ALBA SUMMER CONFERENCE

PROCEDURAL UPDATE

Paul Brown[1]

INTRODUCTION

1. The content of any talk described as an "update" is, in large measure, dictated by what has happened rather than what is necessarily of interest. However, in preparing this session, I have taken advantage of the fact that there was no procedural update at last year's ALBA conference, and used this as a pretext for going back beyond the past 12 months to talk about at least one topic in a little more detail.

2. Consequently, the "route map" for this talk is to spend:

   (1) a little time talking about costs and ***Mt Cook***:

   (2) a little more time on the time-limits for seeking judicial review;

   (3) the remainder of the session looking at Protective Costs Orders

A. *MT COOK* COSTS

3. Following the guidance in ***Mt Cook***[2] it has become standard practice for defendants in judicial review proceedings to include in their summary grounds of resistance a claim, if permission is refused, for the costs of preparing the

[1] Barrister, 4-5 Gray's Inn Square
[2] **[2004] 2 P&CR 405**

summary. However, in their desire to impress upon the judge just how unarguable the claimant's case is, it is clear that many defendants have lost sight of the important distinction which is drawn in the CPR between the *summary* grounds of resistance which are required under CPR 54.8 and the more *detailed* grounds of resistance which CPR54.14 requires if and when permission is granted.

4. The relevance of this distinction has been highlighted in the recent Court of Appeal in ***R (Ewing) v. Deputy Prime Minister***[3] where the "summary" grounds of the two defendants and three interested parties spanned some 50 pages, and in two cases attracted applications for costs for £6,400 and £10,700 respectively.

5. Responding to this, Carnwath LJ observed that the ***Mt Cook*** principles "must not be applied in a way which seriously impedes the right of citizens to access justice". Both he and Brooke LJ suggested that in cases where a Pre-Action Protocol letter had been sent, the summary grounds may not need to do more than refer to the letter in reply (note the incentive here to claimants to comply with the Pre-Action Protocol).

6. Brooke LJ indicated that a claimant who skips the pre-action protocol stage must expect to put his opponents to greater expense in preparing the summary of their grounds for contesting the claim). Otherwise, parties who wished to incur greater expense in preparing a document which was more elaborate should not expect to recover the extra expense from a claimant whose application was dismissed.

7. There is obviously a dilemma here for defendants who wish to ensure that the court has enough information to decide that there is a knock-out blow, and thus save the costs of filing more detailed grounds and a substantive hearing. It may not always be easy to judge where to draw the line. However, it suggests that, at the summary grounds stage, defendants should concentrate on

[3] **[2006] 1 WLR 1271**

what are truly "knock-out" blows, and worry less about those matters where there is an arguable point.

B. TIME LIMITS

8. CPR 54.5, like its predecessor in RSC Order 53, requires applications for judicial review to be brought "promptly and in any event within three months". While in many cases, judges start from the principle that an application which is made within three months is "prompt" unless the contrary is proven, most public lawyers are very aware of the fact that "promptness" and 3 months are distinct requirements, and that it is possible for an application which is made within the 3 months to be refused permission on the basis that it is still not "prompt".

9. But if this is so, how can a claimant ever know what "prompt" means? For some time now, the potential uncertainty which this creates for applicants has given rise to suggestions that the CPR was contrary to Article 6 ECHR. Those suggestions were fuelled by the *obiter* observations of Lord Steyn in ***Burkett***[4] that:

> "there is at the very least doubt whether the obligation to apply 'promptly' is sufficiently certain to comply with European Community Law and the Convention for the Protection of Human Rights and Fundamental freedoms"

10. Even at the time, there were those who said Lord Steyn was wrong, and who pointed to the decision in ***Lam v. United Kingdom***[5] where the European Court of Human Rights had concluded that the argument was manifestly ill-founded. The Court had said that:

> "In so far as the applicants impugn the strict application of the promptness requirement in that it restricted their right of access to a court, the Court observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim.

---

[4] **[2002] 1 WLR 1593**
[5] **Application 41671/98**

> The applicants were not denied access to a court *ab initio*. They failed to satisfy a procedural requirement which served a public interest purpose, namely the need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions"

11. ***Lam*** did not appear to have been cited in ***Burkett***. However, Lord Steyn's comments have continue to inspire hope in the hearts of many claimants, and until recently there has been a lack of any authoritative guidance on the matter from the appellate courts.

