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# Practice & Procedure update: Costs in public interest litigation

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1. In 1950, Oliver Brown, a 32 year-old African-American pastor and father of two, was asked by the Tokepa NAACP whether he would be willing to join a class action lawsuit challenging the Topeka City Board of Education’s school admissions policy based on racial segregation. Mr Brown took some convincing.[[1]](#footnote-1) He was not an activist and was concerned about the impact that the litigation would have on his family and his position in the community. He did not, however, have to consider the financial risks of the litigation. The NAACP would cover the costs of bringing the claim and, owing to America’s “no costs rule”, he was protected from an adverse costs order. Mr Brown, who had well-paid employment and owned his house, could not have brought the claim if he had been required to put all his assets at risk.

1. That was the evidence given to Sir Rupert Jackson by an experienced American lawyer[[2]](#footnote-2) during his review of civil litigation costs in 2009 and which informed his recommendation to introduce one-way costs shifting in judicial review proceedings.[[3]](#footnote-3) A reform of costs in judicial review proceedings was required, Sir Rupert said at the time, because it was “not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved”[[4]](#footnote-4).

1. Ten years since Sir Rupert Jackson made these recommendations, the protection of claimants from adverse costs orders in public interest proceedings remains a hotly debated issue. The Government did not take up the proposal to introduce qualified one-way costs shifting in judicial review claims. Instead, it introduced a scheme for cost capping orders in judicial review claims and a separate regime for certain kinds of environmental claims. For any claim brought in the public interest to test the legality of actions taken by public authorities, claimants must rely on the court’s general discretion at common law to seek protection from the risk of adverse costs.

The result is a disparate set of rules governing the availability of costs protection in public interest litigation.

1. Albeit the jurisdictional bases for these regimes differ (e.g. the CPR, primary legislation and the common law) they share a common aim: to facilitate access to justice for claims brought in the public interest whilst avoiding undue prejudice to public bodies. How to strike that balance continues to generate litigation across all three areas. This paper reviews the cases from the last year arising out of these different cost regimes and identifies likely battle grounds for the year to come.

# Judicial review Cost Capping Orders

1. One of the six reasons given by Sir Rupert Jackson for reform of costs in judicial review was that the protective costs regime at common law had not been effective. It was, in his view, “expensive to operate and uncertain in its outcome”[[5]](#footnote-5).

1. Although sections 88-90 the Criminal Justice and Courts Act 2015 (CJCA 2015) have placed that regime on a statutory footing, as Ouseley J observed in *Beety v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin) at §6, “the language of the statute is couched in terms quite similar to those found in the previous case law”. It is, then, unsurprising that when Sir Rupert assessed the regime for his supplemental costs review in 2017 he concluded that CCOs are of “little practical value because the procedure for obtaining such orders is too cumbersome and too expensive” and that “the criteria for granting CCOs are unacceptably wide and the outcome of any application must be uncertain”.[[6]](#footnote-6)

1. Those features of the regime were evident in this year’s key case on CCOs –*R (We Love Hackney Ltd ) v London Borough of Hackney* [2019] EWHC 1007 (Admin). The decision diverges in a number of ways from earlier cases, illustrating the uncertain application of the statutory conditions for securing a CCO. These are set out at s. 88 CJCA 2015, which provides:

“88 Capping of costs

[…]

* 1. The court may make a costs capping order only if it is satisfied that—
     1. the proceedings are public interest proceedings,
     2. in the absence of the order, the applicant for judicial review would withdraw the

application for judicial review or cease to participate in the proceedings, and (c) it would be reasonable for the applicant for judicial review to do so.

* 1. The proceedings are “public interest proceedings” only if—
     1. an issue that is the subject of the proceedings is of general public importance,
     2. the public interest requires the issue to be resolved, and
     3. the proceedings are likely to provide an appropriate means of resolving it.

* 1. The matters to which the court must have regard when determining whether proceedings are public interest proceedings include—
     1. the number of people likely to be directly affected if relief is granted to the applicant for judicial review,
     2. how significant the effect on those people is likely to be, and
     3. whether the proceedings involve consideration of a point of law of general public importance.”

1. *We Love Hackney* was a challenge to changes to Hackney’s licensing policy aimed at clamping down on antisocial behaviour, public nuisance and noise in Shoreditch and Dalston. Permission was granted to challenge the changes on the grounds that there had been a failure to have regard to the public sector equality duty and a failure to take account of material considerations.

