ACCESS TO JUSTICE FOR NGOs AND CHARITIES

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Introduction

1. In this workshop, we consider at access to justice for NGOs and charities. We will look at when charities and NGOs should bring claims, and what kinds of claim are most likely to succeed. And, perhaps most importantly, we deal with funding. How can a charity or NGO minimise the costs risk of losing a case, perhaps using a Protective Costs Order?

2. This paper focuses on the legal issues relating to costs and funding. But the discussion at the seminar will range much wider and look at practical, policy, decision-making and governance issues as well.

3. The current costs rules adopted by in public law follow the private law model: costs are usually determined at the end of the case, and the 'loser' pays the costs of the 'winner'. This approach encourages litigants to think very carefully before bringing or defending a claim. But the costs rules also represent a formidable barrier to litigants wishing to challenge a public decision. Many lawyers have experience of strong claims that are never brought because of the effect of the risk of losing and facing an uncertain (and often very large) costs bill. Judicial review is not cheap, especially if there is an interested party that will also be represented and may seek costs.

4. Protective costs orders ("PCOs") are the judge-invented means of reducing these problems and so promoting access to public law justice. As is well known, the modern PCO was developed by the Court of Appeal in **Corner House** 6 years ago. This paper seeks to identify the **Corner House** principles, understand how the principles have been

applied and developed over the last few years and gives some practical hints for those applying for PCOs to enable them to bring important public interest litigation.

General rule

5. The ordinary costs rules are codified in the CPR. CPR Rule 44.3 sets out the Court's discretion relating to costs and the general rule:

> (1) the court has discretion as to-
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> > (a) whether costs are payable by one party to another;
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> > (b) the amount of those costs; and
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> > (c) when they are to be paid.
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> (2) If the court decides to make an order about costs-
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> > (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
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> > (b) the court may make a different order.

6. The ordinary rule is therefore that the loser pays the winner, but the Court retains its discretion. Rule 44.3 must be read and applied in accordance with the overriding objective in CPR 1.

7. Whilst a departure from the general rule must be justified, there is nothing in the CPR that requires exceptional circumstances or a compelling reason for a departure. Since the introduction of the CPR, the Courts have been creative when applying the costs rules at the end of the case to ensure that substantial justice is done between the parties. See the examples given by Brooke LJ in **R (Refugee Legal Centre) v SSHD** [2004] EWCA Civ

1239 at [21]. In a number of public law cases, unsuccessful claimants have persuaded the Court not to make any adverse costs order, despite losing[1].

8. Or, when winning a case at first instance, the Court can direct that the public body defendant pay the costs of an appeal in any event, as a condition of granting permission to appeal under CPR 52.37. This type of order is commonly made as a condition of permission to appeal where a public body has lost a case and wishes to pursue a matter further to obtain an authoritative ruling in the public interest. See, for example **Chief Constable of North Wales Police v Evans** [1982] 1 WLR 1155 (fairness of dismissal procedures for probationary police constable) ("Happily, the Appeal Committee, as a condition of giving permission to appeal, directed that the appellant bear the [defendant's] costs of the appeal in any event" per Lord Hailsham LC at 1164C). The same order was made by the Administrative Court in **R (Corner House & Campaign Against Arms Trade) v Director of the Serious Fraud Office** [2008] 3 WLR 568 at [48] per Lord Bingham of Cornhill (halting of SFO investigation into alleged bribery and corruption by BAE halted on national security grounds). The Divisional Court ordered that the Defendant pay the Claimants' costs at first instance with a Conditional Fee Agreement ("CFA") uplift and the costs of a leapfrog appeal to the House of Lords, regardless of the outcome of the appeal. Cranston J made such a similar order in **Medical Justice** [2010] EWHC 1425 (Admin). The Secretary of State is seeking to appeal against the condition and the case is ongoing in the Court of Appeal.

9. Further judicial encouragement for this type of order was provided in **R (Weaver) v London & Quadrant Housing Trust** [2009] EWCA Civ 235 (Elias and Toulson LJJ):

> 5. In my judgment it is important to bear in mind that, when granting leave to appeal, it was certainly open to the court to have made it a condition of the Trust

[1] Examples include **R v SSETR, ex parte Challenger** [2001] Env LR 209 (Harrison J), **R (Friends of the Earth & Greenpeace) v SSEFRA** [2001] EWCA Civ 1950, **R v Commissioner of Police of the Metropolis, ex parte Blackburn** *(No. 3)* [1973] 1 QB 241, **New Zealand Maori Council v Attorney General of New Zealand** [1994] 1 AC 466, **R v Secretary of State for the Environment, ex parte Shelter** [1997] COD 49 and **BACONGO** [2004] UKPC 6. Most recently, Age Concern and Friends of the Earth were successful in obtaining a no order for costs after losing their judicial review relating to fuel poverty (**R (Friends of the Earth & Help the Aged) v SSBERR & SSEFRA** [2008] EWHC 2518 (Admin), McCombe J).

> pursuing the appeal not only that they should not undertake not to pursue costs against the claimant, if successful, but in fact that they should bear the costs of both parties in the appeal. The power to impose conditions of that kind is granted by CPR Part 52.37. As an example, in the notes in the White Book the case of Morris v Wrexham CBC [2001] EWHC Admin 697 is identified as a case where leave to appeal was granted on condition that the appellant pay the respondent's costs of the appeal in any event.
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> ...
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> 16 ... As Elias LJ has observed, it would in those circumstances have been well within the permissible range of the court's powers on considering the application for permission to appeal to have made such permission conditional, at least on the Trust not seeking any order for costs against the respondent or the Legal Services Commission. The Trust might consider itself fortunate that it was not made subject to a condition requiring it to pay both sides' costs of the appeal, since the appeal was being brought in order to establish a point of law of general importance to registered social landlords.

