

Neutral Citation Number: [2008] EWCA Civ 749

Case No: C1/2007/2850
C1/2008/1000 and C1/2008/1022

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice McCombe
[2007] EWHC 2769 (Admin)
Mr Justice Holman
[2008] EWHC 880 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2008

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division

LORD JUSTICE BUXTON
and
LADY JUSTICE SMITH

Between :

The Queen on the Application of Compton
- and -
Wiltshire Primary Care Trust

Respondent
Appellant

Neil Garnham QC, Guy Opperman and Mathew Gullick (assigned by the **Bar Pro Bono Unit**) for **Mrs Compton**
Philip Havers QC and Jeremy Hyam (instructed by **Capsticks**) for the **Wiltshire PCT**
Ben Jaffey and Naina Patel (instructed by **The Public Law Project**) for the Public Law Project as **Intervener**
Hearing date : 21st May 2008

Judgment

Lord Justice Waller :

1. This judgment deals with three appeals relating to the granting of Protective Costs Orders (PCOs) in judicial review proceedings between Mrs Val Compton and the Wiltshire Primary Care Trust (the PCT). The first appeal is from a decision of McCombe J, given on 26th November 2007, under which he refused to reconsider an order for a PCO made by Simon J on paper in judicial review proceedings relating to the day hospital at Savernake Hospital (the day hospital). The second and third appeals are from a decision of Holman J, given on 22 April 2008, granting a PCO in relation to judicial review proceedings relating to the Minor Injuries Unit (the MIU) at the same hospital. In all three appeals we are being asked to look again at the principles and guidance given in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 (*Corner House*) the leading authority on the power to make PCOs and the procedure to be adopted.
2. Mrs Val Compton brought her applications for judicial review on behalf of “a campaign known as Community Action for Savernake Hospital (CASH)”. It is alleged that decisions have been taken by the PCT to close the day hospital facility and the MIU (as it was put by Mr Garnham QC before us) “by stealth”. She has brought on behalf of CASH separate applications for judicial review in relation to the two units and has obtained permission to move in both cases. In relation to the grounds relied on in the two cases, Holman J conveniently summarised the position in this way:-

“11. Although there are obvious points of overlap and in common, there are also many points of difference between the two cases. The financial and clinical arguments and issues in relation to the day hospital facility and the MIU may be similar, but they are not the same. Further, the thrust of the judicial review challenges varies. I understand that in the Day Hospital case there is a greater challenge to the adequacy of the consultation process than in the MIU case.

12. The reasons why I granted permission in the MIU case are, in summary, as follows. As a preliminary, I was satisfied that there is an arguable case that there was a second decision after further consideration, or reconsideration, during August 2007, so that the application for judicial review was (arguably) not out of time. As to the merits, I was satisfied, first and principally, that it is arguable that the Trust's financial case for closure of the MIU is wrong, such that their decision is irrational. In short, although they claim that they will save money by closing the MIU, in reality they will not.

13. Second, although this carried less weight with me, I accepted that there is an arguable case that the decision was tainted by apparent bias in part of the consultation process. The apparent bias results, or may result, because the supposed independent consultant, who analysed the public responses, is in fact the settled partner and cohabitant of a senior director of the Strategic Health Authority which supports and manages the performance of the Trust.

14. Third, again carrying less weight with me, I accepted that the Trust had arguably attached no weight, or less weight than they should have done, to the report "Emergency Access - Clinical case for change" by Sir George Alberti and published by the Department of Health in December 2006. (The report does not, however, state or represent government policy.)”

3. The substantive hearings are listed for hearing over three days commencing 16th July this year. Thus there is an urgency in finalising the question of what, if any, PCOs should be made.
4. In an application relating to the day hospital, at the same time as granting permission to move for judicial review, Simon J, having before him both the application for a PCO and the PCT’s written grounds for resisting the same, made a PCO under which he ordered that the PCT should not be entitled to recover any costs against Mrs Compton, and put a cap on the costs that Mrs Compton could recover from the PCT at £25,000. The PCT applied to set aside that order relying again on the grounds placed before Simon J. That application came before McCombe J. Those acting for Mrs Compton in reliance on the guidance given in *Corner House* to the effect that by analogy with CPR 52.9(2) (setting aside permission to appeal) a PCO once granted on paper should only be set aside on the application of a defendant if the defendant showed “compelling reasons”, argued that there were no compelling reasons. Those acting for the PCT sought to argue that in *Corner House* certain rules in the CPR had been overlooked, that the analogy with CPR 52.9(2) was not an appropriate one and that it should not be a requirement to show “compelling reasons”. A defendant should be entitled to have a decision made in his absence reconsidered in the same way as *Corner House* envisaged that if a PCO was refused an applicant would be entitled to have the matter reconsidered at an oral hearing.
5. McCombe J held that he was bound by the guidance in *Corner House* (although by a footnote he queried whether the analogy with CPR 52.9(2) was appropriate). He held that the PCT having shown no compelling reasons he should not reconsider the order made by Simon J. Rix LJ gave permission to appeal saying this:-

“There is a serious argument with reasonable prospects of success that the *Corner House* analogy with CPR 52.9(2) does not here apply. Issues are raised about the correct interpretation of and application of the Rules. The judge (McCombe J) has himself at footnote 2 raised a query about the CPR 52.9 analogy. In the absence of these more general issues, I doubt that I would have given permission to appeal on the issue of whether Simon J’s decision on the merits of a PCO itself gave rise to a compelling reason why an appeal should be heard. Nevertheless, in the circumstances, that issue may be argued as well.”
6. The issues on the appeal from McCombe J are thus (1) should the Court of Appeal reconsider the guidance in *Corner House* that a defendant against whom a PCO has been made on paper must, before a court will consider setting the same aside, show compelling reasons; (2) if so what the appropriate guidance should be and whether with that guidance Simon J’s order should be set aside or varied; and (3) if

“compelling reasons” remains appropriate whether McCombe J should have found there were compelling reasons.

7. In the application relating to the MIU again at the same time as applying for permission to move for judicial review Mrs Compton applied for a PCO. The matter came before Bean J on paper, and he initially refused permission to move. He then had drawn to his attention material which should have been before him, but for reasons with which we need not concern ourselves was not, and he reconsidered the matter. He set aside his refusal and directed an oral hearing. Holman J heard the application for permission to move for judicial review and granted permission, delivering an *ex tempore* judgment on 14th April 2008. He then heard argument on whether a PCO should be granted on 18th April 2008 and delivered a reserved judgment on 22nd April 2008. The order he made was (1) to direct (this aspect being conceded by counsel acting for Mrs Compton) that Mrs Compton should not be permitted to recover any part of her costs of the judicial review proceedings from the PCT; (2) to direct that in any event the total costs which the PCT may recover from Mrs Compton in the judicial review proceedings should be capped at £20,000 and shall not exceed that sum; and (3) to direct that the order should not apply to any proceedings in the Court of Appeal, the costs of which he stated were entirely in the discretion of that court.
8. Holman J refused permission to appeal his order and both Mrs Compton and the PCT sought permission to appeal from that order from the Court of Appeal. Since the appeal from McCombe J was already listed for hearing on 21st May 2008, I directed that both applications should be adjourned to that hearing and that if permission was granted appeals would follow. At the hearing, rather than have time taken up arguing about arguability, we granted permission to appeal to both Mrs Compton and the PCT. The issues on these appeals, in short, are (1) whether as the PCT asserts it was wrong on the principles set out in *Corner House*, to grant a PCO at all; (2) if it was appropriate, (a) whether (as the PCT contends) the cap of £20,000 was too low or (b) whether (as Mrs Compton contends), it was wrong to allow for the recovery of any costs by the PCT, the right order being no order as to costs either way.
9. It is convenient to set out at this stage the relevant paragraphs in *Corner House*. It is right in doing so to say that in quoting only certain paragraphs one does not do justice to the judgment as a whole. That judgment is, on any view, a detailed appraisal of why the court should have the power to make PCOs, of why the principles should be as the court ultimately rules and why the guidance as to the procedures should be as ultimately given. It is fair to say that as regards procedures it would seem as though, to a large extent, they were thought out by the members of the court who were parties to the judgment and not the subject of detailed argument before the court. But on any view it is clear that very detailed thought was given to devising a procedure which would make it possible to exercise what was perceived to be a necessary power to enable to be decided issues of general public importance in the public law field, which might not otherwise be capable of being heard. The aim was also to devise a procedure which would avoid extensive and expensive satellite litigation. Whatever procedure was devised also had to have in mind that, if a PCO was appropriate, it was important that a decision to that effect should be taken speedily, without the question of its appropriateness being able to be tested over many months of argument. If

many months of argument were allowed the very issues of general importance which needed deciding might not be decided fairly and in time.