1. We Love Hackney was originally an association of local residents and business owners who campaigned about Hackney’s night-time economy. It incorporated in 2018 to advance this claim for judicial review. The company applied for a CCO on the basis that it had insufficient resources to risk the costs exposure associated with judicial review proceedings. The claim was to be funded by donations raised through the crowdfunding site CrowdJustice.

## Public interest proceedings

1. On the question of whether the proceedings were public interest proceedings, Farbey J found that the claim was essentially a complaint about specific aspects of the local authority’s decision-making process and raised no question of general public importance: §§34-39. She considered separately whether the proceedings involved a point of law of general public importance, concluding that they did not. The principles concerning the application of the PSED were well-established and the application of these principles to licensing decisions did not raise any novel point of law: §§40-43.

1. As required by s.88(8)(a) CJCA 2015, Farbey J considered the number of people likely to be directly affected by the decision and accepted that number might be substanti*al*: §45*.* She concluded, however, that there were difficultiesin *“*delineating and measuring” the direct effect of any decision and for that reason it should count for less than other statutory factors.

1. This is a narrower approach to the public interest test than that adopted in other recent decisions.

1. In *R (Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin) Ouseley J accepted that the question of whether or not the professional indemnity arrangements provided to 70 or so self-employed midwives satisfied the requirements of the Nursing and Midwifery Order 2001 was a public interest issue within the meaning of section 88(7) CJCA 2015. He did so primarily on the basis that the issue was significant for the midwives who would be severely affected in their chosen form of work if their claim did not succeed: §18. He did so notwithstanding the fact that the number of midwives affected was small (§18) and that the proceedings, although concerning new legislation, did not involve consideration of a point of law of general public importance: §20. It is difficult to reconcile this conclusion with the decision in *We Love Hackney*. If a matter that will significantly affect the livelihood of a small number of self-employed midwives can, for that reason alone, constitute a public interest issue, it is difficult to see why a challenge to licensing policy that will impact on the livelihoods of a small but not insignificant number of local business owners should not also satisfy that test.

1. It is also difficult to reconcile with Richard Clayton QC’s decision in *R (Harvey) v Leighton Linslade Town Council* [2019] EWHC 760 (Admin)[[7]](#footnote-7) to grant a CCO of £4,000 in respect of a challenge by an individual to a local authority’s decision to revise market pitch fees on the basis that it was unlawful for lack of consultation. If these facts meet the statutory test for a public interest claim, it is difficult to see why challenge to Hackney’s licensing policy brought by an association of over 4,000 registered supporters does not.

1. The decision by Cheema-Grubb J in *R (Hawking and others) v Secretary of State for Health and Social Care* [2018] EWHC 989 (Admin)that the late Professor’s Hawking’s challenge to the introduction of Accountable Care Organisations satisfied the public interest test might seem more easily distinguishable from the challenge in *We Love Hackney*. A challenge to restructuring of the National Health Service led by a national treasure has the instinctive feel of a matter of general public interest. What is notable, however, is the comparatively light touch approach to determining whether the statutory criteria were satisfied in the face of strong opposition from the Secretary of State. The Secretary of State had argued that his agreement, following issue of proceedings, to engage in formal consultation on the proposed reform diminished the public interest in the claim proceeding. The judge acknowledged the force in that argument, stating that “it is highly likely that at least some of the concerns under the headings of ‘Transparency and excess of power’ are matters with a high degree of public interest and they plainly will be engaged in the judicial review, albeit they may also be engaged with at the public consultation”: §17. She nonetheless concluded, without further analysis, that the proceedings met the statutory test of public interest.

## Whether it would be reasonable to withdraw from the claim

1. In *We Love Hackney*, Farbey J accepted the claimant’s assertion that the claim would be withdrawn without a CCO. When considering whether that would be reasonable, she looked beyond the claimant company’s resources. She noted that although the company had very limited resources, the “key players” in the company were local entrepreneurs with adequate financial resources to contribute to funding the judicial review proceedings: §§26-30. She also concluded that company’s directors had a commercial interest in the proceedings. In those circumstances, she found that it would not be reasonable for the claimant to withdraw its application for judicial review, stating at §52:

“A number of well-resourced individuals have chosen to litigate the claim via an impecunious company which has taken possession of funds donated by members of the public. Given their individual and cumulative financial resources, I infer that the director and other backers do not want to fund the litigation beyond the level of third party support, rather than that they are incapable of doing so. I do not accept on the evidence before me that the claimant would be forced to withdraw the claim through impecuniosity. In my judgement, absent any compulsion to withdraw through impecuniosity, it would not be reasonable for the claimant to withdraw its application for judicial review”.