Protective Costs Orders

10. The risk of losing a claim, and then failing to persuade the judge at the end of the case that the general rule as to costs should not apply, has a chilling effect on Judicial Review claims. One solution is a PCO: at an early stage in the litigation, the Court can be invited to make an order prospectively affirming that the Claimant will not, regardless of the outcome of the case, be required to pay the costs of the Defendant or any third party.

11. These orders have been recognised in English public law since **R v Lord Chancellor, ex parte CPAG** [1999] 1 WLR 347 where Dyson J set out some very restrictive guidelines, and refused to grant protective costs orders on the facts. In 2002, the Divisional Court made a partial protective costs order (capping costs to £25,000) in CND's challenge to the legality of the second Iraq war (**Campaign for Nuclear Disarmament v Prime Minister & others [**2002] EWHC 2777 (Admin)). And in 2004, the Court of Appeal granted a PCO by consent to allow the Refugee Legal Centre to challenge the fast-track asylum system at Harmondsworth (**R (RLC) v SSHD** [2004] EWCA Civ 1296 and 1239).

Corner House

12. The leading authority is now the decision of the Court of Appeal in **R (Corner House Research) v Secretary of State for Trade and Industry** [2005] EWCA Civ 192. **Corner House** was an expedited challenge to the Export Credits Guarantee Department's decision to change its anti-corruption procedures at the request of various exporters and banks. Corner House, an anti-corruption NGO, complained that the anti-corruption procedures had been weakened and that it had not been consulted. It brought a claim for judicial review and sought a PCO. It was common ground that Corner House would be unable to continue with the claim unless an order was granted.

13. The Court of Appeal (reversing Davis J) granted a full PCO protecting Corner House from having to pay any costs if it lost and observed "if we had not taken that course, the issues of public importance that arose in the case would have been stifled at the outset, and the courts would have been powerless to grant this small company the relief that it sought" [145]. The claim was eventually settled, with the ECGD conceding the claim and agreeing to hold the consultation sought by Corner House [2]. In **Corner House**, the Court of Appeal set down the following guidance on the grant of PCOs:

- **A PCO may be made at any stage of the proceedings on such conditions as the court thinks fit, provided that the court is satisfied that:**
    - **The issues are of general public importance.**
    - **The public interest requires that those issues should be resolved.**
    - **The Claimant has no private interest in the outcome of the case.**
    - **Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order.**
    - **If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in so doing.**

- **If those acting for the Claimant are doing so *pro bono* this will be likely to enhance the merits of the PCO application.**

- **It is for the Court, in its discretion, to decide whether it is fair and just to make the order in light of the above considerations [74].**

14. If a protective costs order is made, it may take many forms. There is considerable possibility for variation to suit the circumstances of individual cases. The type of order made in **Corner House** was generous to the Claimant, who was protected from the risk of any adverse costs order but who was permitted to recover costs (including a conditional fee agreement uplift) if it won. A more limited order would be that there would be no order as to costs, whatever the outcome of the case. This was the order made in **Refugee Legal Centre**, where the Claimant's lawyers were acting *pro bono*. The most limited form of order is that made in **CND** where the Claimant successfully obtained an order capping (at £25,000) its maximum liability for costs if it lost. In general, the Court is more likely to make more limited forms of order (see **Corner House** at [146]) although a more generous order will be made when the interests of justice require.

15. **Corner House** also imposed limits on the costs that a Claimant with a PCO can recover if it wins. In such cases, the Court will normally impose a cost capping order that will prescribe, in advance, a total amount of recoverable costs. The Court of Appeal made clear that Claimants should not expect the capping order to provide for anything more than:

> … solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest… The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly [76].

16. The Court of Appeal in **Corner House** therefore identified two sub-rules. First, the costs must be "no more than modest". Secondly, costs can only be recovered for a single junior counsel. Both sub-rules have been substantially amended by subsequent cases.

17. In **Corner House** the Court of Appeal also gave guidance on the procedure relating to PCOs:

a) An application for a PCO should be made by a Claimant on its claim form, resisted by a Defendant in its acknowledgement of service and initially considered on the papers [78-79]. A claimant's maximum cost liability against a single defendant at this stage should be limited to the court fee, a Defendant's costs of successfully resisting the PCO application – not expected to exceed £1,000 – and a Defendant's costs of acknowledgement of service of successfully resisting the application for permission, applying the principles in **Mount Cook**.

b) If the application for a PCO is refused on the papers and the claimant requests that the decision be reconsidered at a hearing, the hearing should be limited to an hour so as to limit the Claimant's further liability for costs if the PCO is again refused. Proportionate costs of a Defendant in this regard would not be expected to exceed £2,500 [79].

c) If the application is granted on the papers, the court should not set aside the PCO unless, by analogy with CPR 52.9(2), there is a compelling reason for doing so [79]. The costs of resisting any application to set aside should be covered by the PCO that it is sought to set aside.

d) If a Defendant makes an unsuccessful application to set aside a PCO at an oral hearing, it should expect to pay costs on the indemnity basis.

e) In a case involving multiple defendants, each resisting an application for a PCO, a court should not normally allow more than one set of additional costs [80].