10. The relevant paragraphs are as follows. The principles are set out in paragraph 74 as follows:-

“We would therefore restate the governing principles in these terms:

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.”

11. The guidance as to procedure is set out in paragraphs 78 and 79 as follows:-

“78. We consider that a PCO should in normal circumstances be sought on the face of the initiating claim form, with the application supported by the requisite evidence, which should include a schedule of the claimant's future costs of and incidental to the full judicial review application. If the defendant wishes to resist the making of the PCO, or any of the sums set out in the claimant's schedule, it should set out its reasons in the acknowledgment of service filed pursuant to CPR 54.8. The claimant will of course be liable for the court fee(s) for pursuing the claim, and it will also be liable for the defendant's costs incurred in a successful resistance to an application for a PCO (compare *Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346 at para 76(1)).

The costs incurred in resisting a PCO should have regard to the overriding objective in the peculiar circumstances of such an application, and recoverability will depend on the normal tests of proportionality and, where appropriate, necessity. We would not normally expect a defendant to be able to demonstrate that proportionate costs exceeded £1,000. These liabilities should provide an appropriate financial disincentive for those who believe that they can apply for a PCO as a matter of course or that contesting a PCO may be a profitable exercise. So long as the initial liability is reasonably foreseeable, we see no reason why the court should handle an application for a PCO at no financial risk to the claimant at all.

79. The judge will then consider whether to make the PCO on the papers and if so, in what terms, and the size of the cap he should place on the claimant's recoverable costs, when he considers whether to grant permission to proceed. If he refuses to grant the PCO and the claimant requests that his decision is reconsidered at a hearing, the hearing should be limited to an hour and the claimant will face a liability for costs if the PCO is again refused. The considerations as to costs we have set out in paragraph 78 above will also apply at this stage: we would not expect a respondent to be able to demonstrate that proportionate costs exceeded £2,500. Although CPR 54.13 does not in terms apply to the making of a PCO, the defendant will have had the opportunity of providing reasoned written argument before the order is made, and by analogy with CPR 52.9(2) the court should not set a PCO aside unless there is a compelling reason for doing so. The PCO made by the judge on paper will provide its beneficiary with costs protection if any such application is made. An unmeritorious application to set aside a PCO should be met with an order for indemnity costs, to which any cap imposed by the PCO should not apply. Once the judge has made an order which includes the caps on costs to which we have referred, this will be an order to which anyone subsequently concerned with the assessment of costs will be bound to give effect (see CPR 44.5(2)).”

12. Although the appeal from McCombe J was argued first by the parties, I would like to start by considering the decision of Holman J. I do that because it seems to me that his decision raises, in a straightforward way, what ought to be the real question in both appeals. Do these applications for judicial review (i) raise issues of general public importance which (ii) the public interest requires to be resolved? Mr Havers QC, for the PCT, submits that they do not; he submits that the language used in paragraph 74 of *Corner House* is couched in terms that limit the granting of PCOs to a very limited number of cases and he produced a schedule of the types of case where he would say they were appropriate and he did so by reference to cases where such orders had been made. For convenience I append that schedule to this judgment.

13. He submitted furthermore that *R (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin) provided a good example of a case where permission to move for judicial review was granted but rightly a PCO was not ordered. In that case, Mrs Bullmore, representing a pressure group, obtained permission to move for judicial review of a decision of an NHS Trust to stop providing acute hospital services at Hemel Hempstead Hospital. Mrs Bullmore sought a PCO, which would limit the amount of costs which she might be ordered to pay, which sum raised by the group being some £20,500. Lloyd Jones J refused to make a PCO. He found four of the *Corner House* criteria were not satisfied, including criteria (1) and (2) expressing in relation to those criteria the following view:-

“14. In the present case it is not suggested there is a general point of legal importance in the sense of these proceedings being necessary in order to decide a point of law which will have implications beyond this particular case. That is, of course, only one of the routes by which an issue may qualify under this head. Again it seems to me that this is not a case that requires the elucidation of public law by the Administrative Court in the public interest. Moreover this is a case in which the Group represents a particular interest. It is a pressure group representing a particular constituency and it has aims which are intended to promote the interests of a particular geographical area. This is not a case being brought for the social benefit of the community at large. It may well be that it would benefit a particular section of the Dacorum community, but it does represent a local interest.

15. In these circumstances, I am not persuaded that this is a case that raises issues of general public importance.”

14. Hughes LJ refused permission to appeal to the Court of Appeal on the grounds that this was an exercise of discretion. He said this as regards Lloyd Jones J’s views on criteria (1) and (2).

“15. . . . I agree, for my part, with Mr Wolfe’s proposition that pressure groups of one kind and another are likely both to mount claims for judicial review and, in appropriate cases, qualify for protective costs orders. But the judge is plainly entitled to address the breadth of public interest which is engaged in the case before him. In the present case the judge rested his conclusion substantially upon the decision that the case did not raise sufficient issues of general public importance as to require, in the public interest, that they should be litigated at the expense, in this case partially rather than wholly, of the defendants, whether they succeeded or not. The question is whether he was entitled to come to that conclusion or not. I am quite satisfied that it is not arguable that he could not come to the conclusion that he did.”

15. Mr Havers submits that there is little to distinguish the instant cases from the position in *Bullmore* and that where judicial review is sought of decisions being taken about a purely local dispute in relation to the closure of a local hospital and where the challenge is a normal judicial review challenge – failure to consult and the like - the case raises no issue of “general public importance” and does not raise issues which the public interest requires resolving. He stressed the paragraph in *Corner House* on the exceptional nature of a PCO where the court said:-

“72. Dyson J emphasised that the guidelines related to public interest challenges, which he defined at [1999] 1 WLR 347,353. We believe that this definition can usefully be incorporated into the guidelines themselves. Dyson J said that the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances. We agree with this statement, but of itself it does not assist in identifying those circumstances.”

16. Mr Garnham QC (acting, it should be emphasised, pro bono for Mrs Compton), on the other hand, submits that Holman J’s decision on general public importance and the public interest in having the matter resolved should be upheld. He emphasised that the decision was an exercise of discretion and that Holman J’s decision should not be interfered with unless it can be shown he has erred in principle, or if this court would have taken a different view from the judge’s view, he has exceeded the generous ambit within which reasonable disagreement is possible. Holman J put it this way:-

“General public importance

31. It is important to note that provisos (i) and (ii) in paragraph 74(1) are separate and distinct. The question whether the issues are of "general public importance" is separate and distinct from the question whether "the public interest requires that those issues should be resolved."

