Neutral Citation Number: 2013 EWHC 3164 (Admin)

Case No: 5313/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2013

Before:

MR JUSTICE HADDON-CAVE

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Between:

(on the application of THE PLANTAGENET ALLIANCE LIMITED)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**First Defendant**
- and -	
THE UNIVERSITY OF LEICESTER	**Second Defendant**
- and -	
THE MEMBERS FOR THE TIME BEING OF THE CHAPTER, THE COUNCIL AND THE COLLEGE OF CANONS OF THE CATHEDRAL OF SAINT MARTIN LEICESTER	**First Interested Party**
- and -	
THE MEMBERS FOR THE TIME BEING OF THE CHAPTER, THE COUNCIL AND THE COLLEGE OF CANONS OF THE CATHEDRAL AND METROPOLITAN CHURCH OF SAINT PETER YORK	**Second Interested Party**

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Gerard Clarke and Tom Cleaver (instructed by **Gordons LLP**) for the **Claimant**
Tom Weisselberg (instructed by **The Treasury Solicitor**) for the **First Defendant**
Anya Proops and Heather Emmerson (instructed by **University of Leicester**) for the **Second Defendant**

Hearing date: 26th September 2013

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Approved Judgment

MR JUSTICE HADDON-CAVE:

INTRODUCTION

1. On 15th August 2013, I granted Permission for Judicial Review in this matter on the papers and made certain orders and directions, including a Protective Costs Order ("PCO") and an order for Disclosure. The substantive hearing has now been set down for hearing before the Divisional Court on 26th November 2013.

2. On 26th September 2013, a hearing took place before me in the vacation in Court 3 at the Royal Courts of Justice. The Claimants and First and Second Defendants appeared by Counsel. This was originally intended to be a short hearing to fix the level of the PCO 'cap' (as directed in my Order of 15th August 2012). The First Defendant ("the Justice Secretary") however, made four additional applications:
   (1) An application for discharge or variation of the PCO.
   (2) An application for Security for Costs against the Claimants.
   (3) An application for a variation of the Disclosure Order.
   (4) An application for an extension of time to file Detailed Grounds.

3. The Second Defendant ("the University of Leicester"), supported applications (1) and (2) above, was neutral on application (3) and had no objection to (4). The University made a separate application to have the PCO set aside against it.

4. The First and Second Interested Parties ("Leicester Cathedral" and "York Cathedral") indicated an intention not to appear.

5. After hearing a full day's submissions from Counsel on all sides, I indicated that I would hand down my decision in the early part of Michaelmas Term. My ruling on the various applications and the level of the PCO 'cap' is set out below.

ISSUE 1: APPLICATION FOR DISCHARGE OR VARIATION OF THE PCO

6. On 15th August 2013, I granted a PCO in the following terms (paragraph 4 of my Order):

> *"There shall be a Protective Costs Order whereby the First and Second Defendants shall be prevented from recovering their costs of these proceedings from the Claimant."*

7. I granted a PCO on the basis of the well-known principles in *R(Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192 as explained in *Morgan v. Hinton Organics* [2009] EWCA Civ 107 (see paragraphs 36-38 of my Judgment). PCOs are about ensuring access to justice. They are granted in respect of judicial review claims which raise issues of *"general public importance"* which it is in the *"public interest"* should be determined, but would otherwise be stifled by lack of financial means. For the reasons given in my Judgment, I decided that this was a paradigm case for the grant of a full PCO in favour of the Claimants (*i.e.* full protection against the Defendants' costs), and directed that there should be a hearing before me to set an appropriate 'cap' on the Claimant's own recoverable costs.

8. On 5th September 2013, the Justice Secretary lodged an appeal against the grant of a PCO with the Court of Appeal. This was a procedural mistake. It is impermissible to challenge a decision of the Administrative Court made on paper on an ancillary matter by way of appeal to the Court of Appeal without having first renewed the matter orally before the Administrative Court (*c.f. R (on the application of MD (Afghanistan) v. SSHD* [2012] EWCA Civ 194). On 17th September 2013, this error was pointed out to the Treasury Solicitors by an alert lawyer in the Administrative Court Office, Samantha Lovett. On 19th September 2013, the Justice Secretary issued an application for an extension of time for service of detailed Grounds until after the determination of his application for permission to appeal against the PCO. On 24th September 2013, Deputy Master Meacher of the Civil Appeals Office directed that the Justice Secretary's application for permission to appeal was *"premature"* and was to be closed in the Court of Appeal *"for want of jurisdiction"*. The Court of Appeal file was then duly closed and the fee refunded.

9. On 25th September 2013, the Justice Secretary issued a further application challenging the grant of the PCO by way of a re-hearing and seeking its discharge or variation.

Submissions

10. Mr Weisselberg, Counsel for the Justice Secretary, submitted that the PCO should be discharged on the following grounds: (i) this was a 'wholly inappropriate' case for the Government to fund; (ii) on a proper application of the relevant principles, it was 'fundamentally wrong' to grant the Claimant company a PCO; and (iii) in any event, even if the relevant principles were flexible enough to permit the grant of a PCO in this case, 'this was not an appropriate case for a PCO'. Mr Weisselberg submitted, in alternative, that the PCO should be varied so that it was not a full PCO but a partial PCO, *i.e.* only gave the Claimant partial protection against liability for the Defendants' costs.