New Developments since Corner House

18. The decision in **Corner House** was a significant development in the law. Appellate approval was given to PCOs and a number of applications have been made for PCOs in the last few years. However, the floodgates do not appear to have opened. The total number of PCOs granted in the 6 years since **Corner House** seems be measurable in the low tens, not the hundreds or the thousands. However, that small number of cases has already led to substantial refinement and reconsideration of the principles set out in **Corner House**. Indeed, the current state of the case law on PCOs is in many respects unrecognisable from the guidance given in **Corner House**.

Guidance or Rules?

19. Despite initial conflicting first instance decisions on this point, there is now ample Court of Appeal authority that the principles identified in **Corner House** are to be treated as guidance not rules. In **R (Compton) v Wiltshire PCT** [2009] 1 WLR 1436 Waller LJ held at [23]:

> 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.

20. Smith LJ agreed ("the principles [in *Corner House*] are not part of the statute and, in my view, should not be construed as if they were") [75]. Buxton LJ dissented at [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 option[al] 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.

21. In **R (Buglife) v Thurrock Thames Gateway Development Corporation** [2008] EWCA Civ 1209 a unanimous Court of Appeal expressly approved the majority approach in **Compton**, speaking approvingly of the "flexible approach" adopted in the line of cases

starting with Lloyd Jones J's decision in **R (Bullmore) v West Hertfordshire Hospitals NHS Trust** [2007] EWHC 1350 (Admin). Most recently, in **Morgan v Hinton Organics** [2009] EWCA Civ 107 another differently constituted and unanimous Court of Appeal re-approved the flexible approach in **Compton** and **Bullmore**:

> 40... in our view the "flexible" basis proposed by Waller LJ [in **Compton**], and approved in **Buglife** should be applied to all aspects of the **Corner House** guidelines.

22. The principles in **Corner House** must be interpreted flexibly, with the aim of doing justice between the parties. **Corner House** contains guidance as to the exercise of the discretion as to costs, not a series of hoops or trips for a Claimant to overcome. No one factor is necessarily decisive of itself.

General public importance and the public interest

23. Since **Corner House** the Court has found the public importance/public interest tests to have been satisfied in a number of cases, and not satisfied in others. For example, the test was satisfied in **R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department** [2006] EWHC 250 (Admin) where Bean J granted a protective costs order to BUAV, capping its total potential costs liability at £40,000 (the government's projected costs were up to £150,000). The case concerned BUAV's challenge to the Secretary of State's application of the statutory scheme on laboratory animal testing. Bean J had no doubt that the claim met the public interest test. He held that BUAV was a responsible organisation that was bringing a legitimate challenge on matters of considerable public importance [15]. The test was also satisfied in **R (Public Interest Lawyers) v Legal Services Commission** [2010] EWHC 3259 (Admin), a challenge to a public law tendering exercise carried out by the LSC (Cranston J).

24. In contrast in **R (Goodson) v Bedfordshire and Luton Coroner** [2005] EWCA Civ 1172 the Court of Appeal considered an application by a Claimant for a PCO for a challenge to the verdict in her father's inquest, which she claimed had not been conducted

in accordance with Article 2 ECHR. The court was satisfied that the appeal, in circumstances where it was contended an individual had died as a result of injury sustained during surgery, raised an issue of general public importance. However, the court was not satisfied that it was in the public interest that that issue be litigated, by reason of similar litigation afoot in the courts.

25. The Court of Appeal considered the proper approach to the public importance/public interest principle in **Compton**. Compton concerned two linked judicial review challenges to the closure or reconfiguration (depending on your point of view) of local hospital services in Wiltshire.

26. The majority of the Court of Appeal held that local issues can amount to matters of public importance and public interest and that ultimately, the issue was one for the judge dealing with the PCO application, who will enjoy a wide discretion. Waller LJ held at [21-23]:

> 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...
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> 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 issues are ones of general public importance.

27. Smith LJ gave a detailed and helpful explanation of the proper approach, as applied to the facts [73-78]:

> 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.

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.

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.

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.

28. **Compton** was applied by Davis J in **R (Action Against Medical Accidents) v General Medical Council** [2009] EWHC 2522 (Admin). Davis J held that a case which "involves issues unique to the Powell family and the doctors concerned... [that] will set no general precedent" raised no issue of wider public importance as to justify a PCO.

Private interest

29. The Court of Appeal in **Corner House** left untouched the principle first set down in **CPAG** that the Claimant must have no private interest in the outcome of the case. This principle has been subject to criticism both before and after the Court of Appeal's judgment (see **Chakrabarti et al** [2003] PL 697 and **Stein & Beagent** [2005] JR 206).

30. The 'no private interest' requirement was interpreted narrowly and restrictively in **Goodson v HM Coroner for Bedfordshire** [2005] EWCA Civ 1172. Mrs Goodson sought a fuller enquiry into the circumstances of her father's death. The Court of Appeal held that she had a private interest and accordingly her application failed. The Court of Appeal went as far as to say "a personal litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case" [28]. The only exceptions appear to be for pressure groups (such as Corner House) or "a public-spirited individual… in relation to a matter in which he has no direct personal interest separate from that of the population as a whole" [28]. If correct, **Goodson** has the effect of excluding many individual Claimants from eligibility for a PCO, especially in environmental cases.

