

## **Development in Scotland of Protective Expenses Orders**

### **A brief overview**

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"The great can protect themselves but the poor and humble require the arm and shield of the law" Andrew Jackson (1821).

#### Introduction

Protective expenses orders ("PEOs") are derived from protective cost orders ("PCO's") in England. A PEO may be made at the commencement or in the course of proceedings. It may limit a claimant's (such as that of a petitioner in a judicial review) liability to expenses to a specific sum or declare that, regardless of the outcome of the case, the petitioner will not be required to pay the expenses of opponents. Where the Court makes a PEO it may also impose a "cost capping" order limiting the amount of expenses that the petitioner may recover in the event of success.

PCOs were developed by the English Courts in public interest litigation. They are intended to avoid the "chilling effect" of open ended exposure to liability to opponent's costs, which would deter litigation in the public interest. On the other hand the cost capping element imposed upon claimants is intended to address the potential for a PCO to operate as a blank cheque enabling a claimant to litigate it in an unreasonable or disproportionate fashion in the knowledge that it will not incur any liability in expenses.

#### Development in Scotland

It is understood that some doubt was expressed in open court by the Inner House as to the competency of a PEO. This was during a hearing in a statutory appeal brought by Friends of the Earth Scotland regarding the M74 extension in 2007.<sup>1</sup> The Inner House did not decide the matter however. The arguments against altering the "loser pays" rule, in advance of anyone losing, appear to be rooted in the conduct of parties in the litigation. It is always possible for the Court at the end of the day to depart from the general rule, on account of parties' conduct. The objection to a POE at the beginning of the litigation is that it fetters the discretion of the Court which hears and resolves the dispute. It thus deprives the Court of the opportunity to take into account, in its award of expenses, of matters such as the conduct of parties in the litigation.

Despite these arguments, there are now three Outer House cases which expressly accept the principle of PEOs.<sup>2</sup> The Scottish cases have followed the principles stated by the

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<sup>1</sup> Report of Civil Courts Review 2009 (The Gill Review), Chapter 12 para. 65, 73.

<sup>2</sup> McArthur & Others [2005] CSOH 165; McGinty & Another [2010] CSOH 5 and Road Sense [2011] CSOH 10.

Court of Appeal in R (Corner House Research) -v- Secretary of State for Trade and Industry [2005] 1 WLR 265 at 2625 paragraph 74 per Lord Phillips MR.

### Corner House Principles

Quoting Lord Phillips these are:-

- (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) 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.

The capping order would not be expected to provide for more than "modest representation" of solicitor and single junior counsel.

It is useful to see how these principles have been applied in Scotland:-

### Application in Scotland.

In *McArthur*, the petitioner sought judicial review of the Lord Advocate and Scottish Minister's position of not holding a fatal accident inquiry into the death of relatives resulting from contaminated blood transfusions. Lord Glennie held that a PEO was competent in Scotland. He held that criteria 1(i) and (ii) were satisfied. He also found the "no personal interest" criterion (iii) satisfied; he was persuaded the relatives did not have a financial interest in the matter at issue which was a factual investigation by an inquiry. Individual relatives were put forward as petitioners because they, rather than any pressure group, would have appropriate status for judicial review proceedings. However conditions (iv) and (v) were not fulfilled. It appears that full financial details of the petitioners' finances were not placed before the Court and the Haemophilia Society had made available a substantial fund to meet any contra award of expenses. The maximum exposure of each petitioner was of the order of £10,000, and absent clear evidence to the effect the petition was unaffordable for the petitioners the Court was not prepared to make the order. The judge's reasoning was also influenced by the fact that it was not suggested that legal aid was not available in principle for the application, but it was a case of the Court being asked to step in to assist the petitioners in a case where their personal means were above the limit set for the grant of legal aid.

*McGinty* is a judicial review challenge to the Scottish Ministers' adoption of the National Planning Framework (2). The petitioner argues that the designation of a new coal fired Hunterston power station as a "national development" is flawed. Amongst other things it is argued that statutory consultation procedures were not invoked. Scottish Ministers accepted criteria (i) and (ii) were satisfied. The "no private interest" criterion (iii) was given a "flexible approach"; critically the petitioner had no financial interest in the outcome of the case, although he uses the site for recreation purposes. This was not sufficient to rule out the PEO. Regarding (iv) and (v) the Court was satisfied the

petitioner had insufficient means to pursue the application, and that legal aid had been refused in principle. The petitioner had certain financial assistance from NGOs, albeit limited. Lady Dorrian set the POE at £30,000 for the respondent's expenses. The petitioner's own costs were capped to a solicitor and senior without junior.