12. The issue has now been addressed by the Court of Appeal in ***Hardy v. Pembrokeshire County Council***[6]. The case involved challenges to a number of decisions granting planning permission and hazardous substances consent for the construction of Liquefied Natural Gas terminals at Milford Haven. The oldest of these consents had been issued nearly two years before judicial review was sought, the most recent of them (and the only one which was within the normal three month time limit) was made on the last working day before that time expired.

13. At first instance, Sullivan J. had refused permission on the grounds that the application had not been made promptly and that there had been undue delay, and the Court of Appeal refused permission to appeal.

14. Dealing specifically with the Article 6 issue, Keene L.J. observed:

    (1) that ***Lam*** had not been cited in ***Burkett***.

    (2) that the ECtHR in ***Sunday Times v. United Kingdom***[7] had held that, while a citizen should be able to foresee to a reasonable degree the consequences which an action may entail,

    > "those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable."

---

[6] **[2006] EWCA Civ 240**
[7] **[1979-80] 2 EHRR 245**,

(3) that the notion of "promptness" was no more uncertain than "undue delay" , which Lord Steyn had specifically endorsed as a "useful reserve power";

(4) finally, that the European Convention on Human Rights itself employs the concept of "promptness" in its Articles (e.g. Art 5(3)).

15. Accordingly, he rejected the notion that there was any conflict between the requirement of "promptness" and Article 6.

16. Significantly, although this was only a permission hearing, the Court specifically certified that part of its judgment which dealt with delay as suitable for citation.

17. The judgment also deals with an alternative argument that was advanced that permission should not be refused on the grounds of delay, because the Claimant's were alleging that their Article 2 rights had been infringed.

18. In this respect, it is well established that the public importance of the issues raised may be a good reason for extending time. However, the Court in ***Hardy*** was keen to stress that this will be the exception rather than the rule. While recognising that Article 2 was one of the unqualified rights in the ECHR, Keene L.J. observed that there was nothing in the Strasbourg jurisprudence to indicate that limitation periods could not apply where complaints were brought under Article 2.[8] In this case, Sullivan J. had considered whether the Article 2 and public-safety issues justified extending time, and concluded that they did not. That was a conclusion which he had been entitled to reach.

19. Given that the decision in ***Lam, Hardy*** is not surprising, and the decision signals no major change in the approach to j.r.. However, it resolves and argument that has been in circulation for some time.

[8] see e.g ***Vo v. France*** **[2004] FCR 577**.

PROTECTIVE COSTS ORDERS

20. An article by Richard Clayton in the latest edition of Public Law beings with the observation that:

> "The chilling effect of the costs orders made in public interest litigation is well recognised"

21. That "chilling effect" is something which is felt in all areas of litigation, but it has a particular resonance public law, where the claimant may not have any personal interest in the subject matter, but may be a public interest group or one of Lord Diplock's "public spirited taxpayers"[9]. As the rules of standing have widened to embrace claimants in this category, there has been a concern that those who act *in the public interest* should not have to pay for their intervention out of their own pocket. In an often-cited Australian case, Toohey J. observed that there was:

> "little point in opening the doors to the courts if the litigants cannot afford to come in. The fear, if unsuccessful, of having to pay the costs of the other side – with devastating consequences to the individual or environmental group bringing the action – must inhibit the taking of the case to court"

22. There are various solutions to the problem but many of them (more readily available legal aid, the creation of an environmental court) require legislative rather than judicial creativity. The one area where the Courts obviously have the power to assist is in the discretion they have in relation to the award of costs against an unsuccessful party. While this may not fund litigation, it can at least alleviate the fear of the crippling consequences of losing.

23. That the Courts have the power to do this has been recognised for some time. Most will be familiar with the decision in ***R. v. Lord Chancellor ex p CPAG*** **[1999] 1 WLR 347**, where Dyson J. accepted that he had the power to make what is now generally known as a Protective Costs Order ("PCO"). However,

---

[9] ***IRC v. NFSSB*** **[1982] AC 617**

while accepting that such a power existed, Dyson J. indicated that it would be in only in the most exceptional circumstances that the discretion to make a PCO would be exercised in a case involving a pubic-law challenge. The criteria which he set out were that:

(1) the court must be satisfied that the issues raised are truly ones of general public importance;

(2) the court must be satisfied (following short argument) that it has a sufficient appreciation of the merits of the claim to conclude that it is in the public interest to make the order;

(3) the court must have regard to the financial resources of the applicant and the respondent and the amount of costs likely to be in issue;

(4) the court will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings, and where it is satisfied that, if the order is not made, the applicant will probably discontinue the proceedings (and will e acting reasonably in so doing).

