

**LORD JUSTICE JACKSON'S RESPONSE TO MoJ CONSULTATION
PAPER CP 16/11 "COSTS PROTECTION FOR LITIGANTS IN
ENVIRONMENTAL JUDICIAL REVIEW CASES"**

1. INTRODUCTION

1.1 Abbreviations. In this note I use the following abbreviations:

"Aarhus" means the Aarhus Convention;

"C" means the claimant;

"D" means the defendant;

"Final Report" or "FR" means the Review of Civil Litigation Costs Final Report;

"PCO" means protective costs order;

"PPD" means the Public Participation Directive (Directive 2003/35/EC);

"Preliminary Report" or PR means the Review of Civil Litigation Costs Preliminary Report;

"QOCS" means qualified one way costs shifting.

1.2 Background. By way of background I refer to, but do not repeat, chapters 35 and 36 of my Preliminary Report and chapter 30 of my Final Report. These chapters set out (a) a summary of the law on PCOs, (b) a summary of the relevant evidence submitted during the Review, (c) a summary of the arguments deployed in relation to costs protection for litigants in environmental judicial review cases and (d) my own conclusions. As the MoJ are aware, I concluded that the best course was to introduce QOCS for the reasons set out in FR chapter 30.

1.3 The Government's decision of March 2011. The Government has accepted my recommendation to introduce QOCS for personal injury and clinical negligence claims, but has decided not "at this stage" to extend QOCS further.¹

1.4 The present problem. The problem of devising costs rules for environmental judicial review cases which (a) are fair to both parties, (b) facilitate access to justice, (c) cater for the wide diversity of such cases and (d) comply with the UK's international obligations is an intractable one. In particular:

(i) Pure one way costs shifting is (with all due respect to those who suggest otherwise) a non-starter. It would be absurd if a global corporation, which brings a judicial review claim² to protect its own commercial interests and loses, has no liability for costs.

(ii) PCOs, though devised by the courts with the best of intentions, are unsatisfactory. They tend to generate hard fought satellite litigation and to drive up costs substantially. This became clear during the Costs Review and it also accords with my own judicial experience.

(iii) QOCS (my preferred solution) has not found favour with a number of public authorities on the basis that it is too generous to claimants. It has not found favour with a number of claimant bodies³ for the opposite reason, namely that it provides

¹ See The Government's Response, Cm 8041, dated March 2011.

² E.g. to prevent a rival development

³ Environmental pressure groups etc

insufficient protection for claimants. Whilst the experience of being shot at equally from both sides tends to confirm my view that the FR struck the right balance, I accept the Government's decision that QOCS will not be extended "at this stage". I understand that the Government wishes to see how QOCS works in personal injury and clinical negligence cases before considering my recommendation⁴ that it be extended to other areas of asymmetric litigation.

2. THE MoJ's CURRENT PROPOSALS

2.1 The proposals. The MoJ proposes a costs regime specifically for cases which fall within Aarhus and the PPD. Under this regime, the normal outcome of an environmental judicial review claim which succeeds at trial will be that C recovers costs of £30,000. The normal outcome of an environmental judicial review claim which fails at trial will be that D recovers costs of £5,000.

2.2 How should the proposals be characterised.? The MoJ characterises the proposals as "codification of PCOs". I am not sure that this is the right badge. The regime outlined in the consultation paper is more akin to a fixed costs regime.

2.3 Fixed costs regimes come in all shapes and sizes. It can be seen from CPR Part 45 that "fixed costs" is a Protean concept. The categories of fixed costs set out in CPR Part 45 are regularly expanding.

2.4 Fixed costs in the Patents County Court. One recent addition to Part 45 is section 7. This applies in the Patents County Court, where the claim value may be up to £500,000. The rules set out scales of recoverable costs, subject to a cap of £25,000 or £50,000 depending on the nature of the case. In any fully contested case the "caps" of £25,000 or £50,000 will always be reached. Hence the figures are characterised as "fixed costs". This regime is of considerable benefit to SMEs and it ensures that costs are (a) affordable and (b) proportionate to the sums in issue. See further FR chapter 24 ("Intellectual Property Litigation"), which strongly commended the (then still in draft) fixed costs regime for the Patents County Court. The Patents County Court has attracted a considerable volume of work since the new provisions came into force. It is believed that the new costs regime is one important reason for this.

3. THE WAY FORWARD

3.1 Develop a fixed costs regime. In my view the proposals in the MoJ consultation paper should be developed as a fixed costs regime and located within CPR Part 45. The label which we apply does matter. First, as critics of every reform always say, the devil is in the detail. I believe that the details will be much easier to work out if we formulate the new regime within the framework of fixed costs rather than develop the scheme as a special sort of PCO. Secondly, the way a costs regime is classified affects the culture or the mindset of practitioners and judges who deal with cases under that regime.

3.2 The detail. The new regime could be added to the Pantheon of Part 45. It would become "Part 9: Fixed Costs for Environmental Judicial Review Cases". Such cases

⁴ See FR chapter 9 paras 5.1 to 5.14 and chapter 30.

could be defined as all judicial review cases falling within Aarhus or the PPD. A set of rules for such cases could then be developed broadly similar to that set out in CPR rules 45.41 to 45.43 and section 25C of the Costs Practice Direction.⁵

3.3 Offer of assistance. If time allows (which currently it does not owing to pressure of other implementation work), I would be willing to sit down with a group of representative practitioners and produce a first draft of the fixed costs rules for this category of cases.

