IN THE HIGH COURT OF JUSTICE **CO/8229/2011**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

B E T W E E N:

THE QUEEN

on the application of

GREENPEACE UK LIMITED

Claimant

and

SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

CLAIMANT'S SUBMISSIONS ON THE DEFENDANT'S CLAIM FOR HIS COSTS OF PREPARING THE ACKNOWLEDGEMENT OF SERVICE

A. Introduction

1. These are the submissions of the Claimant ("**Greenpeace**") in relation to the amount of costs claimed by the Defendant Secretary of State for preparing the Acknowledgement of Service and summary grounds attached thereto. (The relevant factual background is summarised at Section B below.)

2. The amount claimed by the Defendant as acknowledgement of service costs is **£11,813.00**, of which £8,585.00 is in respect of fees for two Queen's Counsel and one junior Counsel.

The amount is excessive

3. By any standards, the amount claimed by the Defendant is extraordinary. As the Court has repeatedly stated: the purpose of the permission procedure is to determine whether or not a claim crosses the threshold of being arguable; and a defendant ought normally to be able to file an acknowledgement of service, providing a brief statement of reasons why the claim is said to be unarguable, for only modest costs. The amount claimed by the Defendant in this case is very far outside the range of costs which one would normally expect to see claimed for acknowledging service in a judicial review case. As set out in Section C below, having regard to the nature and subject matter of these proceedings, the claimed amount is (manifestly) excessive and unjustified.

Aarhus Convention compliance

4. Furthermore – and importantly – this case falls within the scope of the Aarhus Convention[1], Article 9 of which guarantees access to justice in environmental matters. Article 9(4) of the Convention provides that access to judicial review procedures relating to environmental matters must be "*fair, equitable, timely and not prohibitively expensive*" (emphasis added).

5. As discussed in Section D below, to award the Defendant nearly £12,000 in respect of the costs of complying with the requirement to provide *a summary* of his grounds for resisting the claim would not be compatible with that provision. It is not appropriate that government parties should run up costs at such a rate and then be permitted to claim them from environmental NGOs or other persons seeking – for reasons of

[1] The 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

public and environmental, rather than for any private or commercial, interest – to obtain judicial scrutiny of decisions which they believe are likely to have significant negative impacts on the environment. If claimants' costs liabilities were able to escalate to such high levels even before a grant of permission, then a consequent severe chilling effect on access to the courts in environmental cases would be inevitable.

The assessment of reasonable acknowledgement of service costs

6. For these reasons, Greenpeace asks that the Defendant be permitted to recover its acknowledgement of service costs confined to an amount which:

    a) does not exceed a fair approximation of the costs that the Defendant would have had to incur to provide a succinct summary of the grounds for resisting the claim, with the assistance of junior Counsel only; and

    b) complies with Article 9(4) of the Aarhus Convention.

7. Greenpeace respectfully suggests that an award of acknowledgement of service costs of at most £1,500 would be appropriate.

B. Factual background

8. Prior to issuing the claim, Greenpeace sent the Defendant a pre-action protocol letter attaching a draft of its proposed Statement of Facts and Grounds. This letter **[CB/pp.73-105]** was sent on 16 August 2011 and Greenpeace requested a response by 22 August.

9. The reason why Greenpeace requested a response within that period was that the legislation under which the challenged decision was taken requires any challenge to be brought within a tight timeframe: pursuant to section 13 of the Planning Act 2008, the Court may entertain a challenge to a National Policy Statement only if it is

brought within 6 weeks. As a result, environmental NGOs and other persons have only a very short period within which to consider what may be a detailed and lengthy document with multiple annexes (as was the position in the present case), and decide whether or not to bring a challenge.

10. While the Defendant and his officials will have been responsible for preparing that document, and will therefore be familiar with its provisions and the details of its intended operation (and will therefore be able to use that knowledge to assist and direct their legal representatives in the event of any pre-action letter or challenge being received), the position of a potential challenger such as Greenpeace is very different. In this case, the last date by which Greenpeace could bring a challenge was 26 August 2011. Greenpeace therefore had to ensure that any judicial review claim was commenced by that date.