32. It is clear that issues do not have to be of importance to all citizens or the whole nation in order to be of "general public importance". I am satisfied that the ultimate issue in this case, namely continuing closure or the reopening of the MIU, is an important and not a trivial one; and that it is of importance to a sufficiently large section of the public, namely the 30,000 to 50,000 people in the affected catchment area, as to be an issue of general public importance. However, whilst I accept that the ultimate issue in the case (continuing closure or reopening of the MIU) is of general public importance, I do not accept the further submission of Mr Opperman that the case raises legal or other issues of importance not only to the public who live in the catchment area, but to the general public or nation as a whole.

33. He says that it is very difficult to challenge "hospital closures"; that this case is being closely followed, not only in the area of Savernake but in many parts of the country; and that "this is a test case for the closure of units such as this" (see

paragraph 3 of his written submissions dated 17 April 2008; and much that he urged in oral argument). He drew my attention to certain articles in the national press and to a national BBC interview with the Secretary of State for Health, each addressing "hospital closures" generally and this closure specifically.

34. But in my view it is not a "test case". I have summarised the essential issues upon which I have given permission to apply. The "financial argument" is clearly fact specific to the figures and disputed calculations in relation to this unit, this hospital, and this Trust. The "apparent bias point" is totally fact specific. It may of course raise some questions of more general legal interest about independence and apparent bias in public consultation processes. But just because a case happens to contain some topic of general legal importance, upon which the public as a whole may gain from a ruling, does not make the case one of general public importance so as to engage the PCO jurisdiction. I accept that the relevance of, and weight to be attached to, the Alberti report may apply more generally to other "hospital closure" cases. But in my view it is not the central issue in this case, and the "Alberti point" does not give to this case the quality of a test case properly so-called.

35. What this case does not involve is, by way of example only, some issue of statutory construction which needs to be resolved and which is relevant to this and a number of other "hospital closure" situations. This case does not involve any "elucidation of public law by the higher courts" (cp paragraphs 69 and 70 of Corner House). Rather, it requires application of well-established principles of judicial review to the particular facts of the case.

The public interest

36. Proviso (ii) is a distinct and separate proviso. It does not necessarily follow, simply because an issue is raised which is of "general public importance", that "the public interest requires" that that issue should be resolved. Whilst I have agreed that the issues are of importance to a sufficiently large section of the public to be of general public importance, I consider it much more marginal whether "the public interest requires" that they should be resolved. I have already explained that this is not a test case. The issue has engaged the national media, and the public at large may watch with interest and concern the fate of the Savernake MIU. But the public at large is not affected by, and has no direct interest in, whether that particular, very local, MIU remains closed or is reopened.

37. What is striking about this case is that of all the 30,000 to 50,000 people said to be affected by the closures, and the

several thousands who are said to have actively petitioned or campaigned against closure, only one has applied for judicial review: Mrs Compton. I find it impossible to say that the interest of any members of the general public other than those in the catchment area requires that the issues should be resolved. And I am sceptical whether the interest of those members of the general public who do live in the catchment area requires the issues to be resolved, when only one of them has taken any action. This ties in, in my view, with the next principle, proviso number (iv).”

17. Mr Garnham was supported by submissions which we allowed to be made on behalf of The Public Law Project (PLP), a charity concerned with improving access to public law remedies, who had made submissions in *Corner House*.

18. What is the proper approach to the principles set out in paragraph 74 of *Corner House*? We were referred to a Report of a Working Group on Public Interest Litigation. That Working Group consisted of representatives from PLP, public law claimants and their representatives, senior representatives from the Department of Constitutional Affairs, and (in a personal capacity) a member of the staff of the Treasury Solicitor. The Group was chaired by Maurice Kay LJ. The Group were agreed that to be suitable for a PCO a case must be a “public interest case”, but found it difficult to define what sort of case fell within the definition a “public interest case” and what did not. Ultimately the working party concluded as follows:-

“75. After much discussion the Group came back to the first two criteria identified by the Court of Appeal in *Corner House* and agreed that these provided a definition that was both workable and sufficiently flexible. A public interest case is one where:

(i) the issues raised are ones of general public importance, and

(ii) the public interest requires that those issues should be resolved.

76. The Group agreed that the definition should be given a broad, purposive interpretation. The definition should not be allowed to become unduly restrictive.”

19. We were also shown a Report from a Working Group on Access to Environmental Justice (chaired by Sullivan J) published as recently as 9th May 2008. The main concern of that Report was with the question whether the current approach of the courts in relation to costs was compliant with the UNECE Aarhus Convention, concerned with access to justice in environmental matters, and its conclusion is that they are not. In Appendix 3 of the Report what is termed the “Exceptionality test” is addressed in these terms:-

“In *Corner House*, the Court of Appeal accepted that PCOs should only be granted in “exceptional” cases. But it now

seems this “exceptionality” test is being applied so as to set too high a threshold for deciding (for example) “general public importance”, thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case, *Bullmore*, the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with Aarhus.”

20. Mr Havers stresses that this Report is concerned with environmental issues and that is obviously right, but the thrust of appendix 3 is to suggest the courts should generally consider their approach to PCOs so that there will be compliance with the Aarhus Treaty obligation, and it would seem less than satisfactory to carve out different rules where environmental issues are involved as compared with other serious issues.
21. It seems to me that when considering whether a PCO should be granted the two stage tests of general public importance and the public interest in the issue being resolved are difficult to separate. Holman J did treat them separately in this case and concluded that the issues were of sufficient importance to a sufficiently large section of the public to make the issues ones of general public importance. He was less convinced that that the “public interest required the issue to be resolved”. He was “sceptical whether the interest of those members of the general public who do live in the catchment area requires the issues to be resolved, when only one of them has taken any action.”
22. We were perhaps in a slightly different position from the judge because, as a result of the order he made exposing Mrs Compton to the possibility if she lost the case to a costs order of £20,000, many people in the relevant catchment area have demonstrated their support by pledging funds, a matter which Mrs Compton very properly drew to the attention of the court.
23. Where someone in the position of Mrs Compton is bringing an action to obtain resolution of issues as to the closure of parts of a hospital which affects a wide community, and where that community has a real interest in the issues that arise being resolved, my view is that it is certainly open to a judge to hold that there is a public interest in resolution of the issues and that the issues are ones of general public importance. The paragraphs in *Corner House* are not, in my view, to be read as statutory provisions, nor to be read in an over-restrictive way. Indeed, it seems to me there is already support for a non-rigorous approach exemplified by paragraph 19 of Lloyd Jones J’s judgment in *Bullmore* where he said in relation to the criteria of “no private interest”:-

“19. This particular requirement as formulated in *Corner House* has been diluted in the later case law. I have in mind particularly *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam), [2006]

2 FCR 537, [2006] 2 FLR 397 (Fam), where Sir Mark Potter P said at para 54:

“As to (1)(iii), I find the requirement that the Applicant should have 'no private interest in the outcome' a somewhat elusive concept to apply in any case in which the Applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case, it is difficult to see why, if a PCO is otherwise appropriate, the existence of the Applicant's private or personal interest should disqualify him or her from the benefit of such an order. I consider that, the nature and extent of the 'private interest' and its weight or importance in the overall context should be treated as a flexible element in the court's consideration of the question whether it is fair and just to make the order. Were I to be persuaded that the remaining criteria are satisfied, I would not regard requirement 1(iii) as fatal to this application.

I note that passage was approved by the Court of Appeal in *R (England) (?) v London Borough of Tower Hamlets and others* at para 14.”