Hurdles

11. Mr Weisselberg recognised that the Justice Secretary faced three hurdles in making the application.

12. The first hurdle was to demonstrate that the Court has jurisdiction to hear an application for re-consideration of a decision regarding a PCO. The procedural position is that, absent a clear agreement that the matter can be dealt with solely on paper, an application for a PCO is to be treated as governed by CPR rule 23.8(c) so that either party has the right to make an application to the court to have the order set aside, varied or discharged (*R (Compton) v. Wiltshire Primary Care Trust* [2009]1 WLR 1436 [42]). I am satisfied, therefore, that the Court does have jurisdiction to hear the application.

13. The second hurdle was the Justice Secretary's application was out of time. An application to set aside, vary or discharge an order on paper must be made within seven days (CPR 3.3(6)(b)). The Justice Secretary's application to set aside the PCO granted on 15th August 2013 was not made until 25th September 2013, *i.e.* nearly four weeks late. The reason for the lateness was the incorrect procedure adopted by the Justice Secretary (see above). Mr Weisselberg submitted that the Court should exercise its discretion to grant an extension of time because prompt action was taken to issue the correct application once the error was pointed out. It is also fair to say the mistake was not initially noticed by the busy Appeals Office itself. In these

circumstances, I am satisfied that it would be appropriate to exercise my discretion to extent time to allow the Justice Secretary to bring his application to challenge my PCO order at a re-hearing (even applying the new stringent *post*-Jackson regime under CPR rule 3.9(1)).

14. The third hurdle was that the court will not set a PCO aside unless there is a *"compelling reason"* for doing so (see *Corner House, supra,* at [76]; and *R (Compton) v. Wiltshire Primary Care Trust* [2009]1 WLR 1436 [42-46] (see further below). Mr Weisselberg submitted that an absence of reasons below given for the grant of a PCO was a *"compelling reason"*, at least for reviewing the matter. He further submitted that my Judgment of 15th August 2013 did not contain any, or any sufficient, reasons for my decision to grant a PCO on the papers, but comprised merely a recitation of the *Corner House* criteria.

15. I disagree. Mr Weisselberg focuses only on paragraphs 36 and 37 of my Judgment where I cited to the relevant authorities and explained that each of the five main criteria was satisfied. However, the preceding paragraphs in my Judgment contain detailed reasoning directly germane to the question of the grant of a PCO: see paragraph 30 (*'Public feeling'*), paragraph 31 (*'Parliamentary debate'*), paragraph 32 (*'Belated attempt at consultation'*), paragraph 33 (*'Article 8'*) and paragraph 34 (*'Unprecedented'*). In my judgment, the reader could be in little doubt as to the rationale for my decision to grant a PCO. It should be noted the procedure adopted was *Corner House* compliant, *viz.* the grant of a PCO on the papers, following written submissions from both sides, (see *Corner House, ibid,* [78-79]).

16. In my judgment, therefore, Mr Weisselberg's 'no reasons' ground does not amount to a *"compelling reason"* for a reconsideration of the grant of the PCO. Nevertheless, I turn to consider the question of the grant of a PCO afresh, in case there is some other compelling reason for setting aside my own Order.

The Law

The Corner House principles (2005)

17. The general principles governing Protective Costs Ordered were restated by the Court of Appeal in *R (Corner House) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 (CA) at [74] as follows (see also The White Book at paragraph 48.15.7):

> *"(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that 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 respondent(s) 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 for a PCO."*

(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 the considerations set out above.

18. A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge (*Corner House, ibid,* at [75]). There is room for considerable variation, depending on what is *"appropriate and fair"* in each of the rare cases in which the question of a PCO may arise (*Corner House, ibid,* at [76]).

19. The Court of Appeal in *Corner House* said that the earlier guidance in the case of *King v Telegraph Group Ltd* [2004] EWCA Civ 613 at [101-2] (a defamation case) will *"always"* be applicable, but rephrased the *King* guidance in the present context as follows (*Corner House, ibid,* at [76]):

    (1) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability.

    (2) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. 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 overriding purpose of exercising this jurisdiction is 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, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly.

20. The Court should not set a PCO aside which has already been granted unless there is *"compelling reason"* for doing so (*Corner House, ibid,* at [79]).

Subsequent cases – the need for "flexibility"

21. Subsequent cases have, however, repeatedly emphasised the need for *"flexibility"* when applying the *Corner House* guidelines, and in particular guideline (iii) that an applicant should have no "*private interest*" in the outcome of the judicial review case (see *R (Bullmore) v. West Hertfordshore Hospitals NHS Trust* [2007] EWHC 1350 (Admin), *per* Lloyd Jones J; *R (Compton) v Wiltshire PCT* [2008] EWCA Civ 749 (Waller and Smith LJJ, Buxton LJ dissenting) ; *R (Buglife) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209, [2009] 1 Costs LR 80 (Sir Anthony Clarke MR, Maurice Kay and Stanley Burnton LJJ); and *Morgan v. Hinton Organics (Wessex) Ltd* [2009] Env LR 30 (Laws, Carnwath and Maurice Kay LJJ).