11. On 22 August 2011 the Treasury Solicitor, acting for the Defendant, sent a holding reply **[CB/pp.107-108]** stating that the response deadline proposed by Greenpeace did not allow the Defendant sufficient time to answer the points raised. The final paragraph of the letter stated that the Defendant would "*respond substantively in due course*".

12. On 24 August 2011 Greenpeace's solicitors responded **[CB/p.109]** to that letter, noting that Greenpeace was "*bound by statute to submit a claim by Friday 26 August 2011*". "*You state that you are not able to respond this week but have not given us any indication of when we can expect a response.*"

13. At the time when Greenpeace issued the claim on 26 August 2011 (i.e. the last possible date), it had still not received the Defendant's substantive response to the proposed grounds of claim.

14. The Defendant's Acknowledgement of Service was filed on 20 September 2011. In his summary grounds, the Defendant stated that:

"*each of the matters referred to at Grounds 1(a)-(c) (i.e. safety of a site from risk of flooding; security of off-site electricity supply; and the adequacy of on-site emergency controls) are matters that would be considered by the [Office of Nuclear Regulation (ONR)] when deciding whether or not to grant the consents/licence necessary to build and operate a nuclear power station*".[2]

15. On 5 December 2011 (order sent to the parties on 12 December 2011) Ouseley J refused permission on the papers, stating as follows:

"*The case is not arguable for the reasons given in the AOS. The claim does not in reality recognise the role of the ONR and site licensing in dealing with flood protection, off-site supplies and communications. The potential for the 8 sites to be protected against flooding does not prevent a later decision by the ONR or by IPC on its advice that any one cannot be protected, nor does it prevent a decision by IPC that the as yet undefined measures have planning implications which tell against a site. The claim that a comparative safety exercise was required ignores the fundamental judgment that all were potentially safe, and a decision that no examination of the degree of margin was required is not irrational. The consultation was lawful.*"

16. Ouseley J awarded the Defendant his "*costs of preparing the Acknowledgment of Service*". Greenpeace was given 14 days within which to file written submissions disputing that award either in principle or in relation to the amount. The Defendant was ordered to file any response within seven days thereafter.

C. The amount claimed is excessive for acknowledgement of service costs, and all the more so in the circumstances of this case

17. In *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 W.L.R. 1260 Carnwath LJ, with whom Brooke and Dyson LJJ agreed, considered (starting at 1270E) what he called "Costs under *Mount Cook*" (the case in which the Court decided that, where permission was refused, defendants should generally be permitted to recover their costs of filing an acknowledgement of service, given that filing an acknowledgement had become compulsory pursuant to CPR Part 54).

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[2] Defendant's Summary Grounds, paragraph 3(4). See also paragraphs 35(4)-(6); paragraphs 66(1)-(2) – where it is said that these matters are "*matters to be the subject of project specific consideration by the ONR and other regulators*" and that "*they concern site specific matters which fall properly to be considered at the stage that an individual application is determined*"; paragraphs 69-71 re: flood risk; paragraph 89 re: off-electricity supplies; and paragraph 100 re: on-site emergency controls and off-site communications.

18. Carnwath LJ stated:

> "[41] While I do not of course question the principles established by [*Mount Cook*], they **must not be applied in a way which seriously impedes the right of citizens to access to justice, particularly when seeking to protect their environment**…
>
> [42] The considerations which may apply in responding to the application for permission will vary enormously from case to case. For example, where the subject-matter is in essence a commercial dispute between rival developers, different considerations may apply. In the ordinary case, however, the court must be particularly careful to ensure that the costs falling on the judicial review claimant are not disproportionately inflated by the involvement of the other parties at the permission stage.
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> [43] … **The purpose of the "summary of grounds" is not to provide the basis for full argument of the substantive merits, but rather (as explained at p 71, para 24 of the Bowman Report: see para 15 above) to assist the judge in deciding whether to grant permission, and if so on what terms.** If a party's position is sufficiently apparent from the protocol response, it may be appropriate simply to refer to that letter in the acknowledgement of service. In other cases it will be helpful to **draw attention to any "knock-out points" or procedural bars**, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition). As the Bowman Report advised, **it should be possible to do what is required without incurring "substantial expense at this stage"**.
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> [44] The present case illustrates the risks. There were five potential parties to be considered: two public authorities whose decisions were under attack, and three interested parties who had commercial interests in the development. Between them they had generated some 50 pages by way of summaries of grounds attached to acknowledgements of service. In four cases they were settled by counsel. In two cases we have schedules of costs, amounting to £6,400 (RBL) and £10,754 (Pegasus). The council's response seems to me a model of what is required by way of a "summary", making all the necessary points in 2½ pages. …"

