Civil Justice Council response to
MoJ consultation paper – Costs protection in Environmental cases

December 2015

Introductory remarks

The CJC welcomes the publication of further costs protection proposals in environmental cases. These needed further attention to ensure that the jurisdiction complies with the requirements of the European Directive and subsequent case law (domestically and in Europe) that there should be access to justice without prohibitive expense.

As the following individual question responses make clear, the Council has a number of reservations about whether the current set of proposals satisfy those requirements, in spirit or in form. We have particular concerns that the effect of the measures will be to increase demands and costs for parties, and fear the overall effect may be to make the process more complicated and prone to challenge and satellite litigation.

We have seen the consultation response provided by the Wildlife and Countryside Link, put together by specialist environmental law specialists and agree with it. For that reason the CJC's own response is shorter than it would otherwise be.

Responses to individual consultation questions

Definition

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

The proposed definition expands on the existing one set out in the Civil Procedure Rules, and draws in a wider band of environmental cases. This is in itself to be welcomed as it increases access to justice for those in that band e.g. appellants in listed building protection cases. However, as environmental groups such as Wildlife & Countryside Link have pointed out, the new definition risks not fully complying with the Aarhus Convention, as commented upon by the Court of Appeal in the *Venn* case[1].

One aspect which the consultation paper does not address is private nuisance claims which may fall within the scope of the Aarhus Convention. The Court of Appeal in *Austin v Miller Argent (South Wales) Ltd*[2] found that the Convention was capable of being applied to such

[1] http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2014/1539.html&query=venn&method=boolean

[2] http://www.bailii.org/ew/cases/EWCA/Civ/2014/1012.html

claims, and it set out two requirements that would have to be met. This is an area the Government will presumably need to revisit, and it seems a missed opportunity that it has not been addressed in this set of proposals.

Eligibility

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

No – the proposal appears to seek to narrow the existing broad definition of a 'member of the public' as framed in Article 2 of the Aarhus Convention[3] and which refers to groups and associations as well as members of the public. The proposed rule amendment risks excluding groups or encouraging defendants to make applications to challenge their eligibility for costs protection.

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

Not in our view – we have previously expressed our concerns about the chilling effect on access to justice arising from claimants only being paid for work if permission is granted for a judicial review application[4]. With the new level of court fees and preparation of application papers the costs of bringing a claim can be high and potentially prohibitive – the Government risks assembling another barrier which would fall foul of the requirements of the Aarhus Convention and risk another costly referral to the Court of Justice of the European Union.

Levels of costs protection available

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

We do not agree with this proposal. At present the approach to setting the level of costs is clear and is set out in both European and UK court judgments; the principle that the costs of proceedings must not exceed the financial resources of the claimant and must not be objectively unreasonable. The paper proposes that parties would be able to make applications for varying costs caps (or the court would be able to of its own volition).More fundamentally, the proposal to introduce a hybrid approach would appear to be contrary to the Aarhus Convention. This risks adding to litigation (and cost), and reducing certainty of costs which seems a retrograde step against the spirit of the convention.

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

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[3] http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

[4] https://www.judiciary.gov.uk/wp-content/uploads/2014/02/cjc-response-judicial-review-21-october-2013.pdf

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

We have reservations, as stated in the answer to question 4. The draft rule introduces a list of possible criteria by which the reasonableness of costs are to be considered, and this seems likely to increase uncertainty and the prospect of challenges. For example, a defendant may argue a claimant has no prospect of success and on those grounds should not qualify for costs protection.

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

No. Judicial Review cases are not subject to costs budgeting, and while the Government has made statutory provision for claimants' financial information to be made available, in its recent consultation it specifically referred to charities as being exempted from this requirement. Many of the cases to which these proposals relate will be brought by charitable bodies.

We do not see how the requirement to ease access to justice for those bringing environmental claims, as required by the Convention (and subsequent judgments), can be compatible with imposing this additional burden.

Another concern relates to the proposal that the claimants be required to serve defendants with a copy of their schedule of financial resources. The Government's reasoning is that defendants could not apply for variations to cost capping orders without such information. However, the wording of the draft rule is extraordinarily broad: "it (the court) will have regard to any financial support which any person has provided or is likely to provide to the claimant", and it is very hard to see how a claimant could quantify this, or a defendant or court could make a proper assessment of whether funding pledges would be honoured in trying to assess a cost capping limit.

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

The approach proposed of having multiple costs caps for multiple claimants or defendants appears likely to lead to problems and additional burdens on the court and parties. It would provide ample scope for additional applications on varying costs capping orders, but a major problem is that if one party felt unable to proceed because of a high costs cap ceiling a whole case may fail to proceed, which may not meet the Convention's requirements. There is also an issue about whether the collective costs cap for multiple parties would exceed the requirement that costs must not be unreasonable.

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

The Council considers the current levels (£5,000 for an individual, and £10,000 for other cases) should continue to apply.

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

We would oppose setting a range of default costs caps in the future, means tested by a link to claimants' financial means. The Government itself concedes the limited data available, and the level of uncertainty it would introduce to the process would not assist access to justice and may encourage satellite litigation.

Costs of challenges and applications to vary costs caps

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

No – we consider that the rationale for the existing system (that defendants may be encouraged to bring weak challenges if there is no penalty for contesting that a claim is an Aarhus Convention one) is a sound one. In any event, as the paper states, the court would retain discretion to make an indemnity costs order.

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

We have set out our reservations on the introduction of applications for varying costs caps. If this process is introduced there will need to be specific provision, although drafting of appropriate rules would be a matter for the expertise of the Civil Procedure Rule Committee. Our only comment is that such rules should try to assist the court and parties in keeping processes as simple as possible to minimise the inevitable additional costs.

Cross-undertakings in damages

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

We consider the proposed rewording of this Practice Direction too narrowly drawn, and while consistent with other proposals in the consultation paper, it gives rise to concerns we have expressed in earlier answers.For example, in our response to question 2 on eligibility for costs protection we advised against excluding groups and organisations from the definition, as this was contrary to the Aarhus Convention's own definition – that applies equally in this context. Similarly, the Practice Direction repeats the wording which we thought far too broad in the answer to question 7, in terms of the financial resources available to claimants. It imposes a burden on the court to establish the resources available or 'likely to be available' in a case where there are multiple organisations bringing a claim.

Other forms of review

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

This is a matter on which specialist environmental law practitioners and bodies could advise.

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

The best source of data we have found is the profile of those seeking assistance from the Environmental Law Forum[5], and this found that 65% of those seeking help earned less than £15,000 per annum, which reinforces the importance of the protective costs regime for these cases.

[5] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexDCivillawaspectsofEnvJustice.pdf