

## **Protective costs orders in judicial review proceedings**

R (Corner House Research) v Secretary of State for Trade & Industry (Public Law Project interested party) [2005] EWCA Civ 192

**Facts:** This was an appeal against the refusal of an application for a protective costs order in judicial review proceedings arising from a challenge by a small NGO of the failure to consult over the new anti-corruption policy issued by the Export Credit Guarantee Department (part of the Department of Trade and Industry). Corner House instructed their solicitors, Leigh Day & Co, and counsel under a conditional fee agreement. However, they could not risk being liable for the defendant's costs if their action failed and were unable to obtain insurance. They therefore made an application for a protective costs order (PCO), seeking costs protection on the basis that if they lost, there would be no order for costs against them, but if they were successful, they would recover their costs (including any success fee under the CFA) from the Defendant.

The Public Law Project intervened as an interested third party because of the importance of costs protection in public interest litigation in judicial review and their recent work on such applications.

The claimants' application for a PCO was refused at first instance by Davis J, who took the view that the claim did not meet the criteria set out in the leading authority (*R v Lord Chancellor ex p CPAG* [1999] 1 WLR 347) for the granting of such an order.

**The decision:** The court allowed the appeal and echoed Dyson J's 'most exceptional circumstances' direction. The criterion that 'the court was satisfied it had sufficient appreciation of the claim's merits to conclude it was in the public interest to make the order' was adapted with the 'sufficient appreciation of the merits' test modified to where there is 'a real (as opposed to a fanciful) prospect of success, or that its case is 'properly arguable'. Thus the court found that 'no PCO should be granted unless the judge considers that the application for judicial review has a real prospect of success and that it is in the public interest to make the order'.

The court restated the governing principles: that the court must be satisfied that the issues raised are of general public importance; that the public interest requires those issues to be resolved; that the applicant has no private interest in the outcome of the case; that having regard to the parties' resources and the likely costs it is fair and just to make the order; and that without the order, the applicant is likely to discontinue the proceedings and is reasonable in doing so.

The court also held that pro bono representation would enhance the merits of the PCO application, and 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'.

The court also listed the different forms a PCO may take, and gave guidance on capping orders to restrict the defendant's costs liability where the claimant is funded by way of a CFA.

Perhaps as importantly as restating the principles, the court dealt with procedure. The initial application is to be made on the papers, with capped costs protection: the claimant is liable for the defendant's costs if unsuccessful, but the court thought these should not exceed £1,000. The claimant can renew their application at an oral hearing, but the court directed this should be time limited to one hour, and that the defendant's costs, if the application failed should not be more than £2,500. Similar rules apply to third parties.

The court found that Corner House's claim met the criteria and made a PCO in their favour.

**Comment:** Although the court generally followed Dyson J's restrictive criteria from the *CPAG* case, their restating and additional comments should assist claimants and their advisers in applying for a PCO with limited costs risks, and enable them to make a better assessment of whether a PCO will be granted which in turn may well lead to more PCOs than in recent years. The procedure is now clearer, and there is some costs protection for making the application itself. Furthermore, the judgment does reflect a shift to a broader approach so that although PCOs should only be granted in the 'most exceptional circumstances', there might be a greater number of these now that judicial review is utilised by an increasing number of both individuals and organisations to test issues of public importance.

The judgment does however give rise to a number of concerns.

### **Representation**

These are meant to be cases of public importance and public interest, with PCOs only granted in 'the most exceptional circumstances'. However, the claimant's representation must either be 'pro bono' or run under a CFA in line with a capping order restricting 'it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest'. These two propositions – exceptional cases run with limited costs recovery - may well prove irreconcilable in many cases.

It is difficult to understand why the court should be more willing to grant the application in matters of public interest where the claimant's lawyers act pro bono. Why should claimants be expected to secure free representation to enhance their chances of securing a PCO? Who is to provide such representation? The fact that the claimant has secured free representation should have no bearing on the merits of their application for a PCO: either the criteria are met or they are not.