Road Sense is a statutory appeal against the making of certain roads orders and schemes relating to the Aberdeen Western Peripheral Route (AWPR). The case is interesting because it deals both with Corner House principles and also, and perhaps more fundamentally, certain environmental law principles referred to below. The appellants were made up of 560 individuals, and appear to have been sufficiently well funded to have participated in a lengthy public inquiry. On the basis of information presented to the Court regarding the amount of pledges etc and likely costs of litigation, a judge made a PEO of £40,000. He imposed a cap permitting the appellants, in the event of success, to recover the taxed expenses of a solicitor and one senior counsel without junior.

### Environmental Cases

The basis for obtaining PEOs in environmental cases (as opposed to "general public importance" cases on the basis of Corner House) cases is as follows:-

The Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters was made on 25<sup>th</sup> June 1998. It is a UN Treaty. It was ratified by the UK and EC in February 2005. Article 9 of the Treaty provides for access to review procedures to challenge substantive and procedural legality of decisions; with an objective of giving "the public concerned wide access to justice within the scope of this Convention". Provision is made "...the procedures ... shall provide adequate and effective remedies including injunctive relief as appropriate and be fair, equitable and timely and *not prohibitively expensive* ..."

The Convention has been *partially* implemented by EC Directives. One of these is Council Directive 85/337/ECC (as amended in 2003) on the Assessment of the Effects of Certain Public and Private Projects on the Environment. This is the directive which provides for the assessment of environmental effects on certain projects, and associated public participation in the decision making process. The 1985 Directive is implemented in domestic law, *inter alia* by the Environmental Impact Assessment (Scotland) Regulations 1999 as amended (now SSI 2011 No.139.) These regulations require certain planning applications to be supported by an environmental statement.

Article 10a of the 1985 Directive requires member states to ensure that:-

"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 pre condition, 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 ... what constitutes a sufficient interest and impairment of a right shall be determined by the member states, consistently with the objective of giving the public concern wide access to justice ..."

*"Any such procedure shall be fair, equitable, timely and not prohibitively expensive."*

The content of Article 10a is not mentioned in the 1999 or 2011 Regulations.

It follows that judicial review cases falling under the 1985 Directive have a discreet basis on which to seek a PEO. Road Sense was such a case. There was no dispute that the decision in question (i.e. to make the roads orders etc on the basis of a public inquiry looking into environmental issues) was one to which Article 10a applied. It was therefore unnecessary to apply the Corner House principles.

This is illustrated by the fact some members of Road Sense had private financial interests in play because of the incidence of compulsory purchase orders resulting from the roads orders. This would have been a reason for refusing a PEO under the no private interest Rule (iii) under Corner House, but not a reason to disqualify under Article 10a. Lord Stewart observed however that patrimonial interest is capable of being a relevant factor in the assessment of the level of any PEO. The case contains useful discussion of the issues including what is meant by "prohibitively expensive" and "reasonable costs against claimants".

### Procedural

Following Lord Glennie's comments in McArthur, a procedure is evolving whereby a separate minute or note in process is lodged and answered. This sets out the basis for seeking a PEO, along with affidavits and other documents which are produced in support of the motion. Early disclosure is encouraged. As yet there are no rules of court on PEOs.

### Issues and Further Development

Given the complexity of the issues seems inevitable that the law will develop further, both north and south of the border. Moreover the Aarhus Compliance Committee has stated on 18<sup>th</sup> October 2010 that the costs regime in England is not compliant with Aarhus. On 18<sup>th</sup> April 2011 the EC decided to refer the UK to the ECJ for failure to implement the EIA Directive properly by providing affordable access to justice. The issues appear to be there is considered to be insufficient binding direction to ensure costs are not prohibitively expensive, and that the basis for obtaining a PCO is too uncertain.

The Gill Review<sup>3</sup> preciently states that absent rules on the matter the status quo leaves room for doubt on applicable criteria in any given case and may not be sufficient to fulfil the UK's obligations under the Aarhus Convention. An Act of Sederunt in draft form was tabled at the rules council meeting of 11<sup>th</sup> October 2010.

