COST PROTECTION FOR LITIGANTS IN ENVIRONMENTAL JUDICIAL REVIEW CLAIMS

Response submitted by the Masters of the Senior Courts Costs Office on 16 December 2011

1 The Consultation paper sets out proposals to implement the Aarhus Convention as to costs by means of Protective Costs Orders (PCO's). Before setting out our views as to those proposals we think it right to state our opinion that PCO's may not, by themselves, remove the risk of prohibitive expense in a great number of cases. There are some environmental judicial review claims in which, in order to bring them effectively, the claimants will necessarily expose themselves to heavy bills in respect of their own costs even if they were to obtain a PCO of the type proposed: for example, court fees (especially fees for appeals), fees for advice on legal matters, fees relating to expert evidence and advice, and all fees necessarily incurred which overtop any cap imposed by a PCO.

2 In order to protect claimants from prohibitive expense in environmental judicial review claims it may be necessary to ensure that legal aid is available for all such claims, and for appeals therefrom, subject to a means test which would permit legal aid to be granted, subject to a contribution, to all applicants save only persons (individuals or companies) who are conspicuously wealthy. (Applicants would also have to satisfy the current merits test.)

3 We acknowledge that an increase in the availability of legal aid in environmental judicial review cases would be inconsistent with the current trend of policy decisions made by Governments past and present: over several years now, the availability of legal aid in civil

litigation has been substantially reduced Accordingly, our alternative suggestion for implementing the Aarhus principles is a system in which intending claimants would have the right to opt in or opt out of a costs-shifting regime: the effects of opting out would be an exemption from court fees in those proceedings, at the end of which no orders for costs would be made (save possibly in exceptional circumstances, such as proof of unreasonable behaviour). A precedent for the system we have in mind are the rules presently in force which allow citizens to opt in or out of a costs-shifting regime in Complex tax cases in the First-tier Tribunal.

4 We turn now to consider the proposals for PCO's as set out in the Consultation paper. We start by setting out two substantial matters which have affected our reasoning as to the ideal system to adopt:

(1) Persons wishing to bring judicial review proceedings are sometimes able to arrange their affairs so as to minimise any adverse costs consequences that proceedings may have for them. For example:

(a) if one active campaigner qualifies for legal aid with a nil contribution, there may be no need for any application for a protective costs order.

(b) A group of campaigners may each agree to contribute to the costs of the proceedings as "pure funders", ie, persons who will not exercise any control over the litigation. Pure funders are able to obtain a refund of their contributions if the claim is successful and costs are recovered without exposing themselves to any liability to pay the defendants' costs if the claim is lost.

(c) Lawyers may be retained on no-win-no-fee terms.

In some cases, items (a) and (b) may be combined: the Legal Services Commission may require funds be raised from relevant interested groups. Any legal aid granted will fund only those costs which are incurred in excess of the sum required to be collected from interested persons.

Given the range of possibilities already available, there is less need for a system of PCO's which is infinitely variable.

(2) Applications about costs may themselves lead to disproportionate costs and may well give rise to fears, which are sometimes justified, that such applications will be used as a weapon

- to discourage the claimant from bringing proceedings and
- to use up any finance the claimant has or may obtain.

5 In our view, the ideal system to prevent prohibitively expensive proceedings would be a system which avoided all need for the following:-

a) applications for protective costs orders,
b) hearings of such applications,
c) applications to vary default figures in those orders,
d) appeals from those orders,

e) applications to obtain protective costs orders in respect of appeals,
f) detailed assessment hearings following judicial review proceedings and
g) appeals therefrom.

6 We recommend a regime in which, if no legal aid was available, potential claimants in environmental judicial review claims could, simply by serving notice on the potential defendants, entitle themselves to a deemed protective costs order. That order would specify both the maximum sum they may be ordered to pay (if costs are awarded against them) and also the maximum sum which they would be entitled to recover from the defendants (if an order for costs were later made in their favour).

7 These deemed orders:

(a) would not be subject to any variation, save that the respondents could apply for the deemed order to be set aside (for example, in cases where the proceedings commenced are an abuse of process: the set aside application would be combined with a strike out application);

(b) would apply only to the application in question: a separate notice would be required in respect of any renewed application, or in respect of any appeal (whether the claimant was the appellant or the respondent);

(c) would, in the case of multiple claimants, have to be signed by all of the claimants;

(d) would impose upon the court hearing the application, or the appeal in question, an obligation to assess (summarily) the costs of that application or appeal. In the case of appeals, the court would also have to assess (summarily) the costs of the earlier proceedings if they had not already been assessed.

8 Our proposal to have complete rigidity as to the figures provided for by deemed protective costs orders is, we hope, justified by the savings it would bring to claimants in the form of wasted or disproportionate hearings about costs, and also by the claimants' ability to seek other methods of funding a claim if they so choose.