31. In an article published in Judicial Review shortly after the decision was handed down ([2006] JR 171), one of us expressed the view that **Goodson** was wrongly decided:

    a) In **Goodson** the Court of Appeal reasoned "the court in the Corner House case was well-placed to decide where to draw the line in terms of public interest. The requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have

formulated this part of the guidelines in more qualified terms… if it had thought it appropriate to do so" [27]. However, in **Corner House**, the private interest issue was irrelevant and not the subject of argument. It was common ground that Corner House had no private interest and this issue was not addressed in the submissions of either party or in the Court's judgment. The Court in **Corner House** was not asked to, nor did it consider the private interest issue. At the highest, the private interest "requirement" in **Corner House** is an *obiter* comment, not a binding rule.

b) **Corner House** was treated as setting down binding "requirements" as to when a protective costs order should be made. In fact, **Corner House** contains guidance, which can be departed from where the interests of justice so require. See **Compton**.

c) The subject matter of **Goodson** is also notable. Mrs Goodson sought a proper enquiry into the circumstances of her father's death. This forms part of the right to life under Article 2 of the European Convention on Human Rights. If that right is frustrated by an inability to access the courts, Article 2 (and the Article 6 right of access to justice) is also infringed.

32. Although **Goodson** has not been formally overruled, no judge who has had cause to consider **Goodson** has yet failed to distinguish or disapprove it. **Goodson** should not be viewed as good law. A private interest is a relevant matter to take into consideration, but it is not a bar of itself to a PCO:

a) In **Wilkinson v Kitsinger** [2006] EWHC 835 (Fam) Potter P declined to apply **Goodson** to a case concerning the validity in the UK of a foreign lesbian marriage. He held (granting a limited PCO) that the 'private interest' principle was no more than "a flexible element in the court's consideration of whether it is fair and just to make the order" [54].

b) **Wilkinson** was approved by the Court of Appeal in **R (England) v LB Tower Hamlets** [2006] EWCA Civ 1742 at [14]:

> The recent report of a group chaired by Lord Justice Kay "Litigating the Public Interest" (July 2006) provides a valuable discussion of the issues arising from the *Cornerhouse* case. In particular, the report questions the requirement in the criteria there laid down that the applicant should not have any "private interest" in the outcome of the case. For our part we respectfully share the doubts expressed by Sir Mark Potter as to the appropriateness or workability of this criterion (*Wilkinson v Kitzinger* [2006] EWHC 835)...

c) In **Kings Cross Railway Lands Group** (22 March 2007) Collins J reached the same conclusion, albeit more trenchantly expressed:

> I have the gravest doubt whether the [private interest] limitation suggested in *Corner House* was correct. No doubt private interest is a relevant consideration which may in many cases mean that a PCO would not be appropriate, but I do not think it should be an absolute bar. I am satisfied that *Goodson* is wrong in this respect. In any event, since *Corner House* provides guidance and not rigid rules, that aspect can properly be reconsidered in individual cases.

d) In **R (Eley) v SSCLG** (1 July 2008) Collins J confirmed his view that "the no personal interest condition in *Corner House* is in my view unsustainable" and granted a PCO. The Court of Appeal (Clarke MR and Waller LJ) dismissed an application by the Secretary of State for permission to appeal on 5 November 2008 and held that the fact that a person has standing for the purposes of bringing a claim for judicial review or a statutory planning appeal is not a bar to being granted a PCO.

e) In **Bullmore** Lloyd Jones J (refusing a PCO on other grounds) noted that the public interest requirement had been "diluted in later case law" and concluded that it should not be a disqualifying factor but "its weight or importance in the overall context" should be treated as a "flexible element" in the judge's conclusion.

f) Finally, in **Morgan v Hinton Organics**, the Court of Appeal delivered the long overdue coup de grace:

> 39. On a strict view, it could be said, *Goodson* remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court in the last two cases [**Compton** and **Buglife**]. Although they were directly concerned with other aspects of the *Corner House* guidelines, the "flexible" approach which they approved seems to us intended to be of general application. Their specific adoption of Lloyd Jones J's treatment of the private interest element makes it impossible in our view to regard that element of the guidelines as an exception to their general approach.

33. **Morgan v Hinton Organics** was applied in **Public Interest Lawyers**. Cranston J granted a PCO to a law firm challenging a LSC decision that was likely to deprive it of substantial fees. Although the private interest was relevant, it was not decisive. Cranston J held at [115]:

> I turn to the third principle, private interest. That is the most troubling aspect of the Claimant's application. There is no doubt that both Public Interest Lawyers and RMNJ solicitors have a strong interest in the outcome of this case. In his second statement Mr Shiner, for the Public Interest Lawyers, identifies a benefit of some £44,000 over a three-year period as a result of the award of a contract as bid for. The equivalent figure for RMNJ is £135,000. There is no doubt that that represents a private interest…
>
> In my view, however, the private interest which the claimants obviously have is not such as to determine this application for a protective costs order. As I have explained, the firms supporting the litigation, and the two firms themselves, are prominent players in advancing public interest matters. I regard the first claimant, in particular, as a surrogate for others who seek to advance the public interest through public law actions. That being the case, it seems to me that it devalues the work that these firms undertake to describe their action in this case as primarily commercial. It seems to me that private interest is not a major factor in the balance in this case. In particular I draw on the part of the judgment by Lord Hope in … **JFS** [2009] 1 WLR 2353, paragraph 25, where, in a different context, his Lordship said that the system of public funding would be gravely disadvantaged if

the pool of reputable solicitors willing to undertake this type of work was to be adversely affected.

Pro bono representation

34. In **Corner House**, the Court of Appeal held that an application is more likely to be successful if the Claimant's lawyers are acting *pro bono* (as opposed to acting under a conditional fee agreement or are instructing their lawyers on an ordinary private client basis). The logic behind the Court of Appeal's conclusion appears to be a reflection of the fact that if a PCO assisted Claimant who enjoys *pro bono* representation wins, he or she will not seek a costs order, because there are no costs to seek. The potential difficulty is that many solicitors firms specialising in public law challenges are unable to routinely act *pro bono* as such challenges form the major part of their practice.