24. Some indication of how rigorous that test was may be gleaned from its application to the cases before him. These concerned, on the one hand, a challenge by CPAG to the exercise of the power under s. 14(2) Legal Aid Act 1985 with respect to social security tribunals and commissioners; and on the other a challenge by Amnesty International to the decision of the DPP not to prosecute two individuals for possession of an electric-shock baton. The CPAG application failed two of the tests, the Amnesty case failed all four.

25. There were numerous applications for PCO's in the wake of ***CPAG***, some successful, others not.[10] However, in addition to concerns among many public

[10] eg. ***R. v. Hammersmith & Fulham LBC ex p. CPRE , R (Refugee Legal centre) v. Home Secretary [2004] EWCA Civ 1296; R (Refugee Legal centre) v. Home Secretary*** **[2004] EWCA Civ 1296.** Perhaps the most celebrated was ***R v. The Prime Minister ex p. CND*** **[2002] EWHC 2712b,**

lawyers that the threshold was too high, there were other difficulties. In particular, the procedures which were in place for seeking a PCO were proving cumbersome, time consuming and expensive. In one case, the combined costs of arguing about the PCO alone were estimated at £60,000.[11] This sort of problem led to the absurd situation in the ***Refugee Legal Centre*** case where Brooke LJ held a 2-hour hearing to determine whether he should grant a PCO to protect the RLC from an award of costs incurred in the course of the 1-day hearing into the application for a full PCO to cover the substantive hearing.

26. All these issues led the Court of Appeal to review the jurisdiction and procedure in relation to PCOs in ***R. (o.a.o. Corner House Research) v. Secretary of State for Trade and Industry*** **[2005] 1 WLR 2600,** which concerned an application for judicial review of procedures adopted by the Export Credit Guarantee Department of the DTI. Corner House was a non-profit making company with a particular interest and expertise in examining bribery and corruption in international trade.

27. As is well-known, the Court of Appeal reformulated the ***CPAG*** guideleines. In particular, it was concerned that if the threshold was placed higher than requiring an applicant to show a "properly arguable" case (i.e. one which had a real, as opposed to a fanciful prospect of success) would be to invite "heavy and time consuming litigation". The Court of Appeal therefore indicated that a PCO should not be made unless the judge considered that the application for judicial review had a "real prospect of success" and that it was in the public interest to make the order.

28. The ***CPAG*** <u>principles</u> were therefore recast as follows:

---

where the CND applied for a PCO in proceedings in which they sought an advisory declaration that UN Security Resolutiuon 1441 did not authorise the use of force against Iraq in the event of a breach of that resolution. The Divisional Court concluded that the CPAG tests were met and made an order in favour of the claimants capping any award of costs against them at £25,000.

[11] ***Smart v. East Cheshire NHS Trust*** **[2003] EWHC 2806**

(1) A PCO may be made at any stage, provided the court is satisfied that:

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

(2) If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of these considerations."

29. The importance of point (2) was reflected in the guidance the Court gave about cost-capping. In essence, the Court of Appeal indicated that a PCO which prescribed that there should be no order as to costs would generally only be granted where the claimant's lawyers were acting *pro bono* and where the effect of the PCO was that there should be no order as to costs *whatever* the outcome. In circumstances where the applicant is expecting to have its reasonable costs reimbursed if it succeeds, the Court of Appeal indicated that a cost – *capping* order was more likely to be required.

30. The Court gave guidance on the way in which the amount of any cap should be determined:

(1) the court should prescribed the total amount recoverable, inclusive, so far as any CFA funded party is concerned, of any additional liability;

(2) 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".

(3) the purpose was to enable the applicant to present its case to the court with a "reasonably competent advocate" without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all. The beneficiary of the PCO should not expect more than "modest representation"

31. In terms of procedure, the Court stated that a PCO should be sought on the face of the initiating claim form, supported by the requisite evidence, which should include a schedule of the claimant's future costs of and incidental to the full judicial review application. If the defendant wishes to resist the PCO, it should set out its reasons in the acknowledgement of service. The application will then be considered by the judge on the papers. If he refuses to grant a PCO and the claimant requests that his decision is reconsidered at a hearing, the hearing should be limited to one hour.

