (2) If the court decides to make an order about costs –
  - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
  - (b) the court may make a different order.
- ...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances [...]"

- 15 It was undisputed in all the recent cases concerning PCOs that the courts have the power to make such an order.
- 16 As noted in the Public Law article<sup>5</sup> the principle underlying the rule that costs follow the event is that the winning party should be compensated for the vindication of his position<sup>6</sup>. It has also been said that "it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation," and that the rule that costs follow the event "promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim."<sup>7</sup>

#### Conditional fee agreements

- 17 Conditional fee agreements (CFAs) are permitted by section 58 Courts and Legal Services Act 1990. By subsection 3 they must be in writing and by subsection 4, if there is to be a success fee, they must state the percentage by which the fees which would normally be chargeable are to be increased.
- 18 Until 1st November 2005 there were further requirements prescribed by the Conditional Fee Agreements Regulations 2000. These regulations were notoriously difficult to apply and engendered much litigation. They were revoked from 1st November 2005.
- 19 Solicitors must comply with the Solicitors' Costs Information and Client Care Code 1999. For the most part the Code already mirrored the requirements in the Regulations, although there was one amendment which came into force at the same time as the Regulations were revoked. The amendment inserted into the Code a new paragraph 5(d), the purpose of which is to ensure that a solicitor fully explains the effect of the CFA to his client.
- 20 The clear expectation is that prospective litigants entering into a CFA will, if they do not already have some form of insurance cover, take out after-the-event insurance to cover their potential liability for their opponents' costs. There are several companies that offer such insurance. However, only one member of the Group was aware of an occasion where someone had obtained after-the-event insurance for a judicial review application. It seems that judicial review cases are too much of a risk for insurance companies. That view was confirmed by an ALBA survey compiled when it was responding to a proposal made by the Legal Service Commission in 2004 that in judicial review proceedings legal aid should cease post permission and the case should be pursued by a CFA<sup>8</sup>. If insurance cover were to be available its cost would probably be prohibitive.

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<sup>5</sup> Page 699, note 9.

<sup>6</sup> See, for example, *McDonald v Horn* [1995] I.C.R. 685 at 694D-E per Hoffmann LJ

<sup>7</sup> *R v Lord Chancellor ex parte CPAG* [1999] 1 W.L.R. 347 at 355H - 356B per Dyson J

<sup>8</sup> The proposal was made in the LSC's consultation document *A New Focus for Legal Aid*. The proposed change was not implemented.

### Relevant elements of the legal aid scheme

- 21 Only individuals can apply for funding from the Community Legal Service (CLS), or, as it is more usually referred to despite the changes brought in by the Access to Justice Act 1999, legal aid.
- 22 Proceedings before certain tribunals (e.g. the Employment Tribunal) and for certain causes of action (e.g. defamation) cannot be funded by the CLS<sup>9</sup>, although the Secretary of State for Constitutional Affairs has a discretion under section 6(8) Access to Justice Act 1999 to make provision for such funding, either on an individual or a blanket basis.

### *Costs protection*

- 23 A litigant whose representation is funded by the CLS has the benefit of *costs protection*. Under section 11(1) Access to Justice Act 1999 the amount that a legally-aided litigant can be ordered to pay towards his opponent's legal costs cannot exceed the amount, if any, that it is reasonable for him to pay. In practice, this means that a legally-aided litigant is unlikely to be ordered to pay anything towards his opponent's legal costs if the case is unsuccessful. Where a legally-aided litigant's opponent does not get his costs because the legally-aided litigant has costs protection, the courts can make an order for costs against the Legal Services Commission<sup>10</sup>. At first instance, such an order can only be made in favour of an individual who would otherwise suffer financial hardship. This has the effect that in judicial review cases such an order will only be made on an appeal to the Court of Appeal.
- 24 A litigant with legal aid, and therefore costs protection, has no need of a PCO.

### *Eligibility for a legal aid certificate*

- 25 Whether a prospective litigant is granted a funding certificate is dependant both on his financial eligibility and on the case meeting the merits criteria set out in the CLS's Funding Code.
- 26 According to a parliamentary answer given by David Lammy, then Parliamentary Secretary in the Department for Constitutional Affairs, on 21st March 2005 it is estimated that 50% of the population meets the financial eligibility criteria for non-family civil legal aid, the proportion having fallen from 63% in 1986<sup>11</sup>. The Constitutional Affairs Committee in its report "Civil Legal Aid: adequacy of provision"<sup>12</sup> noted that in 2001 only 47% of households were eligible for legal aid. It went on:

"At present, the legal aid system is increasingly being restricted to those with no means at all. There is a substantial risk that many people of modest means but who

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<sup>9</sup> Section 6(6) and Schedule 2 Access to Justice Act 1999

<sup>10</sup> Reg. 5 Community Legal Service (Cost Protection) Regulations 2000 (as amended)

<sup>11</sup> Hansard 25th March 2005, Col 609W – as the 50% of the population eligible for legal aid presumably includes almost all children and most pensioners, this suggests that well below 50% of those of working age are eligible.

<sup>12</sup> Fourth report of Session 2003-4, HC 391-I, para. 103 – as the 50% of the population eligible for legal aid presumably includes almost all children and most pensioners, this suggests that well below 50% of those of working age are eligible.



are homeowners effectively will fall out of the ambit of legal aid. In many cases this may amount to a serious denial of access to justice.”<sup>13</sup>

It seems therefore that at least half of the population is ineligible for legal aid and cannot get the benefits of costs protection. That proportion may increase.