35. On the facts of **Corner House**, costs protection was ordered, despite a Conditional Fee Agreement being in place. In numerous other cases, PCOs have been granted where the Claimant's lawyers were not acting *pro bono* (eg. **Buglife**, **CAAT v BAE, Corner House 2, Eley, KXRLG**).

36. In **Corner House 2 (R (Corner House & Campaign Against Arms Trade v Director of the Serious Fraud Office** [2008] EWHC 71 (Admin)) the Defendant argued that the Claimant should have to adduce evidence that it had tried and failed to try to find *pro bono* representation as a pre-condition of obtaining a PCO [12]. The argument failed on the facts – it was only raised at a late stage in the preparation of the case and it would be iniquitous to change the basis on which the case had to be funded at that point. However, Moses LJ expressly left the point open for determination in another case.

37. It is suggested that the extreme form of the Defendant's argument in that case was wrong: the Court of Appeal in **Corner House** held that *pro bono* representation is only a factor, and is not determinative. However, Claimants would be well advised when applying for a PCO to expressly deal in their evidence with the question of whether *pro bono* representation is a realistic option, giving reasons.

38. The relevance of this point may now be much diminished. In October 2008 section 194 of the Legal Services Act 2007 came into force, permitting successful parties with *pro bono* representation to apply for a '*pro bono* costs order'. The costs awarded will be paid to the Access to Justice Foundation, who will distribute them to organisations that provide *pro bono* legal representation. If *pro bono* funded parties can now recover costs, the logic behind the Court of Appeal's reasoning in **Corner House** falls away, unless the *pro bono* funded party waives his or her right to claim costs under the new provisions.

Cost capping of Claimant's costs

39. In **Corner House**, the Court of Appeal provided for a system of capping of the Claimant's costs, as a *quid pro quo* for the grant of a PCO. This system was designed to ensure that Claimants (a) did not run up excessive costs and (b) to ensure that the grant of a PCO strikes a fair balance between the interests of the Claimant and the interests of the Defendant.

40. The Court of Appeal provided for costs to be capped at a 'modest' level, and for counsel's fees to be restricted to a proper fee for a single junior barrister. Where there is a dispute as to the proper level of the cap, this can be referred to a Costs Judge for assessment.

41. The 'junior counsel only' principle is no longer good law. In **Buglife** [2008] EWCA Civ 1209 the Court of Appeal held that "we would certainly accept that there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases where it would be unjust to do so" [25]. Two counsel were permitted in **Medical Justice**, **Public Interest Lawyers**, **Corner House 1** and **Corner House 2**.

42. In **Corner House 2**, the Defendant also sought to argue that the Claimants' lawyers should not be able to recover a CFA uplift if they won. The Divisional Court (Moses LJ and Irwin J, 9 November 2007) disagreed:

> In this field of public interest litigation it is important that solicitors such as Leigh Day should be able to continue to operate so as to provide skilled public legal services to those concerned in public interest cases. To make an order that does not preserve the importance to them of CFA funding seems to me to be wrong, for it is inevitable that they will lose a percentage of their cases for which they will not recover any costs; and no firm can continue to operate bearing in mind that risk. So any order we make should reflect the fact that the party is CFA funded, as the Court of Appeal acknowledged at paragraph 76 (1) [of *Corner House*].

43. At a later hearing, the Defendant sought to argue that the costs that can be recovered by the Claimant should be limited to the amount the Claimant was offering to pay if it lost (a "mirrored cap"). The Court again disagreed:

> The claimants have raised, for the purpose of this litigation, £70,000. Because the costs order has been capped in any amount that the claimants should have to pay the defendants, the defendants contended it is only fair that since the public purse is going to suffer in any event, that that £70,000 should be paid and therefore the £173,420.50 (or whatever sum should be) should suffer a deduction of the £70,000 that should be raised. I do not agree. In my view the public purse has already been protected should the defendants lose, by the fact that not only are the costs capped to the sum involving a solicitor and junior counsel, but also that the sum agreed should be a modest amount. That it was the approach that the Senior Master would have had to adopt, and was adopted in reaching agreement, is entirely in accordance with what Brooke LJ said in Corner House, to which I have already referred. It seems to me therefore wrong that those who have put forward money on a voluntary basis should see that money go in reduction of what would otherwise have to be paid by the defendants if they lose. It must be recalled that this will only happen if they lose, and the public purse has been protected because a reasonable costs order is not being made against them, but one that is capped in the terms that I have already described. It does not seem to me right therefore that the public purse should be further protected by requiring that £70,000 to further reduce the liability of the losing party. In those circumstances the capped figure will be whatever the appropriate sum is ([2008] EWHC 71 (Admin) at [13]).

44. The Court of Appeal approved this approach in **Buglife** at [26] per Sir Anthony Clarke MR at [26]:

> We entirely agree that there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. As just stated, the amount of any cap on the defendant's liability for costs will depend upon all the circumstances of the case.

Despite this statement, the Court of Appeal approved a "mirrored cap" imposed by Sullivan J and imposed a similar cap in the Court of Appeal.

45. In **Buglife** the Court of Appeal gave additional guidance on how to deal with cost capping where there is a CFA. The Court of Appeal indicated that the Claimant would have to disclose the level of the uplift. This is a surprising finding because it is contrary to the principles that apply in all other CFA cases, and will involve disclosing privileged information about prospects of success to the Court (and the other parties). Nevertheless, in **R (Medical Justice) v Secretary of State for the Home Department** [2010] EWHC 1425 (Admin) Cranston J required the Claimant to disclose the success fee.