1. Farbey J’s approach to the reasonableness of withdrawing a claim appears strict when compared with earlier cases. In *Hawking,* Cheema-Grubb J found that it would be unreasonable to expect the claimants to bear the burden of a high degree of financial risk. Unlike Farbey J, Cheema-Grubb J’s conclusion was not based on examination of the financial position of the individual claimants and whether they could afford to contribute to the claim. Instead, she looked at whether it was reasonable for the claimants to be exposed to personal financial risk in order bring forward a public interest claim, stating at §21 that “given the unusual circumstances of this claim being brought out of apparent public spiritedness by a group of claimants who do not claim any personal interest directly, the impact upon their personal financial standing is a feature to be taken into account”.

1. The approach of Cheema-Grubb J is more in keeping with earlier case law on protective costs orders where there appeared greater willingness to accept that an individual claimant would be acting reasonably in withdrawing from a claim where proceeding in the absence of a protective costs order would expose them to personal financial risk of unquantifiable costs liability. In *Lumsdon v Legal Services Board* [2013] EWHC 3289 (Admin) Bean J stated that it was “of course, absolutely right and proper that the four individual claimants should not be exposed to personal liability for costs” remarking that “otherwise, as their witness statements make clear, they would not continue with the claim, and no one could expect them to do so”: §13.

1. There is a strong sense that Farbey J’s conclusion was driven by conclusion that the company’s directors had a commercial interest in the proceedings. She expressed sympathy for the respondent’s submission that this was “an industry-driven campaign”. This approach has echoes of the earlier cases applying the *Corner House* rules under which a private interest in the outcome of a claim was wrongly thought to disqualify a claimant from costs protection. More recent cases have recognised that a claimant’s private interest in proceedings is not determinative of whether a claim is also in the public interest. These cases, discussed further below in the context of the *Corner House* rules, may be of relevance when considering this aspect of the statutory test for a CCO.

## Expense of CCO proceedings

1. The costs of applying for a CCO are also proving just as expensive as PCOs. In *We Love Hackney* the respondent’s costs of the application were just over £42,000 – a sum not far short of We Love Hackney’s“stretch” crowdfunding target of £53,000, intended to fund the entire claim. The unsuccessful applicants for a PCO in *Maugham v Uber London Lt* [2019] EWHC 391 (Ch) faced a costs order of £100,000 in respect of the PCO application.

1. In sum, there is nothing in this year’s cases to give Sir Rupert any cause to revisit his 2017 assessment of the CCO regime. The statutory criteria for the grant of a CCO are proving just as unpredictable in application as their common law predecessors and equally as expensive.

# The Environmental Costs Protection Regime

1. Litigation over costs in environmental claims remains driven by arguments as to the compatibility of the UK’s Environmental Costs Protection Regime (ECPR) with the Aarhus Convention.[[8]](#footnote-8)

1. The regime was introduced into CPR Part 45 in 2013 and substantially amended in 2017. Four aspects of the regime are currently under the spotlight.

## (1) Exclusion of certain environmental claims from Aarhus costs rules

1. First, the scope of the ECPR continues to attract challenge. Originally, the ECPR was confined to claims for judicial review. In *Venn v Secretary of State for Communities and Local Government* [2015] 1 WLR 2328, the Court of Appeal stated that this aspect of the regime was not Aarhus-compliant in so far as it excluded statutory appeals and applications dealing with environmental matters.

1. The 2017 amendments extended the definition of an Aarhus claim to include statutory review claims (e.g. under s.288 of the Town and Country Planning Act 1990), and two forms of statutory appeal: s.289(1) of the Town and Country Planning Act 1990 and s. 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. Costs protection in environmental claims – either through statutory review or appeal, or through judicial review – is now permitted for claims challenging the legality of any decision, act or omission of a body exercising public functions falling within the scope of articles 9(1) or 9(2): CPR r.45.41(2)(b)(i). However, challenges to decisions, acts or omissions falling within the scope of article 9(3) remain confined to judicial review challenges: CPR r.45.41(2)(b)(ii). Private law claims, including nuisance actions,[[9]](#footnote-9) remain excluded.
2. The compatibility of this aspect of the ECPR with the Convention is the subject of a communication to the Aarhus Compliance Committee. ACCC/C/2017/157 identifies two grounds of non-compliance with article 9(3), the first of which is that the ECPR does not extend to planning challenges brought under s.288 of the Town and Country Planning Act 1990. The Compliance Committee ruled the communication to be admissible on 15 March 2018 but is yet to make its determination.

