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Justice for the Planet

To:
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From:
James Thornton
Alan Andrews

By:
Post and email (steve.uttley@justice.gsi.gov.uk)

London, 18 January 2012

Dear Mr Uttley

Cost Protection for Litigants in Environmental Judicial Review Claims

1. ClientEarth is a not-for-profit environmental law organisation.

2. This is ClientEarth's response to the Ministry of Justice's consultation on outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention.[1]

[1] Consultation Paper CP16/11.

Executive Summary

1. The current proposals would not bring the UK into compliance with the Aarhus Convention or EU law.

2. The proposals only deal with public law environmental challenges and do not address problems with access to justice in private law environmental challenges.

3. The proposed presumptive cap of £5,000 is too high and would mean access to justice remained prohibitively expensive to most ordinary people.

4. The proposal to allow defendants to challenge the presumptive cap based on publicly available information about the claimant's financial resources is fundamentally flawed. This would fail to provide certainty to claimants that they would not face prohibitively expensive costs, resulting in a continued chilling effect and expensive and time-consuming satellite litigation. Further, it would mean that the level of costs exposure faced by claimants was still subject to judicial discretion, which would fail to provide the level of certainty required by EU law and would therefore be unlawful.

5. Environmental NGOs, who are often uniquely placed to bring environmental judicial review cases, would be deterred from doing so by these proposals.

6. The proposals fail properly to recognise the public interest nature of environmental judicial review claims.

7. The simplest way to ensure compliance with the Aarhus Convention would be to extend one-way costs shifting to *all* environmental cases through the LASPO Bill.

8. To ensure that codification of the rules on PCOs results in access to justice in environmental judicial review claims that is not prohibitively expensive, it will be necessary to set an absolute cap on the claimant's liability of either zero or a nominal sum, with no reciprocal cap on the claimant's ability to recover costs from the defendant. This is consistent with the recommendation of Lord Justice Sullivan's update report that one-way costs shifting should only be qualified where the claimant has behaved unreasonably. The normal process of costs assessment will be adequate in ensuring that claimants' costs are kept at a reasonable level.

Background

The Aarhus Convention Compliance Committee

3. ClientEarth submitted a communication to the Aarhus Convention Compliance Committee (the "Committee") on 2 December 2008 alleging that the UK was in non-compliance with its obligations under Article 9 of the Convention.

4. The Committee adopted its final findings and recommendations concerning the UK's compliance with the Convention on 24 September 2010.[2] The Committee found that the UK had failed to implement its obligations under Article 9(4) to ensure that procedures are not prohibitively expensive.

5. In addition, the Committee found that the system as a whole is not such as "to remove or reduce financial...barriers to access to justice" as required by Article 9(5).

6. The Committee also found that the UK failed to comply with Article 3(1), by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement the provisions of the Convention.

7. The Committee recommended that the UK review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to ensure such procedures:

    a. Are fair and equitable and not prohibitively expensive; and

    b. Provide a clear and transparent framework.

Referral to the Court of Justice of the European Union

8. On 6 April 2011, in response to a complaint by the Coalition for Access to Justice, the European Commission (the "Commission") referred the UK to the Court of Justice for failure to implement the access to justice provisions of the Public Participation Directive.

The Legal Aid, Sentencing and Punishment of Offenders Bill

9. The LASPO Bill has now reached the House of Lords, where it had its second reading on 21 November 2011. The Bill implements some of the recommendations made by Lord Justice Jackson in his far-reaching report on litigation costs – the "Jackson Review". Unfortunately, the Bill implements some but not all of Lord Jackson's recommendations, with grave consequences for access to justice, particularly in environmental cases.

10. The Bill makes two changes which are of direct relevance to the UK's compliance with Article 9 of the Convention. First, it prohibits successful claimants from recovering "success fees" under conditional fee arrangements from defendants. Success fees

[2] Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland.

developed to compensate lawyers for the cases that they lose, and for which they receive no payment under a CFA. Removal of success fees will therefore make it more difficult for lawyers to take on cases under a CFA.