32. Significantly, the Court stated that a claimant will be liable for the defendant's costs incurred in a successful resistance to an application for a PCO, on ***Mount Cook*** principles, but these costs should have regard to the overriding objective and recoverability would depend on the normal tests of proportionality. The Court indicated that it did not expect that the costs of a written objection to a PCO would exceed £1000, or that the costs of resisting at an oral hearing would exceed £2,500.

33. In circumstances where a defendant has had the opportunity to provide a reasoned written argument before the order is made, the court should not set aside a PCO unless there was a "compelling reason" for doing so. An unmeritorious application to set aside should be met with an order for indemnity costs, to which ay cap imposed by the PCO should not apply.

34. Interestingly, the Court indicated that similar principles would apply to any party other than the defendant, and gave as an example "an interested party such as a developer in a planning dispute". Such a party who successfully resisted the making of a PCO would also be entitled to its costs, subject to the same considerations.

35. This is a slightly curious aspect of the decision, since the general rule – at least in planning disputes – is that there will only be one set of costs. Consequently, unless a developer is able to demonstrate that it has added something to the proceedings, it will be unusual for the claimant to be liable for the developers costs in any event.

36. Applying these principles to the facts, the Court of Appeal:

(1) "had no hesitation" in concluding that the case raised issues of general importance. Obtaining contracts by bribery was an "evil which offends against the public policy of this country", and the interests of the taxpayer were involved. Further, it was a matter of "general public importance if a division of a department of state publishes and adopts an open consultation policy of general application and then reverts to a timeworn practice of privileged access".

(2) found that the fact that Corner House's Lawyers might be willing to act *pro bono* did not eliminate the risk that Corner House would have to pay the Secretary of State's costs if unsuccessful The director of Corner House had given unequivocal evidence that, without the PCO, the company would have no option but to withdraw the claim;

(3) considered there was a real (i.e. not fanciful) prospect of success;

(4) was satisfied that Corner House had no private interest in the outcome, and the public interest required the issues to be litigated.

37. As Richard Clayton has recently observed,[12] it is difficult to establish the precise impact of ***Corner House***. Certainly, it has led to a number of PCOs being made on the papers or by consent.[13] However, there are also a number of judgments (reported and unreported) which illustrate or elucidate the application of the ***Corner House Principles***. The summary which follows is arranged on a topic-by-topic basis.

At What Stage Should an Application be Made?

38. ***Corner House*** gives slightly mixed messages on this issue. On the one hand the judgment indicates that the application for a PCO can be made at any stage in the proceedings, while on the other the procedure identified by the Court indicates that the applications hold normally be "on the face of the initiating claim form".

39. It may be that there is no golden rule here, and it is certainly the case that cost-capping orders have been made in circumstances where they have had retrospective as well as prospective effect.[14] However, in both cases the element of retrospectivity was limited[15] and in one of the two the principle was conceded. In practice it will be sensible to make the application as early in the day as possible. Certainly, applications which are made when significant costs have already been incurred may face an uphill struggle, particularly if they seek to have retrospective effect. Two cases (both of which predate ***Corner House***) illustrate this:

(1) ***Henry v. BBC*** **[2005] EWHC 2503**.

The BBC applied for a costs-capping order in libel proceedings brought against it when it discovered – a matter of days before the

[12] "Public interest litiigation, costs and the role of legal aid" [2006] PL 429
[13] See the cases cited in Clayton, p. 431.
[14] See ***Smart v. East Cheshire NHS Trust*** **[2003] EWHC 2806**; ***Ledward Claimants v. Kent & Medway Health Authority*** **[2003] EWHC 2551.**
[15] In one it covered only the period between the date of application for the cost-capping order, and the date of the order itself.

substantive trial – that the claimant was operating under a CFA with a 100% success fee. Gray J. rejected the application. EWhile n the one hand, the facts of the case indicated that a cost-capping order was required, it was for the parties to keep themselves informed of the other side's costs and, if necessary make an application to the court. A costs capping order should operate prospectively not be retrospectively. The imposition of a cap so close to trial would penalise the claimant's solicitors, which was not its purpose.

