OUTER HOUSE, COURT OF SESSION

[2011] CSOH 10

XA53/10

OPINION OF LORD STEWART

upon

Minute for the Appellants and Answers the Respondents

in the Appeal under Schedule 2 to the Roads (Scotland) Act 1984

by

ROAD SENSE, an unincorporated association, and WILLIAM WALTON, Chairman of Road Sense, as its representative and as an individual,

Appellants;

against

a Decision of Scottish Ministers contained in a letter dated 21 December 2009 intimating approval of certain Schemes and Orders in connection with the Aberdeen Western Peripheral Route, and in respect of the Schemes and Orders approved by resolution of the Scottish Parliament of which intimation was given by Notices in the Edinburgh Gazette of 26 March 2010

Respondents:

Appellants/Minuters: Findlay; Drummond Miller LLP
Respondents/Respondents: Mure QC, Drummond; Scottish Government Legal Directorate

20 January 2011

[1] This matter is about the meaning and domestic application of the access to justice provisions contained in Article 10a which was inserted into Directive 85/337/EEC on the assessment of environmental impacts [the 'EIA Directive'] by Article 3(7) of the Public Participation Directive 2003/35/EC. The implementation date was 25 June 2005. Counsel were agreed that as between the present parties the access to justice provision in question satisfies the criteria for direct effect including non-implementation and — with no apparent irony — the 'clear, precise and unconditional' requirement [*cf. Sweetman* v *An Bord Pleanala and the Attorney General* [2007] IEHC 153, § 7.1; *Garner, R (on the application of)* v *Elmbridge Borough Council & Ors* [2010] EWCA Civ 1006 at §§ 21, 32; *Coedbach Action Team Ltd* v *Secretary of State for Energy and Climate Change* [2010] EWHC 2312 (Admin) at § 10; Opinion of AG Sharpston in *Trianel Kohlekraftwerk Lunen* [2010] EUECJ C-115/09 (16 Dec 2010).] I say 'irony' because Counsel then debated the meaning for one-and-a-half days. Neither party, however, wishes the matter to be referred to the European Court of Justice [*cf. R (on the application of Edwards and Another)* v *Environment Agency and Others* [2010] UKSC 57 (15 Dec 2010.)] No devolution issue has been raised in terms of Rule 25A. In deference to the lucid and informative submissions of Counsel I have dealt with the matter at length while recognising that, because of developments elsewhere, my Opinion as to the wider issues will be as if writ upon water.

[2] The matter comes before me by virtue of an incidental application in the course of a statutory appeal by the Road Sense pressure group. The Appeal is against a decision by the Scottish Ministers as trunk and special roads authority in terms of the Roads (Scotland) Act 1984. Road Sense and their office-bearers want to limit their financial exposure in the Appeal and have now applied by Minute in the Appeal

process for a Protective Expenses Order [PEO.] The Scottish Ministers have lodged Answers to the Minute. The issues between parties on the Minute and Answers, which I have been asked to decide, are whether, in implementation of the access to justice provision of the EIA Directive 85/337/EEC as amended, Article 10a, the Court should make a PEO in favour of Road Sense and, if so, what the amount of the protective expenses cap should be.

[3] The subject-matter of the substantive proceedings is the Scottish Ministers' proposal for the Aberdeen Western Peripheral Route [AWPR] consisting of a new four lane highway on a designated route that would loop around the west and north of the city of Aberdeen connecting with the existing A90 highway, south of Aberdeen, at Stonehaven, and north of Aberdeen, at Potterton. The AWPR has a branch into the city south of the River Dee. The original published draft Schemes and Orders for the construction of the AWPR were subject to a three-month public inquiry, from 9 September to 10 December 2008, conducted by reporters appointed by the Scottish Ministers. Road Sense participated in the public inquiry and were represented throughout by Counsel. The Report of the Inquiry proposed certain modifications. By letter dated 21 December 2009 issued by the Scottish Transport Directorate, the Scottish Ministers notified their decision to make the Schemes and Orders with a number of modifications. The Schemes and Orders, as modified, were then subject to an affirmative resolution of the Scottish Parliament. Notices to that effect were published in the Edinburgh Gazette on 26 March 2010.

[4] The fact that the AWPR has four lanes is legally significant: 'construction of a new road of four or more lanes' is one of the kinds of project for which environmental impact assessments are mandatory in terms of the EIA Directive 85/337/EEC, as amended, Article 4 and Annex 1, paragraph 7(c), given domestic effect by the

Environmental Impact Assessment (Scotland) Regulations 1999 (No 1), regulations 2, 3 and Schedule 1 paragraph 7(3); and environmental assessment brings the relative decision-making process within the public participation and access to justice provisions of the EIA Directive 85/337/EEC, as amended, by virtue of Articles 2, 6 and 10a.

[5] The Article 10a access to justice provisions have become germane because Road Sense through their Chairman William Walton are now appealing to the Court of Session against the decision of the Scottish Ministers to proceed with the modified AWPR proposal as notified in the letter of the 21 December 2009 etc. The Appeal has been remitted for a hearing in the Outer House. The hearing has been fixed for 22 February 2011 and subsequent days. Article 10a provides that procedures such as the present Appeal should be 'not prohibitively expensive.'