11. Second, the Bill prohibits recovery of after the event insurance (ATE) premiums from defendants. ATE insurance has developed alongside CFAs to help poorer claimants in private environmental claims, such as for environmental nuisance, fund litigation.

12. These reforms followed recommendations made in the Jackson Report. However, the Jackson Report made clear that these reforms would only be acceptable where balanced by a number of other reforms which would ensure adequate access to justice. The most important of these in this context was Lord Jackson's proposal that "one-way costs shifting" be introduced for all judicial review claims. However, the LASPO bill does not implement any form of one-way costs shifting in relation to environmental cases.

13. It is clear from the Committee's findings in relation to Article 9(5) that it is necessary to look at the system as a whole to ensure that it removes or reduces financial barriers to access to justice. The issue of codification of PCOs cannot therefore be considered in isolation.

14. In ClientEarth's view, the simplest and most effective way of ensuring access to justice that is not prohibitively expensive would be to implement one-way costs shifting in all environmental cases through the LASPO Bill. The amendment should ensure that unsuccessful claimants in environmental cases are not ordered to pay the costs of any other party except where the claimant has acted unreasonably in bringing or conducting proceedings.

15. Nevertheless, codification of the rules on PCOs has the potential to greatly improve access to justice in England and Wales. However, the codified rules must take into account the changes being made by the LASPO Bill, because as things stand, the combined effect of the current PCO proposals and the LASPO Bill would be a significant net deterioration in access to justice and would mean that the UK continued to be in breach of the Aarhus Convention.

General comments

Private law claims

16. This consultation only relates to environmental judicial review claims. However, not all challenges to environmental decisions are judicial review claims. Private law claims, for example in environmental nuisance, have an important role to play in protecting the environment and are also covered by the Aarhus Convention.

17. Article 9(3) requires Parties to the Convention to ensure that "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." These procedures must not be prohibitively expensive. The application of Article 9(3), and indeed Article 9(2), is not restricted to judicial review, but covers other types of claims, including private law actions. Article 9(4)

applies, and it is necessary for the UK to provide mechanisms for private environmental law actions to be brought that are not prohibitively expensive, if it is not to continue to be in breach of the Convention.

18. However, the changes that are being proposed through the LASPO Bill would make access to justice prohibitively expensive in private law environmental claims by removing the mechanisms that have developed in recent years to allow poorer clients to access legal advice: namely CFAs and ATE insurance. This would be compounded by a reform of PCO rules which excluded private law environmental claims from its application.

19. Please confirm in the response to this consultation how the Government proposes to ensure that the system ensures access to justice in both private and public law environmental cases.

Timetable for implementation

20. We are concerned that the consultation document does not propose a timetable for implementation of these proposals, despite the fact that over a year has passed since the Aarhus Convention Compliance Committee finalized its findings that the UK was in breach of the Aarhus Convention. The Government assured the Aarhus Convention Compliance Committee that proposed rule changes on PCOs in England and Wales would be implemented by April 2011 at the latest.[3] This deadline is set to be missed by a year at least.

21. Given that the Commission has now referred the UK to the Court of Justice of the European Union, it is vital that the UK is seen to be taking urgent and decisive action to ensure compliance with EU access to justice laws. We therefore urge the Government to commit to a clear and firm timetable for implementation of legally compliant proposals when it publishes its response to this consultation in March.

Cross-undertakings in damages

22. We are also concerned that the proposals do not deal with the issue of cross-undertakings in damages. The use of cross-undertakings in damages in environmental judicial review claims has been found to be in breach of the Aarhus Convention by both the Aarhus Convention Compliance Committee and the Commission. Cross-undertakings in damages in environmental judicial review claims are therefore unlawful and their use must be prohibited.

23. The Government previously held a public consultation on proposals to reform the way that cross-undertakings are used in environmental judicial review claims.[4] However, no indication has been given as to any further developments in these proposals. Please therefore confirm in your response to this consultation when the Government proposes to address this issue.

[3] UK response to draft compliance committee findings in cases 2008/27 and 2008/33.
[4] Consultation Paper CP17/10.