Fee levels

46. In **Corner House**, the parties agreed a capped figure for the Claimant's costs on the basis that if it was too high, the issue could be resolved on detailed assessment. After the case, the Costs Judge reduced the ordinary fee rates by 10% to reflect the need for fees to be modest.

47. In **Medical Justice** Cranston J directed that the Claimant should be able to recover modest fees for leading and junior counsel and solicitors fees plus a success fee [27-28]. Cranston J held that the "suitable benchmark of modesty" would be the rates paid to Treasury Counsel. The order stated that any order for costs against the Secretary of State would be limited to "the equivalent rates payable to Treasury leading and junior counsel instructed by the Defendant". The High Court confirmed the importance of firms and charities doing public interest work being able to recover success fees in CFA cases they won to make up for those cases that were lost.[2]

[2] In the different context of legal aid, the Supreme Court made a similar point in **JFS** [2009] 1 WLR 2353 at [25] per Lord Hope:

> "It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at *inter partes* rates in the event that their case is successful. If that were to become

48. In **Public Interest Lawyers** Cranston J adopted a different approach, permitting the recovery of no more than £375 per hour for solicitors and LSC rates for barristers (which are above the Treasury rates) but no recovery of a success fee. The reasoning was that these were commercial rates, so this factor compensated somewhat for the risk of the Claimant losing and its lawyers being paid nothing. The common feature of the cases is the imposition of limits to ensure that the Claimant's lawyers do not receive full commercial fees unless they are also taking a risk being paid nothing if the case is lost.

Exceptional circumstances

49. In **Corner House** the Court of Appeal indicated that the making of a PCO was exceptional. In **Compton** the Court of Appeal held (Buxton LJ dissenting) that this is not a further hurdle or additional requirement for the Claimant to overcome:

> "exceptionality" was not seen in *Corner House* as some additional criteria to the principles set out in paragraph 84 but a prediction as to the effect of applying the principles (Waller LJ at [24]).
>
> 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 (Smith LJ at [83]).

50. These conclusions were approved by the Court of Appeal in **Buglife** at [18].

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the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work."

Setting aside a PCO granted on the papers

51. If a PCO is granted on the papers, the Court of Appeal in *Corner House* indicated that it should only be set aside in exceptional circumstances or where there was a compelling reason. This principle was affirmed by the Court of Appeal in **Compton**. Once a PCO has been granted, it is therefore extremely difficult for a Defendant to get it set aside:

> ... In our opinion the courts should do their utmost to dissuade parties from engaging in expensive satellite litigation on the question whether PCOs and thus cost capping orders should be made. The expenditure of such costs cannot be in the public interest. Judges in the Administrative Court have considerable experience in this area and their decisions should not be revisited save in exceptional circumstances, as this court made clear in [79] of *Corner House*... (**Buglife** at [31]).

PCOs in ancillary private law claims

52. PCOs may also be available for ancillary private law claims that are closely linked to claims for judicial review proceedings. In **CAAT v BAE Systems Plc** [2007] EWHC 330 (QB) Campaign Against Arms Trade obtained an interim without notice PCO from Underhill J to protect it against an adverse costs order in an application for a *Norwich Pharmacal* order. BAE had come into possession of a privileged email sent by CAAT's solicitors in its pending challenge to the decision of the Serious Fraud Office to halt its inquiry into alleged Saudi corruption. BAE refused to tell CAAT the source of the email, and attempted to delete its records. CAAT obtained an injunction and BAE was ordered to disclose the identity of its agents who had received the materials.

53. Different principles apply in pure private law litigation. In **Eweida v British Airways** [2009] EWCA Civ 1025 the Court of Appeal confirmed that a PCO was not available in an employment case, even though Ms Eweida was appealing from a jurisdiction (the EAT) where costs are not routinely awarded ("the court cannot make a PCO in this case... this is not public law litigation, but a private claim by a single employee against her employer..."

PCOs for Defendants and Interested Parties

54. A Defendant can also obtain a protective costs order. In **R (Ministry of Defence) v Wiltshire and Swindon Coroner** [2005] 4 All ER 40 the Coroner sought a protective costs order in respect of a judicial review by the Ministry of Defence of the verdict of unlawful killing from nerve gas testing at Porton Down. Collins J held that in principle such an order could be made where, for example, an individual had a public law role and there was no costs protection given to him by any other body. In that case, the Coroner was indemnified by the local authority and so no order was required. The Coroner's concern that the local authority would be reluctant to expose itself to substantial costs was not a material factor in the exercise of the court's discretion.

PCOs on appeal

55. In **Compton**, the Court of Appeal gave guidance on the application of the **Corner House** principles in the Court of Appeal:

> 47. The governing principles identified in para 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 a compelling reason 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.

56. PCOs are also available to Respondents in appeals where the refusal of a PCO would lead to it being necessary to appoint an *amicus*. In **Weaver v London & Quadrant**, L&Q appealed against a declaration that it was a public body within the meaning of section 6(3)(b). The Respondent would not have been able to appear on the appeal without costs protection. The Court of Appeal had little hesitation extending the principles in **Corner House** to this situation and granting the costs protection sought. Toulson LJ was unimpressed by what a cynic might suspect was a tactical attempt by L&Q to ensure that the Respondent went unrepresented in the appeal:

> 17. I am puzzled by what the Trust has hoped to achieve by resisting the application. If the application were refused, the respondent would be unrepresented on the appeal. That would be the practical effect, as we understand it. It would be most unsatisfactory that the court hearing the appeal should not be assisted by oral argument on both sides. The only way of achieving that would be either through the intervention of the Equality and Human Rights Commission or by the appointment of an *amicus*. Those are both less obvious methods than by the respondent being represented and if either of those courses were followed the Trust would have no prospect of recovering its costs. In the circumstances I agree that the order should be that the appellant shall not recover any costs in the appeal against either the respondent or the Legal Services Commission.