24. Furthermore, I would agree with Holman J that “exceptionality” was not seen in *Corner House* as some additional criteria to the principles set out in paragraph 74 but a prediction as to the effect of applying the principles. 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.
25. Thus, I would uphold Holman J’s decision that the case was one in which he could grant a PCO.
26. I turn briefly to the question whether he should have granted one in the terms he did. There is some inconsistency in the argument put forward on behalf of Mrs Compton that no permission to appeal should be granted to the PCT since Holman J was exercising his discretion in fixing the cap of £20,000, and her application for permission to appeal on the basis that he should have fixed the cap at nil or a figure lower than £20,000. It seems to me that this was an exercise in discretion and unless it can be shown, either by the PCT, or by Mrs Compton, that he has misdirected himself in some way, or has reached a decision outside the ambit of reasonable disagreement, there is no basis for disturbing his order.
27. So far as Mrs Compton is concerned, those acting for her seek to argue that it was wrong to take into account the possible means of those whom she was representing. In my view, if a party seeks to represent others, the court is entitled to take into account

whether the others have the means to support the action. The jurisdiction to grant a PCO is concerned with enabling actions to be brought and is concerned to hold the balance so far as it can between the parties. It may often be right to expose a claimant and those the claimant represents to some risk as to costs capped so that all can see what the risk is. In the same way it seems to me that Mr Havers' argument that the original costs estimate was only rough and thus that now estimates put the costs at nearer £40,000 carries little weight in the Court of Appeal. It would furthermore not be right to hold that just because the judge's order has produced the possibility of more than £20,000 being available to Mrs Compton through those that support her, the PCT can bring the matter to the Court of Appeal to re-assess the cap.

28. As regards the term of Holman J's order, that his PCO should not apply to any proceedings in the Court of Appeal, I have had some anxiety, because if it is right there needs to be developed a procedure for dealing with the matter in the Court of Appeal, and at present I do not believe there is any clear procedure laid down. My view however is that Holman J is, in fact, right in leaving the matter to the Court of Appeal, and a procedure needs to be worked out. It will be convenient to deal with what that procedure should be after considering the appeal against the judgment of McCombe J and the attack made on the guidance in paragraph 78 and 79 in *Corner House*.
29. At this stage I can simply say that I would dismiss both parties' appeals against the decision of Holman J.
30. I now turn to the appeal from McCombe J.
31. As already indicated, on 5th October 2007 Simon J made an order for a PCO. He gave no reasons. The PCT made an application for Simon J's order for a PCO to be set aside and Mrs Compton's application for a PCO be refused on the grounds that the requirements set out in *Corner House* were not satisfied. The matter came on before McCombe J. In their skeleton in support of their application the PCT opposed the making of a PCO in principle on the basis inter alia that the case was not exceptional, no point of public general importance was involved, and the issues did not "require to be resolved as a matter of public interest". They did not attack his decision for failure to give reasons although it seems to me, *prima facie*, that would have been a legitimate ground of complaint. I would have thought in this difficult area some short reasons would be required. In response those acting for Mrs Compton referred to paragraph 79 of *Corner House* and submitted that the PCT had to show "compelling reasons" if they were to set aside Simon J's order. They referred to the notes in White Book under CPR 52.9.2 to which *Corner House* referred by analogy and submitted that the PCT could not show that Simon J overlooked some plainly and unarguably decisive authority or some statute or that he had been misled.
32. Before McCombe J it seems that Mr Opperman simply relied on paragraph 79 of *Corner House* to support his position that "compelling reasons" were necessary. It was the judge who then questioned under which of the CPR rules an application to reconsider was being made. This resulted in both sides making submissions on the provisions of the CPR which do not get any express reference in paragraph 79 in *Corner House*. In order to understand the points argued I will set out all the relevant rules as they are conveniently quoted in Mr Havers' consolidated skeleton for the appeals:-

“Relevant procedural rules under the CPR

29. CPR 23.8 provides:

Applications which may be dealt with without a hearing

23.8 The Court may deal with an application without a hearing if –

- (a) the parties agree to the terms of the order sought;*
- (b) the parties agree that the court should dispose of the application without a hearing*
- (c) the court does not consider that a hearing would be appropriate.*

CPR PD23 provides so far as is relevant:-

11.1. Where rule 23.8(b) applies the parties should so inform the court in writing and each should confirm that all evidence and other material on which he relies has been disclosed to the other parties to the application.

11.2. Where rule 23.8(c) applies the court will treat the application as if it were proposing to make an order on its own initiative.

CPR 3.3(1) provides:-

Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

CPR 3.3(4) provides:-

The court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations.

CPR 3.3(5) provides:-

Where the court has made an order under paragraph (4) –

- i. a party affected by the order may apply to have it set aside varied or stayed; and*
- ii. the order must contain a statement of the right to make such an application.*

CPR 3.1(7) provides:-

A power of the court under these Rules to make an order includes a power to vary or revoke an order.”

33. Mr Opperman for Mrs Compton, in order to bring paragraph 79 into line with the rules, submitted that the PCT’s application was in fact being made under Rule 3.1(7) and he relied on the fact that the very general power given by that rule had been held to be somewhat circumscribed. McCombe J accurately put the matter this way:-

“8. This apparently quite general power in the court to vary or revoke an order has been held not to be available as a simple tool for an aggrieved party to mount a disguised appeal against an order with which he is dissatisfied. As is noted in "Civil Procedure 2007" in *Lloyd's Investment (Scandinavia) Ltd. v Ager-Hanssen* [2003] EWHC 1740 Mr Justice Patten said that

"... in his opinion, for the court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done in the context of an appeal. Similarly it is not open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ." (See Civil Procedure 2007 Vol. 1 paragraph 3.1.9 p.92)

This is an approach which was endorsed in the Court of Appeal in *Collier v Williams* [2006] EWCA Civ 20, a case to which I shall have to return hereafter.”

34. Mr Opperman’s argument before McCombe J (as indeed was Mr Garnham’s before us) was that the application before Simon J was an application that the parties had agreed to have dealt with on the papers within CPR 23.8(b) and thus that the only power to have the order set aside flowed from Rule 3.1(7) with the restrictions placed upon it. The agreement relied on was said to have been made by virtue of the fact that the PCT in its acknowledgment of the proceedings clearly requested the application for a PCO to be dealt with at the same time as the permission application, expressing the hope that if that occurred that might influence Mrs Compton in her decision whether to make an oral application for permission.
35. So the submission was that the requirement to have compelling reasons did fit with the scheme of the rules, at least in a case where an agreement to dispense with an oral hearing could be established.
36. Mr Hyam, for the PCT, argued before McCombe J, as Mr Havers argued before us, that in paragraph 79 the court in *Corner House* had overlooked the above rules and

had invented a procedure which was inconsistent with the rules and indeed unfair on a defendant. The argument in short was that the application before Simon J was an application without a hearing, where the court “had not considered that a hearing would be appropriate” [i.e. one to which CPR 23.8(c) applied]. Thus the Practice Direction, ran the argument, required that application to be treated as made on the court’s own initiative [PD23 11.2]. That being so the PCT had a right to apply to have the order set aside, or varied, and there was nothing that brought into play any requirement for there to be compelling reasons, as opposed to what would normally be the position of having the matter reconsidered. Furthermore, it was submitted that it was unfair that the claimant, who was refused a PCO, should, as paragraph 79 envisaged, have a right effectively to a re-hearing, whereas the PCT was fixed with a PCO against it unless it could show compelling reasons.

37. McCombe J found that there was an agreement that the matter would be heard on the papers and thus he held at paragraph 16 as follows:-

“It follows, therefore, that rule 3.3(4) and (5) do not apply. One is thrown back on the apparently general, but in fact restrictive, rule 3.1(7) and the cases dealing with the limits of that rule. Those limits, and the analogy with CPR rule 52.9 made in *Corner House*, inform the court that some "compelling reason" is required for a PCO to be set aside.”