3.4 Which cases should fall outside the regime? Most categories of fixed costs cases have let out provisions: see, for example, rule 45.12, which takes low value RTA cases outside the fixed costs regime in exceptional circumstances. Therefore the existence of such provisions is not inimical to a fixed costs regime. I suggest that two categories of case should fall outside the fixed costs regime.

3.5 First category. Subject to the overriding discretion of the court to prevent abuses, claimants should always be entitled to opt out of the regime. If a claimant is prepared to forego the safety net of limiting his costs liability £5,000, then his entitlement to recover costs if successful should also be at large. Such a provision has analogies in the tax field. In tax appeals to the First-Tier Tribunal⁶ the taxpayer (but not HM Revenue and Customs) has a right to opt into or to opt out of a costs shifting regime.

3.6 Second category. The court should have a discretion to disapply the regime in cases where the claimant's resources are such that it can clearly afford to meet the full costs of the action. The drafting of this exception will require considerable care, but it is not an impossible exercise. In practice, an application on this ground will only be made by the defendant. I suggest that the defendant (a) should always bear its own costs of making such an application and (b) should also pay the claimant's costs of opposing the application⁷ unless the application succeeds. In clear cases (as where the claimant is a multi-national corporation) the costs of an application to disapply will be minimal and anyway the matter is likely to be agreed. In borderline cases (a) applications to disapply will be discouraged by costs rules weighted in this way and (b) the costs of the application to disapply are likely to be far more modest than the satellite litigation costs of PCO applications.

3.7 The same costs regime should apply whether the claimant is an individual or a company. If we add a new category of fixed costs to CPR Part 45, it would add a grotesque and unwelcome complication to have different rules for individuals and companies. Furthermore I see considerable force in the MoJ's suggestion that the defendant on an application to disapply should only be permitted to rely upon publicly available information.

⁵ The use of scales plus a cap will mean that sometimes a successful party recovers less than the "fixed costs" – as in the Patents County Court. If one side capitulates at an early stage the recoverable costs will reflect the stage which the litigation has reached. In a simple and straightforward environmental judicial review case which goes to judgment after a short hearing the claimant will recover less than £30,000.

⁶ Mr Justice Warren has recommended an extension of this regime to tax appeals to the Upper Tribunal where the taxpayer was successful in the First-Tier Tribunal.

⁷ The claimant's costs of opposing the application to disapply should be treated as additional to the £30,000 fixed recoverable costs.

3.8 Need for principled development of the law. There are two points to be made here:

(i) There are strong arguments of principle for progressively expanding the use of fixed costs in larger cases (i.e. above the fast track⁸ – where hopefully all costs will soon be fixed). These arguments are set out in chapter 23 of the Preliminary Report and chapter 15 of the Final Report. The development of a fixed regime for larger cases can only be incremental and the present debate about Aarhus and the PPD provides a golden opportunity to take this process one stage further.

(ii) If we go down the route of creating two different categories of PCOs we shall be adding unwelcome complexity to an area of the law which is already bedevilled with unwelcome complexity and expense. This is contrary to the principle that all procedural rules should be as simple and clear as the subject matter allows.⁹ Also one should not overlook the growing body Court of Appeal authority which says that the PCO rules should be the same in both environmental and non-environmental judicial review cases.¹⁰

3.8 Copper-bottomed compliance with Aarhus. In my view a further advantage of a properly drawn fixed costs regime is that there will be copper-bottomed compliance with the requirements of Aarhus and the PPD. Such a regime will be not far removed from the Continental costs regimes which, I understand, are regarded as satisfactory by both the Aarhus Compliance Committee and the European Commission.

3.9 Appeals. There is no need to make any special rules for appeals. The new rule 52.9A which the Rule Committee approved in November 2011 will make appropriate provision for appeal costs, if a fixed costs regime is introduced at first instance. Rule 52.9A is part of the batch of rule amendments which are being held in escrow until the general implementation date for the Costs Review reforms. It would be sensible for the fixed costs regime proposed in this paper to be introduced on the same general implementation date. This fixed costs regime represents implementation of part of the proposals in FR chapter 16. Everything will then tie in nicely and appeals will be catered for.

3.10 Overseas experience. A number of overseas jurisdictions have developed costs regimes which are benign to claimants. In respect of the approach in Canada, see PR chapter 35, para 3.9. In respect of Australia, see the High Court's decision in *Oshlack v Richmond River Council* (1998) 193 CLR 72. This decision is discussed by Hon Michael Kirby in "Deconstructing the Law's Hostility to Public Interest Litigation" (2011) 127 LQR 537 at 550-551. The approach advocated in the MoJ's consultation paper and developed in this response is not out of line with the approaches to the present problem in other common law jurisdictions.

4. ANSWERS TO QUESTIONS IN MoJ CONSULTATION PAPER

4.1 For the reasons set out above my answers to the questions posed in the consultation paper are as follows:

⁸ PR chapter 22 and FR chapter 15 propose a fixed costs regime for all fast track cases.

⁹ See FR chapter 4 paras 3.2 to 3.6.

¹⁰ See PR chapter 35, PR chapter 36 and FR chapter 30.

Q. 1: Not applicable.

Q. 2: Not applicable.

Q. 3: I agree with the figure of £5,000, but it should be part of a fixed costs regime.

Qs. 4-7: See paras 3.3 to 3.6 above.

Q. 8: Not applicable.

Q. 9: I agree with the figure of £30,000, but it should be part of a fixed costs regime.

Qs. 10 and 11: See paras 3.3 to 3.6 above.

Qs. 12 to 14: See para 3.9 above.

Rupert Jackson

10th January 2012