Legislative framework

[6] The Public Participation Directive 2003/35/EC implements the United Nations Economic Commission for Europe [UNECE] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 ['the Aarhus Convention.'] I am told that the Convention was ratified by the European Community on 17 February 2005 and by the United Kingdom on 23 February 2005. Provisions of the Aarhus Convention relevant to the present discussion include the following [*emphasis added*]:

PREAMBLE

[...]

Recognising also that *every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment* for the benefit of present and future generations.

Considering that, *to be able to assert this right and observe this duty, citizens must* have access to information, be entitled to participate in decision-making and *have access to justice in environmental matters, and* acknowledging in this regard that *citizens may need assistance in order to exercise their rights*.

[...]

Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced.

[...]

Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and *access to justice in environmental matters* in accordance with the provisions of this Convention.

Article 2

DEFINITIONS

[...]

4. ‘The public’ means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups;

5. ‘The public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

[...]

Article 3

GENERAL PROVISIONS

[...]

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. *This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.*

[...]

Article 9

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.

[...]

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.

[...]

> 3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, *each Party shall ensure that*, where they meet the criteria, if any, laid down in its national law, *members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*
>
> 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...*
>
> 5. In order to further the effectiveness of the provisions of this article, *each Party* shall ensure that information is provided to the public on access to administrative and judicial review procedures and *shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice*.

Article 6, not quoted above, contains the 'public participation provisions' of the Convention. It provides that Parties signatory are bound to apply the public participation provisions with respect to decision-making on whether to permit activities listed in Annex 1. One of the activities listed in Annex 1, at paragraph 8(c), is 'Construction of a new road of four or more lanes.' Parties are also bound to apply the provisions with respect to decision-making on such activities not listed in Annex 1 as may, according to the determination of Parties, have a significant effect on the environment.

[7] The United Kingdom's adherence to the Aarhus Convention was qualified by the following declaration:

> The United Kingdom understands the references in Article 1 and the seventh preambular paragraph of this Convention [*quoted above*] to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under Article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.

The qualification has been repeated for the purposes of ratification by the United Kingdom.

[8] The Public Participation Directive 2003/35/EC provides *inter alia*:

> Whereas:
>
> [...]
>
> (9) Article 9 (2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.
>
> [...]
>
> *Article 1*
>
> **Objective**
>
> The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention, in particular by:
>
> [...]

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.

It is noted that recital (9) of the preamble to the Public Participation Directive 2003/35/EC, just quoted, refers to 'Article 9 (2) and (4) of the Århus Convention', omitting reference to Article 9 (1), (3) and (5), quoted in full above, which provisions are concerned respectively with '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', with 'access to... judicial procedures to challenge acts and omissions by private persons' as well as by public authorities 'which contravene provisions of... national law relating to the environment' and with 'appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'

[9] In this connection it may also be noted that the European Commission, deferring to the principle of 'subsidiarity', has expressly rejected the idea of legislating to give effect to Article 9 (3) of the Aarhus Convention [*supra*] which deals with *inter alia* acts and omissions by private persons [*Proposal for a Directive on Access to Justice in Environmental Matters*, 24 Oct 2003, COM(2003) 624 final, Explanatory Memorandum, 12.] The Commission stated:

'Setting out provisions in relation to private persons would impinge upon the very core of member states systems since it means that a community law might address an issue as close to member states' competence as the possibility for private persons to challenge in courts acts by private persons.'

Article 9 (3) has been described as an '*actio popularis* provision' [Opinion of A G Sharpston in *Trianel Kohlekraftwerk Lunen supra* at § 42.] At the same time straightforward actions between individuals, which are completely outside the scope

of the public participation provisions, are within its ambit. Actions for nuisance are an example [*Morgan & Anor* v *Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107; Findings of Aarhus Convention Compliance Committee, ACCC/C/2008/33, 24 Sep communicated on 18 Oct 2010, §§ 72—79, 110, 137.] The Convention Article 9 (4) 'not prohibitively expensive' condition applies equally to private-on-private proceedings as referred to in Convention Article 9 (3). This has to be borne in mind for the purpose of assigning meaning to the 'not prohibitively expensive' condition. Were the matter free for decision, the question might well be asked whether it is likely that Parties signatory to the Convention intended the Convention to control the overall cost of 'private' litigation 'relating to the environment' or whether the intention was simply to control the level of court dues.

H M Government's initial view was that the 'not prohibitively expensive' condition related only to court dues [*Ensuring Access to Environmental Justice*, Report of the Working Group chaired by Lord Justice Sullivan (May 2008), 11, § 20, notes 20 and 22; see also *Kavanagh* v *MJELR & Ors* [2007] IEHC 389.] The matter may be revisited in the litigation possibly on course for the European Court of Justice [*infra*.]

[10] Subject to the above-mentioned omissions, Article 10a of the EIA Directive 85/337/EEC as amended by the Public Participation Directive 2003/35/EC, Article 3, echoes the Aarhus Convention, Article 9, by providing *inter alia*:

> Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> [...]
>
> Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

The *Corner House* Principles

[11] Counsel for the Minuters, Mr James Findlay, submitted that an important part of the context for the ongoing debate about the domestic application of Article 10a is the Protective Costs Order regime which already exists in England & Wales for 'public interest' litigation in general. The 'governing principles' were re-stated in *R (Corner House Research)* v *The Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at 2625 § 74 *per* Lord Phillips MR, giving the judgement of the Court of Appeal, as follows:

> (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; and (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.