Compton (2008)

22. In *Compton* (*supra*), Waller LJ examined the 2006 Kay Report of a *Working Group*

on Public Interest Litigation and the 2008 Sullivan Report of a *Working Group on Access to Environmental* Justice. Waller LJ went on expressly to approve Lloyd Jones J's *"flexible"* approach and emphasise that the *Corner House* guidelines should not be read as statutory provisions or in an *"over-restrictive"* way (*ibid*, at [23]). Waller LJ also dismissed the notion of an *"exceptionality"* principle in addition to the *Corner House* guidelines (*ibid*, at [24]). Waller LJ concluded with the following observations on the meaning of *"general public importance"* (*ibid*, at [24]):

> *"Finally I do not read the word "general" as meaning that it must be of interest to all the public nationally. On the other hand I would accept that a local group may be so small that issues in which they alone might be interested would not be issues of "general public importance". It is a question of degree and a question which Corner House would expect judges to be able to resolve."*

23. Smith LJ endorsed a similarly *"flexible"* approach to Waller LJ in *Compton* and gave the following guidance in relation to the question of *"general public importance"* at [77]:

> *"It seems to me that a case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome. Because it is impossible to define what amounts to an issue of general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general."*

24. Smith LJ enunciated the following useful, common sense yardstick in *Compton* at [85] (which was cited by Sir Anthony Clarke MR in *Buglife* at [20]):

> *"It seems to me as a matter of common sense, justice and proportionality that when exercising his discretion as to whether to make an order and if so what order, the judge should take account of the fullness of the extent to which the applicant has satisfied the five Corner House requirements. Where the issues to be raised are of the first rank of general public importance and there are compelling public interest reasons for them to be resolved, it may well be appropriate for the judge to make the strongest of orders, if the financial circumstances of the parties warrant it. But where the issues are of a lower order of general public importance and/or the public interest in resolution is less than compelling, a more modest order may still be open to the judge and a proportionate response to the circumstances."*

Subsequent CA cases

25. In *Buglife* (*supra*), the Court of Appeal stated Waller LJ's views were of general application (*ibid*, at [17]) and said that the correct approach was to follow *Corner House* as explained by Waller LJ and Smith LJ in *Compton* (*Buglife*, *ibid*, at [18-19]). The Court of Appeal in *Buglife* also expressly agreed with Waller LJ's view that it was *"difficult to separate"* the two tests of *"general public importance"* on the one hand, and *"public interest"* on the other (*per* Sir Anthony Clarke MR giving the judgment of the Court, *ibid*, at [17]).

26. In *Morgan Hinton* (*supra*), the Court of Appeal noted that the Rules Committee had not yet addressed the criticisms of the narrow approach to the *Corner House* guidelines and went on to say that, in the meantime, the *"flexible"* basis proposed by Waller LJ and approved by *Buglife*, should be applied to all aspects of the Corner House guidelines (*Morgan Hinton, ibid,* at [40]):

27. In the very recent decision of *R (Litvinenko) v. Secretary of State for the Home Department* (Goldring LJ, Treacy LJ and Mitting J, 4th October 2013), the Court of Appeal is summarily reported as having stated as follows:

    (1) The starting point was that a PCO would not be made unless (a) there was a real prospect of success in the judicial review proceedings, (b) the issues raised were of general public importance and (c) there was a compelling public interest for them to be resolved.

    (2) A private interest in the judicial review claim is not fatal to the application for a PCO. Subsequent cases have emphasised the need for flexibility when considering the requirement in *Corner House* that an applicant should have no private interest in the case. The correct approach was that an applicants' private interest was (merely) *"a factor"* to consider when balancing against the other elements of the *Corner House* guidance.

    (3) In the present case, Mrs Litvinenko's liquid assets outweighed the value of the Secretary of State's estimated costs and she had greater means than many other litigants. She had the financial means to bring the proceedings if she chose to and it would not be *"fair or just"* to make a PCO, nor was it an *"exceptional"* case for the *Corner House* principles to apply.

28. It should be noted that the reference in *Litvinenko* to an *"exceptionality"* requirement is in contrast to the Court of Appeal's previous endorsements of Waller LJ's approach in both *Buglife* and *Morgan Hinton* (see above). A full transcript of *Litvinenko* is not yet available.

'Legal' issues of public importance

29. Mr Weisselberg accepted that PCOs were not only available where pure legal issues of public importance were at stake, but reserved his position to argue otherwise should the matter go further. Suffice it to say that I do not read *Corner House* as confining itself to points of law alone, nor for that matter did even Buxton LJ in *Compton* (*ibid,* at [60]). As Smith LJ emphasised in *Compton*, because it is impossible to define what amounts to an issue of *"general public importance"*, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general *(*see *Compton, ibid,* at [77] cited above).

Application of the Law to the Facts

Submissions

30. Mr Weisselberg relied principally upon the Skeleton Argument prepared by Senior Treasury Counsel, James Eadie QC, and Ben Watson, in support of the Justice Secretary's case that a PCO should not be, or should have been, granted.