Q1: Have you been deterred from bringing a judicial review within the scope of the Aarhus Convention because you considered that costs were prohibitive?

24. The parties involved in the Port of Tyne case were unable to bring judicial review proceedings due, in part, to concerns regarding prohibitive cost. Full details of the Port of Tyne case were provided by ClientEarth in its communication to the Aarhus Convention Compliance Committee.[5]

25. Our experience in this regard is broadly typical: a survey by WWF found that 76% of respondents were aware of good, arguable cases that did not proceed because of concerns about exposure to costs.[6] Even this striking statistic probably understates the significance of the chilling effect that prohibitive cost has on environmental cases: in many cases the fear of adverse costs orders deters would-be claimants from even considering bringing a legal challenge. In these circumstances, potential judicial review claims would not even come to the attention of the practitioners surveyed, particularly barristers.

Q2: Would the proposed codification of PCOs enable you to bring a judicial review in a case within the scope of the Aarhus Convention if you wished to challenge a decision in the future?

26. The proposals would not enable ClientEarth to bring a judicial review within the scope of the Aarhus Convention in the future, for the following reasons:

Level of the cap

27. First, the proposed cap of £5,000 is too high. Even as a reasonably well-resourced, medium-sized NGO, ClientEarth would be deterred from bringing a legal challenge by the risk of being ordered to pay £5,000. Like many environmental NGOs, ClientEarth does not have funds set aside to pay for litigation costs. If we were forced to pay £5,000 in adverse costs we would have to make savings by reducing other costs, for example by dismissing programme staff or cutting back on essential overheads.

28. In any event, the Aarhus Convention requires parties to ensure access to justice is not prohibitively expensive to the general public, which requires an objective assessment of what is prohibitively expensive. In this context, the proposed cap of £5,000 would be far too high to ensure compliance with the Aarhus Convention. The size of the proposed cap is discussed in greater detail in response to question 3 below.

Possible challenges to the cap

29. Second, the proposal that the defendant be allowed to apply for the cap to be removed where information on the claimant's resources is publicly available would fail to give ClientEarth adequate certainty that it would not face a large adverse costs order if it brought a case and lost.

30. Like most environmental NGOs, ClientEarth is a registered charity and a limited company. ClientEarth's accounts are therefore publicly available documents, as they

[5] ACCC/C/2008/33.
[6] WWF "Tackling Barriers to Environmental Justice", October 2011.

are published by the Charities Commission and Companies House. This information would show that ClientEarth is reasonably well-resourced in terms of its overall revenue. Under the current proposals, defendants would be able to use the mere fact that this information was available as the basis for an argument that ClientEarth was not in need of costs protection, and apply to have the cap set aside.

31. However, this would misunderstand the way in which organisations like ClientEarth are financed. The charitable grants we receive are usually restricted to delivering specific work programmes and paying the salaries of our staff, so we do not have financial reserves with which to fund litigation. If we were ordered to pay costs in excess of £5,000, this would curtail our ability to continue to operate in all our programme areas.

32. For these reasons, if ClientEarth were to bring a judicial review claim following implementation of these proposals, we would oppose any application to set aside the presumptive cap. We would submit detailed witness evidence from our financial director explaining the financial constrictions under which we operate. This would lead to time consuming and costly satellite litigation in which the court would have to consider complex financial information and make a judgment as to whether ClientEarth needed cost protection.

33. ClientEarth would need to consider carefully whether to incur the costs of this satellite litigation in the face of such uncertainty regarding the eventual outcome of the costs order. Therefore, the proposed rule would prevent access to justice for ClientEarth. It would also unlawfully involve judicial discretion (this is discussed further in response to question 4 below).

34. This kind of uncertainty would undoubtedly perpetuate the "chilling effect" that exists in the current, uncodified system, and which these proposals are intended to eliminate. This is a fundamental flaw in the proposal which seriously undermines the objective of ensuring that access to justice is not prohibitively expensive, as well as the proposals' stated aims of providing "certainty for applicants at the outset of the proceedings that the costs they will face if their claim fails will not be prohibitively expensive."[7]

35. The risk of having the cap set aside would be even greater for the large national environmental NGOs, some of which have annual budgets of several million pounds, which are also publicly available. That the proposals would act as a deterrent to environmental NGOs is of particular concern given that these organisations are often uniquely placed to bring such cases. Many environmental issues are highly complex and technical, and require the dedicated professional expertise offered by environmental NGOs.