Reasons for making a Protective Expensive Order

[12] I take the view, for the reasons which follow, that the Court is bound to make a Protective Expenses Order.

[13] Parties are agreed, subject to a qualification which I shall mention below, about a number of matters, namely: that the present appeal is a 'review procedure' which is governed by the access to justice provisions of Article 10a of the EIA Directive 85/337/EEC as amended; that Road Sense and its office-bearers are 'members of the public' entitled to the benefit of those provisions; and that the Court has power to make a Protective Expenses Order. [*McArthur* v *Lord Advocate* 2006 SLT 170; *McGinty* v *Scottish Ministers* 2010 CSOH 5; Rt Hon Lord Gill, Lord Justice-Clerk, *Report of the Scottish Civil Courts Review* (Scottish Civil Courts Review, Edinburgh, 2009), Vol 2, ch 12, §§ 63—65.] I am content to proceed on that basis. No other way of implementing the Directive in Scotland has been suggested.

[14] Scottish courts do have a discretionary power, exercisable after the event, to modify the amount of expenses payable by an unsuccessful party including the power to modify to nil. The European Court of Justice has ruled that after-the-event modification is not Article 10a compliant for the reason that it does not have the specificity, precision and clarity required to satisfy the need for legal certainty: a directive intended to confer rights on individuals must be implemented in such a way that the persons concerned are enabled to ascertain the full extent of their rights

[*Commission* v *Ireland* C-427/07, 16 Jul 2009, [2010] Env L R 8 at §§ 2, 54, 55, 77—79, 92—94.] A supplementary argument is that uncertainty as to the expenses outcome is in itself a powerful disincentive to participation, a state of affairs which is not consistent with the purposes of the legislation. When the Aarhus Treaty was laid before Parliament for ratification in 2005, the Foreign and Commonwealth Office stated: 'Changes are required to the Scottish justice system, as a result of the Convention's requirements on access to justice' [Aarhus Treaty, Miscellaneous No 15 (2000) Cm 4736, Treaty Series No 24 (2005) Cm 6586, revised Explanatory Memorandum (Jan 2005).]

[15] England & Wales has for some time had a before-the-event Protective Costs Order [PCO] regime for public interest litigation in general by which the risk of an adverse costs order can be limited in advance [The *Corner House* Principles *supra*]. The Aarhus Convention Compliance Committee has identified shortcomings in this regime [Findings of Aarhus Convention Compliance Committee, ACCC/C/2008/33, 24 Sep communicated on 18 Oct 2010, §§ 128—136.] In addition, by Letter of Formal Notice to the UK Government in October 2007 the European Commission alleged failure to comply with *inter alia* Article 3(7) of Directive 2003/35/EC which inserted Article 10a into the EIA Directive 85/337/EEC. On 18 March 2010 the Commission issued a Reasoned Opinion. The process is ongoing and may lead, as in the case of Ireland, to compliance proceedings under Article 226 EC.

[16] The Aarhus Convention Compliance Committee has taken notice of the recommendations of the *Scottish Civil Courts Review* [Findings of Aarhus Convention Compliance Committee *supra* § 15.] The *Review* addresses Aarhus Convention compliance and makes recommendations about 'Protective Expenses Orders' [*Scottish Civil Courts Review*, Vol 2, ch 12, §§ 61, 70—78.] On 10 May 2010 the

Court of Session Rules Council noted that the Commission's Reasoned Opinion had been issued [*supra*] and resolved that compliance measures should be progressed in early course. An Act of Sederunt in draft form was tabled at the Rules Council Meeting of 11 October 2010. The draft Act of Sederunt would, if given effect to, introduce a new Chapter 23A of the Rules of the Court of Session entitled 'Protective Expenses Orders in Environmental Cases.' The new Chapter 23A would apply to public authority decisions which are subject to the Public Participation Directive.

[17] Given that dealing with the expenses after the event is not an option, that PEOs have been identified as the way forward and that parties are agreed that I can make such an order, I shall make a PEO.

How should the amount of Protective Expenses Orders be assessed?

[18] Parties put forward primary and fall-back positions as to the amount of any PEO having regard to the 'not prohibitively expensive' requirement of the Directive. I was told that the issue of principle was whether an 'objective' or a 'subjective' test should be applied. The terminology comes from an English decision *R (Garner)* v *Elmbridge Borough Council* [2010] EWCA 1006. It happens that Counsel for the Appellants in the present application appeared for the Respondents in the *Garner* case as his other self, James Findlay QC of the Bar of England & Wales. In *Garner* at para 42 Sullivan LJ asked:

> … Should the question whether the procedure is or is not prohibitively expensive be decided on an 'objective' basis by reference to the ability of an 'ordinary' member of the public to meet the potential liability for costs, or should it be decided on a 'subjective' basis by reference to the means of the particular claimant, or upon some combination of the two bases?