1. The Government’s response to this communication does not offer any rationale for the current position. This is perhaps unsurprising: in *Venn* Sullivan LJ recorded, at §31, the Secretary of State’s counsel as saying that “there was no principled basis for that distinction if the object of the costs protection regime was to secure compliance with the UK’s obligations under Aarhus”. Instead, it states that the UK is “mindful” of the support for extending the ECPR expressed in responses to the September 2015 consultation on costs protection in environmental claims and explains that the UK Government is “advanced in its consideration of what action would be appropriate”.

*(2) Statement of means – chilling effect?*

1. The 2017 amendments to the ECPR introduced a requirement in CPR 45.42(1)(b) that a claimant seeking Aarhus protection file and serve a schedule of their final resources. In Communication ACCC/C/2017/157 it is argued that this requirement is incompatible with article 9(3) due to the “chilling effect” that the disclosure of private financial information will have, since claimants will be reluctant to bring environmental challenges. As noted above, this communication has been ruled admissible by the Compliance Committee. Pending the determination of this communication, the current trend for claimants to resist filing a statement of means on grounds of Aarhus non-compliance is likely to continue.

## (3) Eligibility of public bodies for Aarhus protection

1. Following the Government’s unsuccessful attempt to argue in *HS2 Action Alliance v Secretary of State for Transport* [2015] EWCA Civ 203 that local authorities were excluded from the group of claimants who could apply for Aarhus costs protection[[10]](#footnote-10), the 2017 amendments introduced the requirement in CPR 45.42(1) that the person seeking Aarhus costs protection is a “member of the public” within the meaning of the Aarhus Convention.

1. It had generally been assumed that this excludes from the scope of the Aarhus cost rules all public authorities. But when granting leave under s.288 of the Town and

Country Planning Act 1990 in *Crondall Parish Council v Secretary of State for Housing*, *Communities and Local Government*, John Howell QC accepted that the parish council was a “member of the public”: permission decision of deputy judge John Howell QC 28 November 2018 (unreported).

1. John Howell began by noting that a parish council, as a statutory body corporate, *prima facie* fell within the definition of “the public” for the purpose of article 2.4 of the Aarhus Convention. He rejected the argument that the categories of “the public” and “public authority” in the Convention were mutually exclusive, noting that there was no warrant within the Convention for drawing that inference and that to exclude some public authorities from being a “member of the public” in relation to access to environmental information held by other public authorities and from participation in the procedure leading to significant decisions for the environment taken by other authorities would undermine the principles underpinning the Aarhus Convention. He said, at §12, that:

“Generally articles 9.2 and 9.3 of the Convention are concerned with access to justice by those with an appropriate interest in significant environmental decisions and securing compliance with national law relating to the environment. It might be thought “bizarre” if a body representing the interests of local members of the public should not have such access to justice secured by the Convention.”

1. In supporting this analysis John Howell pointed to the decision of the Aarhus Compliance Committee in ACCC/C/2012 that a community council in Scotland was a member of the public for the purpose of submitting a communication to the Committee although they had “statutory duties in respect of licensing and planning” given “in particular the role of the council in representing the interests of the community in planning matters and the fact that council members provide their services on a voluntary basis and have no regulatory decision-making functions”: §81-83. As for the Committee’s decision in ACCC/C/2014/100, the Committee did not find that no “public authority” could be a “member of the public”. Rather, it concluded that as the London Borough of Hillingdon is an emanation of the UK, finding it to be a member of the public for the purposes of submitting a communication “would give rise to an internal dispute between authorities of a party concerned which was not within the remit of the Committee”. It was for that reason not to be regarded as a “member of the public” for the purpose of making a communication.

1. No doubt John Howell QC will not be the final word on this issue. However, it is worth noting that his reasoning in *Crondall* has echoes of the observation made by Sullivan LJ in *HS2,* at §22*:*

“Given the breadth of the definition of “public authority” in article 2(2), the implications of the Secretary of State's submission that a public authority (so defined) cannot be a member of the public for the purposes of article 9(3) even if it is seeking to protect the interests of its own local inhabitants when challenging an environmental decision made by another public authority are potentially of considerable significance for all of the parties to the Convention.”

*(4) Permission stage costs – chilling effect?*

1. In its recent decision in *Campaign to Protect Rural England v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1230, the Court of Appeal rejected the argument that applying the full Aarhus costs cap where a claim fails at the permission stage rather than after a substantial hearing, would have a chilling effect on environmental claims.