36. The important role of environmental NGOs is enshrined in the Aarhus Convention, which confers standing on environmental NGOs by including them in the definition of "public concerned."[8] Any proposal which would make it especially difficult for environmental NGOs to bring cases could not possibly comply with the Aarhus

[7] UK Response to draft compliance committe findings in cases 2008/27 and 20087/33.
[8] *Ibid*, Article 2(5).

Convention. This point was recognised by Lord Justice Sullivan in his report on access to environmental justice:

> *"In the case of a non-governmental organisation promoting environmental protection, any decision whether the expense would be prohibitive must recognise that there are many calls on the funds of the organisation. An approach that was likely to prevent the NGO bringing the claim (for example, because it required such an organisation to reduce other areas of its work in order incur risk of such liability) would not only be inconsistent with Art. 9 of the Aarhus Convention but also with Art. 3(4) which requires parties to provide support and recognition to such organisations..."*[9]

The reciprocal cost cap

37. Third, the proposed reciprocal cost cap of £30,000 would make it difficult for ClientEarth to bring complex judicial review challenges, for example where there was a dispute of fact which required submission of expert evidence, or where there were several parties to a dispute.

38. Even a legal organisation such as ClientEarth cannot undertake litigation unless there is some prospect of recovery of its own in-house solicitor's costs.

39. This issue is considered in greater detail in the response to question 9 below.

Objective test of "not prohibitively expensive"

40. In any event, the question ought to be "would the proposed codification of PCOs enable an ordinary member of the public to bring a judicial review case?" and "does the proposed codification of PCOs satisfy international and EU law requirements regarding the costs of access to justice in environmental cases?" The answer to both questions is undoubtedly no. This issue is discussed further in the answer to question 3 below.

Q3: Do you agree with the proposal to set the presumptive PCO limit at £5,000?

41. No. The proposed default PCO limit of £5,000 is far too high and would mean that access to justice would remain prohibitively expensive for most ordinary people in England and Wales.

42. The question of whether the test of "prohibitive expense" is a subjective or objective one in the context of the Public Participation Directive has been referred by the Supreme Court to the Court of Justice of the European Union for a preliminary ruling.[10] However, the Supreme Court's view was that "the balance seems to lie in favour of the objective approach."

43. In ClientEarth's view, the Aarhus Convention requires an objective test i.e. what is prohibitively expensive is to be determined by reference to the ordinary member of the public. Any consideration of the claimant's financial means will require subjective

[9] Working Group on Access to Justice in England and Wales "Ensuring access to environmental justice in England and Wales" (May 2008) paragraph 8, page 8.
[10] R (Edwards) v Environment Agency (No. 2) [2011] 1 WLR 79.

judgments to be made by the court as to what level of costs would be not prohibitively expensive, which will necessarily involve discretion and uncertainty. It is therefore difficult to see how a subjective test could possibly satisfy the requirement under Article 3(1) that there be a clear, transparent and consistent framework for implementing the Convention, or the EU law requirement of certainty, which precludes the use of judicial discretion to give effect to EU law rights. The importance of uncertainty and discretion are discussed further at paragraph 52.

44. The justification given for the £5,000 default limit is that "any claimant who is so impecunious that the possibility of being liable for £5,000 would present an insuperable barrier to proceeding would in most cases be eligible for legal aid."

45. There are several problems with the proposals' reliance on the legal aid system to ensure access to justice. First, legal aid is restricted by a stringent means testing system. This makes it difficult for a would-be claimant to establish at the outset whether they are eligible for the scheme. By the time a claimant has undergone means testing, it may be too late to bring a judicial review claim, which must be brought "promptly".