31. Mr Weisselberg's submission on behalf of the Justice Secretary were adopted and supported by Counsel for the University of Leicester. Without discourtesy to the diligence of Miss Proops and Miss Emmerson, I do not deal with their submissions separately, save where they differed materially from those of Mr Weisselberg's submissions.

32. I deal with each of the main arguments raised below under each of the five *Corner House* principles.

(1) 'General public importance'

33. The Justice Secretary argued that there were no issues of *"general public importance"* raised by this case. Mr Weisselberg's submissions on behalf of the Justice Secretary can be summarised as follows: The fact that members of the public might be interested in the underlying subject matter of a claim, did not mean that the claim itself raises an issue of *"general public importance"* for *Corner House* purposes. The claim itself is a challenge to the process by which the re-burial decision itself was arrived at, but there was no point of *"general public importance"* which arises in respect of the process since (a) it is clear that section 25 of the Burial Act 1857 conferred an 'unfettered discretion' (see *R(Rudewicz) v. Secretary of State for Justice* [2013] QB 410 at paragraph [30]); (b) there is no need for further guidance as to the operation of section 25 of the Burial Act 1957 as the Claimant suggested, albeit that it was an enactment made in the industrial age; and (c) there is no need for a reconsideration of the law of 'legitimate expectation' which was settled law.

Analysis

34. My Judgment of 15th August 2013 sets out the reasons why this case self-evidently raises matters of *"general public importance"* which go well beyond those of the immediate parties. The following points, in particular, are pertinent: (i) The fundamental question as to the final resting place of Richard III's remains has aroused a great deal of strong public feeling in the country (paragraph 30). (ii) It has led to a Parliamentary debate (paragraph 31). (iii) The Ministry of Justice belatedly sought to arrange a consultation meeting with national bodies, including the Church of England, the Catholic Church, and HM The Queen (paragraph 32). (iv) The discovery of Richard III's remains is *"unprecedented"* and touches on our history, heritage and identity (paragraph 34). (v) The discovery of Richard III's remains engages interests beyond those of the immediate parties, and touches on Sovereign, State and Church (paragraph 40).

35. Mr Weisselberg's essential argument appears to me, in *précis*, to boil down to the following proposition: because the legal challenge is merely a challenge to the *process* by which the reburial decision was arrived at, *ergo* there is no point of public importance raised by this case because the issues relating to *process* are settled law. This argument, if I have understood it correctly, seeks to side-step the essential point: that there is an important public interest in ensuring that the decision as to the final resting place of the remains of a former Monarch is arrived at in a proper manner. His argument seeks, illegitimately, to divorce the decision from the process. The two aspects are, however, inextricably linked and cannot properly be viewed with blinkers or in separate silos. The more important the decision, the more important the public interest in adherence to the proper and lawful process. It makes no sense to suggest

that the fate of Richard III's remains may, *per arguendo*, be a question of *"general public importance"*, but the manner in which that decision was arrived at is not. The Claimants readily acknowledged that it was not a matter at the highest end of the scale of public importance, but it was nevertheless of considerable public importance (*c.f.* Smith LJ in *Compton, supra,* at [85]).

Burial Act 1857

36. The Claimant argues that the Burial Act 1857 would benefit from consideration by the Courts, since it was introduced in the industrial and railway age when burial sites might be disrupted by development works and was intended to cater for exhumations and re-interments having regard to the prevailing Christian *mores* of the United Kingdom, and was not directed towards the modern practice of archaeology. This may be so, but I do not regard this as giving rise, in itself, to a point of *"general public importance"*. It is settled that section 25 of the Burial Act 1857 confers an 'unfettered' discretion on the Justice Secretary to issue burial licences (*R(Rudewicz) v. Secretary of State for Justice* [2013] QB 410 at [30]), subject to the fundamental shackles of rationality and general public law.

(2) 'Public interest'

37. The Justice Secretary argued that there was no *"public interest"* in the outcome of the judicial review, merely a 'parochial' interest by York sympathisers driving the claim. Mr Weisselberg submitted that that there is no need or *"public interest"* in having a judicial review in Court because the interests of the public about where the remains of the former King should are 'entirely served' by a public debate on the matter which is, in effect, already going on. Mr Weisselberg submitted that it was sufficient that the issues regarding Richard III's re-burial were 'ventilated' in the newspapers.

Analysis

38. In my judgment, this argument is flawed and heretical. It ignores the fundamental need for the Court to ensure that the due processes of the Common Law are adhered to. It suggests that amorphous 'public debate' in the Press or on the Web is somehow a substitute for the adherence by public bodies to the duty at Common Law properly to consult interested parties. It also ignores the fact that the licensee (the University of Leicester) is not a disinterested party and has a personal interest in retaining possession and control of the remains whatever views might be expressed in such a public debate.

(3) 'Private interest'

39. The Justice Secretary argued that the interest being served by this claim is 'exclusively private or personal', namely that of a handful of distant relatives of Richard III who have a 'personal desire' to have his remains reburied in York, rather than Leicester, and were using the litigation as a mere 'vehicle' for advancing this interest by imposing a procedural impediment in the way of the permission granted in the licence.