19. Brooke LJ agreed. In his concurring judgment, he stated (at [51]) that compliance with the requirement to set out summary grounds when acknowledging service was "*not the occasion for the preparation of an elaborate formal document*". "*If [claimants] wish to incur greater expense in preparing a document that is more elaborate than the rules require at this stage, they should not expect to recover the extra expense from a claimant whose application is dismissed at the permission stage, since they will be doing more than the rules require of them at that stage*" (at [52]).

20. Carnwath LJ's exposition of the relevant principles has been repeatedly endorsed in subsequent cases; see, e.g., *R (Davey) v Aylesbury Vale District Council* [2007] EWCA Civ 1166 at [32]. At [33] Sir Anthony Clarke MR stated:

> "It seems to me that any defendant who incurs more cost at the permission stage than is contemplated by Carnwath LJ will not be awarded such additional costs at the permission stage if the application is unsuccessful. Moreover, as I see it, the court should at that stage decline to look at anything which goes beyond the "summary of grounds" described in *Ewing*."

21. At [21], Sedley LJ stated that even where a claim which has gone to a substantive hearing, the unsuccessful claimant should not always be fixed with all – and should sometimes not be fixed with any – of the defendant's costs:

> "On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs."

(The judgments of Sir Anthony Clarke MR and Sedley LJ were consistent with one another, and Lloyd LJ agreed with both of them.)

22. In the present case, the amount claimed by the Defendant as the costs of his Acknowledgement of Service is (far) in excess of what would constitute reasonable costs for providing a succinct summary of the Defendant's case, indicating why the claim should be found to be unarguable.

23. As noted at paragraph 2 above, the vast majority of the claimed costs are Counsel's fees. The engagement of the services of 2 QCs (Michael Beloff QC and Jonathan Swift QC), in addition to an experienced Junior (10 years' Call, specialising in environmental and planning law), is manifestly far beyond anything contemplated in *Ewing* as representing the level of costs/effort to which a defendant was required to go to comply with the duty to file an Acknowledgement of Service.

24. Likewise, the length and detail of the Defendant's summary grounds (a document of 46 pages / 119 paragraphs) is clearly well in excess of being the kind of short summary that the Court of Appeal had in mind.

25. The Defendant is of course entitled to take his own decisions as to how to conduct litigation. He may choose to serve detailed submissions at the permission stage, and may choose to instruct multiple or leading Counsel for that purpose (even to resist a claim which is said to be unarguable). But as Brooke LJ made clear (see paragraph 19 above), the costs of such additional efforts are not recoverable by the Defendant in the event that permission is refused. The Defendant's costs are limited to what was genuinely required for providing the kind of short summary grounds necessary to comply with CPR Part 54.

26. Regard must also be had to the public interest and environmental character of the issues raised by the claim: see the guidance given by Sedley LJ quoted at paragraph 21 above. This is not commercial litigation. Greenpeace is an environmental NGO which relies on donations from private citizens to fund its work. The claim raised issues as to the operation, and associated practical consequences, of the planning regime for new nuclear power stations and the assessment of nuclear safety. Given the potentially huge ramifications of a nuclear accident for human health and the environment, those issues were plainly ones of the highest public interest and concern.

27. The amount of costs claimed by the Defendant is all the more unjustified in view of the fact that the claim focused upon legal issues and did not require consideration of matters of particular technical or scientific complexity (and, *a fortiori*, did not require consideration of such matters at the permission stage). The claim was concerned essentially with the mechanics of the operation of the planning consents regime for infrastructure projects that was introduced by the Planning Act 2008, and the legal consequences of the decision being challenged, namely the Defendant's approval of a National Planning Policy Statement on nuclear energy.