Sullivan LJ with whom the other judges agreed went on to express himself satisfied that 'a purely *subjective* approach… is not consistent with the objectives underlying the Directive.' Sullivan LJ interpreted the requirement to mean 'not prohibitively expensive for an ordinary member of "the public concerned"' [§ 46.] The last three words are a reference to the introduction to Article 10a: 'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned…'

[19] *Garner* was about judicial review of a planning permission for the comprehensive redevelopment Hampton Court Station. The substantive hearing was listed for one and a half days. The estimate for the Respondents' costs was £60,000, or possibly more given the complications that had arisen. In the result the Court of Appeal granted a PCO in respect of liability of the Appellant and two joined objectors for the Respondents' costs in the total sum of £5,000. The Court also imposed a reciprocal cap on the costs recoverable by the Appellants from the Respondents of £35,000. The outcome has to be understood against a background which included a pre-hearing offer by the Respondents, in open correspondence, to agree to a PCO on the basis that the Respondents would limit their costs claim to £5,500 in exchange for a reciprocal cap on the Respondents' liability in the sum of £35,000 [§§ 28—29.]

[20] *Garner* was considered by the Supreme Court in the case of *Edwards & Anor, R (on the application of)* v *Environment Agency & Ors* [2010] UKSC 57. Lord Hope of Craighead delivering the judgement of the Panel referred, at paragraph 31, to: *Garner*; the *Jackson Review of Civil Litigation Costs* (Jan 2010), Ch 30, para 4.5, as to environmental judicial review cases; *Ensuring Access to Environmental Justice*, Report of the Working Group chaired by Lord Justice Sullivan (May 2008); *Environmental Justice Update* Report of the same Working Group (Aug 2010); and

the Findings of the Aarhus Convention Compliance Committee [*supra*]. His lordship concluded:

> It is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of an objective approach, but this has yet to be finally determined.

Given the uncertainty the Supreme Court decided that the matter should be referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU. In the meantime, of course, the 'state of uncertainty' persists with the existing guidance pointing in different directions.

[21] In England & Wales, *The Jackson Review of Civil Litigation Costs*, published in January 2010, recommended, for all judicial reviews and certain other proceedings, not PCOs but a system of mandatory 'qualified one-way costs shifting' [QuOCS] *ie* modification of expenses after the event, similar to the system currently in force for legally-aided parties. The regime proposed was said to be 'the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention.' The important point for present purposes is that the proposed new Civil Procedure Rule would require claimants' liability in expenses to be assessed 'having regard to… the financial resources of all the parties to the proceedings.' This is very much the 'subjective approach', to use the language of Lord Justice Sullivan in *Garner*.

[22] As regards Scotland, both options canvassed in Lord Gill's *Scottish Civil Courts Review [supra]* were PCO-based. The first involved a 'reformulated *Corner House* test'; and the second was the Australian Law Reform Commission [ALRC] model for public interest proceedings. Both options regard parties' resources as relevant. The Draft Rule of Court RCS 43A provides: 'In deciding the terms of a

protective expenses order… the court must consider… the funding available to the applicant…' All of this reflects, again, the 'subjective approach.'

[23] The views of Lord Justice Sullivan have evolved. Mr Justice Sullivan (as he then was) convened his 'Working Group on Access to Environmental Justice' in October 2006. In May 2008 the Working Group published its report entitled *Ensuring access to Environmental Justice in England and Wales.* The report suggested improvements to the *Corner House* PCO Principles specifically for Aarhus cases but did not in terms address the extent to which, if at all, resources should be taken into account. What the report did say was: 'costs… would be "prohibitively expensive" if they would reasonably prevent an "ordinary" member of the public (who is neither very rich nor very poor and would not be entitled to legal aid) from embarking on the challenge' [*Environmental Justice*, 12, § 20 (6).] This is suggestive of the 'not purely subjective' approach which was deployed in *Garner*. The *Environmental Justice Update* published in August 2010 abandoned the idea of judicial 'tinkering' with public interest PCOs and recommended — for all judicial reviews, not just for Aarhus cases — departing from the 'expenses follows success' principle altogether. The new Civil Practice Rule proposed by the Sullivan *Environmental Justice Update* is to the effect that judicial review claimants (unless they act unreasonably) should simply not be liable to pay any other party's costs — if I understand it, a sort of reverse QuOCS. The same would apply in statutory appeals [§§ 25—30, 38.]

[24] Now (since 15 December 2010) we have the authority of the United Kingdom Supreme Court for the view that 'The balance seems to lie in favour of an objective approach, but this has yet to be finally determined' [*Edwards supra*.]

[25] It is not unthinkable that the views of the Supreme Court in *Edwards* and of the Court of Appeal in *Garner* [*supra*] were shaped to an extent by the fact that there

were key claimants in both cases who were not organisations but individuals — and not just individuals, individuals who insisted on their entitlement to Aarhus protection while refusing to disclose their resources. In *Garner* [*supra*] the individual who took this stance, Gerald Macaulay, was, according to Mr Findlay, a retired oil company president. He had a company pension, an investment portfolio and an expensive house.

[26] Sullivan LJ, with whom the other judges agreed, was apparently influenced by the 'chilling effect' metaphor deployed by Counsel for the Claimants. (In what follows, I have added the emphasis.) Counsel submitted: 'A PCO must be made in order to avoid the *chilling effect* of an open-ended exposure to liability for the respondent and the two interested parties' costs'[§ 21]; and again, '... the prospect of a public investigation into one's financial means, with a wholly uncertain outcome, would be bound to have a *chilling effect* on the willingness of members of the public to challenge environmental decisions' [§ 26.] His lordship took up the discussion as follows:

> 51. Mr Macaulay said that he was unwilling to undergo a means test in a public forum. Applicants for public funding from the Legal Services Commission have to disclose details of their means to the Legal Services Commission, 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.
>
> 52. The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a *chilling effect* on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions.