Analysis

40. A private preference for a particular result following appropriate consultation is to be distinguished from a pure *"private interest"* in the outcome of the judicial review proceedings seeking to bring about that consultation in the first place. As Mr Clarke,

Counsel for the Claimant, submitted, the fact that some might prefer York to Leicester as the chosen final resting place for Richard III's remains, does not mean that they merely have a *"private interest"* in the outcome of the judicial review proceedings, still less a mere 'parochial' interest. These judicial review proceedings are limited is scope to deciding whether there should be a public consultation process in the first place. These judicial review proceedings will not decide between the Cities of Leicester and York (or Westminster). The latter decision might be categorised as a sectional interest (although not, I would suggest, as a mere 'parochial' interest). The former decision is neither. As stated above, there is a public interest in a decision as to the resting place of a former Monarch being arrived at in a proper manner. In any event, it is settled law that a private interest in the judicial review claim is not fatal to the application for a PCO but merely a factor to consider when balancing against the other elements of the *Corner House* guidance (see cases cited above).

(4) 'Financial resources'

41. The Justice Secretary argued that (i) there had been no proper evidence or inquiry into the means of the Claimant company or the individuals represented by it, (ii) the Claimant company has simply been incorporated by Mr Nicolay as a 'device' to limit his exposure to costs and (iii) the Claimant could and should try to raise money from the public and granting a PCO would act as a disincentive to the raising of money from the public.

Analysis

42. It is clear that there that there is an inequality of arms in this case. The Claimant, Plantagenet Alliance Limited, is a not-for-profit entity set up by Mr Stephen Nicolay, the 16th great-nephew of Richard III. Mr Nicolay is the sole director and shareholder of the Claimant, which he set up to represent the interests of himself and a number of collateral descendants of Richard III (comprising 16th, 17th and 18th great-nephews and great-nieces). In his witness statement in support of the application dated 30th April 2013 which was before me on the original application for permission, Mr Nicolay explained that the Claimant's sole income had come from private donations from supporters of the Richard III campaign and that following expenditure on the website and travel costs, the Claimant only just had sufficient funds left to pay the Court issue fees of £60 and £215 (see paragraph 35). He also explained that the Claimant's Counsel were acting under Conditional Fee Arrangements ("CFAs") and the Claimant's solicitors, Messrs Gordons, had undertaken a considerable amount of work *pro bono* given the financial position of the company before entering into a CFA. His evidence as to financial means was clear and was follows (paragraph 37):

> *"I do not personally have the funds to finance this litigation personally. I work primarily as a self-employed gardener, and have no realisable assets, savings or other capital. Nor am I aware of any other person who has the funds to finance this litigation. Accordingly, in the event that a Protective Costs Order is not granted, neither the Company nor the individuals which it represents will be in a position to continue with this claim, and the issue will not be considered by the Court."*

43. The respondent parties did not seek to challenge this evidence, but merely suggested that the Claimant had not given 'sufficient disclosure' as to financial means (Grounds of Resistance, paragraph 38(3)).

44. There were no reasons on the papers to doubt Mr Nicolay's evidence as to either his own personal circumstances or as to the Claimant's cash-flow or fund-raising situation or as to his knowledge of the non-availability of funds of others to finance the litigation. Absent any such countervailing evidence, in my judgment, there was no reason not to take Mr Nicolay's evidence at face value. He is a self-employed gardener without the means himself.

45. At the hearing on 26th September 2013, Mr Clarke told the Court, on express instructions, that the Claimant's fundraising position had not improved and that the Claimant's financial position had not changed from that was stated in Mr Nicolay's statement. Mr Clarke also pointed out that, since the Claimant had only got wind of the Justice Secretary's late application to re-open the question of a PCO the evening before, the Claimant was obviously not in a position to provide any further information in the time available even if required. Mr Clarke also submitted that, in any event, it would be inappropriate to require a party seeking a PCO to disclose financial information about its supporters. He submitted that this would impose a 'novel and seriously detrimental restriction' on the ability of campaign groups to seek orders of this nature, and may well discourage individuals from supporting campaign groups at all because of the risk that their means will be scrutinised by the Courts by a party resisting such an application.

46. I do not accept Miss Proops' submission that a PCO is inappropriate because the Claimant 'could and should' have raised funds from the public. This is speculative and runs contrary to the evidence the fund-raising position has not improved. Nor do I accept her submission that PCOs should not be granted unless applicants prove they have taken 'diligent steps' to obtain *pro bono* legal representation in the first place. If lawyers are prepared to act free of charge in particular cases all well and good; but it cannot be a *sine qua non* to the grant of a PCO that applicants are required to prove that they have trawled the legal market for *pro bono* representation. This would be contrary to the principle of free choice of representation.

47. In my judgment, for the above reasons, the Court was and is entitled to accept the evidence before it at face value: the Claimant simply has no means to fund the litigation.

(5) 'Fair and just' to grant a PCO

48. The Justice Secretary argued that it was not 'fair or just' for the risk of this litigation to be visited upon the Government. Mr Weisselberg made two main submissions on behalf of the Justice Secretary: (i) first, that this litigation was simply being used as a 'campaigning or publicity tool' to try and persuade decision-makers to re-inter the body of Richard III in York; and (ii) second it was not 'fair or just' that the Government should take the entire risk of defending the proceedings to grant a PCO in circumstances where the applicant had not 'put its hand in its pocket' and the matter was being run on the basis of CFAs.