38. He added a footnote that he was concerned about the analogy with rule 59.2.

“I admit (with respect) to concern about the analogy with r. 52.9 which envisages an application to set aside permission to appeal. The grant of such permission does not result in the same finality as a PCO which, subject to later revision in a true change of circumstances, regulates the parties’ rights for the whole of the proceedings. If permission to appeal has been wrongly granted, the remedy is on the substantive appeal. There is usually no going back on a PCO. ”

39. Mr Hyam submitted that there were compelling reasons for saying Simon J was wrong. First the case was not exceptional and second there was no issue of general public importance. These points were disputed by Mr Opperman, but ultimately McCombe J held that it was not for him to review Simon J’s decision and that since none of the arguments before him differed from those deployed before Simon J, there were no compelling reasons and the application should be refused.

40. As I have said, the same arguments were deployed in the Court of Appeal. Mr Havers’ main concern was as to the unfairness, as he would describe it, of a claimant who is refused a PCO having the right to renew the application at an oral hearing without constraint but a defendant who has a PCO made against him having to establish “compelling reasons” if the PCO is to be set aside.

41. I would accept that in *Corner House* the court did not follow through with precision how the various rules operated in the circumstances where a PCO had been granted on paper. But it seems to me that, if they had had the rules in mind, the reasoning would have been likely to go like this. First they would not have contemplated that, simply

because a party recognises the reality, i.e. that an application for a PCO will be dealt with on paper and seeks that that should be done contemplating refusal, the application should be treated as a CPR 23.8(b) application. For parties to agree that the court should dispose of an application without a hearing so as to come within that provision, the agreement needs to be clear and binding on both parties. In this instance, as the PCT recognised in its acknowledgement, Mrs Compton was going to be free to make an oral application. I would thus disagree with McCombe J that there was any agreement within CPR 23.8(b).

42. The application would thus come under CPR 23.8(c) and in the result either party has the right to make an application to the court to have it set aside, varied or discharged. But would appreciation of that fact have led to the court ruling other than it did in *Corner House*? In my view it would not. It seems to me that in *Corner House* it was being recognised that a defendant had the right to apply to set aside, vary or discharge the order but it was warning parties that where, as is the case with an application for a PCO, the defendant has had an opportunity to put its points on paper to the judge dealing with the matter on paper, it will require compelling reasons to alter the order made. That the claimant, who may have been refused a PCO, should have a little more latitude is understandable, since without a PCO no proceedings will be brought at all, whereas the existence of a PCO will not prevent a defendant defending the merits of the case. The analogy with CPR 52.9 may not be precise (and I will consider below whether what the Court of Appeal has indicated are needed for there to be “compelling reasons” should be adopted without more to the PCO situation) but there is an analogy because if permission is refused an applicant has the right to renew, but if it is granted there is a constraint on applying to set it aside despite the cost consequences for a respondent having to fight an appeal which it may feel has little chances of success and despite in some cases having little prospect of recovering costs if the appellant loses.
43. It seems to me that where the Court of Appeal has laid down guidelines for a procedure in the way paragraph 79 has done, another Court of Appeal should be very reluctant to rewrite them, or attempt to rewrite them unless the compulsion to do so was clear. It is unfortunate that the rules committee have still not codified the procedure but this is not a case where we should reconsider the guidance previously given.
44. Where then does that leave the appeal from McCombe J? Because of his finding that this was a case of an agreed hearing on paper, and because it seems to me he may have been giving too narrow a construction to compelling reasons, in my view, this court is entitled to reconsider his decision.
45. So far as what constitutes “compelling reasons” one must, I think, remember that the examples given of what are needed as compelling reasons for the setting aside of permission in the Court of Appeal, and even what is required before an order will be made revoking a previous decision under rule 3.1(7), are peculiar to the circumstances. I am not encouraging the making of applications by entities in the position of the PCT in this case but if I had come to the view that Holman J was plainly and obviously wrong to have granted a PCO in the MIU case, because the case fell outside anything contemplated by *Corner House*, I would have found it unacceptable that on the test of “compelling reasons” I would have been bound to uphold McCombe J’s, and thus Simon J’s, order in almost identical circumstances.

46. It must, it seems to me, be a compelling reason that it is plain that a PCO should not have been made. But in this case, because for the reasons I have given for upholding Holman J's decision, I take the view that it was permissible to make a PCO in this case, I would also take the view that there were no compelling reasons for setting aside the order of Simon J, and I would dismiss the appeal from McCombe J.
47. As to the procedures to be used in the Court of Appeal, having upheld the guidance in paragraph 79 of *Corner House* it seems to me that any procedure in the Court of Appeal should follow that guidance as far as possible. Let me deal first with cases where PCOs have been granted and the proceedings have been fought out. The governing principles identified in paragraph 74 can be taken to have been established so far as the case at first instance is concerned. If the person benefiting from a PCO is the would-be appellant, they may however have to be re-examined at the appellate stage. It may have become clear that no issue of general public importance arises or it may be clear that there is no public interest in bringing the case to the Court of Appeal. If the beneficiary of a PCO has succeeded in the court at first instance, it is difficult to think that some protection will not be appropriate in the Court of Appeal.
48. So far as procedure is concerned, if the recipient of the PCO in the court below is wishing to appeal, an application for a PCO should be lodged with the application for permission. The respondent should have an opportunity of providing written reasons why a PCO is now inappropriate. The decision will be taken on paper by the single Lord Justice. If a PCO is refused the applicant can apply orally. If it is granted then a respondent will need compelling reasons to set it aside.
49. What about PCOs on appeals from a refusal to grant a PCO or from the granting of a PCO? Again the matter should be dealt with by a single Lord Justice on paper and the normal order should be that there will be no order for costs save in exceptional circumstances, for example where the application is an abuse of process.

Lord Justice Buxton :

50. I respectfully agree with, and gratefully adopt, what my Lord has said about the procedural difficulties that have arisen in this case. The outcome may merit some mature consideration by the Rules Committee, but we are bound to follow the approach adopted in *Corner House*. I regret that I am not able to agree with the view of the substance of this matter that attracts the majority of the court.

The jurisdiction to make a PCO

51. The ability to make PCOs is judge-made, under the authority of the very broad control over matters of costs that is conferred on the judges by section 51 of the Supreme Court Act 1981. Accordingly, when this court in *Corner House* set out the rules and principles that should govern the making of a PCO it was, and it was conscious that it was, not merely giving guidance as to the exercise of a judicial function, but delimiting the court's *jurisdiction* to make such an order. That is signalled by the cross-heading to section 8 of the court's judgment that deals with the future making of PCOs:

Protective costs orders: the governing principles and some practical guidance

52. Accordingly, when we look at the governing principles, as opposed to the practical guidance, it is necessary to have two things in mind. First, these principles are not optional for the judge, or simply a guide to his discretion: they must be followed rigorously if he is to have jurisdiction to make a PCO at all. Second, while we must give formal recognition to the assumption that a judgment is not to be read as if it were a statute, both the way in which the *Corner House* principles are presented and the terms in which they are expressed indicate that the language is intended to be more statutory than most. Particularly careful attention is therefore required to the actual language used.
53. I have those factors in mind when addressing what the court in *Corner House* described in §74 of its judgment as the “governing principles”.

The *Corner House* principles.

54. Paragraph 74 of the judgment of this court in *Corner House* reads as follows:

We would therefore restate the governing principles in these terms:

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.