I attempt to address certain specific issues where there has been or may be development in the law:-

-There was initially some suggestion that PCOs should only be granted in "exceptional" cases. But it seems recognised "an exceptionality" test would set the threshold too high.<sup>4</sup>

-It is also suggested that Corner House principles attach too much weight to whether the claimant's lawyers are acting on a pro bono basis.<sup>5</sup>

<sup>3</sup> Chapter 12, paragraph 71

<sup>4</sup> R (Crompton) -v- Wiltshire Primary Care Trust [2009] 1WLR 1436, per Waller LJ at para. 24, Smith LJ at para. 80-83, Buckstone LJ (dissenting) at para. 64-66; and also Gill Review chapter 12 paragraph 74.

<sup>5</sup> Gill Review paragraphs 68 and 74; referring to conclusions of working group on facilitating public interest litigation chaired by Lord Justice Maurice Kay 2006.

-Certain English decisions have shown considerable reluctance to “carve out different rules where environmental issues are involved as compared with other serious cases”.<sup>6</sup> If it be correct that the rules should not be different as between public importance and environmental cases, and that the Corner House principles are applied “flexibly,” then this can be seen as a widening of the criteria in public interest cases towards the easier to fulfil environmental criteria.

-The ECJ has recently held that certain parts of Art 9 of Aarhus, although not implemented by directive, still have indirect effect. This is on the general principle that European law should be effective. As far as Aarhus is concerned this principle implies that access to justice to enforce European environmental law should not be excessively difficult in practice. Domestic law should be interpreted in a way which “to the fullest extent possible, is consistent with the objectives laid down in...Aarhus.” Although the case involved rights of an NGO to be involved in a process concerning the Habitats directive, it is not difficult to extend the logic to PEO’s in environmental cases involving directives other than the 1985 Directive: *Lesoochransarske Zoskupenie VLK v Slovakia Ministry of Environment*<sup>7</sup>.

-In environmental cases there is an issue whether a “subjective” or “objective” approach is required in assessing whether proceedings are “prohibitively expensive”. In other words, should the Court scrutinise the means of the particular petitioners? This point is subject to a reference to the ECJ in *R (Edwards and another) -v- Environment Agency*<sup>8</sup>.

-Consistently with *Road Sense* the English courts have dispensed with the requirement for general public importance and need for resolution of issues in appropriate environmental cases: *Garner v Elmbridge BC*<sup>9</sup>.

-In environmental cases it is suggested it may be more difficult for a limited company to obtain a PCO, as it already is protected by limited liability: *Coedbach Ltd v Sec of State* [2010]<sup>10</sup>.

-Also comment that Aarhus says “not prohibitively expensive”; not “cost free”. *Austin v Miller Argent*<sup>11</sup>.

-As regards capping an applicant’s costs at a “modest” level, a “junior counsel only” principle emerged. However the Court of Appeal has held since *Corner House* that “we would certainly accept that there can be no absolute rule limiting costs to those of junior counsel because we can imagine cases where it would be unjust to do so”.<sup>12</sup>

-A complicating factor in English cases is that claimant’s lawyers may be entitled to obtain a “CFA uplift” from the defendant if they win.

-In judicial review proceedings, Scotland has had relatively strict rules concerning qualifying title and interest of a petitioner. Clearly there is a catch 22 issue for petitioners in order to pass the “no private interest” test for a PEO. A petitioner with no “interest” in the matter would pass rule (iii) to obtain a PEO; but would be vulnerable to

<sup>6</sup> *R (Crompton) -v- Wiltshire Primary Care Trust* [2009] 1 WLR 1436 Waller LJ at 20; *Morgan & Baker -v- Hinton Organics (Wessex) Limited* [2009] CP Rep 26, Carnworth LJ at 47.

<sup>7</sup> (Unreported) C240-09 8<sup>th</sup> March 2011

<sup>8</sup> [2010] UK SC 57

<sup>9</sup> [2010] EWCA Civ 1006

<sup>10</sup> ECHC 2312 (Admin)

<sup>11</sup> [2011] EWCA Civ 928

<sup>12</sup> *R (Buglife) -v- Thurrock Thames Gateway Co-Op* [2008] EWCA Civ 1209 at 25.

a plea of no title or interest in the petition itself. It is worth pointing out that the Inner House in *Axa General Insurance Limited*<sup>13</sup> for the first time expressly recognised that in public law judicial review cases “the qualifying relationship may be of a rather broader and more general nature ...” than for title and interest in private law cases. A decision from the Supreme Court is awaited on this point amongst others. However the “flexible” approach to the no private interest rule, if indeed it still exists, should reduce the potential catch 22 situation.

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<sup>13</sup> 2011 SLT 439