(2) ***Petursson v. Hutchison 3G UK Limited*** **4BM 50028**. This case arose out of a challenge under the Telecommunications Act 1984 to the location of a mobile phone mast next door to the claimant's property. The Electronic Communications Code contains a procedure by which affected parties can give notice of objection and refer the matter to the County Court. In the present case Hutchison, which clearly regarded Mr Petursson's objection a something of a test case, had had the matter transferred to the Technology and Construction Court. Its Allocation Questionnaire, which was served in February 2004, put its estimated costs at £233,000. The parties proceeded with the preparation of witness statements and expert reports, and in October 2004 the claimants applied for an order capping the defendants recoverable costs at £20,000. By this stage, however, the Defendants had already spent an estimated £194,000 on the case.

40. The application was roundly rejected by HHJ Kirkham, who indicated that a retrospective limit on costs would amount to a breach of the defendant's right to a fair hearing. Accordingly, it would be a "wholly exceptional case" where it was appropriate to order a cap retrospectively

What Does it Mean Not to have a Private Interest in the Outcome?

41. This is a question on which Scottish and English authorities have reached different conclusions, in two cases involving the failure to hold an inquiry into

the death of a family member. ***McArthur v. Lord Advocate*** involved challenges to the failure of the Scottish Ministers to hold an Inquiry into the deaths of 3 people who had been infected with Hepatitis C in the course of receiving blood transfusions. The Claimants were all close relatives of the deceased. ***Goodson v. HM Coroner for Bedfordshire,***[16] concerned a Claimant who was seeking to challenge the failure to hold an inquiry into her husband's death during surgery**.**

42. In both cases, one might have thought that the applicants, as relatives of the deceased, would fail the ***Corner House*** test because they had a direct and personal interest in the litigation. However, the Court in ***McArthur*** disagreed, commenting that:

> "although the petitioners are relatives of the deceased, they have no financial interest in pursuing the actions."

They, rather than any pressure group, had been put forward as petitioners because it was they who had standing for the purposes of judicial review in Scotland. In the circumstances, the "no private interest" test was met.

43. In ***Goodson***, the English Court of Appeal reached the opposite conclusion, observing that:

> "the requirement [in ***Corner House***] that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have formulated this part of the guidelines in more qualified terms … if it had thought appropriate to do so"

44. In the Court's view:

> "A personal litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case, although in rare cases a public-spirited individual may be permitted to make such an application in relation to

[16] **[2005] EWCA Civ 1172**

a matter in which he has no direct personal interest separate from the population as a whole".

45. However unsympathetic they may seem to grieving relatives, the observations in ***Goodson*** are almost certainly right. If the ***McArthur*** analysis (lack of any financial interest) was allowed to run, then there are many judicial review cases which would satisfy the ***Corner House*** test.[17] While some may think this is a good thing, it is unlikely that it is what the Court of Appeal intended.

Multi-Claimant Proceedings

46. It is not unusual, in judicial review proceedings brought by local residents pressure groups or unincorporated associations, for there to be several claimants. Aside from the belief which is sometimes expressed that this gives the claim more credence, it provides some comfort to the person who is putting their head over the parapet that they will not be alone if it all goes horribly wrong. But a tactic of this sort may ave implications for a PCO.

47. In ***McArthur***, the Court observed that if each of the 3 petitioners was ordered (at the PCO stage) to pay only her proportion of the respondent's expenses, the maximum exposure of each would be reduced to under £10,000. Having regard to the evidence of means, it was not satisfied that this was unreasonable.

48. That raises an interesting point for claimants. On the one hand, adding more claimants may reduce the prospects of obtaining a PCO. On the other, the Court in ***McArthur*** appears to have been contemplating a different form of

[17] Although curiously, the ***McArthur*** petitioners' status as private individuals ultimately caused them to fail in that case on the basis of ***Corner House*** criteria (iv) and (v). In particular, the Court drew a distinction between pressure groups and private individuals. In the case of the latter, there was a system of legal aid. The Court observed that it a snot easy to see why individuals who were above the limit for legal aid should be regarded as being of "limited means".

PCO in which the Court would decide, in advance, to make an exception to the general rule of joint and several liability for costs, and make it clear that each claimant would only be liable for his or her share.

Evidence of Means: Can't Pay or Won't Pay?

49. The Court in ***McArthur*** was also not satisfied with the evidence of means. The indications were that one of the petitioners had a house worth a "significant amount of money". The fact that she did not want to sell it did not mean that she would not be able to raise money on the security of it. Accordingly, while the Court was satisfied that the petitioners would discontinue with the proceedings if there were no PCO, it was not satisfied that they would be acting reasonably in so doing. In essence, the Court was saying that "can't pay" is not necessarily the same as "won't pay".