- 28 The merits criteria involve a triangulation of the likely costs of the proceedings, the benefit to be obtained if the case is successful and the prospects of success. For most quantifiable claims, the likely damages must exceed the likely costs by a factor fixed by the likely prospects of success<sup>14</sup>. For unquantifiable claims, the likely benefits must justify the likely costs “such that a reasonable paying private client would be prepared to litigate, having regard to the prospects of success and all other circumstances.”<sup>15</sup>

*Significant wider public interest*

- 29 Where a case has *significant wider public interest* the test is whether “the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances.”<sup>16</sup>
- 30 More liberal costs benefit criteria are therefore applied where a case has *significant wider public interest*. The Code also applies less stringent criteria for judicial review cases and claims against public authorities, recognising that these types of cases, as they are concerned with the legality of state actions, have an intrinsic public interest.
- 31 *Wider public interest* means “the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which would normally flow from proceedings of the type in question.)”<sup>17</sup> This definition requires that benefits must flow from the facts of the individual case. It is not sufficient, for example, to argue that a case challenging a public authority has wider public interest simply because it is in the general public interest for public authorities to act lawfully. The Funding Code Guidance accepts that the “real benefits” may take several forms:

- Protection of life or other human rights
- Direct financial benefit
- Potential financial benefit
- Intangible benefits such as health, safety and quality of life.<sup>18</sup>

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<sup>13</sup> Ibid. para. 105

<sup>14</sup> Funding Code – Criteria para. 5.7.3

<sup>15</sup> Ibid. para. 5.7.4

<sup>16</sup> Ibid. para. 5.7.5

<sup>17</sup> Ibid. para. 2.4

<sup>18</sup> Funding Code – Guidance para. 5.2.2

Reports by the Commission's Public Interest Advisory Panel (see paragraph 33 below) recognise that intangible benefits may include benefits to the environment.

- 32 The Guidance advocates a common sense approach to whether the wider public interest in a case is *significant*.<sup>19</sup>

“Public interest carries with it a sense that large numbers of people must be affected. As a general guideline, even where the benefits to others are substantial, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome.”<sup>20</sup>

- 33 The form for applying for a funding certificate, the CLS App 1, has a section in which the applicant's solicitor can set out reasons why he believes that the case has significant wider public interest. The CLS may decide itself that a case does or does not have significant wider public interest. If it is in doubt it can seek the advice of a body called the Public Interest Advisory Panel. The Panel is chaired by a member of the Commission but comprises individuals from a range of independent bodies with an interest in public interest litigation. The panel sits approximately every 6 weeks and in 2004 considered 71 cases in 9 meetings. A reference to the Panel may lead to an applicant for judicial review missing the deadline in CPR 54.5.

### *Alternative funding*

- 34 Paragraph 5.4.2 of the Funding Code – Criteria provides that an application for legal aid may be refused if alternative funding is available to the client. It makes clear that for this purpose this does not include funding by means of a conditional fee agreement. The criterion also allows for refusal of legal aid where there “are other persons or bodies .... who can reasonably be expected to bring or fund the case”. This is often an important consideration in funding cases with a wider public interest.

### *Payment for work done under a legal aid certificate*

- 35 Any legal aid certificate granted by the CLS will be subject to a financial limitation, which limits the amount that can be incurred on profit costs and disbursements, including counsel's fees. Although the limitation is extendable any costs incurred in excess of a limitation that has not yet been extended will be unrecoverable from the CLS.
- 36 The CLS pays for work done by a solicitor under a legal aid certificate at fixed rates. By way of example, the hourly rate for attendances and preparation in cases before the High Court is currently £75.00 if the solicitor's office is outside Greater London and £79.50 if it is within London.<sup>21</sup> (Lower rates apply to high cost cases –

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<sup>19</sup> Ibid. 5.3.1

<sup>20</sup> Ibid. 5.3.2

<sup>21</sup> Legal Aid in Civil Proceedings (Remuneration) Regulations 1994, Schedule 2

see paragraph 39 below.) An enhancement of up to 100% may be allowed where the work was done with exceptional competence, skill or expertise, with exceptional dispatch or where the case involved exceptional circumstances or complexity. In the High Court, in very exceptional circumstances, the enhancement may exceed 100%, but cannot exceed 200%.<sup>22</sup> The enhancements must, however, be within the financial limitations that apply to the certificate.

- 37 Where an *inter partes* costs order is made or agreed against a legally-aided litigant's opponent, the legally-aided party's solicitor is not prevented by the indemnity principle from claiming costs from his client's opponent at commercial *inter partes* rates. For firms outside London the guideline hourly rates suggested by the Supreme Court Costs Office range from £184 to £158 for grade A fee earners (solicitors with over 8 years post-qualification experience) and from £163 to £142 for grade B (solicitors and legal executives with over 4 years post-qualification experience). For firms within London the rates range from £359 to £198 for grade A fee earners and from £259 to £149 for grade B fee earners.
- 38 It is in almost all cases more advantageous for solicitors to be paid their costs by their clients' opponents than to be paid by the CLS.

#### *High cost cases*

- 39 Where the costs and disbursements (including counsel's fees) incurred by a legally-aided litigant's solicitor exceed, or appear likely to exceed, £25,000 the matter becomes a high cost case. As such it is subject to closer control by the CLS than a normal publicly-funded matter. The solicitor enters into a contract with the CLS. A detailed case plan has to be agreed, with the costs to be incurred on particular steps in the proceedings agreed in advance. The payment rates for solicitor and counsel are reduced. Solicitors are normally paid at an hourly rate of £70, senior counsel (a silk or junior of 10 years call or more) at an hourly rate of £90 and junior counsel at an hourly rate of £50.
- 40 It is a standard term of a high cost case contract that where a client's opponent agrees or is ordered to pay some or all of the client's costs, the solicitors and barristers must choose whether to accept the *inter partes* costs or be paid by the CLS. At the very least this means that, where a full *inter partes* costs order is made, a solicitor cannot claim his "legal aid only" costs (i.e. that element of his costs that cannot be claimed *inter partes* because it relates solely to the client's application for legal aid – usually this is no more than £200 to £400.) The effect on both solicitors and counsel is more significant where a split costs order (an order that only a proportion of a person's legal costs will be paid by their opponent) is made, although the CLS has a discretion to pay the proportion of the lawyers' costs not covered by the *inter partes* costs order if it is persuaded that the issues in respect of which an *inter partes* costs order was not made or agreed were reasonably pursued.