1. The Court noted that the CPR provides for no lower cap for particular stages of environmental litigation. Rather, the Aarhus cap is global and applies at whatever stage the costs assessment is done: §50. It went on to find that this approach would not have a chilling effect. The Aarhus Convention requires that environmental claims should “not be prohibitively expensive”, not that they involve no costs risk at all. The Court stated that Aarhus cap “offers a major advantage to claimants which is not available to any other group of civil litigants”, and “allows them costs certainty from the outset, and the ability to pursue litigation in the knowledge that, if they lose, their liability will not be a penny more than the cap”: §53.

# Public interest litigation outside the scope of the ECPR and CCOs

1. For cases falling outside of the scope of the ECPR and CCOs, the question is whether it is open to claimants to fall back on the earlier case law. In this area, the key battlegrounds appear to be (1) whether PCOs are available in private litigation and (2) whether falling back on the earlier cases would inappropriately seek to circumvent the limits on the costs protection regime introduced by primary and secondary legislation.

*(1) Are PCOs available in private litigation?*

1. In cases falling outside of the CCO/ECPR regimes, the courts will generally require a claimant to satisfy the criteria set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600*.* Those criteria are (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 parties and the amount of costs that are likely to be involved it is fair and just to make the order and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. The question which has arisen is whether the first three criteria mean that PCOs are not available in private law litigation.

1. This issue arose in *Maugham v Uber London Lt* [2019] EWHC 391 (Ch), concerning a claim brought by Jolyon Maugham QC, director of the Good Law Project, for a declaration that Uber is required to provide him with a VAT invoice for an Uber ride he took between Chambers and a client’s office.

1. William Trower QC, sitting as a Deputy Judge of the High Court, held that a PCO could not be obtained in “private litigation” (§47) and that the claim was *“private litigation for PCO purposes”*. In reaching the latter conclusion he noted that the only cause of action was a private law entitlement to the provision of a VAT invoice, that no public body was joined to proceedings and there was no public law issue raised for determination: §§49-50.

1. The Good Law Project is seeking permission to appeal expressing “grave concerns about the implications of the decision” which it says “damages the rule of law”.

1. Its primary ground of challenge is against the Judge’s finding that a PCO cannot be made in a private law claim. There are two limbs to its argument. First, the costs discretion conferred by s.51 Seniors Courts Act 1981 is a broad one and does not include a limitation as to the type of proceedings in which a PCO may be made. Secondly, and most fundamentally, the reason identified by the Court of Appeal in *Corner House* for the power to make a PCO – to permit access to justice in public interest litigation – is applicable as much to public interest challenges which are brought in private law proceedings as to public interest challenges brought in public law proceedings.

1. The Good Law Project are also seeking permission to appeal on the basis that the claim should not be understood as private litigation for the purposes of a PCO, having regard to the fact that the claim provides no private benefit to the claimant and raises important public interest issues.

1. If permission to appeal is granted, the *Uber* case would provide a welcome opportunity for the Court of Appeal to clarify not only the scope of court’s jurisdiction to make PCOs, but also the broader question of the extent and nature of limits on its broad discretion to control costs of proceedings. Is it the case that the court, through its case law, has limited the broad jurisdiction in relation to costs conferred by s.51 of the Senior Courts act 1981? Or does the court retain a broad discretion to make such order as to costs as it considers fair and just in all the circumstances?

1. On the question of the court’s jurisdiction to make a PCO, there is a good argument that the *Corner House* criteriaare not absolute. Although the Court of Appeal states (§74) that “a protective costs order may be made … provided that the court is satisfied that” the five criteria are met, it went on to state in the same paragraph that “it is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above”.

1. As a matter of principle it is difficult to see how the court could, through case law, narrow the scope the general discretion conferred on it by s.51 SCA 1981. As observed by Lord Lloyd in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176 at 1178 “as in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule.”[[11]](#footnote-11)

1. While it is desirable and clearly permissible for the court to enunciate principles that will guide the exercise of this discretion, to establish rigid rules which govern the exercise of that discretion would be inconsistent with the legislative scheme. This point was made by the Court of Appeal in *R (Compton) v Wiltshire Primary Care Trust* [2009] 1 WLR 1436, per Waller LJ §23. It is also consistent with the observation of Elias LJ at §13 of his judgment in *Unison v Kelly* [2012] EWCA Civ 1148 that “… it would be stating the principle too high to say that a PCO cannot be awarded in circumstances where private interests are engaged; the jurisdiction is a flexible one and there is no absolute bar but it is right to say that where private interests are engaged that is a significant factor which will bear on the question whether a PCO should be granted or not.”[[12]](#footnote-12)