I shall say more about 'chilling effect' below.

[27] *Edwards* had previously gone up to the House of Lords and has now come back to the Supreme Court for a detailed assessment of costs. The added — and, by the time the case got to the House of Lords, only active — claimant Lillian Pallikaropoulos was unsuccessful. Her application for a PCO had been refused by the House of Lords in 2007 on the basis that she had not made out a 'prohibitively expensive' case. Mrs Pallikaropoulos 'declined to provide details of her means or details of the means of those whom she claimed to represent.' The fact that Mrs Pallikaropoulos had proceeded with the substantive appeal, notwithstanding, was later cited as evidence that the proceedings could not have been 'prohibitively expensive.' When Mrs Pallikaropoulos lost the appeal in 2008, she asked that there should be no order for costs. At that stage '[s]ome information was given about her means, but it was in general terms and it was not accompanied by detailed evidence.' The House of Lords pronounced a costs order against her. The bills for the Respondents' costs in due course submitted to the Supreme Court costs officers for the detailed assessment of costs totalled £88,100. The costs officers considered themselves entitled to take into account the need for compliance with the EIA

Directive 85/337/EEC; they were minded to adopt the Sullivan 'ordinary member of the public' test; and they took the view that they had power to modify Mrs Pallikaropoulos' liability as if she were a legally-aided person, including modifying the liability to nil. The Respondents appealed, arguing that what the costs officers proposed was incompetent. In giving the judgement of the Panel of five Justices, Lord Hope of Craighead said that it was plain that the House of Lords had taken a 'purely subjective approach' to the 2007 application for a PCO; and that in making the 2008 costs order the House had again taken a 'purely subjective approach.' His lordship added:

> 'It is to say the least questionable whether in taking this approach, which has now been disapproved by the Court of Appeal in *Garner* v *Elmbridge Borough Council*, [the House] fulfilled its obligations under the directives.'

The observations just quoted and quoted above at paragraphs 20 and 24 are clearly entitled to the greatest respect but in the circumstances they do not represent a determination of the issue binding on me.

[28] Failing compromise, or possibly capitulation by the Respondents in *Edwards*, the European Court of Justice may, in two or three years, provide some binding clarification of the meaning of the 'not prohibitively expensive' provision of Directive 85/337/EEC as amended, Article 10a. In the meantime, on the basis that a 'not *purely* subjective approach' may be open to me, I should record that the Appellants in this case have, it appears, made substantial disclosure about their resources.

The Appellants, their resources and their willingness to litigate

[29] Road Sense is a single issue pressure group whose objectives, in terms of their

Constitution, are to challenge the existing AWPR proposal and to support the evaluation of other options. The group is an 'unincorporated association' meaning, I believe, that office-bearers who sue in its name have unlimited, personal liability for any adverse expenses awards and that individual members are liable to contribute *pro rata*. It is possible that all members are liable jointly and severally for the association's contractual obligations to third parties including their own lawyers' fees and outlays. There is a register of members. There are 560 members on the register.

[30] The Affidavit of William Walton, Chairman of Road Sense, states that 'Road Sense comprises of individuals living near or around the proposed route, but also those from further afield who wish to oppose the building of a new road *for environmental or other reasons*' [*emphasis added*.] Mr Walton himself has, according to his Affidavit, no financial interest in the outcome. His house is one mile west of the Ministers' proposed route. There are many other members who have had Compulsory Purchase Orders served on them. Counsel were agreed that private patrimonial interest does not disqualify 'members of the public concerned' from the benefit of Article 10a as it would have done under the *Corner House* Principles. Nonetheless it seems to me that patrimonial interest is capable of being a relevant factor in the assessment of the level of any PEO.

[31] In the period from its inception in May 2006 up to April 2010, Road Sense spent £244,473.06. The single biggest item, something more than half the total, was 'legal fees' amounting to £136,879.76 incurred largely if not exclusively, I was led to understand, in connection with the Public Inquiry. The next two biggest items of expenditure were £62,281.39 for 'Road Traffic Studies' and £17,149.94 for 'Public Relations.' By far the largest source of income was individual donations which amounted to £216,108.03. At the date of the hearing, I was told, Road Sense had

£12,610.30 in the bank, as well as promised donations amounting to £7,000, and pledges in respect of legal costs to a total of £65,000. I was told that realistically some 90% of pledges were expected to be redeemed, yielding £58,500. The total of the sum at credit in the bank plus promised donations plus 90% of pledges is about £78,110.

[32] Mr Walton's Affidavit dated 9 December 2010 discloses his resources. He is single with no dependants. He is employed as a senior lecturer in the School of Geoscience at the University of Aberdeen. He has an annual salary of £48,941.51 gross. He has a 'small' investment portfolio yielding a dividend income of around £25.00 a year. He owns his house which he estimates to be worth up to £330,000 subject to a mortgage of £54,000. He has a few hundred pounds in the bank and a credit card debt of £2,500. Mr Walton states that his employment situation is uncertain. His Affidavit concludes:

> ... I do not think I can proceed with the action where I would have a personal liability for expenses. I am likely to withdraw if the Protective Expenses Order is not granted. The officer bearers are likely to resign if the order is not granted, given that none of the officer bearers are prepared to take personal liability.