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<sup>22</sup> *Ibid.* Reg. 5

### International obligations

- 41 The UK is a party to the UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention).
- 42 The Convention makes provision for access to justice in environmental matters. Under Article 9 of the Convention there is a requirement that each signatory have judicial procedures in place to allow members of the public to challenge acts of public authorities which contravene laws relating to the environment. Paragraph 4 of Article 9 sets down that those procedures should be “fair, equitable, timely and not prohibitively expensive”. In addition, paragraph 5 states that to further the effectiveness of Article 9 each signatory should ensure that information is provided to the public on the procedures and “shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”
- 43 A European directive concerned with environmental protection makes specific provision for access to justice in accordance with the provisions of the Aarhus Convention.<sup>23</sup> The Directive provides that, in relation to two specific sets of environmental legislation (environmental impact assessment and integrated pollution prevention and control), access to justice procedures shall be “fair, equitable, timely and not prohibitively expensive”. A group of environmental NGOs has recently complained to the European Commission about the UK’s decision not to transpose the access to justice provisions of the Directive and, in particular, that the risk of adverse costs in public law cases contravenes the requirement that access to justice be “not prohibitively expensive”.
- 44 In *R (Burkett) v LB Hammersmith & Fulham*<sup>24</sup> Brooke LJ noted 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.”<sup>25</sup>

### 45 The development of domestic caselaw

#### *Cases pre-Corner House*

In *R v Lord Chancellor ex parte CPAG*<sup>26</sup> Dyson J considered applications for PCOs by the Child Poverty Action Group, Amnesty International and Redress. He held that the discretion to make pre-emptive orders, even in cases involving public interest challenges, should only be exercised in exceptional circumstances. He identified four factors relevant to the exercise of the court’s discretion:

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<sup>23</sup> Directive 2003/35/EC of the European Parliament and the Council of 26th May 2003 (‘the Public Participation Directive’)

<sup>24</sup> [2004] EWCA Civ 1342, [2005] C.P.Rep. 11 per Brooke LJ

<sup>25</sup> Para. 80

<sup>26</sup> [1999] 1 W.L.R. 347

- (i) the court must be satisfied that the issues raised were truly ones of general public importance;
- (ii) the court must be satisfied, following short argument, that it had a sufficient appreciation of the merits of the claim to conclude that it was in the public interest;
- (iii) the court must have regard to the financial resources of the applicant and respondent, including the likely amount of costs in issue;
- (iv) the court would be more likely to make an order where the respondent had superior capacity to bear the costs and it was satisfied that the applicant would discontinue the proceedings if the order was not made.

He declined to make PCOs.

46 Applying the principles identified by Dyson J in *CPAG*, Richards J refused to make a PCO in *R v Hammersmith and Fulham LBC ex parte CPRE*<sup>27</sup>.

47 In *R (Campaign for Nuclear Disarmament) v the Prime Minister*<sup>28</sup> Simon Brown LJ and Maurice Kay J made an order limiting CND's liability for the Government's costs to the sum of £25,000. CND, who wished to argue that that UN Security Council Resolution 1441 did not authorise the use of force against Iraq, argued that theirs was an exceptional case because:

- (i) they would be in financial difficulties and at risk of going into liquidation/having to curtail their activities in the event of a large adverse costs order. Without the cap they could not proceed, as they did not have time to raise the funds elsewhere;
- (ii) there was public importance in the issues being raised;
- (iii) if the Government was right that the claim was without merit and non-justiciable then the proceedings would end at an early stage and £25,000 would easily cover all the Government's costs;
- (iv) if their challenge ended a substitute applicant, perhaps legally-aided, would be found who would not be able to cover the Government's costs to the amount offered.

Simon Brown LJ found these arguments, particularly the first three, compelling.

48 In *R (Refugee Legal Centre) v Secretary of State for the Home Department*<sup>29</sup> Brooke LJ granted the Refugee Legal Centre a PCO to cover their application for a PCO for an appeal to the Court of Appeal. The Refugee Legal Centre had brought a challenge against the fast-track pilot scheme running at Harmondsworth Removal Centre. At first instance the Home Secretary had agreed not to seek costs against them. Their challenge was unsuccessful. The agreement as to costs did not extend to their appeal. Brooke LJ was clearly impressed by the fact that counsel for the Refugee Legal Centre were acting

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<sup>27</sup> [2000] Env.L.R. 544

<sup>28</sup> [2002] EWHC 2712 Admin, [2003] C.P.Rep. 28

<sup>29</sup> [2004] EWCA Civ 1239

*pro bono*. He was dismissive of the Home Secretary's argument that challenges to the operation of the pilot scheme should more appropriately be brought by individual asylum seekers, pointing out that this was only likely to increase the costs incurred by Government. He made an order that neither side would be liable for the other's costs. Subsequently, the parties agreed a PCO in similar terms in respect of the appeal itself.

### *Corner House*

- 49 In *R (Corner House Research) v the Secretary of State for Trade and Industry*<sup>30</sup> Corner House sought to challenge the Export Credits Guarantee Department's decision to change its anti-corruption procedures. They were represented by lawyers acting under a CFA. They sought a PCO protecting them from being ordered to pay any of the Secretary of State's costs. The application was refused at first instance but an appeal was rapidly listed before the Court of Appeal (Lord Phillips MR, Brooke and Tuckey LJ). The appeal was heard on 22nd December 2004. Members of the Group understand that none of the parties before the Court (which included the Public Law Project as intervener) addressed whether having a private interest should be fatal to a PCO application or whether the costs of a party who successfully applied for one should be capped.
- 50 At the conclusion of the hearing the Court made a PCO in Corner House's favour which provided that it would not be liable for the Secretary of State's costs if it lost. Corner House's costs would, however, be capped. The amount of the cap was referred to the Senior Costs Judge but was subsequently agreed. In its written judgment handed down on 1st March 2005 the Court made clear that, had it had more time, it would have explored with the parties the possibility of requiring Corner House to make a contribution towards the defendant's costs if they were unsuccessful on their substantive application<sup>31</sup>.
- 51 The Court of Appeal's written judgment reviewed the earlier caselaw then set out the following principles at paragraph 74:
- "1. A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
    - (i) the issues are of general public importance;
    - (ii) the public interest requires that those issues should be resolved;
    - (iii) the claimant has no private interest in the outcome of the case;
    - (iv) having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order;
    - (v) if the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

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<sup>30</sup> [2005] EWCA Civ 192, [2005] 1 W.L.R. 2600

<sup>31</sup> Para. 146

2. If those acting for the claimant are doing so *pro bono* this will be likely to enhance the merits of the PCO application.
3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of these considerations.”