28. In particular, the claim concerned the effects of that decision in defining the parameters within which the Infrastructure Planning Commission will be required to confine its consideration of safety and environmental issues when dealing with applications for development consent for new nuclear power stations. The scientific merits of the safety and environmental justifications which might in future be put forwards in support of any such applications were not matters for the Court's consideration in the context of this claim.

29. Also relevant is the fact that (as explained at paragraphs 8 to 13 above), the Defendant did not provide a substantive reponse to Greenpeace's pre-action letter before the date by which Greenpeace had to issue the claim. In this regard, it is noted that the costs recoverable by a defendant as costs of filing an Acknowledgement of Service do not include prior costs, such as those of responding to a pre-action letter. The fact that the Defendant did not respond to the pre-action letter must surely have loaded additional costs onto the Acknowledgement of Service which the Defendant would otherwise have incurred at a prior stage and could not then have been recovered in the present circumstances, i.e. where permission has been refused.[3]

D. The Aarhus Convention

30. As noted above, Article 9(4) of the Aarhus Convention provides that access to judicial review procedures relating to environmental matters must be "*fair, equitable, timely and not prohibitively expensive*" (emphasis added). In addition, Article 9(5) requires States to, "*in order to further the effectiveness of the provisions of [article 9]*", consider "*the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice*".

31. The Convention is an international treaty to which the United Kingdom is a party. It is binding upon the United Kingdom in international law. Judicial discretion in

[3] In *Ewing* Brooke LJ observed (at [51-53]) that a Defendant's AoS costs will often consist essentially in the costs of repeating the same matters already set out in reply to pre action correspondence, perhaps simply by attaching that reply to the AoS form.

relation to costs should therefore be exercised compatibly with that provision. In any event, the EU has incorporated Article 9 of the Convention into the Directives on Environmental Impact Assessment[4] and Industrial Emissions[5], both of which are relevant to the underlying subject matter of the present proceedings. The European Commission is currently pursuing infraction proceedings against the United Kingdom in respect of costs in environmental cases.[6]

32. To expose claimants to the Defendant's costs of almost £12,000 in relation to the Acknowledgement of Service alone would not be compatible with the United Kingdom's obligation to ensure that access to judicial review in matters relating to the environment is "*not prohibitively expensive*". An award of such an amount against Greenpeace in the present circumstances would serve as a serious deterrent to NGOs and individuals wishing to seek judicial review in environmental matters.

33. In *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 the Court of Appeal stated that the question as to whether costs were "*prohibitively expensive*" imported a standard that was not – or was at least not wholly – a subjective one. The Court should therefore "*consider whether the potential costs would be prohibitively expensive for an ordinary member of 'the public concerned'*" (*per* Sullivan LJ, at [46]).

34. The question as to whether the standard is subjective or objective was subsequently referred to the ECJ by the Supreme Court in *R (Edwards) v Environment Agency (No. 2)* [2011] 1 WLR 79. Lord Hope opined that there was "*no clear and simple answer… to the question as to what is the right test*" but that "*the balance seems to lie in favour of the objective approach*" taken in *Garner* [35].

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[4] Directive 85/337/EEC, as amended by Directive 2003/35/EC.

[5] Directive 2010/75/EC. Equivalent provision was also made in the predecessor Directive: the Integrated Pollution Prevention and Control Directive 96/61/EC, as amended by Directive 2003/35/EC.

[6] The Ministry of Justice has recently issued a consultation paper on proposals for addressing the Commission's concerns: *Cost Protection for Litigants in Environmental Judicial Review Claims* (19 October 2011).

35. Applying the objective test, it is submitted that most 'ordinary members of the public' would be deterred from bringing proceedings if they were told they would be exposing themselves to substantial defendant's costs, approaching £12,000 as in the present case, in relation to permission alone. But even applying the subjective test – i.e. looking at the position of an NGO such as Greenpeace – it is apparent that exposure to such costs at that stage would have a strong chilling effect on the bringing of claims by NGOs reliant on voluntary donations from individuals. That would be so even in relation to claims which, like the present claim, relate to matters of very great environmental significance.

E. Conclusion

36. As set out at paragraphs 6 to 7 above, Greenpeace respectfully suggests that £1,500 would be more than sufficient as an award of acknowledgement of service costs in the present case.

KASSIE SMITH
ALAN BATES

22 December 2011

Monckton Chambers
Gray's Inn