There is no information to the effect that Road Sense as a group will discontinue the proceedings unless a protective expenses cap *in a certain sum* is imposed.

[33] The Treasurer of Road Sense is Keith Good. According to Mr Walton's Affidavit, Mr Good is retired. He has a modest private pension. He has recently inherited a significant sum of money from his late mother. Mr Walton says that Mr Good does not want to reveal the amount of his inheritance, nor does he wish to spend it on funding litigation for Road Sense. He has told Mr Walton that he is not prepared to assume any personal liability for 'the court challenge for the AWPR'

meaning, I understand, the current Appeal. I make no comment beyond noting that the amount of his inheritance is information publicly available on application to the Commissary Office.

[34] Counsel were agreed that the Appeal Hearing in the Outer House would last no more than four days. This is on the assumption that two other related appeals on behalf of individuals will not now be heard concurrently. (I was told that the individual appellants Maggie Petrie and Mr and Mrs John Fraser are property-owners with concerns respectively about a compulsory purchase order and injurious affection.) Road Sense's current PEO submission is based on the four-day assumption. Road Sense's own expenses for the hearing are estimated at £30,000, being £20,000 for solicitors' fees and outlays (not including counsel's fees), said to be calculated on a 'Legal Aid recovery basis', and £10,000 for Junior Counsel's fees. Senior Counsel has undertaken to appear on a speculative basis. Road Sense estimates that the Scottish Ministers' expenses recoverable on the party-and-party account for the four day hearing will be £60,000. The Scottish Ministers' estimate is £52,000. If an unmodified, adverse award of expenses were to be made, Road Sense's liability for its own and the other side's expenses would, on these estimates amount to something in the range £82,000-£90,000.

Discussion

[35] Mr James Mure QC, Counsel for the Respondents, told me that nothing in the Aarhus *travaux préparatoires* throws light on the meaning of the 'not prohibitively expensive' requirement. Starting from scratch, the first question is: what expense falls within the ambit of the provision? Although the issue in the present case is about potential liability for the other side's expenses, there are no words in the Convention

or the Directive to confine the application of the requirement. Accepting that 'not prohibitively expensive' is not restricted to court dues but applies to the expense of the procedure as a whole, then provision must apply not only to court dues but also to claimants' own legal expenses, that is fees and outlays, as well as to adverse awards in favour of statutory authorities, private developers and other interested parties, etc [Sullivan, *Environmental Justice*, 11, § 20; Opinion of AG Kokott in *Commission* v *Ireland* Case C-427/07 (15 Jan 2009) at § 93.] For an example of the levels of expenditure that can be incurred all round in England & Wales, see *Burkett, R (on the application of)* v *London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342 §§ 10, 74—80.

[36] Why has the debate focussed on adverse awards, above all on adverse awards in favour of public authorities? The realist's answer might be that claimants' lawyers are unlikely to be party to applications to control their own charges. Other possibilities are (1) that claimants can eliminate the uncertainty element as regards their own lawyers' charges by making fee agreements in advance; (2) that claimants' lawyers have been subsidising their clients by acting *pro bono* or on a 'no-win-no-fee'or limited recovery basis; and (3) that the 'verticality' component of direct effectiveness, agreed by parties to obtain in the present application, does not exist as between private, non-state parties such as claimants and their lawyers, or claimants and non-statutory developers.

[37] None of the foregoing however detracts from the proposition that Article 10a, on the broad interpretation currently favoured, is apt to control all aspects of expenditure incurred in relevant proceedings and that domestic measures should be framed accordingly. Controlling costs could however be counterproductive. There is a risk that, if the work ceases to be remunerative, environmental law skills will

become unavailable to claimants [*Burkett supra*, §§ 74—80; *Garner supra* at § 55.] The proposals of Lord Justice Jackson and of Lord Justice Sullivan's Committee recognise that costs awards against unsuccessful claimants are a useful discipline where there is no other control on frivolous claims. Their various proposals for Aarhus compliance are predicated on the existence in England & Wales of the 'permission filter' to 'weed out unmeritorious claims' for judicial review. Lord Justice Sullivan's Committee has now recommended giving consideration 'to the possibility of introducing a permission filter to statutory appeals' [*Jackson Review supra* at Ch 30 § 4.1 (iii); *Environmental Justice Update supra* at §§ 37, 40.] Unless a condition is attached or implied, advance protective orders must necessarily deprive the court of the sanction most commonly used where the conduct of a case, whatever its substantive merits, has been unreasonable [*McArthur supra*, § 10.]

[38] The next question is: what does 'prohibitively expensive' mean? The phrase has been carried into the Directive from the Convention. In this connection, Mr Mure QC, for the Respondents, referred to *The Aarhus Convention: an Implementation Guide*, ECE/CEP/72 (United Nations, 2000) which, at page 134, states:

> "The cost of bringing a challenge under the Convention or to enforce national environmental law may not be so expensive that it prevents the public, whether individuals or NGOs, from seeking review in appropriate cases. Various mechanisms, including waivers and cost-recovery mechanisms, are available to Parties to meet this obligation."