PCOs for Appeals?

50. One of the curious features of Goodson was that the application for a PCO was only made at the appeal stage. The claimant had lost at first instance, but been granted permission to appeal by the trial judge (Richards J.) who indicated that one of the issues raised as a matter of general importance. Mrs Goodson then sought a PCO to cover the costs of her *appeal*.

51. The application was rejected by the Court of Appeal. On the question whether a PCO was appropriate at the appellate stage, the Court of Appeal observed that nothing had been said in ***Corner House*** to restrict the application of the principles, and that there was no reason why they should not apply to appeals. However, the Court went on to observe that the fact that this was an appeal did have a bearing on the question whether it was in the public interest for the point to be resolved. The question which Mrs Goodson wished to raise had been considered by the court and dealt with in a long and carefully reasoned judgment which would continue to be available to provide guidance for

coroners. The question for the Court, therefore, was whether it was in the public interest for the matter to be decided *at the appellate level*.

51. The Court also indicated that the mere fact that a case raised a matter of general importance did not necessarily mean that the public interest required it to be resolved.[18]

PCOs for Defendants?

52. All the cases we have touched on so far have concerned applications by a Claimant for a PCO. But is there any reason why they should not be available to a defendant?

53. This question arose in the case of ***R (o.a.o. MoD) v. Wiltshire & Swindon Coroner***[19], which involved an application by the MoD for judicial review of a coroner's investigation into the death of a man in 1953 of sarin nerve gas poisoning following a non-theapeutic experiment at a defence establishment. The inquest had resulted in a verdict of unlawful killing. The coroner, who had already spent considerable sums on the 54-day inquest, applied for a protective costs order.

54. The application may have been thought unusual, not merely because it was an application by a defendant, but because coroners already enjoy a degree of protection from bearing the cost of successful challenges to their decisions. As had recently been confirmed in ***R (Davies) v. Birmingham Deputy Coroner*** **[2004] 1 WLR 2739,** an inferior court or tribunal which does not involve itself in any adversarial argument, but merely appears to assist the

[18] The final point of note is in the Court's assessment of the financial resources available to the parties. While at first sight the Hospital had substantial funds available, the Court of Appeal observed that "money spent on litigation is money that would otherwise be available for its ordinary operations". It was therefore appropriate to exercise a degree of caution before concluding that it was in the public interest for funds to be devoted to resolving the problem.

[19] **[2006] 1 WLR 134**

court, for example by directing its attention to the relevant parts of the evidence, will not normally have costs awarded against it.

55. Approaching the question whether it was right *in principle* to make a PCO in favour of a defendant, Collins J. said that:

> "the principle must be that in the court's general discretion in relation to costs and, more importantly, in ensuring that there is proper access to justice and if the needs of justice require, appropriate orders can be made. I see no reason in principle why a protective costs order should not in an appropriate case extend to protect the position of a defendant."

56. However, he went on to say that:

> "It is unlikely in public law cases that a defendant, being a public body, will be in a position where a protective costs order is necessary in the interests of justice. But I do not rule out the possibility that that could arise in a given set of circumstances; particularly, perhaps, where an individual has a public law role and has to make a decision in that role and there is, for whatever reason, no protection given to him in relation to costs by any other body or person. I accept that the circumstances where that could arise would be unusual and no doubt exceedingly rare, but the possibility is there."

57. On the particular facts, Collins J. did not consider it appropriate to make an order. The coroner had the backing of the county council, and provided he acted reasonably he would be indemnified. In view of the fact that the family of the deceased may well not take a part in the proceedings, it would not be unreasonable for him to take a more active role. The concerns about whether the county council should have to pay were not material to that decision.

58. The judgment is also interesting because it deals with an application by the MoD for disclosure of the tapes of the coroner's summing up. The MoD's case was that the coroner's summing up failed to summarise the evidence fairly. It also wished counsel to be able to hear the tapes in order to decide whether the ministry should plead that the coroner by his tone of voice had

been dismissive of the MoD's case. The coroner resisted this on the basis that it was a fishing expedition.

59. Collins J. granted the application. He had regard to the fact that, although the argument had not been pleaded, this merely because counsel for the MoD wished to hear the tapes before deciding whether to pursue the point. He considered that his was a responsible view. Had the point been pleaded, the material would plainly be relevant to the allegations. Accordingly, the tapes should be disclosed.