55. I would make two comments on the terms and arrangement of this statement.
56. First, the five requirements set out in § 74.1 are cumulative. The court must be separately satisfied as to each of them before it has jurisdiction to make the PCO. I therefore cannot agree with the suggestion that in assessing whether requirement (i), general public importance, has been satisfied it is permissible to consider questions relevant to requirement (ii), that the public interest requires that the issues should be resolved. The court must satisfy itself separately about requirement (i) before it passes on to the questions that arise under requirement (ii).
57. Second, § 74.3 makes clear that the court has a discretion to *refuse* to make a PCO even if it is satisfied as to each of the requirements set out in § 74.1. But that is all the discretion that it has. It is not able to exercise a discretion to *make* a PCO in any case where any of the five requirements in § 74.1 are not satisfied.
58. In our case the most important requirement is requirement (i), that the issues raised are of general public importance. To that I now turn.

General public importance

59. By imposing a requirement of general public importance the court in *Corner House* was plainly and intentionally setting a demanding standard. I agree that the test will require interpretation, but on any view it sets limits outside of which a PCO cannot be made. In particular, it is quite inconsistent with a requirement of *general* public importance that a PCO should be made simply on the ground that the matters in issue are of importance to a section of the public.
60. Further understanding of the type of case that would fall within the PCO jurisdiction can be drawn from *Corner House* itself. Three examples stand out:
 - i) “the elucidation of public law by the higher courts in addition to the interests of the parties”: *Corner House*, §70
 - ii) matters of significant importance to a general class such as the body of taxpayers: *Corner House*, §137
 - iii) overlapping with (ii), misbehaviour by a department of state in handling policies that are of general application: *Corner House*, §140

In each of the last two cases the court specifically reverted to the rubric of general public importance to justify the making of a PCO in the circumstances of *Corner House* itself. The jurisdiction is not limited to circumstances as striking as those were, but there is no doubt that the court saw those circumstances as good examples of what would count as a matter of general public importance.

61. In §2 above my Lord has set out Holman J’s analysis of the issues that arise in the MIU proceedings, which for present purposes are of the same order as those that arise in the day hospital case. Those are in summary (i) irrationality because the Strategic Health Authority’s financial case was wrong; (ii) apparent bias, because of a personal relationship between a consultant and an employee of the Trust; (iii) failure to give weight or sufficient weight to a general report on hospital closures by Sir George

Alberti. When he came to consider the application for a PCO in order to litigate those three grounds Holman J said, at §§ 34-35 of his judgment:

34.....in my view [this] is not a "test case". I have summarised the essential issues upon which I have given permission to apply. The "financial argument" is clearly fact specific to the figures and disputed calculations in relation to this unit, this hospital, and this Trust. The "apparent bias point" is totally fact specific. It may of course raise some questions of more general legal interest about independence and apparent bias in public consultation processes. But just because a case happens to contain some topic of general legal importance, upon which the public as a whole may gain from a ruling, does not make the case one of general public importance so as to engage the PCO jurisdiction. I accept that the relevance of, and weight to be attached to, the Alberti report may apply more generally to other "hospital closure" cases. But in my view it is not the central issue in this case, and the "Alberti point" does not give to this case the quality of a test case properly so-called.

35. What this case does not involve is, by way of example only, some issue of statutory construction which needs to be resolved and which is relevant to this and a number of other "hospital closure" situations. This case does not involve any "elucidation of public law by the higher courts" (cp paragraphs 69 and 70 of Corner House). Rather, it requires application of well-established principles of judicial review to the particular facts of the case.

62. Those observations, with respect, make a powerful, I would say conclusive, case as to why the present proceedings are not of general public importance. As a result, the judge's *only* reason for making the PCO was that contained in §32 of his judgment:

It is clear that issues do not have to be of importance to all citizens or the whole nation in order to be of "general public importance". I am satisfied that the ultimate issue in this case, namely continuing closure or the reopening of the MIU, is an important and not a trivial one; and that it is of importance to a sufficiently large section of the public, namely the 30,000 to 50,000 people in the affected catchment area, as to be an issue of general public importance.

63. To say that the decision is important and not trivial says very little more than that it is an apt subject for Judicial Review. To say that it is enough that the decision affects a catchment area of 30,000 to 50,000 moves far away from anything that can be reasonably drawn from *Corner House*. Most decisions on hospital provision; school reorganisation; or any aspect of local government services; will of necessity affect a catchment area as large as, probably much larger than, that on which the judge relied in this case. Quite apart from the fact this case is very different indeed from the types of case to which the court in *Corner House* made specific reference, that court cannot possibly have intended that almost every decision of the type just mentioned would

potentially fall within the jurisdiction to make a PCO. If it had thought that, or anything like it, it would have expressed itself quite differently. It would have said that public importance, which no doubt is satisfied on the facts of our cases, would be enough. But that is what the court was careful not to say. What it added was the requirement of general public importance, a requirement to which the effect of the decision to make a PCO in these cases is to give no weight.

Exceptionality

64. In §72 of its judgment in *Corner House* this court reviewed the earlier decision of Dyson J in *Ex p Child Poverty Action Group* [1999] 1 WLR 347, and said:

Dyson J emphasised that the guidelines related to public interest challenges, which he defined at p 353. We believe that this definition can usefully be incorporated into the guidelines themselves. Dyson J said that the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances. We agree with this statement, but of itself it does not assist in identifying those circumstances.

Holman J did not accept that “exceptionality” was seen by the court in *Corner House* as any additional requirement before a PCO can be made. At his §19 he said:

The effect of that second sentence is, in my view, to make clear that exceptionality is not itself part of the test. Rather, paragraph 72 is merely a forecast or prediction that the effect of applying the principles and test in paragraph 74 will be that it will only be in rare (the word “rare” is used in the first sentence of paragraph 76), and hence exceptional, cases that it is appropriate to make a PCO. There is no test, principle or criterion of exceptionality within paragraph 74 itself.

I cannot agree with that analysis. The court did not think that exceptionality was satisfied by the fulfilment of the requirements set out in its §74. If it had thought that it would not have said in its §72 that there were difficulties in identifying the circumstances of exceptionality, but would have simply said that no difficulties arose from the court’s approval of Dyson J’s requirement of exceptionality, because that requirement was now defined in the terms of §74. And it is also notable that when in its § 144 the court in *Corner House* explained the grounds on which it was making a PCO in that particular case it said that it was satisfied as to the §74 requirements; “and that this was one of those exceptional cases in which [a PCO] should be made”. That is plainly the language of cumulative criteria, and not a statement that because the §74 requirements are satisfied exceptionality is necessarily satisfied as well.

65. I therefore consider that Holman J was wrong in analysing the judgment in *Corner House* as not recognising exceptionality as an additional requirement for the making of a PCO. In the circumstances of the present case, however, it makes no difference to the result whether exceptionality is a separate requirement; or as Holman J thought a cross-check that shows the §74 requirements to be met because they will only be met in a case that is in any event exceptional. That is because on any view the present case is not exceptional or, in the language of the court in § 76 of *Corner*

House, rare: so it fails either because it does not meet one of the criteria required by *Corner House*, or because lack of exceptionality shows that the §74 requirements are not met.

66. That the case is not exceptional is, with respect, plainly demonstrated by Holman J's own analysis that is quoted in §2 above. The grounds for Judicial Review in both cases show them to be the common coin of public law complaints. What we were told about how it is intended to conduct the proceedings demonstrated that they will be almost entirely occupied with disputes of fact, including the cross-examination as to their veracity of various officers of the Trust. There is no point of law of general importance, indeed almost no contested point of law at all. And it is by no means exceptional or unusual for complaints to be made about hospital closures: indeed, Holman J recorded at §33 of his judgment that many such disputes had arisen other parts of the country. That might be of relevance to the general importance of this case if it could be seen as a test case for other disputes elsewhere: but Holman J held in terms that this is not a test case, and no attempt was made to reinstate that claim before us. What it does show, however, is that this case is not exceptional.