Analysis

49. In my view, it is unfair to characterise the Claimant's application for judicial review litigation as merely a 'campaigning or publicity tool' to achieve its aim of re-

interment in York. The judicial review proceedings are necessarily limited in scope: they merely seek the quashing of the original licence and an order that an appropriate consultation should take place prior to re-interment (see above). The relief sought is logically a necessary legal step to achieving what the Claimant's supporters contend they are entitled to at Common Law, namely a level playing field of consultation in which to argue the case for York as opposed to Leicester. Miss Proops, Counsel for the University of Leicester, distanced her clients from the Justice Secretary's argument that the litigation was merely to 'garner publicity', and expressly acknowledged that the Claimant had a 'genuine and legitimate interest' in the eventual outcome of the matter and said that it was appreciated that feelings ran deep on both sides. The fairness of PCO can be properly calibrated by an appropriate 'cap' taking all the circumstances of the case into account (see below).

University of Leicester's position in relation to PCO

50. Miss Proops further submitted on behalf of the University of Leicester that, whatever the position in relation to the Justice Secretary and the Government, there were compelling reasons for setting aside the PCO in relation to the Second Defendant, the University of Leicester. Her essential point was that the University of Leicester should not be a defendant to the proceedings in the first place; and since it had been held that the Justice Secretary's (arguable) duty to consult was 'non-delegable', the burden to consult or to re-visit the question of consultation once Richard III's remains had actually been identified, was at all material times on the Justice Secretary not upon the University of Leicester.

Analysis

51. In my judgment, there are a number of answers to Miss Proops' point. First, the University of Leicester is the licence-holder of a burial licence the legality of which is challenged in judicial review proceedings, and, as such, it is appropriate that the University of Leicester should be before the Court and a full party to the proceedings as a defendant.

52. Second, the fact that the Justice Secretary's duty to consult may be 'non-delegable' would not obviate the need for the University of Leicester, as a responsible public body, either to point out to the Justice Secretary that a public consultation was required or to conduct its own public consultation *in lieu*.

53. Third, it is further arguable that that the University of Leicester, as a responsible public body, should not have begun making arrangements for the re-interment of the remains of Richard III at Leicester Cathedral, prior to an appropriate consultation being carried out (paragraph 22(6) of the Judgment). This is so in circumstances where it appears a process of public consultation was at one stage mooted by the University of Leicester (paragraph 29 of the Judgment). In this regard, further evidence of Miss Phillipa Langley in a witness statement dated 22nd September 2013 (to which no objection was taken by any party) may be relied on. Miss Langley stated as follows:

> *"In early-mid October [2012], [Sarah Levitt], Head of Arts & Museums at Leicester City Council confirmed that some form of public consultation on the reburial of Richard III would be required. Leicester City Council had employed a leading QC and that was his advice."*

54. Miss Langley went on to explain that there were discussions about the form and length of the consultation process and a consultation document was prepared by the Leicester City Council. She explained how at a meeting in Edinburgh on 7th November 2012, Miss Levitt showed her a copy of an accompanying letter that would go to the Attorney-General informing him of the consultation. She also explained how Miss Levitt had agreed to delay sending the letter to the Attorney-General until she had requested the Ministry of Justice to amend the exhumation licence to read *"Richard III"* rather than *"persons unknown"*. Miss Langley stated as follows:

> *"[Sarah Levitt] send me an e-mail on 14 November 2012: "Hindsight is a wonderful thing though and this does not change the council's position on the need for consultation and engagement with the public".*
> *However, on my next trip to Leicester a few days later, I was informed by [Sarah Levitt] that the consultation was not now to take place as [the University of Leicester] did not believe it was necessary. The consultation idea had, in fact, been dropped by [the University of Leicester]."*

Conclusion

55. In conclusion on Issue 1, in all the circumstances, I am satisfied that it was, and is, appropriate to grant a full PCO in favour of the Claimants in respect of the costs of the First and Second Defendants. I therefore dismiss the Justice Secretary's application to discharge or vary the PCO. I also dismiss Miss Proops' separate application to set aside the PCO.

ISSUE 2: SECURITY FOR COSTS

56. The Justice Secretary made a separate and stand-alone application for an order for security for costs against the Claimant pursuant to the discretion given to the Court to grant permission to apply for Judicial Review and/or pursuant to CPR 25.12, 25.13(1)(a) and 25.13(2)(c). Mr Weisselberg submitted on behalf of the Justice Secretary that the incorporation of the company was simply a 'device' to avoid the consequences of an adverse costs order being visited on its sole director and shareholder (Mr Nicolay), that the Claimant was a 'busy-body' and the Claimant should be ordered to put up substantial security, failing which the case should be stayed.