1. On the question of whether, as a matter of principle, the fact that a claimant has a private interest in proceedings denudes the claim of any public interest, there are good reasons for the court to avoid an overly restrictive approach.[[13]](#footnote-13) In what is rapidly becoming an iconic passage, Lord Reed in *R (Unison) v Lord Chancellor* [2017] 3 WLR 409 at §69, reminded the Lord Chancellor of the public interest served by private litigation:

“Access to the courts is not … of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. When, for example, Mrs Donoghue won her appeal to the House of Lords (Donoghue v Stevenson [1932] AC 562), the decision established that producers of consumer goo are under a duty to take care for the health and safety of the consumers of those goods: one of the most important developments in the law of this country in the 20th century. To say that it was of no value to anyone other than Mrs Donoghue and the lawyers and judges involved in the case would be absurd.”

1. This point is illustrated by the Court of Appeal in *Baker v Quantum Clothing Group Limited* [2008] EWCA Civ 823. Pursuing the appeal was of direct interest to the claimant who was seeking £5,000 in damages for alleged breaches of health and safety legislation. When faced with an application for an order that the claimant’s appeal be allowed to proceed but only on the condition that the respondents should bear their cost regardless of outcome, the Court of Appeal granted this order. In doing so, Rix LJ reasoned, at §19, that “… if this application is rejected then this appeal cannot go ahead and will be stifled, and this would be a blow, of course, to Mrs Baker, so far as her potential claim for £5,000 is concerned. But much more important than that, it would be a blow to all the interests involved in this litigation.”

## (2) Side-stepping legislative limits on costs protection

49.The second issue that arises is the extent to which the introduction of the CCO regime for judicial review claims and the ECPR, by primary and secondary legislation respectively, cuts down the court’s discretion to make protective costs orders in other areas.

1. In *Venn,* the Court of Appeal considered this issue in the context of an application for a PCO in a claim under s.288 of the Town and Country Planning Act 1990. At first instance, the judge had held that although the claimant was not entitled to costs protection under the ECPR, it was nevertheless within the court’s discretion to make a PCO. Overturning this decision, the Court of Appeal concluded that since the exclusion of statutory appeals from the scope of the Aarhus cost rules was not an oversight, “it would not be appropriate to exercise a judicial discretion so as to sidestep the limitation (to applications for judicial review) that has been deliberately imposed by secondary legislation”: §33.

1. But where does that logic lead? Under the CPR, the court has a range of case management powers which sit alongside its general discretion to make costs orders. It can make case costs management orders (CPR r.3.15) using court approved budgets to prospectively control recoverable costs; it can make CCOs in cases other than judicial review (CPR r.3.19) in cases where the court is satisfied that it is in the interests of justice to do so and there is a substantial risk that without such an order costs will be disproportionately incurred (CPR r.3.19(5)(b)). More generally, it can “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective” (CPR r.3.1.(2)(m)) and can make any order subject to conditions (CPR r.3.1(3)(a)).

1. In the past, the courts have had recourse to these and other powers to make orders prospectively limiting *inter partes* costs where the justice of the case required. For example, in *Unison v Kelly* the Court of Appeal relied on the power under CPR r.52.9 which permits the appeal court to impose conditions upon which an appeal may be made, if there are compelling reasons to do so, to impose a condition that the appellants should only be allowed to pursue the appeal on the condition that they did not seek costs from the respondents. A similar power[[14]](#footnote-14) was used by the Supreme Court in *Dover DC v CPRE (Kent)* to grant permission on the terms that the previous costs orders in the courts below were undisturbed regardless of the outcome of the appeal and that no costs be sought against the respondent. In *Baker v Quantum* the Court of Appeal relied on s.51 SCA 1981 and CPR r.3.1(2)(m) to make it a condition of granting permission to appeal that the respondents should bear their cost regardless of outcome: §26.

1. Does the introduction of Aarhus cost rules and a special regime governing costs in judicial review claims mean that the court’s broader powers under these provisions are limited in all environmental claims and any judicial review?