Environmental Judicial Review – the Aarhus Convention

57. It is now clear that special principles apply in some environmental cases. Unfortunately, it is not clear what those principles are.

58. Article 9 of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention") provides:

> ACCESS TO JUSTICE

> (1) Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
>
> In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.
>
> Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.
>
> …
>
> (4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive (emphasis added).

59. The effect of the Aarhus Convention is to ensure that access to the Court is not prohibitively expensive. These provisions of the Aarhus Convention are repeated in the EIA and IPPC Directives. The domestic courts are therefore required to comply with the Convention when determining costs issues in cases that engage these Directives.

60. In **R (Garner) v Elmbridge BC** [2010] EWCA Civ 1006 the Court of Appeal granted a PCO to the Claimant. The case concerned the grant of planning permission for the redevelopment of a site near Hampton Court Palace. The Claimant was an architect with an interest in the conservation and preservation of historic buildings. The Claimant applied for a PCO, but refused to give any detailed information about his means. Nicol J held that this was fatal to the PCO application:

> 34. The claimant submits that article 10a of the Directive requires that legal proceedings to challenge environmental decisions should not be "prohibitively expensive". I do not think that that takes the matter any further. It is impossible to tell whether the proceedings would be "prohibitively" expensive unless there is information about the resources which the claimant would have available to fund them. That evidence is simply lacking.

…

> 36. The insufficiency of evidence as to the claimant's financial resources, in my judgment, is a clear reason why the application for a PCO must fail.

61. Nicol J also refused a PCO on the ground that the case did not raise an issue of general public interest and public importance.

62. The Court of Appeal (Sullivan LJ, with Lloyd and Richards LJJ agreeing) reversed Nicol J on both grounds. First, the Court of Appeal held that:

> … in an Article 10a case there is no justification for the application of the issues of "general public importance" / "public interest requiring resolution of those issues" in the Corner House conditions. Both Aarhus and the directive are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases (those cases that are covered by the EIA and IPPC Directives); and an important component of that public participation is that the public should be able to ensure, through an effective review procedure that is not prohibitively expensive, that such important environmental decisions are lawfully taken. In summary, under community law it is a matter of general public importance that those environmental decisions subject to the directive are taken in a lawful manner, and, if there is an issue as to that, the general public interest does require that issue be resolved in an effective review process. The Corner House principles are judge-made law and in accordance with the Marleasing principle those judge-made rules for PCOs must be interpreted and applied in such a way as to secure conformity with the directive.

63. Secondly, the Court of Appeal rejected Nicol J's conclusion that the absence of information about the Claimant's means was fatal to the PCO application. The Court noted that it would have preferred to defer its decision on this point until the outcome of a complaint to the Aarhus Compliance Committee was known. However, "it is not an ideal world… so we must reach a decision…" [45]. Sullivan J held:

> 46. Whether or not the proper approach to the "not prohibitively expensive requirement under Article 10a" should be a wholly objective one, I am satisfied that a purely *subjective* approach, as was applied by Nicol J, is not consistent with the objectives underlying the directive. Even if it is permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who

> happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of "the public concerned"…
>
> 50 … most "ordinary" members of the public, and very many who are much more fortunately placed, would be deterred from proceeding by a potential costs liability, including VAT, that totalled well over double the gross national wage for a full time employee (slightly less than £25,500 pa)…
>
> 51 … applicants for public funding from the Legal Services Commission have to disclose their means to the LSC, but they do so in a private process; they do not have to disclose details of their means and personal affairs, for example who has an interest in the house in which they are living, how much it is worth et cetera, to the opposing parties or to the court, in documents which are publicly available and which will be discussed, unless the judge orders otherwise, in an open forum. The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision.

64. The Court of Appeal ordered a PCO, with a cap on the Claimant's liability of £5,000 and a reciprocal cap on the amount that the Claimant could recover if the claim was won of £35,000.

65. In **R (Edwards) v Environment Agency (No. 2)** [2011] 1 WLR 79 the Supreme Court considered **Garner** and decided to refer the issue of whether "prohibitive expense" was subjective or objective to the CJEU for a preliminary ruling. Lord Hope noted that there was "no clear and simple answer… to the question as to what is the right test" [35] although he noted that "the balance seems to lie in favour of the objective approach" taken in **Garner**.

66. This tentative conclusion is supported by the Findings of the Aarhus Compliance Committee in its decision in the **Port of Tyne Complaint** (ACCC/C/2008/33). The Final Decision is awaited. After summarising the current domestic law on PCOs, the Committee:

a) Notes that repeated judicial calls for amendment of the CPR to make formal provision for PCOs in Aarhus and other cases have not been heeded [130].

b) Says that the guidance in **Corner House** that the Claimant should rely on *pro bono* representation or a single junior counsel is wrong ("the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on *pro bono* or junior legal counsel" [132]).

c) Cross-undertakings as to damages as a condition of injunctive relief should not be required where the risk to the Claimant is likely to be substantial [133].

d) The English courts are failing to give "the public interest nature of the environmental claims under consideration… sufficient consideration in the apportioning of costs" [134].

e) Accordingly, there is currently too much uncertainty for Claimants who wish to legitimately pursue litigation concerning environmental concerns in the public interest. The UK is therefore in breach of the Convention [135-6].

f) Further, the rules on timing in judicial review ("promptly and in any event within 3 months" are in breach of the Convention: "by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e. the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable" [139].