57. In my judgment, however, an order for security for costs would not be appropriate in the present case for three reasons. First, an inference as to improper motivation cannot properly be drawn in view of the actual reasons given for incorporation of the applicant company (see above) (see the similar observation by Richards J in *R v Leicestershire County Council, ex p Blackfordby & Boothorpe Action Group Ltd* [2001] Env LR 2 [35]). Second, on the evidence presently before the Court, an order for security for costs would simply stifle the claim. Third, in any event, as Miss Proops acknowledged, the application for security for costs simply does not arise if the Court decides to maintain the PCO.

ISSUE 3: QUANTUM OF COST CAP

58. I turn to the question of the quantum of the cost 'cap'. Cost-capping is the *quid pro quo* for granting a full or partial PCO. It affords appropriate reciprocal protection to the defendant in respect of the PCO claimant's recoverable costs.

Principles

59. The principles governing the quantum of cost-capping in the context of PCOs are in summary as follows:

    (1) Costs should be capped at a level that is *"modest" (Corner House, supra,* at [76].

    (2) This will normally mean restricting claimants to the costs of solicitors and one junior counsel; but there is no absolute rule *(Buglife, supra,* at [25]*).*

    (3) CFA uplifts are, in principle, recoverable because it was important that those skilled in public interest litigation should continue to operate *(per* Moses LJ in *Corner House, supra,* at [17-19].

    (4) Cost-capping in context of PCOs involves having regard to concepts of public interest (and the public purse) (*c.f. R (Davey) v Aylesbury Vale District Council* [2007] EWCA Civ 1166).

    (5) There is a wide discretion for judges to do what is fair and just in all the circumstances of the particular case subject to the guideline cases.

60. The Courts have employed a variety of costs solutions in different PCO cases, including: *e.g.* (i) ordering Treasury rates only but with a full CFA uplift (*R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin), *per* Cranston J at [27-28]); (ii) allowing commercial rates equivalent to the defendant's rates but without a CFA uplift (*R (Public Interest Lawyers Ltd) v Legal Services Commission* [2010] EWHC 3259 (Admin) *per* Cranston J); (iii) allowing leading and junior counsel where the Secretary of State has the same (*R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) CA); and (iv) allowing two junior counsel where the case warranted (*R (Public Interest Lawyers Ltd) v Legal Services Commission* [2010] EWHC 3259 (Admin) CA).

61. A number of cost caps have been in the £20-25,000 range (see *e.g. Badger Trust v Welsh Ministers* [2010] EWCA Civ 807; and *R (Mencap) v Parliamentary & Health Service Ombudsman* [2010] EWCA Civ 875 at [30]); but some caps have been £100,000 (*Public Interest Lawyers Ltd,* [2010] *supra*).

62. In a helpful analysis of the case law prepared by Miss Emmerson, Junior Counsel for the University of Leicester, it is clear that it is common to link partial PCOs linked with reciprocal caps, *i.e.* the cap matches the level of protection at which the partial PCO is set (see *e.g. Garner v. Elmbridge* [2010] EWCA Civ 1006). In this case, however, I have granted a full PCO.

Submissions

63. Mr Clarke, Counsel for the Claimant, said that it was accepted that any costs recovery had to be relatively modest. He submitted that the Court should take as its starting point commercial rates similar to those being paid to the University of Leicester's

legal team and allow two counsel to match the defence teams. Mr Clarke further submitted that, whilst the Court might not give effect to a straight CFA, the Court should consider 'building in' a 50% uplift for a success fee to reflect 'aggravating factors' arising from the Justice Secretary's conduct in particular in (a) breaching the disclosure order of 15th August 2013, (b) publicly criticising these proceedings in the media using a number of epithets, and (c) failing to engage with the Claimant's open offer to settle the matter. He referred me to the witness statement of Mr Howarth of Messrs Gordons LLP who explained that (i) a significant amount of work was done by Messrs Gordons LLP and the Claimant's Counsel prior to the entering into of a CFA but this had been treated on a *pro bono* basis due to the Claimant's limited means; (ii) some £60,000 fees had already been incurred between 15th August and 17th September 2013; and (iii) that total fees in the region of £200,000 were estimated for the case, including dealing with any appeal. Mr Clarke pointed out that Claimants bringing the case would be put to more work than those responding. Claimant's Counsel recognised, however, that recovery of fees of the order £200,000 would not be appropriate. He submitted that, in all the circumstances, a cap of around £100,000 would be appropriate.

64. Mr Weisselberg, Counsel for the Justice Secretary, argued for Treasury rates, one junior counsel, no CFA or uplift and a modest cap of between £20,000 and £40,000 on the basis that was a 'fairly standard' judicial review, not factually or commercially complex or document-heavy, albeit it was a high profile case and much publicised. He took issue with many aspects of the Claimant's draft estimate of costs. He accepted, however, that it was reasonable to assume that the Justice Secretary would spend over £50,000 in total on the case.

65. Miss Proops, Counsel for the University of Leicester, adopted Mr Weisselberg's stance and argued for a global cap in the region of £35,000. She also submitted that because this was 'unquestionably an extremely interesting, colourful and high-profile' case, the Claimant should have explored getting entirely *pro bono* representation. In my judgment, as stated above, this submission runs counter to the time-honoured principle that people are entitled to instruct lawyers of their choice (within reason) and that lawyers are entitled to be paid a reasonable fee for work done.