- 52 The Court then noted a number of forms that an order, made or sought, had taken in the past:
- (i) a case where the claimant’s lawyers were acting *pro bono*, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (*Refugee Legal Centre*);
  - (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won but sought an order capping their maximum costs liability if they lost (*CND*)
  - (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*CPAG*);
  - (iv) a case where the claimants are bringing the proceedings with the benefit of a CFA but which is otherwise identical to (iii).

It accepted that there may be “considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise.”<sup>32</sup>

- 53 The Court also suggested that costs capping was likely to be required in all cases except for (i) (the *Refugee Legal Centre* type PCO). It gave the following guidance:
- (i) when making a PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive of any additional liability for an applicant represented under a CFA;
  - (ii) the purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant’s costs if the defendant loses will be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors’ fees and a fee for a single advocate of junior counsel status that are no more than modest;
  - (iii) the overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without exposing itself to the serious financial risks that would deter it from advancing a case of general public importance at all. The beneficiary of a PCO must not expect the capping order that accompanies it to permit more than modest representation.

- 54 The Court also addressed the costs of making an application for a PCO<sup>33</sup>. Where an applicant for a

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<sup>32</sup> Para. 76

<sup>33</sup> Paras. 78 to 81

PCO was unsuccessful on an application considered by a judge on the basis of written submissions alone, it should normally expect to be ordered to pay no more than £1,000 towards its opponent's costs of opposing the application. Where the application for a PCO was then renewed at a contested oral hearing and again refused, the Court would not expect the other side's proportionate costs to exceed £2,500. Where there was more than one defendant or there were one or more interested parties, one additional set of costs could be awarded.

- 55 This means that, where there is more than one defendant or where there is an interested party, an applicant for a PCO risks being ordered to pay up to £7,000 if he applies for a PCO and is refused both on the papers and at a subsequent oral hearing. This is in addition to the normal costs risk that he incurs in respect of his application for permission to proceed with his application<sup>34</sup>.

### *Cases since Corner House*

- 56 In *R (Ministry of Defence) v Wiltshire and Swindon Coroner (Craik and others, interested parties)*<sup>35</sup> a coroner who was a defendant in judicial review proceedings sought a PCO to protect him from having to pay the claimant's costs. Collins J could see no reason in principle why a defendant should not be able to seek a PCO, although he considered it unlikely that such an order would be in the interests of justice in a public law case where the defendant would inevitably be a public authority. Here the coroner was indemnified by the local authority provided he acted reasonably. His concerns over whether the local authority should have to pay were not material to the court's decision and accordingly it was not appropriate to grant a PCO.
- 57 In *Weir & Ors v Secretary of State for Transport & Anor (No.1)*<sup>36</sup> the claimants, shareholders in Railtrack bringing an action for damages against the Government in respect of the winding-up of the company, sought an order limiting their costs liability at £1.35 million if they lost the case. The Secretary of State was prepared to agree a cap of £2.25 million if such sum was paid into court or a solicitor's account. Lindsay J considered that if the *Corner House* principles were applied, the claimants' financial interest in the outcome of the case would be fatal. However, he concluded that the *Corner House* principles were only intended to apply to public law challenges. On the assumption that there was a jurisdiction to make a PCO in private law cases he considered what the factors to be taken into account might be. He considered whether the case was one where the defendant's costs had spiralled out of control, or were likely to, to the extent that the problem could not properly be remedied on detailed assessment. He considered that this was not the case. He also considered whether the effect of not making an order would stifle the claim but concluded that it would not. He declined to make an order.
- 58 In *R (Goodson) v Bedfordshire and Luton Coroner*<sup>37</sup> the claimant, whose father had died as a result of an injury

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<sup>34</sup> See *Mount Cook Land Ltd. v Westminster City Council* [2003] EWCA Civ 1346

<sup>35</sup> [2005] EWHC 889 Admin, [2006] 1 W.L.R. 134

<sup>36</sup> [2005] EWHC 812 Ch, [2005] All E.R. (D) 274 (Apr)

<sup>37</sup> [2005] EWCA Civ 1172, [2006] C.P.Rep. 6



sustained during surgery, sought a PCO for an appeal against Richards J's refusal to quash the coroner's verdict of death by misadventure. Recognising the general importance of at least one of the issues raised by the case, the Judge had given her permission to appeal. In the Administrative Court she had been represented under a CFA and had insurance against her liability to pay the defendant coroner's costs. However, she had been ordered to pay the costs of an interested party, the NHS trust that had treated her father. The coroner intended to take no active part in the appeal but the trust did. Ms Goodson's lawyers were prepared to act *pro bono*.

- 59 Moore-Bick LJ, giving a judgment with which Ward and Chadwick LJJ agreed, held that Ms Goodson had a private interest in the outcome of her claim in that she was motivated to obtain a further inquest into her father's death. He took the view that the requirement in *Corner House* that an applicant for a PCO have no private interest was expressed in unqualified terms and concluded that "a personal litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case..."<sup>38</sup> He also doubted whether it was in the public interest that the issue raised by Ms Goodson's case be resolved, given that an appeal raising similar issues was due to be heard by the Court of Appeal.
- 60 In *Campbell v Secretary of State for Work and Pensions*<sup>39</sup> the Court of Appeal, drawing on *Corner House* and *Goodson*, refused to make no order for costs following an unsuccessful appeal from the Social Security Commissioners on the grounds that the appellant, Mr Campbell, stood to gain financially from the outcome of the appeal and therefore had a private interest in it. According to Chadwick LJ "it would be a strange result if, in circumstances in which no protective costs order was or could have been made, nevertheless the Court of Appeal would on the same facts and arguments make no order as to costs following the hearing." Mr Campbell had sought a PCO on the papers before the hearing of his appeal and been refused.
- 61 In *R (British Union for the Abolition of Vivisection) v the Secretary of State for the Home Department*<sup>40</sup> Bean J made an order limiting to £40,000 BUAV's costs liability on a challenge to the grant of licences to experiment on animals. BUAV did not claim that an adverse costs order (predicted to be in the region of £100,000 to £120,000) would put it out of business and evidence was presented that the reserves of the BUAV stood at approximately £1,035,000. However, BUAV did contend that if it lost the case and was ordered to pay the Secretary of State's costs it could be considerably financially embarrassed, with redundancies possible, and that its future work would be significantly curtailed. BUAV said that, given its limited resources, the insecurity of its income base and all the other demands on its income, it could not responsibly run the risk of the envisaged costs. Bean J accepted this and was satisfied that this met the criteria laid out in *Corner House*, namely that if no PCO were made, the applicant would probably discontinue the proceedings and would be acting reasonably in so doing. However, he rejected the application for a PCO with a £20,000 cap (which would be no more than one fifth or one sixth of the likely maximum order for costs) and, balancing the factors referred to in *Corner House*, held that a cap of £40,000 would be fair.