67. As for the future, in addition to the reference in **Edwards**, on 6 April 2011 the Commission announced that it had referred a case against the UK to the CJEU. Unhelpfully, neither the Commission nor the UK have been willing to disclose the Commission's reasoned opinion. However, the basis of the challenge is clear from the Commission's press release:

> Under European law, citizens have a right to know about the impact of industrial pollution, and about the potential impact projects may have on the environment, and a right to challenge such decisions. Directive 2003/35/EC on public participation in the drawing up of plans relating to the environment explicitly states that such challenges must not be prohibitively expensive. The

Commission is concerned that in the United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing such challenges prevents NGOs and individuals from bringing cases against public bodies.

In the United Kingdom, "protective costs orders" can be granted to limit the amount a public authority can recover from a challenger at the end of the case. But the Commission is concerned about the lack of clear rules for granting such orders, and at their discretionary and unpredictable nature, which is not in line with the requirements of the Directive. Although such orders are now granted more frequently than in the past, it is still the norm in UK litigation for the losing party to pay the winning party's costs.

The Commission is also concerned that under UK law applicants for interim measures and injunctions suspending work on projects have to provide a "cross undertaking in damages", promising to pay damages if the injunction turns out to be unfounded. This puts applications for such orders beyond the reach of most applicants, although such orders can be essential to protect sites from environmental damage whilst litigation is ongoing.

In reply to previous letters from the Commission (see IP/10/312), UK authorities had agreed to amend their legislation, and new draft rules have been discussed with the Commission on numerous occasions. But as a year has passed since the reasoned opinion was sent and no legislative provisions are in place, the case is being referred to the Court.

Hints

For Claimants

68. The ideal is for a Claimant to be granted a PCO on the first paper application without the need for any oral hearing. To achieve this, the judicial review claim should be accompanied by a full witness statement setting out the public importance of the claim, the means of the Claimant, and explaining how the Claimant is funding its own legal representation. Where the case is to the benefit of a wider group or community, the Claimant must also explain what attempts have been made at fund-raising (except in environmental cases where a claimant of means would be well advised to say nothing in light of **Garner** and **Edwards**).

69. A Claimant must also give a realistic estimate of how much money it can afford to risk on the litigation. PCOs will usually still expose a Claimant to some costs risk. Whether through savings or fund-raising, a Claimant will normally be expected to take some risk (**Compton**: £30,000, **Buglife**: £10,000, **Corner House 2**: £70,000, **Garner** £5,000, **Public Interest Lawyers** £100,000). Offering a realistic sum, justified by evidence, will greatly assist the merits of a PCO application.

70. Claimants should also keep their substantive cases limited and narrow. Courts are more willing to make a PCO where the case will be short and quickly resolved, and where every point taken has demonstrable merit. Such cases are also cheaper to litigate, so the burden on the Defendant of not being able to recover its costs is less.

71. For an indication of how things can go wrong, it is worth reading the decision of the Court of Appeal in **R (Badger Trust) v Welsh Ministers** [2010] EWCA Civ 1316. Pill LJ delivered a separate judgment on costs at the conclusion of the appeal. The Claimant, Badger Trust, was not funded by a CFA. Burnett J at first instance ordered a reciprocal cap of £10,000 with liberty to apply to vary the cap insofar as it applied to the Claimant. Elias LJ extended the PCO to cover the appeal. The Claimant made written submissions to the effect that it would seek to set aside the cap if it succeeded in the claim. However, during the case the Claimant declined to provide details of its own legal costs. On winning in the Court of Appeal, the Claimant submitted a schedule of costs for a little over £165,000. This was a sum substantially in excess of the cap and the reserves of the Badger Trust. The Court rejected the application:

> 129. Applying the *Corner House* principles, I find wholly unconvincing the appellants' suggestion, first, that they could withhold any estimate of the costs they were incurring until after they had won on appeal and, secondly, that the appellants could leave it until after their success on appeal to challenge the reciprocal order made in the respondents' favour. What the appellants dismiss as a "notional pre-estimate of costs" which "is now entirely overtaken by events", ignores the principles laid down in *Corner House.* Moreover, even if the appellants could not make submissions on reciprocal protection when Burnett J made his order, there was every opportunity to do so subsequently, in submissions to Lloyd Jones J, in submissions to Elias LJ, when permission to appeal was

> sought, and in pre-hearing submissions to this court. In submissions of 22 June 2010 the appellants stated that there was 'simply no basis to undo' the order of Elias LJ.
>
> 130. It is not open to a party to keep its powder dry, both with respect to the level of costs it is incurring, and as to whether it objects to reciprocity, and, when it has won on appeal, to challenge the reciprocal order and put in a schedule of costs massively in excess of the sums provided in that order. Frankness is required from a party seeking a PCO, as is clear from *Corner House* and from *Buglife*. In any event, costs against an unsuccessful defendant will be restricted to a reasonably modest amount.
>
> 131. What the appellants should have done is to disclose at an early stage a pre-estimate of costs. If they sought to challenge reciprocity, they should have done so at an early stage. A judge could then have considered the principle of reciprocity and the extent of protection for each of the parties in the light of that information. If further factors arose when the appeal was brought, application could have been made, along with disclosure of a costs estimate, at that stage. What the appellants cannot do is to take no action on either point and, on finding they are successful, expect a claim such as the present one to be entertained.

72. The moral? Be entirely open with the other parties and the Court about the Claimant's own funding arrangements, the costs that are being incurred and don't seek to leave any part of the costs issues unresolved until the end of the case.