46. Second, legal aid is only available to individuals, whereas most environmental cases are brought by community groups or NGOs. For many such groups, including ClientEarth, £5,000 would be a significant deterrent to bringing a judicial review claim.

47. Third, legal aid is difficult to obtain in public interest cases if there are other persons or bodies who might benefit from the proceedings who can reasonably be expected to bring the case.

48. Fourth, the assumption that anyone who could not afford £5,000 would be "so impecunious" as to be eligible for legal aid is unsupported by any numerical analysis. The thresholds for legal aid eligibility are very low, whereas £5,000 is actually quite a high figure. It is worth noting that the median gross weekly salary for a full-time employee in the UK was £501 as of April 2011.[11] The proposed default cost cap of £5,000 is therefore equivalent to 10 week's salary for a typical working person.

49. Finally, the complex rules on legal aid do not satisfy the requirement under Article 3(1) of the Aarhus Convention that there be a "clear, transparent and consistent framework" for its implementation. An absolute cost cap of zero would be the most simple and effective way of establishing such a framework.

50. The proposal states that "the Government believes that it would not be desirable for claimants to have no costs exposure." We assume this is because of a fear that without some costs exposure on claimants, the courts would be flooded with unmeritorious claims. This ignores the fact that such claims would be filtered out at the permission stage. It also ignores the fact that even when protected from liability

[11] Office of National Statistics, "2011 Annual Survey of Hours and Earnings". Available at: http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/ashe-results-2011/ashe-statistical-bulletin-2011.html#tab-Weekly-earnings

for the defendant's costs, claimants still have to fund their own legal costs unless they are able to draw on pro bono advice or benefit from a CFA.

51. This is backed up by an important European study which suggests that even where national rules afford broad access to the courts, the number of cases brought by NGOs is limited. The de Sadaleer Study[12] analysed access to justice conditions in several EU Member States, including the UK, and compared the numbers of civil cases brought by NGOs. For the seven countries with fairer cost rules than the UK, the number of civil actions was not much higher.[13]

Q4: Do you agree that challenges to the presumptive cap limit of £5,000 should be permitted?

52. As explained in the answer to question 2 above, the proposal that challenges to the presumptive cap be allowed would make it very difficult for ClientEarth and other environmental NGOs to bring judicial review challenges. The lack of clarity over what would be relevant "publicly available information" could deter other classes of claimants, such as any individual who owned property: a search of the land registry would give an indication of the value of a claimant's property which could form the basis of an argument to have the cost cap set aside.

53. The proposal to allow challenges to the presumptive cap would not be compliant with EU law. In *Commission v Ireland*[14] the Court of Justice held that a discretionary practice on the part of the courts cannot be regarded as sufficiently certain to be regarded as valid implementation of the access to justice provisions of the Public Participation Directive. In order to validly implement the Public Participation Directive, the codification of PCOs must satisfy the need for legal certainty. There cannot therefore be any role for judicial discretion in removing or varying the PCO. If the proposals are implemented in their current form through amendments to the Civil Procedure Rules this would itself be vulnerable to judicial review on grounds of illegality.

54. If claimant's are allowed to challenge the presumptive cap they will inevitably seek to do so wherever possible. This will lead to lengthy, expensive and unnecessary satellite litigation.

55. The rationale for this proposal seems to be the concern that an absolute cap would provide the same protection for wealthy organisations and individuals as for those of more limited means. This misunderstands the public interest nature of environmental judicial review claims, which is the basis for the Aarhus Convention. The financial resources of the claimant should not therefore be relevant in public interest cases.

56. The only scenario in which the financial resources of the claimant may be relevant is where a commercial litigant brings an environmental case to further their commercial interests. The classic example would be where a large supermarket chain challenges a

[12] N. de Sadeleer, G. Roller and M. Dross, Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal (Groningen 2005).
[13] *Ibid*, at p. 167.
[14] Case C-427/07 Commission of the European Communities v Ireland (Re Transposition of Directive 85/337).

decision by a local authority to refuse planning consent. There is a simple solution to this problem which would ensure that genuine public interest cases could still proceed. Commercial operators i.e. any profit making company, should be excluded from benefiting from cost protection unless they can prove that they are acting in the public interest rather than to promote their commercial interests.