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<sup>38</sup> Para. 38

<sup>39</sup> [2005] EWCA Civ 1400

<sup>40</sup> [2006] EWHC 250 (Admin)

- 62 In *Wilkinson v Kitzinger*<sup>41</sup> the petitioner, who was seeking a declaration that her marriage contracted in Canada to her same-sex partner should be recognised in English law as a marriage rather than as a civil partnership (or alternatively that section 11(c) Matrimonial Causes Act 1973 be declared incompatible with the European Convention on Human Rights), sought a PCO in respect of the costs of the Lord Chancellor, intervening on behalf of the Government. Although the proceedings were brought in the Family Division, the parties agreed that the proceedings were “quasi-public” and that the Court should apply the *Corner House* principles in deciding whether to grant a PCO. The lawyers for the petitioner were acting *pro bono*.
- 63 Sir Mark Potter P described the *Corner House* requirement that the applicant for a PCO have no private interest in the outcome of the case as “a somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest.”<sup>42</sup> He could not see why, if a PCO was otherwise appropriate, the applicant’s personal or private interest should disqualify her from getting an order. “I consider that, the nature and extent of the ‘private interest’ and its weight or importance in the overall context should be treated as a flexible element in the court’s consideration of the question whether it is fair and just to make the order.”<sup>43</sup> Although he doubted that the case raised issues of general public importance which the public interest required to be resolved (the first and second of the *Corner House* criteria) and held that the fourth and fifth criteria were not met, he nonetheless made an order capping the petitioner’s liability for the Lord Chancellor’s costs at £25,000 inclusive of v.a.t.

### *A Scottish case*

- 64 In *the Petitions of McArthur and others v the Lord Advocate and the Scottish Ministers*<sup>44</sup> the petitioners brought a case arguing that Article 2 of the European Convention on Human Rights required that there be a public enquiry into the deaths of their close relatives. The relatives had died of hepatitis C allegedly contracted from blood transfusions. None of the petitioners sought compensation. The Haemophilia Society had agreed to indemnify them against the respondents’ costs up to the sum of £53,000. It was accepted that the respondents’ costs might well exceed this amount. The petitioners sought a PCO under which they would not be liable for the respondents’ costs if they lost. Lord Glennie, accepting that the Scottish Courts have jurisdiction to make a PCO, looked to the Court of Appeal’s judgment in *Corner House* for guidance and applied the criteria set out in paragraph 74 of that judgment. He decided that criteria (i) and (ii) were met in the cases of two of the three petitioners and that none of the petitioners had a private interest in the outcome of the case, thus meeting the third criterion. However, they failed on criteria (iv) and (v). Given that Parliament had established a system of legal aid and set financial eligibility limits, it was not for the courts to step in and grant the costs protection that would follow from legal aid to those who were not defined by the scheme as being of limited means. The applicants had assets (equity in their homes, savings and pensions) such that criteria (iv) and (v) were not met.

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<sup>41</sup> [2006] EWHC 835 (Fam)

<sup>42</sup> Para. 54

<sup>43</sup> *Ibid.*

<sup>44</sup> [2005] CSOH 165, [2006] S.L.T. 170

## THE GROUP'S DELIBERATION AND CONCLUSION

65 Given that the expertise of most of its members lay in the public law field and that public interest issues are most likely to arise in that context, the Group decided to focus its discussion on judicial review cases. It accepted that public interest cases were heard outside the Administrative Court; cases concerning the treatment of terminally ill patients were mentioned as a possible example. It felt that the principles it identified could have equal applicability in a private law context.

66 The Group agreed, without any dissent, that PCOs have a role to play in facilitating public interest litigation and that the courts should be prepared to grant them in appropriate circumstances.

### *When is it appropriate to make a PCO?*

67 Some members of the Group took the view that the sole test for granting a PCO should be whether it is in the interests of justice to do so. Most of the Group felt that this test was both self-evident and too broad to provide those considering applying for a PCO and their advisers any degree of certainty. It was agreed that to be suitable for a PCO a case must be a *public interest* case.

### *What is a public interest case?*

68 For one member of the Group a public interest case is like an elephant: it is difficult to define but you know what it is when you see it.

69 Doubts were expressed as to whether it was appropriate to seek to define a *public interest* case in the context of an application for a PCO. To do so would be over-prescriptive. The circumstances in which a case might legitimately be considered to be in the public interest were too varied for helpful definition.

70 The Group nonetheless explored whether and how it might be possible to define a public interest case. Various tests were suggested: the case should raise a serious issue which affects or may affect the public or a section of it; the case should raise issues which transcend the interests of the person bringing the case; the case should raise issues which it is in the collective interest to resolve.

71 The Group agreed that it was not enough that the case should raise public law issues, even significant ones; this would bring most, if not all, judicial review cases within the definition.

72 For some members, public controversy or debate around the issues raised by a case were relevant to whether the case was a public interest one. However, this should not be a requirement.

73 It was suggested that cases aimed at clarifying the law, exploring a novel point of law or changing the way in

which existing law is interpreted were more likely to be considered public interest cases. Similarly, challenges to established legal doctrine and significant policy and procedures in other areas. There was discussion as to whether cases raising challenges under the Human Rights Act, or at least those with a significant human rights element, should be deemed public interest cases. The Group agreed that, as significant human rights cases will inevitably involve the type of challenge set out above, it is not necessary to give special precedence to challenges under the Act.