1. This was the argument advanced by the Secretary of State in *R (London Borough of Hillingdon and others) v Secretary of State for Transport* to resist an application by the claimants for a case management order. All the claimants save Greenpeace were ineligible for Aarhus costs protection. As the application for judicial review was listed for a rolled up hearing, the court did not have jurisdiction to entertain an application for a CCO. The claimants, having faced a costs schedule from the Secretary of State for in excess £600,000 at the stage of filing an acknowledgement of service and summary grounds, sought a costs management hearing under CPR 3.12(1A) to seek input from the court as to whether the Secretary of State’s approach was reasonable and proportionate. The Secretary of State resisted this application on the basis that ordering a costs management hearing would subvert the Aarhus cost rules and statutory CCO provisions, citing the passage at §33 in *Venn*. In the end, the claim proceeded on the basis of a mutually agreed cost cap between the claimants and the Secretary of State so this issue was not determined.

1. There are good reasons why the court should guard its broad jurisdiction over costs against the argument that this jurisdiction has been narrowed by the introduction of the CCO/ECPR regimes. The court’s discretionary powers provide a powerful tool to preserve access to justice for certain cases where it is in the public interest that the matter is litigated.

**The future: legislative reform or common law evolution?**

## Legislative reform

1. On 28 March 2019 the Ministry of Justice launched a consultation entitled ‘Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s Proposals’. The Consultation paper addresses the proposals made by Sir Rupert Jackson’s in his 31 July 2017 report entitled ‘Supplemental Report-Fixed Recoverable Costs’. Undeterred by the Government’s decision not to implement his recommendation to introduce qualified one-way costs shifting in judicial review, Sir Rupert returned to the topic of costs in judicial review.

1. Ten years since his first report, Sir Rupert’s conclusions remained unchanged. As noted above, he concluded that the CCO regime is both expensive to operate and uncertain in its outcome.[[15]](#footnote-15) He concluded that costs in judicial reviews are too variable to permit the introduction of fixed recoverable costs. Against this background, he made two recommendations: extension of the Aarhus Rules to all judicial review claims and the introduction of costs budgeting for ‘heavy’ judicial reviews.

1. He described the proposal as “modest” and explained why he had concluded that it would strike the right balance between (a) the need to protect the public purse and

(b) the need to hold public authorities to account.16

1. The Government’s response is set out in the paper in chapter 6 of the consultation paper published on 28 March 2019.[[16]](#footnote-16) The Government rejected the recommendation to extend Aarhus rules to all judicial reviews, stating that “we do not consider there to be an access to justice issue in respect of non-Aarhus JRs” and that “extending cost capping increase the risk of less meritorious JRs coming forward with increased costs to the government and other public-sector defendants”.[[17]](#footnote-17)

1. Although the consultation paper did not include any proposals to introduce fixed recoverable costs, the paper did record a disagreement with Sir Rupert on this point as well, stating that immigration and asylum judicial reviews are relatively uniform and announced that the Government is considering whether a bespoke fixe costs regime could be developed for such cases in the Upper Tribunal.[[18]](#footnote-18)

1. The Government agreed with the recommendation in respect of costs budgeting and has now consulted on this proposal.

## Common law evolution

1. In the likely absence of any further legislative reform in the near future, there remains the problem identified by Sir Rupert of a costs regime governing judicial review proceedings that is both expensive to operate and uncertain in its outcome. Looking at public interest proceedings more generally, the rules and principles governing costs protection are inconsistent and their application difficult to predict. The prospect of no prospective costs protection remains a substantial barrier to access to justice for many claimants pursuing public interest litigation.

1. So, the justifications advanced by Sir Rupert for legislative reform remain: to ensure access to justice and to the reduce costs and bring clarity to costs protection available in public law proceedings. Absent any legislative intervention it falls to the courts to apply and develop the existing framework of legislation and rules to best attain these objectives.

1. There is plenty of scope for them to do so. The application of the statutory test for the grant of a CCO depends on an evaluative exercise by the judge. It is for the courts to determine how broadly or narrowly they will define the concept of “*public interest proceedings*” and how strict they will be when deciding whether withdrawal of an application for judicial review would be unreasonable for the purpose of s.88(6) of the 2015 Act.

1. Outside of the CCO regime, the question for the court will be whether to accede to the argument that Parliament has occupied the entire field in this important area. This point will no doubt arise in subsequent cases. When it does, it will be important to reflect on the fact that Parliament never set out to create a comprehensive statutory code governing protective costs. It has introduced, in a piece-meal way, two inconsistent regimes of uncertain ambit, for different purposes and through different legislative mechanisms. As above, the lacunae which remain are many and important and will frequently arise in practice. Parliament cannot be said to have occupied the entire field – it may even be said that it has barely stepped through the gate - and there is certainly space for legitimate development of the common law to fill these gaps.

