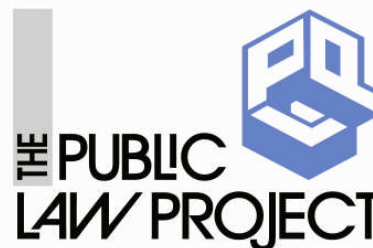


The Proposals for the Reform of Civil Litigation Funding and Costs in England and Wales

- *The Response of the Public Law Project*



The Public Law Project

The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies, such as judicial review, for those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has three main objectives:

- increasing the accountability of public decision makers;
- enhancing the quality of public decision making;
- improving access to justice.

PLP aims to fulfil these objectives by undertaking research, casework, policy work and training across the range of public law remedies.

It is central to PLP's objectives that claimants who wish to challenge public body decision making have access to the courts to do so, the primary method of such challenges being by way of judicial review. Our focus is therefore on the proposals as they relate to claims for judicial review. We do however have some general concerns and observations about access to justice generally, and in regard to the funding of claims particularly when legal aid is not available.

General

- (1) The consultation paper makes a number of false and inadequately supported assertions, primarily suggesting that an increasing number of unmeritorious claims are being pursued against public bodies, at increasing cost to the tax payer. At paragraph 160 for example it is asserted that in 2008 in non-asylum and immigration categories "around 45% of claims [for judicial review] were refused permission to proceed." No reference is given for this claim; it is not indicated whether the figure of 45% is a percentage of all judicial review claims issued or of those claims where permission was considered, i.e. excluding those claims which were settled and/or withdrawn prior to the permission stage. Nor is it stated whether the figure of 45% refers to all refusals of permission or only those at the initial stage, excluding cases in which a renewed application was made. We would refer to our own research: *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Bondy and Sunkin, June 2009. This research makes clear that a consideration only of the crude court statistics presents a false picture of the outcomes of claims for judicial review as it fails to take account of the number of

claims that are issued and settled with real benefit of the claimant before the claim is considered by the court, either at permission stage or at a final hearing.

- (2) An issue not addressed in the consultation paper, in relation to the costs burden on the taxpayer, is the way litigation is conducted by public bodies and the controls in place for ensuring that costs are not incurred in defending claims that should be settled at an early stage, thereby minimising the costs liability of the public body defendant.

Recoverability of CFA success fees and ATE insurance premiums

Most of the detail of the proposals regarding the recoverability of CFA success fees and ATE insurance premiums are addressed at the issues in the context of personal injury litigation. Such litigation is outside PLP's expertise. However, we do have concerns that if success fees and insurance premiums are not recoverable, the risks that firms undertaking such work will have to bear is likely to reduce the number of firms willing to undertake litigation on the basis of CFAs. This will have an impact on access to justice.

We would therefore not support the proposal to abolish recoverability completely but would support some form of capping of the level of success fee that can be recovered. Also, to encourage early settlement, we would support different caps being applied at different stages of the proceedings with either nil or a low percentage being recoverable if a claim is settled at an early stage with a higher percentage being recoverable following success at trial.

Increasing general damages

Should the government adopt the proposal to abolish recoverable success fees and ATE premiums so that these would have to be paid from claimant's damages we would support an overall increase in general damages to compensate claimants.

We would not support the proposal that such an increase should only be applied to those cases funded on a CFA as this would introduce unnecessary complexity and provide perverse incentives to fund a case through a CFA rather than an ordinary fee arrangement.

Part 36 offers

The Part 36 procedure should, in theory, incentivise early offers by defendants as a reasonable offer places claimants under pressure to settle and thereby reduces the defendant's costs liability. However, the Part 36 procedure does not appear to be used by defendants at an early stage as often as it might be and PLP would support enhancements to encourage its use.

We would support the reversal of the *Carver* case. The value of the Part 36 procedure is its clarity and certainty. For the court to exercise discretion on costs when the Part 36 offer has been narrowly beaten encourages satellite litigation on costs.