Decision on cost-capping

66. The Court necessarily adopts a broad-brush approach when deciding levels of cost-capping. It does so having proper regard to all the circumstances, including (a) the general nature of the case and (b) any particular features of proposed litigation and the parties. Each case depends on its own facts.

67. My ruling on appropriate cost-capping in the present case is as follows:

    (1) *Rates:* Treasury rates are appropriate for a case such as this, rather than commercial rates. Treasury rates are, in general, a more suitable benchmark of modesty. This case also involves scholarship and intrinsic interest, rather than burdensome commercial, factual or documentary analysis.

    (2) *CFA:* Giving effect to a CFA would not be appropriate in the context of this case or a full PCO. The concept of a CFA does not generally sit easily with the notion of a modestly funded case in any event. Moreover, the tide has turned against CFAs in the *post*-Jackson world.

(3) *'Uplift':* It would not be appropriate to delve into 'unreasonable conduct' issues at this stage in order to second-guess any uplift to any eventual costs recovery (albeit that such conduct might not go entirely unremarked). To do so would be premature and speculative.

(4) *Counsel:* It would be appropriate, in the interests of fairness and equality of arms, to allow the Claimant to recover the cost of both retained Junior Counsel (Mr Clarke and Mr Cleaver of Blackstone Chambers) since the Justice Secretary has allowed himself the luxury of the Treasury Devil (Mr James Eadie QC) and two Junior Counsel, and the University of Leicester has two Junior Counsel.

(5) *Overall Cap:* It seems that this case will be hard fought, despite entreaties, with no quarter being given on either side. The overall cap should have regard to this fact, the amount of costs already expended and likely future costs assuming Treasury rates, allowing some headroom but reflecting the principle of modesty. In my judgment, taking all factors into consideration, an overall cap of £70,000 would be appropriate. I am fortified that this is a fair figure because it splits the difference between the parties' proffered figures (see above).

(6) *Liberty:* I will grant express liberty to apply to any party for the 'cap' to be revisited at any stage, in the event of exigencies. Excursions to the Court of Appeal may affect the overall costs bill.

ISSUE 4: DISCLOSURE

68. Paragraph 3 of my Order of 15th August 2013 provided as follows:

> *"The First and Second Defendants shall, within 21 days, in accordance with their respective duties of candour, each give disclosure of all correspondence, notes and other documents relevant to (i) the circumstances surrounding the original application and grant of the Licence and (ii) all subsequent discussions and exchanges concerning the remains of Richard III and their re-interment."*

69. The Justice Secretary's applies to discharge this order for disclosure on the basis that it was unnecessary to make a specific order and the usual compliance with the 'duty of candour' is sufficient. The Claimant submitted that a specific was appropriate in circumstances where it was apparent that relevant disclosure had not been given and that, in any event, the Justice Secretary ignored the order and his application was out of time.

Duty of candour

70. The 'duty of candour' in judicial review proceedings, requires parties to disclose materials which are *"reasonably required"* for the court to arrive at an accurate decision (*Graham v Police Service Commission* [2011] UKPC 46). Fordham in *Judicial Review Handbook*, 6th edition, explains (at paragraph 10.4):

> *"A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include: (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant…. and (3) disclosure at the permission stage if permission*

> *is resisted…. A main reason why disclosure is not ordered in judicial review is because the Courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is express when it transpires that they have not done so."*

71. The courts increasingly take a more flexible and less prescriptive approach to the question of ordering disclosure in judicial review case. As Lord Brown observed in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 at [56]:

> "*[T]he time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered. In future, as Lord Carswell puts it, 'a more flexible and less prescriptive principle' should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case.*"

72. Mr Clarke, Counsel for the Claimant, submitted that a specific order for disclosure was justified because the purported compliance by the Defendants with the 'duty of candour' was 'obviously defective'. In my view, however, it is not necessary to approach the matter in this way (and I expressly make no findings on the adequacy of disclosure or otherwise). The issue can be addressed more simply by reference to the spirit in which the Order was made. Given that the Court was already seized of the matter, there were good case management reasons for making a specific order for disclosure on 15th August 2013, namely to assist the parties by putting flesh on the bones of the underlying 'duty of candour'. I see no disadvantages to either Defendant as a result of the Order, but rather the advantage of advance guidance as to what disclosure the Court would regard as *"reasonably required"* (*c.f. Graham, supra*).

ISSUE 5: EXTENSION OF TIME

73. In view of the Court of Appeal's rejection of the Justice Secretary's appeal against the PCO, Mr Weisselberg now simply applies for an extension of time to serve the First Defendant's Grounds of Resistance and evidence. This is not resisted. I grant an extension of time until 25th October 2013.

RESULT

74. In summary, in the result, I make the following rulings:

(1) The application for discharge or variation of the PCO is dismissed.

(2) The application for Security for Costs is dismissed.

(3) The cost cap is set at £70,000 with Treasury rates.

(4) The application to vary the Disclosure Order is dismissed.

(5) Time for filing First Defendant's Grounds of Resistance and evidence is extended until 25th October 2013.

75. I shall invite the parties to agree a form of Order to reflect my rulings.

76. I am grateful to all Counsel for their able submissions.