1. When considering these issues the court may draw assistance from the body of case law that led to the broadening of the standing rules in the early 1990s. The standing test in judicial review and the test for general public importance are guided by similar policy considerations: the importance of vindicating the rule of law, the importance of the issue raised and the likely absence of any other responsible challenger: *R v Secretary of State for Foreign & Commonwealth Affairs, ex parte* *World Development Movement* [1995] 1 WLR 386, 395 per Rose LJ. Judicial development of the rules of standing took place in the context of the Government’s decision not to implement the Law Commission’s recommendation that the sufficient interest test for standing be replaced with a two track system, under which an application could be made if the court considered that “it is in the public interest for an applicant to make the application”.[[19]](#footnote-19) Perhaps Sir Rupert’s recommendations will give a similar impetus to judicial development of the law governing costs in judicial review.

1. Interview with Cheryl Brown Henderson, Oral Histories: Remembering Brown v Board of Education at 65. [↑](#footnote-ref-1)
2. Review of Civil Litigation Costs: Final Report (December 2009), Chp. 30, para. 3.13 [https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report140110.pdf](https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf)  [↑](#footnote-ref-2)
3. In his 31 July 2017 report entitled ‘Supplemental Report-Fixed Recoverable Costs’, Sir Rupert also adopted a comparative approach to bolster his argument for the extension of the Aarhus costs rules. Anticipating some resistance to the first suggestion, he drew comparison with the regime that applies in Canada, stating “Public authorities and judges in Canada recognise the importance of JR claims. They also recognise the need to protect JR claimants against oppressive adverse costs orders. In practice, defendant public authorities often do not seek costs if they win. If defendants do ask for costs, the court may well refuse unless the claimant has acted unreasonably.” [↑](#footnote-ref-3)
4. Review of Civil Litigation Costs: Final Report (December 2009), Chp. 30, para. 4.1. [↑](#footnote-ref-4)
5. Para 4.1 [↑](#footnote-ref-5)
6. Supplemental Report-Fixed Recoverable Costs: Chap 10, para 2.7 . [↑](#footnote-ref-6)
7. The decision to grant the CCO was made on the papers and is not reported. The final judgment in the substantive claim records, at §95, the reason given for the decision to grant the CCO as follows: “The claim itself is a fairness challenge to a consultation in respect of market pitch fees based on an alleged breach of Gunning principles and I am satisfied and I find that the claim is a public interest claim in accordance with s.88(6)(a)”. [↑](#footnote-ref-7)
8. United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. [↑](#footnote-ref-8)
9. In A*ustin v Miller Argent (South Wales) Ltd* [2011] Env LR 650 the Court of Appeal accepted that private nuisance actions were, in principle, capable of constituting procedures which fall within the scope of article 9(3) of the Aarhus Convention (§21). [↑](#footnote-ref-9)
10. The Government argued that a “public authority” as defined in article 2(2) of the Aarhus Convention could not be a “member of the public” for the purposes of article 9(3), even if it was seeking to protect the interests of its own local inhabitants when challenging an environmental decision made by another public authority.

    [↑](#footnote-ref-10)
11. Case cited in Good Law Project’s application for permission to appeal, available online at [https://goodlawproject.org/.](https://goodlawproject.org/) [↑](#footnote-ref-11)
12. See also per Richards LJ at § 21 and to similar effect *Dring v Cape Distribution* [2017] EWHC 2103 per Master Macleod at § 21. [↑](#footnote-ref-12)
13. A point also made by in *R (Compton) v Wiltshire Primary Care Trust* [2009] 1 WLR 1436, per Waller LJ §23 and in A*ustin v Miller Argent (South Wales) Ltd* [2011] Env LR 650 at §44. [↑](#footnote-ref-13)
14. Rule 16(2)(b) of the Supreme Court Rules 2009, allowing the panel to consider the grant of permission “on terms (whether as to costs of otherwise)”. [↑](#footnote-ref-14)
15. Chp 10, para 2.7 . 16 Chp 6, §3.4. [↑](#footnote-ref-15)
16. Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s proposals. [↑](#footnote-ref-16)
17. Chp 6, §2.4 [↑](#footnote-ref-17)
18. Chp 6, §1.3. [↑](#footnote-ref-18)
19. Administrative Law: Judicial Review and Statutory Appeals (Law Com. No. 226, 1994), § 5.20. [↑](#footnote-ref-19)