- 74 Consideration was given to the test applied by the Legal Services Commission in deciding whether a case has significant wider public interest. The Group agreed that the potential a case has to affect a wider number of people than the actual parties to it was very likely to be relevant to the issue of public interest. The Commission's approach therefore has much to recommend it. Moreover, many in the Group felt that the Commission made the right decision in most cases. Nonetheless, reservations were expressed about the way in which the Commission's staff applies the test in practice; it is not always possible for an applicant for legal aid to show with any degree of certainty how many people in addition to himself will benefit from a positive outcome of the case. Moreover, some felt that a head-counting approach to public interest had a tendency to downplay cases where there is a very significant impact on a relatively small number of people (the example given was the detention of 16 people under Part 4 Anti-Terrorism, Crime and Security Act 2001) and, more broadly, a collective interest in good governance.
- 75 After much discussion the Group came back to the first two criteria identified by the Court of Appeal in *Corner House* and agreed that these provided a definition that was both workable and sufficiently flexible. A public interest case is one where:
- (i) the issues raised are ones of general public importance, and
  - (ii) the public interest requires that those issues should be resolved.
- 76 The Group agreed that the definition should be given a broad, purposive interpretation. The definition should not be allowed to become unduly restrictive.

### *Private interest*

- 77 Remaining with the factors identified in *Corner House*, the Group considered whether it should be a requirement that an applicant for a PCO have no private interest in the outcome of the case.
- 78 Some in the Group expressed the view that the origins of this requirement lay in the identities and nature of the early applicants for PCOs. CPAG, Amnesty International, CPRE, CND, the Refugee Legal Centre and Corner House Research were all campaigning voluntary organisations which clearly did not stand to benefit directly themselves from the challenges which they wished to bring. They no doubt emphasised their altruistic intentions, as they believed these would sway the courts hearing their applications. Somehow the lack of a private interest had developed from a factor that might be relevant to a requirement.

- 79 The Group agreed that campaigning groups and NGOs have an important role to play in public interest litigation. They are often able to identify issues at an early stage. They are able to argue points of principle and are not dependant on the facts of an individual case. A case brought by an NGO can avoid court time and legal costs being wasted on a number of cases brought by individuals (as was noted by Brooke LJ in the *Refugee Legal Centre* case.) However, the Group did not see any justification for effectively limiting the availability of PCOs to NGOs and campaigning groups with no private interest in the outcome of the cases they brought.
- 80 An obvious problem with the “no private interest” requirement is that it would seem to exclude anyone with a claim under the Human Rights Act. Subsections 7(1) and (7) limit those who can bring challenges under the Act to those who would be considered victims for the purposes of Article 34 of the European Convention on Human Rights were the proceedings to be brought in Strasbourg. The European Court of Human Rights requires that applicants be personally or directly affected by an alleged violation of the Convention and will rule inadmissible applications where it is not satisfied of the applicant’s victim status.
- 81 Concern was expressed about the fact that the Court of Appeal which heard Ms Goodson’s application for a PCO considered her interest in the outcome of the appeal fatal to her application. The view of most of the Group was that her interest in the outcome of her appeal should not have prevented her from obtaining a PCO. She did not stand to gain financially from the appeal. The extent of her private interest was her concern that her father did not receive adequate treatment.
- 82 The Group discerned a lack of clarity as to what constitutes a private interest. A distinction can properly be drawn between cases such as *Goodson* where the potential benefit to the party seeking a PCO is moral or intangible and one where he stands to benefit financially. Even amongst the latter there is an enormous difference between a case where the potential financial benefit is substantial and a central reason for bringing the case and one where the potential financial benefit is modest and possibly incidental to the motivation for litigating.
- 83 The Group agreed unanimously that the lack of a private interest should not be a condition for obtaining a PCO.
- 84 Nonetheless, the Group thought that the extent and nature of an applicant’s private interest is relevant to the decision whether to grant a PCO. It should not be determinative. The weight to be attached to it should be a matter for the judge considering the application. The courts can legitimately weigh the private interest against the public interest in the case; there are doubtless cases where the public interest in the case is so strong that a relatively modest private interest in the outcome on the part of the person seeking a PCO (particularly where the nature of the case is such that there is unlikely to be anyone else who could bring the case who did not have such an interest) should not prevent one being granted. The Group’s conclusion appears consistent with the views expressed by Sir Mark Potter P in *Wilkinson*.

85 The courts should also have regard to the fact that in Human Rights Act cases a private interest is essential. The “no private interest” requirement should not prevent PCOs being granted in human rights cases which meet the public interest test.

### *Form of a PCO*

86 The Group identified three types of arrangement which might be available under a PCO:

- (i) an arrangement where the party benefiting from the PCO will not be liable for their opponent’s costs if they lose but will be entitled to recover their costs if successful (this type of arrangement is sometimes referred to as “one way fee shifting” but will be referred to in this report as a “Type 1 PCO”);
- (ii) an arrangement where neither side will be liable for the other’s costs (a “Type 2 PCO”);
- (iii) an arrangement where the benefiting party’s liability for their opponent’s costs if they lose is capped in advance (a “Type 3 PCO”).

87 These are broadly similar to the four types of order identified by the Court of Appeal in *Corner House*<sup>45</sup>. There are, however, a number of differences. Firstly, the Court of Appeal in *Corner House* limited a Type 2 PCO to an arrangement where the lawyers for the party seeking the PCO were acting *pro bono*. The Group saw no reason to limit the order in this way and could conceive of circumstances where such an order might be appropriate even though the party benefiting from the PCO was paying its lawyers. Secondly, the Court of Appeal in *Corner House* differentiated between a Type 1 PCO where the lawyers acting for the party benefiting from the PCO were acting under a CFA and a Type 1 PCO where they were not. The Group did not consider this a useful distinction. Indeed, some doubted whether the costs of the benefiting party would be recoverable if they won without a CFA.

88 Clearly, of the three types of order the Type 1 PCO is most attractive to a body or person seeking a PCO. Coupled with a CFA agreement, this would allow the party to litigate without any liability to pay either their own or their opponent’s legal costs. Despite the apparent one-sided nature of such an arrangement, the Group were not prepared to rule this type of order out as a possibility. Indeed, members of the Group who had acted for claimants against government departments had experience of government departments agreeing such arrangements, either with or without caps on the claimant’s legal costs. The Group could see why this type of order might be the only type of PCO which an individual public interest litigant of limited means could countenance. In effect, a consequence of not excluding people with a private interest from obtaining PCOs was that this type of order should not be ruled out.

89 The Group’s view was that all three types of order were orders which the circumstances of a particular case might justify; no type of order should be excluded and none should be preferred. What type of order is appropriate in any particular case would be dependant on the circumstances of the case, particularly, but not exclusively the relative means of the parties.