9 The system of deemed PCO's we propose need not exclude a claimant's right to apply for a PCO on some other terms. However, if such an application were made, the claimant ought to be required to give full information as to his own direct and indirect resources and, a PCO, if made, could be on terms that the rules relating to deemed PCO's would cease to apply to that case.

10 In order to comply with the Aarhus Convention, the amount to be specified in a deemed protective costs order would have to be a sum which, demonstrably, is unlikely to be prohibitive of litigation. In order to have figures which are fair to both parties, it is also necessary to specify a cap on the claimants' recovery which is demonstrably fair to the defendants.

11 In our view the ideal figures may well be £2,000 and £10,000 respectively. The rule should expressly state that these sums are

inclusive of any VAT which may be payable. They should also state that the figures are applicable to the proceedings as a whole, whether or not there is more than one claimant and whether or not the judicial review is brought against more than one defendant. Whatever figures are specified they should be reviewed annually and uprated for inflation if necessary.

12 Any particular judicial review case may generate multiple applications and appeals. For example:

(i) an application to the High Court for leave to bring judicial review proceedings;
(ii) a renewed application for leave which is made to the Court of Appeal;
(iii) the judicial review hearing itself;
(iv) an appeal brought against the judicial review hearing;
(v) a further appeal to the Supreme Court.

13 In our view, the same figures (£2,000 and £10,000) should apply to each such application or appeal. In the example given above the claimants could limit their liability to a maximum sum of £10,000 (5 x £2,000). In the same way those claimants would, if ultimately successful, be entitled to recover no more than a maximum of £50,000 (5 x £10,000).

14 We would also invite the Government to consider whether any changes it proposes for PCOs in environmental judicial review claims should be extended to all judicial review claims in which PCOs are often awarded, i.e. judicial review claims containing a certificate by the

claimant that they are brought in the public interest and are proceedings as to which the claimant has no personal interest.

15 Applying this thinking to the specific questions raised in the Consultation paper our answers are as follows:-

Question 1.	Have you been deterred from bringing a judicial review within the scope of the Aarhus Convention because you considered that costs were prohibitive? If so, please provide details, including specifics about the matter you wished to challenge.
Comments:	Not applicable

Question 2.	Would the proposed codification of PCOs enable you to bring a judicial review in a case within the scope of the Aarhus Convention if you wished to challenge a decision in the future? Please explain your reasons.
Comments:	Not applicable

Question 3.	Do you agree with the proposal to set the presumptive (i.e. default) PCO limit at £5,000? If not what should the figure be? Please give reasons.
Comments:	No. We propose a system of deemed orders specifying lower figures which would apply only to the application or appeal in question; additional deemed orders would be available for further applications and appeals in the same matter. See paragraphs 1 to 15, above.

Question 4.	Do you agree that challenges to the presumptive cap limit of £5,000 should be permitted?
Comments:	No. See paragraphs 1 to 14, above.

Question 5.	If so, do you think that defendants should only be entitled to apply only to remove the cap or should it also be possible for defendants to make applications to raise the cap? Please give reasons.
Comments:	Not applicable

Question 6.	In considering exceptions to the grant of a PCO in the presumptive amount, should the court only consider information that is publicly available? If not, what other information should be taken into account?
Comments:	Not applicable

Question 7.	Should challenges be permitted only against organisations, or should challenges also be permitted against wealthy individuals? Please give reasons.
Comments:	The PCO regime we propose should be available to all claimants

Question 8.	If it were necessary to disclose financial information to obtain a PCO or vary it, would that fact deter you from seeking a PCO? Would your answer differ depending on the information you needed to disclose?
Comments:	Not applicable

Question 9.	Do you agree with the proposal to set the automatic cross-cap at £30,000? If not what should the figure be?
Comments:	No: instead, we propose £10,000 for each application and appeal in the matter for which a deemed PCO is sought

Question 10.	Should it be possible to challenge the cross cap of £30,000? If yes, what should the basis of that challenge be? Please give reasons.
Comments:	No

Question 11.	Do you think that if a challenge were introduced to the cross cap that the £5,000 cap ought to be reviewed at the same time?
Comments:	No

Question 12.	Should the default cap as proposed earlier (in the sum of £5,000 although consultees' views have also been sought on the amount), be applied to all proceedings including those on appeal?
Comments:	No

Question 13.	If not, should an additional application be possible to set a PCO for an appeal? Should the limit be set by the court or should a presumptive limit apply? Please give reasons.
Comments:	Yes. See paragraphs 1 to 14, above

Question 14.	Should the position differ according to whether it is the claimant or defendant (at first instance) who is appealing? If so, in what way?
Comments:	No