The order of Holman J

67. Holman J erred in law in two respects. First, he made a PCO in circumstances to which the jurisdiction to make such orders established by *Corner House* does not extend. Whatever the limits of the jurisdiction to make a PCO, a case whose only distinguishing factor is that it affects a catchment area of 30,000 to 50,000 people does not fall within those limits. Second, he did not respect the requirement of exceptionality established by *Corner House*. I would allow the appeal and set aside his order.

The order of Simon J

68. Simon J gave no reasons for his decision to make a PCO. While I agree that the format in which orders are made in the Administrative Court did not assist him, it was still his obligation to give at least some indication of why he had decided as he did: see *English v Emory Reimbold* [2002] 1 WLR 2409 [15]-[18]. That was particularly so when, in the state of the law as it was when the case came before him, it was far from self-evident that the case was suitable for a PCO.
69. That failure provides a compelling reason why the decision should be reviewed. We were invited to assume that Simon J must have made his decision on the same basis as did Holman J. It is far from clear that that is a necessary or even a sensible way of proceeding, but if we take that step Simon J's decision falls for the same reason as does that of Holman J, that it was made without jurisdiction: which is a compelling reason for interfering with it. I would therefore allow the appeal from McCombe J in terms that there should be substituted for the order of Simon J an order refusing to grant a PCO.

Policy

70. The effect of the decision in this case is very greatly to extend the types of cases in which, if other requirements are fulfilled, a PCO can be made. And although judges retain a discretion to refuse nonetheless to make PCOs, it is difficult to see how a

judge could use that discretion to refuse a PCO in the type of case in which the making of a PCO has been upheld by this court and there were no policy factors (for instance, collusion or the creation of an artificial case) that militated against it. The effect of a PCO is to shift part of the financial burden or risk of litigation from the claimant on to public funds: in the present case, the funds of the Primary Care Trust. One of the reasons that is urged in favour of such a step is the cost, difficulty and risk for the citizen of public law litigation. There is much to be said in terms of policy about those issues, but I am very uneasy at the prospect of the issues being resolved or assisted by further rule-making by the courts. One of the criteria for making a PCO is effectively that the claimant is not eligible for Community Legal Service funding. The limits on such funding are very controversial, but that controversy is about decisions taken by Parliament or under its authority. The court should in my view be very cautious in taking steps that extend support from public funds beyond that chosen by Parliament, especially when the funds used for that purpose are not those dedicated by Parliament to legal purposes.

71. These considerations may well have been in the mind of this court in *Corner House* when it placed very significant limits on the power of the court to make a PCO. For my part, and while recognising the importance of the general issue, I do not think it appropriate for the court to go beyond those limits: and that is quite apart from the fact that this court in *Corner House* plainly thought that it was laying down a specific set of rules that bind first instance judges as they bind us.

Lady Justice Smith:

72. I have read in draft the judgments of Lord Justice Waller and Lord Justice Buxton. I gratefully adopt Lord Justice Waller's exposition of the facts. I am in agreement with Lord Justice Waller's conclusion that all three appeals should be dismissed. I will briefly explain my reasons.

The appeal from Holman J

73. Holman J was concerned with the application in respect of the closure of the Minor Injuries Unit (MIU) and gave a detailed reasoned judgment as to why he thought it appropriate to allow Mrs Compton the benefit of a PCO. Waller LJ is of the view that Holman J was entitled to make a CPO; Buxton LJ considers that he was not. The main area of disagreement is whether Holman J was entitled to find that the first requirement governing the making of a PCO, as set out in paragraph 74 of *Corner House*, was satisfied so as to permit him to exercise his discretion to make an order. Buxton LJ is of the view that it cannot be said that the closure of the MIU at Savernake Hospital gives rise to an issue of general public importance and there is therefore no jurisdiction to make a PCO. The second area of disagreement is whether Holman J was right to reject the submission that, before he could make a PCO, he had to be satisfied that the five requirements in paragraph 74 of *Corner House* had been met and that it was fair and just to make an order but also that the case was exceptional. Buxton LJ is of the view that exceptionality is an additional requirement; Waller LJ says that it is not.
74. I agree with Buxton LJ that the principles expounded by this court in *Corner House* are binding on us. I agree too that they relate to the jurisdiction to make a PCO in that they govern the basis on which the jurisdiction provided by section 51 of the Supreme

Court Act 1981 is to be exercised. That said, the principles are not part of the statute and, in my view, should not be construed as if they were.

Showing that the issues are of general public importance

75. The first governing principle requires the judge to evaluate the importance of the issues raised and to make a judgment as to whether they are of ‘general public importance’. I have three observations to make about that judgment. First, there is no absolute standard by which to define what amounts to an issue of general public importance. Second, there are degrees to which the requirement may be satisfied; some issues may be of the first rank of general public importance, others of lesser rank although still of general public importance. Third, making the judgment is an exercise in which two judges might legitimately reach a different view without either being wrong.
76. In my view, *Corner House* does not define what is an issue of general public importance. It provides some examples of the type of issue which will be of general public importance (see paragraph 60 of Buxton LJ’s judgment) but it does not seek to define or limit the field to issues of that nature. In particular, *Corner House* does not say that only issues of national importance will qualify. It does not (and could not) say how publicly important the issues have to be or how general the public importance has to be.
77. During the hearing, there was some discussion about the meaning of the word ‘general’ in the context of ‘general public importance’. As Buxton LJ says, it must add something to mere ‘public importance’. In some cases, the answer is easy. For example, if the case will clarify the true construction of a statutory provision which applies to and potentially affects the whole population, the issues are of general public importance. But if the issue is of public importance and affects only a section of the population, it does not in my view follow that it is not of general public importance, although it will not be in the first rank of general public importance. Mr Havers QC for the appellant accepted that a local issue might be sufficiently ‘general’ to be of general public importance but submitted that one could not decide whether it was so merely by taking a headcount of the numbers of people who would be affected by the decision of the court. He may be right although he did not explain how the general importance of a local issue was to be assessed. 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.
78. Holman J gave careful consideration to the question whether the closure of the MIU gave rise to issues of general public importance. He rejected the applicant’s counsel’s claim that the case raised issues of general legal importance. It was not, he said, a test case. But, nonetheless, he considered that the issues were of sufficient general public importance to satisfy the first requirement, largely because the closure directly affected 30,000 to 50,000 people. I think that the judge recognised that the issues were of ‘borderline’ general public importance and that is why he made the order in the particular form that he chose (an issue to which I will return). In my view,

Holman J applied his mind to the relevant issues in respect of the first requirement and I respectfully disagree with Buxton LJ that his conclusion was plainly wrong. I do not think that the judge misdirected himself in any way and I think that it was open to him to hold that the threshold of public general importance was passed. My own view is that the issues were very much on the borderline of general public importance and I myself might have reached a different conclusion, but that is beside the point.

79. No real complaint is made of the judge's holdings in respect of the remaining requirements or of his approach to the exercise of his overall discretion. In particular, no criticism can be made as to the separate consideration the judge gave to the second requirement, namely that the public interest required that the issues be resolved. True it is that the judge expressed some reservation about whether this requirement was satisfied but it is clear that he held that it had been. I will return to the judge's reservations on that point later.