57. An absolute cap on the claimant's liability is the only way to ensure at the outset, and with the requisite degree of certainty, that claimants will not face a prohibitively expensive costs order, and thereby ensure that the UK complies with EU law.

Q5: If so, do you think that defendants should only be entitled to apply only to remove the cap or should it also be possible for defendant's to make applications to raise the cap?

58. Defendants should not be entitled to apply to either remove or vary the cap, as either of these possibilities would introduce uncertainty and judicial discretion, thereby defeating the proposals' stated object of ensuring access to justice that is not prohibitively expensive.

Q6: In considering exceptions to the grant of a PCO in the presumptive amount, should the court only consider information that is publicly available? If not, what other information should be taken into account?

59. The court should not consider exceptions to the grant of a PCO in the presumptive amount in any circumstances other than unreasonable conduct by the claimant. This is consistent with the recommendation of Lord Justice Sullivan's update report that one-way costs shifting should only be qualified where the Claimant has behaved unreasonably.[15]

Q7: Should challenges be permitted only against organisations, or should challenges also be permitted against wealthy individuals?

60. Challenges should not be permitted against either organisations or wealthy individuals, for the reasons given above. The Aarhus Convention recognises that it is in the public interest that environmental judicial review claims are brought. If an environmental judicial review is brought by an individual in the public interest, it is irrelevant whether that person is wealthy or not.

Q8: If it were necessary to disclose financial information to obtain a PCO or vary it, would that fact deter you from seeking a PCO?

61. As a registered charity, ClientEarth is already required to disclose financial information, so this would have little bearing on the decision to seek a PCO.

[15] Working Group on Access to Justice in England and Wales "Ensuring access to environmental justice in England and Wales Update Report" (August 2010) paragraph 32, page 12.

Q9: Do you agree with the proposal to set the automatic cross-cap at £30,000? If not what should the figure be?

62. We do not agree that there should be a cross-cap at all. We propose that there be no reciprocal cost cap, which would allow claimants' lawyers to recover at commercial rates. This would in effect lead to "one-way costs shifting", which was a key recommendation of both the Jackson and Sullivan Reports as a way of improving access to justice in environmental judicial review cases.

63. The consultation gives the reason for the automatic cross-cap as "preventing the claimant from incurring excessive costs on their own side which will not be recovered if the claim is unsuccessful." However, this concern is unfounded as a mechanism for preventing parties from claiming excessive and unreasonable costs already exists in the form of detailed costs assessment.

64. Far from encouraging claimants incurring excessive costs, the current proposals may actually force claimants' lawyers to work at non-commercial rates or pro bono if claims are to proceed. It is essential that in considering the issue of prohibitive cost, the proposals consider the claimants' total litigation costs, not just the possibility of adverse costs orders. In order to bring a legal challenge, the claimant must first be able to fund their own legal costs. These costs include the fees of the claimant's solicitors and counsel, in addition to any experts' fees. Only very wealthy claimants can afford to pay these costs out of their own pockets, and only very poor claimants can do so through legal aid. CFAs have therefore emerged as an important mechanism by which claimants of modest means can pay for environmental claims.

65. However, if a cross-cap is set too low, CFAs will be unworkable, as the cap will prevent claimants' lawyers from recovering their fees. An automatic cross-cap set at £30,000 might be sufficient to allow simple claims to proceed under a CFA, but would make it difficult to fund more complex cases which require extensive legal argument, expert evidence, or involve multiple parties. Such claims would only proceed where claimants' lawyers are prepared to subsidise litigation by working on reduced rates or pro bono. While some lawyers are able to cross-subsidise such claims from more profitable practice areas, this is not possible for specialist environmental practices, which may be forced out of business as a consequence.