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<sup>45</sup> Para. 75

90 The point was made that none of the three types of order in themselves put the body facing a litigant with a PCO in a worse position than a body facing a legally-aided litigant, at least at first instance. Section 11(1) Access to Justice Act 1999 will in almost all cases prevent a body defending a claim brought by a legally-aided litigant from recovering costs from the claimant if the claim is unsuccessful. Types 1 and 2 PCOs expand this irrecoverability to what is assumed will be a fairly small number of public interest cases. The only circumstances where a body facing a litigant with a PCO will be in a worse position than when facing a legally-aided litigant are where the claimant's lawyers are acting under a CFA which provides for a success fee.

#### *Costs caps*

91 The Group discussed whether as a *quid pro quo* for being granted a PCO a cap should be placed on the costs that a party with a PCO can recover from their opponent if successful. Obviously, this issue only arises with Types 1 and 3 PCOs, although the argument for such a cap might be thought to be more persuasive in relation to a Type 1 order. The Court of Appeal in *Corner House* made clear that a capping order should be made and that an applicant for a PCO "should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest."<sup>46</sup>

92 This was not an issue on which the Group could reach agreement. The view was expressed that it would be reasonable for a court granting a PCO to limit the costs recoverable by the party to whom the PCO is granted and that the equality of arms principle did not require that the parties have legal representation of equal seniority or status.

93 Many in the Group were strongly of the contrary view. If a case is considered significant enough to meet the public interest test then it is important that the claimant's ability to present the case should not be restricted; if the courts are to decide an issue of public importance it is essential that the case be fully and competently argued on both sides. Limiting the claimant to the modest fees of junior counsel, as required by *Corner House*, means that in public interest cases brought with a PCO there is no role for leading counsel unless they act *pro bono*. This runs contrary to the notion that PCOs should only be available in cases of general public importance; representation by leading counsel is surely appropriate in such cases. Such a limitation will inevitably limit the number of cases where PCOs will significantly increase access to justice. Many in the Group took the view that it is in the general interest, not just the claimant's, that both parties have equal levels of representation.

94 The Group considered whether it might at least be appropriate for a court granting a PCO to restrict in advance the lawyers' right to claim a success fee. Some members of the Group took the view that this was not appropriate. They pointed out that the logic of allowing success fees in CFA cases is to compensate lawyers for those cases which they do under CFAs which are unsuccessful. Restricting or not allowing a success fee would limit the number of firms of solicitors or barristers who would undertake cases. Assessment of the costs recoverable by a successful party with a PCO is best left to the costs judge at the conclusion of the case.

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<sup>46</sup> Para. 76

- 95 Others took the view that not allowing the lawyers for a litigant with a PCO to claim a success fee was a reasonable *quid pro quo* and that this would not unduly restrict access to the best lawyers, particularly as the type of cases in which this issue will arise will almost inevitably be ones that lawyers are keen to take on for reasons of professional development. Allowing lawyers acting for litigants with a PCO to recover their costs at normal commercial rates but without a success fee left their opponents in no worse a position than if they faced a legally-aided litigant.

### *Pro bono representation*

- 96 A related issue considered by the Group was the suggestion made in *Corner House* that “if those acting for the applicant are acting *pro bono* this will be likely to enhance the merits of an application for a PCO.”<sup>47</sup> While not denying that acting *pro bono* was laudable and that the willingness of lawyers to act *pro bono* was a factor that a court could properly take into account when deciding whether to grant a PCO, the Group was concerned that there should not be too much emphasis laid on this. It was felt that this would unduly restrict that pool of lawyers who might be willing to act for someone wishing to bring a public interest case. The point was made that firms that do legal aid work largely or exclusively are very unlikely to be able to afford to do a significant amount, if any, of *pro bono* work (indeed, they often end up doing a lot of work without pay on legally-aided matters because of the tight control exercised by the Legal Services Commission over what is chargeable.) While there may be many large commercial firms willing to take on cases *pro bono* they are sometimes selective in the types of case they are willing to take on, are frequently conflicted and do not necessarily have the requisite expertise.

### *Inability to proceed without a PCO*

- 97 The remaining factor relevant to the decision whether to grant a PCO identified by the Court of Appeal in *Corner House* was that if the order was not made the applicant would probably discontinue the proceedings and would be acting reasonably if he did so. Again the Group did not rule out that whether a party seeking a PCO could or would continue with the action if they did not get one was a matter that the court considering the application could properly take into account. Indeed, the fact that someone would be prevented from bringing a meritorious public interest challenge if he could not get the protection of a PCO seemed to many to be a strong factor weighing in favour of granting one. It was hard to see why a factor suggesting that a PCO should be granted had become one whose absence excluded the possibility of a PCO. The Group could conceive of circumstances where granting a PCO might be appropriate even though the party seeking it might still be able to pursue the claim without one. The public interest in the case and the disparity of resources between the parties might nonetheless justify granting a PCO. The Group took the view that this was in effect the approach taken by Bean J in the *BUAV* case.

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<sup>47</sup> Para. 74



*PCOs on appeal*

- 98 The Group also considered whether PCOs should be available for appeals, whether one had been granted at first instance or where, as in *Goodson*, insurance or some other form of indemnity in respect of the applicant's liability for their opponent's costs was no longer available. The Group could see no reason in principle why PCOs should not be available on appeal. Clearly, where the party seeking the PCO was the appellant the merits of the appeal and of appealing would be relevant to the decision whether to grant the order. The suggestion was also made that there should be a strong presumption that a PCO should continue where the party benefiting from it was the respondent to an appeal.

*Costs of the application*

- 99 Almost all members of the Group took the view that the principles set out in *Corner House* regarding the costs of making an application for a PCO (under which an unsuccessful applicant could be exposed to a costs liability of up to £7,000) were unduly harsh and likely to result in meritorious applicants being deterred<sup>48</sup>. Their view was that the normal rule on a PCO application should be that there should be no order as to costs, this rule only to be departed from where a party acts unreasonably.

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<sup>48</sup> For a fuller discussion of the difficulties caused by *Corner House* in relation to the costs of an application for a PCO see Richard Stein and Jamie Beagent *Protective costs orders in public interest litigation – the Corner House principles* (Judicial Review, Volume 10, Issue 3 – September 2005).