Given the government's aim to reduce the overall cost of litigation, in relation particularly to public bodies and government departments, PLP would like to see empirical research into the way litigation is conducted by public bodies, and in particular how controls are exercised over the level of costs that are incurred, with an examination of why claims where the merits of the defence are weak are not settled at an earlier stage.

Qualified one way costs shifting (QOCS)

The consultation on legal aid proposes that legal aid will continue to be available for claims for judicial review. We support this and, on the basis that legal aid does continue to be available, we support the introduction of one way costs shifting.

In his Final Report Sir Rupert recommended QOCS in certain categories of case, those where the parties are in an asymmetric relationship, including housing disrepair cases, actions against the police, judicial review claims, defamation/breach of privacy claims against the media. He suggests that such protection should be modelled on s.11(1) of the Access to Justice Act 1999 which provides 'costs protection' for legally aided litigants. The aim is to ensure that such costs protection does not assist those who bring frivolous claims, nor those whose resources are such that they can afford to pay adverse costs if they lose. Section 11 identifies the financial resources of the parties and their conduct in relation to the dispute as factors to be taken into account when determining the amount of costs a legally aided litigant should be ordered to pay to an opponent.

We accept that the court must retain some discretion regarding costs with reference to both financial resources and conduct of the parties. However, it is our view that there are factors crucial to the situation of a legally aided litigant which make s.11 an inappropriate model for a qualified one way costs shifting rule outside of the legal aid scheme.

In practice, it is very rare for the court to order that a legally aided party should pay any costs to a successful opponent. The reasons are likely to be twofold: first, a legally aided party must have extremely limited resources in order to be eligible for legal aid so that it will rarely be appropriate for an order to be made on the basis of the financial resources of the parties; secondly, in relation to conduct, the solicitor acting for a legally aided party has a duty to the Legal Services Commission to report any instance in which s/he believes the legally aided party to be acting unreasonably. Hence, applications for costs against a legally aided litigant are extremely rare and legally aided litigant can enjoy reasonably certain costs protection, win or lose.

We have serious concerns that the QOCS rule proposed by Sir Rupert would not provide sufficient certainty at the outset of the case and that many would be claimants will be deterred from bringing claims for fear of an adverse costs order.

QOCS in Judicial Review

PLP agrees with the Michael Fordham QC and Jessica Boyd paper (the FB paper) that Judicial review is a special case. We support their submission that:

“A public law costs regime should promote access to justice. It should be workable and straightforward. It should facilitate the operation of public law scrutiny on the executive, in the public interest. This is the key point. For judicial review is a constitutional protection, which operates in the public interest, to hold public authorities to the rule of law. It is well-established that judicial review principles ‘give effect to the rule of law’...The facilitation of judicial review is a constitutional imperative.”

PLP supports the proposal that one way costs shifting should be the default position in judicial review, subject to any different order which might be made at the permission stage. As the FB paper points out, the permission requirement will prevent frivolous claims so that there is no need for costs rules to deter such claims.

If there is to be QOCS, how should it work?

Sir Rupert’s final report recommends that the following rule (modelled on s.11 AJA) would apply:

“Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

*(a) the financial resources of all the parties to the proceedings, and
(b) their conduct in connection with the dispute to which the proceedings relate.”*

We accept that one way costs shifting would not be appropriate for claimants of ‘conspicuous wealth’ and that there should be some sanction for unreasonable conduct within litigation.

These two factors (resources and conduct) are fundamentally different: in almost all cases the financial resources of the parties are known at the outset of the case whereas the parties’ conduct in connection to the dispute will only be known at the conclusion of the case.

Financial resources

Some certainty as to the level of financial resources that would justify a contribution to costs or an early assessment is vital to avoid the risk of deterring claimants from bringing a claim for fear of an adverse costs order for an amount not quantified until the end of the litigation. While the current PCO regime has its flaws, it does at least it provide an indication at the outset of the claim of the maximum liability the claimant may incur.

If the court's assessment of financial resources were to become a regular feature of judicial review litigation, this would generate much satellite litigation, at either the outset of the claim or on the determination of the claim, possibly even at both stages or at interim stages.