Equally, it seems unrealistic (and undesirable) to expect public interest test cases to be run by juniors, or by senior counsel on greatly reduced fees. (Even in publicly-funded cases, before you hit the Very High Costs Case regime, you can at least instruct leading counsel at normal rates.)

Finally, the judgment also arguably undermines the CFA regime by allowing costs caps that will include the success fee, a mechanism that is meant to cover losses in unsuccessful cases. This again has the potential to restrict access to justice for claimants in such cases if solicitors and counsel are unable to recover success fees on cases they win.

### **Cost protection guidelines**

There is also no discussion in the judgment of the situation where the Claimant cannot risk losing the initial application and being liable for the defendant's costs even if they are capped at £1,000 for a paper application and £2,500 for a hearing. Many small NGOs would not even have this sort of sum available and therefore could not rely on this judgment to try to obtain a PCO, particularly where there are multiple defendants. Such potential liability is presumably in addition to that incurred in the preparation of the defendant's Acknowledgement of Service, (following *Mount Cook v Westminster City Council* [2003] EWCA Civ 1346).

### **Private Interest Criterion**

Lastly, there must be some scope for arguing that even claimants with a 'private interest' in the outcome of the proceedings should be able to benefit from a PCO if the case meets the other criteria. A non-legally-aided client of modest means may well be the appropriate claimant to test an important social welfare issue for example. The Corner House criteria would preclude them, although there may be scope to argue that they should be given protection if their interest does not justify the litigation economically.

### **Where we go from here**

It is vital that the guidance given by the Court of Appeal does not turn into a straitjacket. On each occasion where a PCO is being considered, it must be borne in mind that the overarching aim of the court is to make such order that it considers necessary in the interests of justice. That is the court's overriding objective:

'1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable -

(a) ensuring that the parties are on an equal footing;...

(d) ensuring that [the case] is dealt with ... fairly.'

The approach of the Court of Appeal (which echoes the overriding objective) included the following statement of principle:

'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' (para 76 (iii)).

Seen in that context, it becomes possible to argue for PCOs in circumstances where the guidelines might otherwise appear unhelpful. For instance, the applicant may well have a private interest in the outcome of the matter, and that a strict adherence to the Corner House guidance would thwart that objective. In *Smeaton (SPUC) v Secretary of State for Health & Others* [2002] EWHC 610 the court refused an application for a no costs order at the end of the proceedings as it did not consider the matter litigated to be one of genuine public concern at all, not because the applicant had a private

interest in the outcome, (as a more flexible and nuanced approach was required by the CPR). Thus this factor can be outweighed by other considerations.

Similarly, it should never be forgotten that costs are always within the discretion of the court. A well worded letter before claim encompassing an intention to seek a PCO in the event that the defendant refuses to provide costs comfort, can help minimise costs exposure in the event that any application is ultimately unsuccessful, particularly where the defendant refuses to engage in a constructive dialogue on costs.

It also cannot have been the intention of the Court of Appeal to assist only those claimants able to afford to expose themselves to a costs risk of £1,000.00. Those that cannot should set out in detail their financial position and argue that the overriding purpose of the jurisdiction would otherwise be thwarted. It is for the court, in its discretion, to decide whether it is fair and just to make an order.

After six years of the restrictions of the *CPAG* judgment on protective costs orders, it is now hoped that more cases can be brought with appropriate costs protection enabling more individuals and organisations with limited resources to check the behaviour of public bodies through judicial review proceedings. However, due to the limitations of the *Corner House* judgment and the reservations outlined above, this is likely to be the first of many cases and many issues still need to be addressed. There is clearly a need for further applications to be brought to increase the availability of such orders and the regularity with which they are obtained.

The Public Law Project would be interested to hear of any applications PCOs and can offer free advice and support to practitioners via the Public Law Specialist Support Line on 0808 808 4546.