Counsel drew my attention to the text box which follows headed 'Keeping costs down.' The text states:

> Costs associated with going to court can include:

- Court fees,
- Attorney's fees,
- Witness transport costs, and
- Expert fees.

These types of costs represent a substantial financial barrier for the public. Some countries have taken steps to control them:

- In Slovakia, NGOs are exempt from paying court fees [Slovakia, Act on Court Fees, No 71/1992, Article 4];
- In Austria, an appeal of a refusal of access to information is free of charge and the plaintiff does not need a lawyer to launch the appeal;
- In many countries attorneys' fees are awarded to the prevailing party in a case. In the United States, in addition, members of the public bringing a case to enforce the law in the public interest may not be required to pay the defendant's costs, even if the case is unsuccessful or dismissed.

Counsel submitted that 'Keeping costs down' is not synonymous with eliminating costs altogether; the 'Costs associated with going to court...' are apparently items of expenditure typically incurred by claimants themselves; and the reference to expenses being awarded to the successful party 'in many countries' apparently as a cost-control measure is not at first sight consistent with the idea that the 'expenses follow success' rule is in conflict with Convention Article 9(4) and Directive Article 10a. I do not treat the *Implementation Guide* as authoritative: but it does provide some interesting illustrations.

[39] Turning then to the context within the Convention itself — only some of which has been carried into the Directive, but all of which remains an aid to the construction of Article 10a — the expressions used in connection with Convention-compliant administrative and judicial 'procedures' might be arranged in an ascending scale of costliness as follows: 'free of charge'[Article 9 (1)]; 'inexpensive'[Article 9 (1)]; 'reasonable costs' [Article 3 (8)]; 'prohibitively expensive' [Article 9 (4).] 'Reasonable costs' would seem to lie somewhere between 'inexpensive' and 'prohibitively expensive.'

[40] The Convention, by the terms of Article 3 (8), expressly contemplates that national courts will, acting within the Convention, award 'reasonable costs' *against* claimants. Advocate General Juliane Kokott made the point in her Opinion in *Commission* v *Ireland* [*supra*] at § 94:

> There is, however, no absolute ban precluding costs from being awarded against applicants who are covered by Directive 2003/35. This is shown not only by the wording, which forbids only prohibitive costs, but also in particular by Article 3 (8) of the Aarhus Convention, which presupposes that costs can be imposed.

The qualifier 'reasonable' tends to signal that the circumstances of the particular case must be taken into account. Counsel for the Appellants led me to understand that, in the terminology of *Garner*, taking the particular circumstances into account would be classed as a 'subjective approach.'

[41] As a matter of language, the 'subjective-objective' antinomy does not capture the essence of the debate in *Garner*. Indeed, the phrase 'viewed objectively', as used in the successful submission for the Appellant in that case, is a redundancy [*Garner supra* at § 25, *emphasis added*]:

> Mr Drabble submitted that...Article 10a required systemic compliance with the requirement that the review procedures provided by the member state should not be prohibitively expensive. The obligation on the member state is to ensure that members of the public concerned with a sufficient interest have access to a procedure which is not prohibitively expensive for them. Thus the procedure must be one which, *viewed objectively*, is not so expensive as to deter an ordinary member of the public concerned. The test is not whether the particular member of the public who happens to wish to access the review procedure would find it prohibitively expensive to do so.

The debate as I understand it was as to whether Article 10a permits courts to approach matters on a case-by-case basis by reference to the particular circumstances [*Garner supra* §§ 23, 25, 27, 28, 42, 44, 46.] The *quasi*-systemic solution favoured by Sullivan LJ and his colleagues is based on what 'the ordinary member of the public' might be able to afford: 'as a matter of common sense, 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 average wage for a full time employee (slightly less than £25,500 pa)'[*Garner supra* § 50.]

[42] I find it difficult, with respect, given the terms of Article 3 (8) of the Convention — which was not referred to in *Garner* — to follow the Court of Appeal in this matter. I should also find it profoundly counter-intuitive, in a variety of scenarios, including cases covered by legal expenses insurance, to apply the 'ordinary member of the public' yardstick [*Morgan & Anr* v *Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at § 15.] The 'ordinary member of the public' is of course a

non-Aarhus construct: despite its fanfare preamble, the Convention restricts standing (for present purposes) to (1) environmental non-governmental organisations [NGOs] — clearly not 'ordinary members of the public'— and (2) individuals, groups of individuals and other entities likely to be affected who also (a) have a sufficient interest or (b) claim 'impairment' of their rights [Article 2 (4) and (5) and Article 9 (2).] The EIA Directive 85/337/EEC as amended follows the Convention [Articles 1 (2) and 10a.] I can see that if environmental pollution is in issue, many, many individual members of the public may be 'affected.' As regards other types of case I remain to be convinced that anything more than a relatively small class including, at the local level, affected property owners would be entitled to the benefit of Article 10a [*cf Forbes* v *Aberdeenshire Council & Anor* [2010] ScotCS CSOH 1 at §§ 5-8 and 26.] I doubt that profiling of this class would produce an "ordinary member of the public".

[43] Where concepts of 'subjectivity' and 'objectivity' do have a meaningful role is in assessing whether the expense of proceeding is likely to be prohibitive. I would accept that this question is best answered by reference to the objective circumstances rather than by reference to the feelings of particular claimants.