Exceptionality

80. Mr Havers submitted that, in addition to satisfying the five requirements and persuading the judge that it was fair and just to make the order sought, an applicant for a PCO must also show that the circumstances of the case were exceptional. Holman J rejected that submission when made below and Mr Havers submits that he was wrong to do so. Buxton LJ agrees.
81. In origin, this supposed additional requirement comes from *R v Lord Chancellor ex parte Child Poverty Action Group* [1999] 1 WLR 347; [1998] 2 All ER 755, where Dyson J, as he then was, said that a PCO should be made only in the most exceptional circumstances. In *Corner House*, the court said that it agreed with Dyson J's statement but added that 'of itself, it does not assist in identifying those circumstances' Further, as Holman J pointed out, when defining the guiding principles at paragraph 74, the court made no mention of an additional requirement of exceptionality. Nor at any stage did it explain how any such additional requirement was to be applied. However, when the court came to apply the guiding principles to the facts of *Corner House*, it said that it was satisfied that the five principles were satisfied, that it was appropriate in the exercise of its discretion to permit Corner House to proceed with the benefit of a PCO "and that this was one of those exceptional cases in which such an order should be made".
82. Although the court linked the two parts of that sentence by the word 'and' thereby suggesting that exceptionality was an additional and independent finding, the court said nothing to demonstrate that it had in fact required anything additional over and above the satisfaction of the five requirements and the exercise of the discretion. Indeed, before mentioning exceptionality, it had already said that it was appropriate to permit Corner House to have the benefit of a PCO. It seems to me therefore that, in practice, if all the requirements are satisfied and the court thinks it right to exercise its overall discretion, nothing more is required. In those circumstances, exceptionality is satisfied. And indeed, it must be accepted that it will be a rare case which satisfies all five requirements.
83. I conclude therefore, in respectful disagreement with Buxton LJ, that exceptionality is not an additional requirement over and above satisfying the five governing principles and persuading the judge that it is fair and just to make the order. So far as I can see,

the only function of the *Corner House* endorsement of Dyson J's statement was to serve as a reminder that PCOs are not to be routinely made and that it will be a rare case which meets all the requirements.

The exercise of the discretion

84. No specific criticism has been made of the way in which the judge exercised his overall discretion. However, I consider that it is important that I should refer to this part of his decision. I said that I would return to the judge's implicit reservations about the strength of his finding that the issues raised were of general public importance and his explicit reservations about the public interest need for the issues to be resolved.
85. When turning to consider whether to exercise his overall discretion to make a PCO, Holman J inserted a sub-heading in his judgment: 'is it fair and just to make a PCO; and if so, in what form?' He had earlier set out some of the possibilities open to a judge who was considering whether to make a PCO, recognising, rightly in my view, that a PCO is a flexible remedy which can take a variety of forms.
86. At one end of the scale, the judge may make a PCO which imposes on a defendant the burden of bearing its own costs even though it wins on the merits and does not relieve it of the prospective burden of paying the applicant's costs in the event that the applicant succeeds. However, *Corner House* makes it plain that it will be usual to limit the successful claimant to recovery of modest costs, comprising the fees of the solicitor and one junior counsel. That is the 'strongest' form of order which will usually be made. It puts the defendant at a major disadvantage; on costs it is in a 'heads you win tails I lose' position. At the other end of the scale, the court can make a much more modest order, whereby the claimant's liability to pay the defendant's costs is capped not at nil but at a specified level and where the defendant is given a guarantee that it will not be required to pay any of the claimant's costs. Holman J made a modest order of this type. He directed that, if the defendant PCT were to succeed, the claimant would be liable for £20,000 of its costs; that was two-thirds of the sum which the defendant PCT (then) estimated its costs would be. If the claimant were to win, the defendant would not have to pay any of the claimant's costs. (In fact, the claimant's costs will be minimal, as she has no solicitors and has the benefit of counsel acting *pro bono*.) Under that order, the defendant has the comfort of knowing that it cannot be required to meet any bill of costs other than its own and, over that, it has a large measure of control. Between the two extremes of the forms of order I have mentioned, it is possible for the judge to tailor the terms of the order to meet what he sees as the justice and fairness of the case.
87. As I have said, Holman J made an order very much at the modest end of the scale. It is clear from his reasoning between paragraphs 50 and 61, that he tailored the order to meet the particular circumstances of the case. At paragraph 55, he took account of his own reservations about the strength of the public interest in having the issues resolved and the limitations on the extent of the general public importance of the issues raised. No one has suggested that he was wrong to do so and, in my judgment, he was entitled and right to do so. 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.

88. I have said that, in my view, the judge was entitled to hold that the first and second requirements were met, even though they only just crossed the threshold, which I think was the judge's view. But, as the thresholds were crossed, the judge was entitled, in the exercise of his discretion, to make the modest order he chose to make. For the reasons given by Waller LJ, I would reject both parties' appeals against the form of order made by Holman J.

The effect

89. The decision of the majority on this part of the appeal may appear to broaden the range of cases in which a PCO may be made. However, I do not think that, in reality, it does so. That is because I do not think that, in *Corner House*, the court was seeking to constrain the freedom of judges to decide when it is appropriate to make an order. It was only defining a series of principles or questions which must be answered affirmatively before an order can be made.

The appeal from McCombe J

90. I propose to deal with this appeal very briefly because on the important issues I agree with Waller LJ. I agree with his analysis of the procedural problems which arose in this case and that McCombe J was wrong to hold that the parties had agreed to the PCO application being dealt with without any appearance. I agree also that whether an application for a PCO, considered as *Corner House* says it should be, on paper, is properly to be considered under CPR 23.8(b) or (c) makes no difference to the test to be applied. The court in *Corner House* was anxious to impose a procedure that would avoid drawn out preliminary skirmishes and for that reason intended, with justification, to impose a difficult hurdle (compelling reasons) on a defendant who seeks to set aside an order made on consideration of the papers. I do not accept Mr Havers' submission that the procedure laid down is unfair to defendants.
91. I agree with Waller LJ that this appeal must be resolved in the same way as the appeal from Holman J because of the way in which the appeal was argued. Mr Havers expressly accepted that Simon J was not to be criticised for failure to give reasons for his decision to make a PCO. He invited us to assume that Simon J had been guided by reasoning similar to that which had guided Holman J. I am not sure that that assumption is entirely satisfactory as Simon J made a rather different order from Holman J's on the basis of very similar facts. Simon J ordered that the defendant should not recover any of its costs even if it won and that the claimant would be entitled to recover £25,000 from the defendant if she won. So, Simon J's order was significantly more disadvantageous to the defendant than was that of Holman J. However, as we were asked to do so, I am prepared to deal with this case on the basis of that assumption.

92. If Simon J's failure to give reasons following a paper determination is not to be regarded as a matter for criticism, there was no compelling reason advanced by Mr Havers as to why Simon J's decision should be reopened on the merits. For that reason, I agree with Waller LJ that the appeal against McCombe J's order should be dismissed and the order made by Simon J confirmed.
93. However, I agree with Buxton LJ that a complete failure to provide any reasons for a decision made on consideration of the papers ought to amount to a compelling reason why the decision should be reviewed on the merits. If the judge gives no reasons at all for making the order, the defendant cannot know whether he has even applied his mind to the correct issues. I do recognise the need for judges to be able to deal with paper applications with reasonable expedition and I would certainly not wish to impose a requirement for a reasoned judgment. However, I do think that a note of two or three sentences explaining the basic reasoning is essential.
94. Had Mr Havers not made the concession that he did, I would have had to evaluate for myself the facts and circumstances and to decide whether the five governing requirements were satisfied in the day hospital case. I would have had to exercise my discretion as to whether an order should be made and if so what order. That would have been a difficult task. I think the facts of this case, like those of Holman J's, would have been very much on the borderline for an order to be made. But, as I have said, I am spared that task and I base my dismissal of the appeal from McCombe J on the fact (absent any complaint about the lack of reasons) that no compelling reason was advanced to justify a review on the merits of Simon J's decision.
95. I agree with and endorse the proposals made by Waller LJ as to the approach which should be taken to applications for PCOs in respect of proceedings in the Court of Appeal.