Given the special constitutional importance of judicial review and the public interest in ensuring there is an accessible procedure for holding to account the executive, we would support a rule that in all judicial review cases, save where the claimant was 'conspicuously wealthy', the claimant would not be liable for the defendant's costs if unsuccessful but would be able to recover costs if successful.

Conduct

Claims for judicial review can only proceed if the court gives permission for the claim, which means that there is an arguable case. Again, given the constitutional importance of the availability of judicial review in holding public bodies to account, costs orders based on a claimant's conduct should only be made in exceptional cases, such as where a claimant has provided false or incomplete information to the court. The nature of the conduct that would justify a costs order should be set out in a practice direction to avoid defendant's routinely seeking costs orders at the end of the case.

One way to do this would be to adopt a test similar to that applied when the court is making an order for costs on an indemnity basis [see *Noorani v Calver* [2009] EWHC 592 (QB)].

Type of Claimant

It is suggested that QOCS should only be available for individual litigants and not for organisations. We can see no justification for the distinction. Many claims for judicial review are brought by charities and voluntary organisations. Many NGOs and firms of solicitors who undertake public interest litigation act for such organisations under CFAs and, if the conditions are satisfied, will seek Protective Costs Orders (PCOs). We would support the application of QOCS to all claimants in judicial review claims (save for the conspicuously wealthy) which would make it unnecessary to apply for a PCO.

We would support QOCS for all judicial review claims whether funded by a CFA or otherwise.

The alternative proposal

Sir Rupert suggested that if his proposal for QOCS were rejected, a 'possible middle way' would be a cap on the claimant's liability for costs by way of a practice direction in the following terms:

Save in exceptional circumstances,

- (i) the cap on the claimant's liability for adverse costs up to the grant of permission should be no less than £3,000; and*

- (ii) *if permission is granted, the cap on the claimant's liability for adverse costs (in respect of the whole case) should be no less than £5,000.*

PLP's preference would be for QOCS, as detailed above. However, if this is not implemented or is implemented without sufficient certainty at the outset of the litigation, PLP would support a proposal for a standard cap, in the terms proposed above, provided it were possible to seek a lower cap in circumstances where the claimant's means were so limited that the standard cap would prevent the claim being brought.

This is on the basis that judicial review remains within scope, as proposed in the Legal Aid Consultation.

Claims that settle – *Boxall*

We wish to make clear that our views set out above are based on the whole package of proposals put forward by Sir Rupert being implemented. In particular, we refer to the proposal set out at para 4.13, page 313: in a judicial review claim where the claimant has complied with the judicial review pre-action protocol if the defendant settles after issue the normal rule should be that the defendant pays the claimant's costs.

We urge the government to implement this proposal which would encourage defendants to settle claims before issue thereby reducing overall litigation costs and saving court time.

Costs: Proportionality

Under CPR the principle of proportionality applies, both to the way the court deals with cases and to the amount of costs recoverable by a successful party. The case of *Lownds v Home Office* provides that when assessing costs the court should take a two stage approach: (1) consider the global amount claimed and (2) consider the costs of each item. If the global figure is proportionate to the amount at issue the court should go on to decide whether each item was reasonably incurred. If the global figure is disproportionate, the court must decide whether each item was necessary and, if so, whether it was reasonable. This is reflected in CPR 44.4 which provides that

(2) Where the amount of costs is to be assessed on the standard basis, the court will

(a) only allow costs which are proportionate to the matters in issue; and

(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

The consultation states that "If parties incur disproportionate costs in taking forward a claim, they should do so at their own expense" [213] and that a new definition of proportionality be introduced so that costs necessarily incurred may be deemed disproportionate and therefore not recoverable from the opponent.

We would strongly oppose this proposal. The current rule is adequate. It is wrong in principle that costs that have been necessarily incurred and that are reasonable (with doubt being resolved in favour of the paying party) should not be recovered. There are mechanisms in place, such as the pre-action protocols and the Part 36 procedure, to encourage defendants to settle claims at an early stage so as to avoid significant costs liability. As indicated above, we would urge the government to examine why defendants, in particular public body defendants who are funded by the tax payer, are not conducting litigation more efficiently and cost effectively.

The Public Law Project

14 February 2011