## LEGAL AID

- 100 A number of concerns were raised about the legal aid system. No consensus was achieved within the Group about these. Nonetheless, it was agreed that these should be recorded in the report.
- 101 The view was expressed that the growth of interest in PCOs is in part a result of the reduction of the number of people financially eligible for legal aid.
- 102 Concern was expressed that the low rates of pay which legally-aided work attracts is making it more and more difficult for firms specialising in legal aid work to keep going and is leading to a reduction in the number of young lawyers prepared to go into legal aid work<sup>49</sup>.
- 103 The view was also expressed that many members of the judiciary are not sufficiently aware of the difference not ordering costs *inter partes* makes both to lawyers doing legal aid work and to the CLS. For lawyers the rates of pay that their work will attract are considerably higher where the work is paid by their client's opponent. Just as the success fee in CFA cases is used to subsidise those CFA cases that the lawyer does not win, so cases paid at *inter partes* rates effectively subsidise cases paid at legal aid rates. For the CLS an *inter partes* costs order made on a legally-aided matter means that they are likely to have to pay out little themselves on the case and therefore have more funds available for other cases. An order that the lawyers in a legally-aided matter be paid by the CLS is a straight drain on the Commission's funds. Making an *inter partes* costs order against a public authority on a legally-aided matter is not a simple matter of robbing Peter to pay Paul.
- 104 The issue has become more acute both with the increased practice of making split costs orders and with the Court of Appeal's confirmation in *Burkett* that where one party was in receipt of legal aid, an order for costs in favour of the other party could direct that those costs be set off against the costs to which the first party had become entitled. Where the lawyers are acting under a high cost case contract, the consequence of such a split costs order or set-off is that the lawyers may not be paid anything by the CLS in addition to the costs that are paid *inter partes*.
- 105 The suggestion was made that, while the rationale for making split costs orders or allowing set-off in ordinary litigation is self evident, the justification is less compelling in a successfully concluded public interest case where there is a substantial public benefit in the determination of the issue. It was proposed

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<sup>49</sup> In its report referred to above (see note 12) the Constitutional Affairs Committee expressed considerable concern about the difficulties legal aid firms experience recruiting and retaining young lawyers.

that consideration be given (i) to identifying a class of public interest cases and (ii) to awarding the totality of the claimant's costs where the claimant is in substance successful in the litigation irrespective of whether the claimant succeeded on every issue in the case. This is a particularly important issue in public interest group actions where the recovery of generic costs may be further prejudiced by the outcome of the individual claims.

106 Concern was also expressed about the courts' reluctance to order costs on the discontinuance of judicial review proceedings (see *R (Boxall) v Waltham Forest LBC*<sup>50</sup>). While it is obviously desirable to avoid unnecessary judicial time being given over to costs issues and to avoid satellite litigation, it should at the same time be recognised that public bodies are not minded to volunteer paying costs and have an incentive to argue that their change of position occurred because of other unrelated factors. Not only does the courts' reluctance to make costs orders in these circumstances have an adverse impact on the claimant's lawyers where the claimant is legally-aided, but also, and even more so, where the claimant is represented under a CFA.

107 It was suggested, therefore, that in public interest cases there may be merit in the court formulating and implementing a rigorous approach towards awarding costs to claimants. If public bodies were on notice from the outset that resisting public interest claims carried a cost penalty, this might:

- (i) spur defendants into making earlier concessions;
- (ii) reduce public expenditure by discouraging numerous claimants from taking proceedings where there is a common public interest issue;
- (iii) discourage defendants from cherry picking the best cases from their standpoint to contest the public interest issue; and
- (iv) ensure that the CLS recovers its costs in public interest cases.

108 Finally, concern was expressed lest the greater availability of PCOs, if that is indeed the effect of the *Corner House* judgment or of the Group's deliberations, should lead to legal aid being refused on the basis that the case could be conducted under a conditional fee agreement with a PCO. The Group accepted that under the present rules this could not be considered a source of alternative funding, at least where the lawyers are acting under a CFA. However, the fear was expressed that, given the pressure on the legal aid budget, the rules could at some stage in the future be changed, and it would be disappointing if the increased use of a measure which could provide a means of enabling those outside the scope of legal aid to bring public interest challenges should have the effect of depriving those who are financially eligible for legal aid of the possibility of bringing a case with public funding.

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<sup>50</sup> (2001) 4 C.C.L. Rep. 258, Scott Baker J



## APPENDIX 1 Schedule of meetings and members of the Group

### Meetings:

Monday 4th July 2005 - 1

Thursday 15th September 2005 - 2

Wednesday 30th November 2005 - 3

Wednesday 8th March 2006 - 4

<b>Member Name</b>	<b>Organisation</b>	<b>Meetings</b>
Diana Babar*	Treasury Solicitor's Department	2, 3, 4
David Ball	Liberty (minutes)	3, 4
Kim Brudenell*	Treasury Solicitor's Department	1
Louise Christian	Christian Khan	1, 2, 4
Richard Clayton QC	Constitutional and Administrative Law Bar Association (ALBA)	1, 2, 3, 4
Stephen Durno	The Law Society	1, 2, 4
Neera Gajjar*	Department for Environment Food and Rural Affairs	2
Caoilfhionn Gallagher	Liberty	1
Conrad Haley	Public Law Project	1, 2, 3, 4
Geaneen Hayes	Legal Services Commission	3, 4
Janet Howe	Department for Constitutional Affairs	1
Tony Jeeves	Department for Constitutional Affairs	3, 4
Lord Justice Maurice Kay		1, 2, 3, 4
Aimee Jane Lee	Liberty (minutes)	4
Greg Lewis	The Law Society	1, 2, 3, 4
Phil Michaels	Friends of the Earth	1, 2, 3, 4
Jenny Nutt	Liberty (minutes)	2
Jasveer Randhawa	Liberty (minutes)	1
Mahesh Rao	Department for Constitutional Affairs	3, 4
Paul Stookes	The Law Society	4
Colin Stutt	Legal Services Commission	1, 2, 3, 4
James Welch	Liberty	1, 2, 3, 4

\* Attended in a personal capacity

## APPENDIX 2 – “Whose Cost the Public Interest?”

Chakrabarti S, Stephens J and Gallagher C, “Whose Cost the Public Interest?”

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