66. An automatic cross-cap may also restrict claimants to instructing junior counsel, something that the Aarhus Committee criticised as failing to secure the equality of arms between parties to a case.[16]

67. These problems are exacerbated by the proposals in the LASPO Bill to prohibit recovery of success fees. In addition to having to work at reduced rates or act pro bono because of the cross-cap, claimants' lawyers will be unable to charge success fees to compensate for the cases they lose, and for which they recover no fees under a CFA. If lawyers are unable to charge commercial rates for their work, there is a real risk that important cases are not brought.

[16] Paragraph 132.

68. In any event, it is highly undesirable for environmental cases to be subsidised by claimants' lawyers, as recognised by Lord Justice Sullivan:

> *"nor can there be any significant reliance on lawyers, whether solicitors or barristers, agreeing to undertake such work at significantly reduced, let alone zero rates. There are relatively few expert practitioners in this area of law, where expertise is essential, particularly those willing to act for claimants."*[17]

69. There is a public interest in environmental cases being brought before the courts, so it is vital that appropriate financial incentives are in place to ensure that claimants can access specialist, professional legal advice.

70. Finally, an automatic cross-cap could have the opposite effect to that intended and actually increase the burden on the taxpayer. If claimants cannot obtain legal representation through CFAs, there will be an increase in the number of litigants in person appearing in environmental cases. Litigation by untrained lay claimants will not only lead to otherwise good claims being dismissed, but will also waste valuable court time.

Q10: Should it be possible to challenge the cross cap of £30,000?

71. There should be no cross-cap. However, if the Government insists on setting an automatic cross-cap then it will need to be possible to challenge it to ensure that more complex cases can be brought under CFAs.

Q11: Do you think that if a challenge were introduced to the cross cap that the £5,000 cap ought to be reviewed at the same time?

72. No, for reasons explained above, it is essential that there is an absolute cap on the claimant's liability.

Q12: Should the default cap as proposed earlier (in the sum of £5,000 although consultee's views have also been sought on the amount), be applied to all proceedings including those on appeal?

73. Yes, the default cap (which must be significantly lower than £5,000, and ideally zero) should apply to all proceedings, including appeals. As with judicial review claims at first instance, there is a permission hurdle which will ensure that only meritorious appeals are brought. If an environmental case is deemed to have good prospects for appeal by a Court of Appeal judge, then it is self-evidently in the public interest that it be heard. It is therefore appropriate that appellants benefit from full costs protection at the appeal stage. It is our view that there should be no cross-cap. However, if the Government does impose an automatic cross-cap, it will be necessary to apply to have this increased to cover the costs of the appeal, to ensure that appellants are able to fund their legal costs of the appeal proceedings under a CFA.

[17] Sullivan, note 9 above at paragraph 24(6), page 14.

Q13: If not, should an additional application be possible to set a PCO for an appeal? Should the limit be set by the court or should a presumptive limit apply?

74. See answer to question 12 above.

Q14: Should the position differ according to whether it is the claimant or defendant (at first instance) who is appealing? If so, in what way?

75. No, it should make no difference.

Conclusion

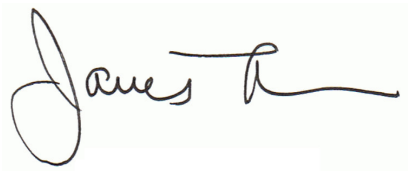
76. Improving access to justice in environmental cases should be a major priority for the Government, and is an objective entirely consistent with the idea of the "Big Society." Removing financial barriers to the courts empowers communities to take responsibility for their local environment. We therefore welcome these moves to codify the complex and unclear rules on PCOs in environmental cases.

77. However the current proposals fail in their stated aim of ensuring that claimants have certainty at the outset that they will not face prohibitively expensive legal costs if they lose.

78. Simplicity is the key to ensuring a clear and effective system which ensures access to justice that is not prohibitively expensive. Introducing exceptions introduces complexity, which will inevitably lead to time and resources being wasted by claimants, defendants and the courts. It would also appear to be inconsistent with the Government's Red Tape Challenge and Better Regulation Agenda to introduce new rules which are complex and expensive to follow. One way-cost shifting is the simplest and most effective way of avoiding this.

79. We would be happy to meet with officials from the Ministry of Justice to discuss how these proposals could be improved.

Yours sincerely,



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