Comparison with Capping Orders in Private Litigation

60. As we have seen, one of the key requirements for a PCO in judicial review is that the claimant must have no direct or personal interest in the outcome of the litigation. Of itself, this operates as a significant limitation on the extent to which PCOs will be made, and one might imagine that it meant that there was no scope for a PCO or a capping order in private civil proceedings.

61. In fact, that is not the case, and there are now numerous cases in which the power of the Court to make a cost-capping order has been either recognised or exercised in favour of private individuals who have a very clear interest in the litigation. Some examples are:

(1) ***AB v. Leeds Teaching Hospitals NHS Trust***[20] (group litigation arising out of organ retention). Gage J. – group litigation cases were a "prim example" of a case where it would be appropriate for a costs cap order, and in such cases there was no requirement for there to be exceptional circumstances.

(2) ***Smart v. East Cheshire NHS Trust*** (clinical negligence claim). Gage J. specifically addressed the argument, based on the public-law

[20] **[2003] EWHC 1034; f**ollowed in ***Ledward v. Kent & Medway Health Authority*** **[2003] EWHC 2551**.

authorities, that a costs cap should only be imposed in exceptional circumstances. On that issue, he said this:

> "In my judgment, the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred, and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial; and it is just to make such an order. It seems to me that it is unnecessary to ascribe to such a test the general heading of exceptional circumstances. I would expect that in the run of ordinary cases it will be rare for this test to be satisfied but it is impossible to predict all the circumstances in which it may be said to arise"

(3) ***King v. Telegraph Group Limited***[21] (defamation case), in which the Court of Appeal approved the conclusions in ***AB*** and ***Ledward*** that the court possessed the power to make a costs-capping order in an appropriate case. Brooke LJ said that:

> "I have .. no doubt … that it would be very much better for the court to exercise control over costs in advance, rather than to wait reactively until after the case is over and the costs are being assessed."

> "There are three main weapons available to a party who is concerned about extravagant conduct by the other side, or the risk of such extravagance. The first is a prospective costs capping order … The second is a retrospective assessment of costs conducted toughly in accordance with CPR principles. The third is a wasted costs order against the other party's lawyers …
> In my judgment recourse to the first of these weapons should be the court's first response when a concern is raised by defendants of the type to which this part of this judgment is addressed …"

62. ***King*** was specifically discussed considered in ***Corner House***. Notwithstanding the rather different direction in which ***Corner House*** has taken the principles governing PCO's in public law, that decision does not call into question the clear statement in ***King*** that cost capping has a role in private

[21] **[2004] EWCA Civ 613**

law cases. Distinguishing private law civil and family litigation, the Cpourt of Appeal in ***Corner House*** merely observed that one should not therefore expect identical principles to apply. Accordingly, in the private law sphere, ***King*** is still good law.

63. It will be noted that there are significant differences between principles which are applied to PCOs in private cases, and those which apply in public law. In particular:

(1) the private law cases almost always involve a costs *cap*, rather than complete exemption from costs;

(2) although in both cases it is expected that orders will be the exception rather than the rule, in private law claims the "gateway" is controlled by the tests set out in ***Smart***, rather than any explicit requirement that the order is exceptional;

(3) the purpose of the order in private law cases is to limit *excessive* or *disproportionate* costs. It is not designed to protect parties from orders to pay costs which are reasonably incurred in litigation of this sort;

(4) in non-judicial review proceedings, the case management procedures provide for estimates of costs to be provided as the proceedings evolve. It will therefore be easier to predict what the other side's costs will be.

64. In practical terms, these factors may combine to suggest that the private law principles on cost-capping would be unlikely to assist in many public-law cases in any event (certainly, the experience of most public lawyers bringing claims against central government will be that T.Sol's costs routinely come in at less than half the claimant's). But there is a point here which does not yet appear to have been tested, namely:

- why should the principles which are applicable in ordinary civil litigation not apply to those judicial review claims which are brought

by someone with a private interest in the outcome. In other words, if a claimant fails the ***Corner House*** test because they are not sufficiently disinterested or public-spirited, why should that private interest in the litigation not, in appropriate cases, qualify for protection on the basis of cases such as ***King*** and ***Smart*****?**

PAUL BROWN

28Th July 2006