[44] The 'further aspect of the purely subjective approach' which persuaded the Court of Appeal in *Garner* to opt for the *quasi*-systemic solution was the 'chilling effect' on claimants of having to disclose their means [*Garner supra* §§ 50—52.] The phrase 'chilling effect' is an import from the United States where it is something of a term of art in constitutional, particularly First Amendment, law [*Dombrowski* v *Pfister,* 380 US 479 (1965), a case about harassment and threatened prosecution of civil rights activists under Louisiana's Subversive Activities and Communist Propaganda Control Laws, at 487 — 489 *per* Brennan J.] It might be thought

hyperbole, if I may respectfully say so, to apply the expression to Mr Macaulay's coyness about disclosing his means in *Garner*. The comparison with the position of legally-aided litigants, relied on by the Court of Appeal, is again with respect not helpful[*Garner supra* § 51.] While it is true that individuals do not have to make public disclosure of their means when applying for Legal Aid in civil proceedings, they do disclose their means in court when seeking modification of liability for an adverse award of expenses 'as an Assisted Person'; and they may even find the details published in the law reports [*Bell* v *Inkersall Investments No 2* 2007 SC 823 at 827 — 828 *per* Lord Justice Clerk.] That is the proper analogy with Mr Macaulay's situation in *Garner*. (In this context I assume that an Aarhus-compliant PEO regime, on the current interpretation, would give legally-aided claimants the right to seek, effectively, modification in advance.)

[45] In any event, on their facts, the main English authorities to which I was referred are not entirely apt. *Garner* and *Edwards* are essentially about access to environmental justice for private individuals. (I appreciate that Mr Garner had incorporated his one-man architect's practice and that at one point Mrs Pallikaropoulos claimed to speak for up to 90,000 residents of Rugby: *Edwards, R (on the application of)* v *Environment Agency & Anor* [2004] EWHC 736 (Admin) at § 12.) A case which I find more helpful on its facts is *Coedbach Action Team Ltd* v *Secretary of State for Energy and Climate Change* [2010] EWHC 2312 (Admin.) In that case the environmental objectors had formed a private limited company as the vehicle for their activities, including court proceedings. On the company's application for a PCO, Wynn Williams J said:

> "36. ... My experience suggests that many limited companies would not regard an overall costs bill in the region of £70,000 as prohibitively expensive

> in relation to litigation about which they felt strongly. If one looks beyond the limited company to its members there must be literally thousands of companies – even private limited companies – in which approximately 25 people have an interest. I would not anticipate that each of those individuals would regard a potential outlay of about £3,000 each as prohibitively expensive in relation to litigation which was of importance to them.
>
> 37. In *Garner* Sullivan LJ left open whether it was permissible to have regard to the personal circumstances of the particular claimant. He did not determine that issue definitively but, in my judgment, the tenor of what he says tends to support the view that some regard should be paid to the individual circumstances of a claimant. There is nothing in the evidence in this case which persuades me that these proceedings are prohibitively expensive for the Claimant or, in context perhaps more importantly, the individuals who have an interest in the activities of the Claimant".

[46] In the present case I have to deal with an organisation made up of 560 individuals; an undisclosed number of those individuals have a patrimonial interest as affected property owners; the organisation has given a full account of its resources; and its resources, unlike those of private individuals, are dedicated exclusively to funding a campaign of which the present proceedings are part [*cf. McArthur supra* where the Haemophilia Society pledged £53,000 specifically to meet any contra-award of expenses.].

Decision

[47] It seems to me that I cannot do better than accept what the Respondents say

about the likely amount of their recoverable expenses, namely £52,000 [paragraph 34, above.] On the figures provided by the Appellants for their own lawyers' charges, £30,000, the Appellants have a potential total expenses liability, their own and the other side's, of £82,000 [paragraph 34, above.] The Appellants have or could have resources available to a total of about £78,000 [paragraph 31, above.] In the circumstances I take the view that a reasonable award against Appellants and in favour of the Respondents, if it comes to that, would be £40,000 maximum; and I propose to make a Protective Expenses Order in that amount. I have taken account of the fact that the cost estimates do not include an allowance for the present incidental procedure. My assessment is that, with the order in place, the proceedings as a whole will not be prohibitively expensive for the Appellants.

[48] Parties are agreed that in the event that a Protective Expenses Order is made there should be a reciprocal cap permitting the Appellants to recover the taxed expenses of a solicitor and Senior Counsel acting without a junior. I shall order a reciprocal cap in those terms.

[49] The qualification that I mentioned in paragraph 13 above is that the Respondents insist on the Treasurer of Road Sense, Mr Keith Good, being named as an Appellant in that capacity. The Appellants have now made a motion to amend the instance to that effect, which is unopposed, and which I shall grant. The Respondents have stated that in the absence of a minute or other authority authorising these proceedings on behalf of Road Sense, they reserve their position on title to sue. Counsel for the Appellants did state on instructions that the relevant minute should be forthcoming. The PEO which has been applied for and which I intend to grant more or less in terms specified by the Appellants protects (1) Road Sense and (2) Mr Walton and Mr Good only in their capacity as representatives of Road Sense.

The Appellants' motion to bring in Mr Good designs Mr Good as 'Treasurer of Road Sense, as its representative.' Mr Walton will no doubt take advice on his position as an individual. He is currently designed as 'Chairman of Road Sense as its representative and as an individual.'