R (on the application of Garner) v Elmbridge Borough Council

[2010] EWCA Civ 1006

COURT OF APPEAL, CIVIL DIVISION
LLOYD, RICHARDS AND SULLIVAN LJJ
29 JULY 2010

Judicial review – Costs of application – Pre-emptive order for costs – Protective costs order – Principles – Proceedings to be not prohibitively expensive – Nature of test – Council Directive (EEC) 85/337 – Council Directive (EC) 96/61.

In June 2009 the respondent local planning authority had granted planning permission for a comprehensive redevelopment of a site (the site) on the opposite bank of the River Thames from Hampton Court Palace which was a scheduled ancient monument and grade 1 listed building. Hampton Court Palace was managed by Historic Royal Palaces (HRP), an independent charity. G was an architect specialising in conservation of historic buildings. He had a long-standing interest in the palace; he had worked for HRP from 1994 to 2004 and during that time his duties included advising the director on planning applications affecting its setting. In 2007 he had objected to a scheme for redevelopment of the site; his objection was to the scale of the proposed development and the effect of a redevelopment on the site of that scale on the setting of the palace. The scheme for which planning permission was granted in 2009 was on the same scale although the architectural treatment had been changed. G had not resubmitted his objection, because he considered that his 2007 objection was equally applicable to both schemes. In September 2009 he applied for judicial review of the grant of planning permission. His claim included an application for a protective costs order. He was refused permission to apply for judicial review on the basis that he did not have sufficient standing. In December 2009 G gave notice of renewal of his claim for permission to apply for judicial review. It was agreed that there should be a 'rolled up' hearing of the permission application and the substantive hearing if permission was granted. The planning authority and the second interested party (one of the persons who had applied for the planning permission) opposed the making of a protective costs order. Applying established principles, the judge held that the challenge was not one where the issues in the case were of general public importance and which the general public interest required to be resolved. The judge stated that he was not satisfied, having regard to the financial resources of the parties and to the amount of costs that were likely to be involved, that it was fair and just to make a protective costs order and that if the order was not made G would probably discontinue the proceedings and be acting reasonably in so doing. He refused the order. G appealed. He contended that Council Directive (EC) 2003/35 (OJ 1997 L156 p 17) which had amended Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment) (OJ 1985 L175 p 40) (the EIA Directive) and Council Directive (EC) 96/61 (concerning integrated pollution prevention and control) (OJ 1996 L257 p 26) by the insertion of art 10a[a] had incorporated

a Article 10a, so far as material, is set out at [14], below

the principles of the Aarhus Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus, 25 June 1998; ST 24 (2005); Cm 6586) into a directive which had direct effect in domestic law. Under art 10a, member states were to 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 required that as a condition, had access to a review procedure to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive: 'Any such procedure shall be fair, equitable, timely and not prohibitively expensive.' The definitions in the EIA Directive included: 'The "public" means one or more natural legal persons and, in accordance with national legislation or practice, their associations, organisations or groups' and ' "The public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures … 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.'

Held – (1) Where the EIA Directive applied, the settled principles established by authority governing the grant of protective costs orders were to be modified, but only in so far as it was necessary to secure compliance with the Directive. G was 'a member of the public concerned' for the purposes of art 10a; even if he was not affected or likely to be affected by the decision to grant planning permission, he had an interest in the decision-making process in respect of applications for planning permission which affected the setting of Hampton Court Palace given the underlying objective of giving the public concerned wide access to justice. In an art 10a case there was no justification for the application of the conditions of 'general public importance' or 'public interest requiring resolution of those issues'. The EIA Directive and the Aarhus Convention were based on the premise that it was in the public interest that there should be effective public participation in the decision-making process in significant environmental cases and an important component of that public participation was that the public should be able to ensure, through an effective review procedure that was not prohibitively expensive, that such important environmental decisions were lawfully taken. Under EU law it was a matter of general public importance that those environmental decisions subject to the Directive were taken in a lawful manner and, if there was an issue as to that, the general public interest required that that issue be resolved in an effective review process. It followed that the judge had not been entitled to reject G's application for a protective costs order on the basis that the issues raised were not of general public importance which the public interest required to be resolved (see [33]–[40], [59], [60], below); *R* (*on the application of Corner House Research*) *v Secretary of State for Trade and Industry* [2005] 4 All ER 1 considered.

(2) A purely subjective approach to the 'not prohibitively expensive' requirement under art 10a, as had been applied by the judge in the instant case, was not consistent with the objectives underlying the EIA Directive. Even if it was either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the Directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which was not prohibitively

expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of 'the public concerned'. In the instant case there had been evidence that without a protective costs order the liability and costs of an unsuccessful appellant was likely to be prohibitively expensive to anyone of 'ordinary' means; and there had been no evidence to suggest that the likely costs liability had been overestimated. The judge's approach had not been consistent with art 10a. However, the imposition of some form of reciprocal limit upon a respondent's liability for costs was not necessarily inconsistent with art 10a and that feature had to be considered on a case by case basis. On the facts of the instant case the imposition of a reciprocal cap would not be inconsistent and it would be fair and reasonable in all the circumstances. Accordingly, a protective costs order of £5,000 would be granted for G and an order that the respondent should not have to pay more than £35,00. The appeal would therefore be allowed (see [46]–[60], below).

Notes

For judicial review: costs generally and for protective costs orders, see 61 *Halsbury's Laws* (5th edn) (2010) paras 681, 686.

Cases referred to in judgments

European Commission v Ireland Case C-427/07 [2009] ECR I-6277, ECJ.

Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89 [1990] ECR I-4135, ECJ.

Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107, [2009] 2 P & CR 30.

R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2008] EWCA Civ 1209, [2009] 1 Costs LR 80.

R (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600.

R (on the application of Edwards) v Environment Agency [2006] EWCA Civ 877, [2006] All ER (D) 309 (Jun).

Appeal

Keith Garner appealed with permission given by Munby LJ on 10 June 2010 from the decision of Nicol J on 3 March 2010 dismissing his application for a protective costs order in judicial review proceedings brought against Elmbridge Borough Council (the respondent) relating to the grant of planning permission on 16 June 2009 to the interested parties, Gladedale Group Ltd and Network Rail Infrastructure Ltd, for the redevelopment of Hampton Court Station and adjoining land at Hampton Court Way, East Molesey. WWF-UK Ltd and Friends of the Earth were given permission to intervene. The interested parties did not appear. The facts are set out in the judgment of Sullivan LJ.

Richard Drabble QC and *David Wolfe* (instructed by *Richard Buxton*) for the appellant.

James Findlay QC and *Robert Williams* (instructed by *Sharpe Pritchard*) for the respondent.

29 July 2010. The following judgments were delivered.

SULLIVAN LJ (giving the first judgment at the invitation of Lloyd LJ).

INTRODUCTION

[**1**] This is an appeal against the order made on 3 March 2010 by Nicol J, in so far as that order dismissed the appellant's application for a protective costs order (PCO) and ordered that he should pay the respondent's costs of the PCO application summarily assessed in the sum of £3,000.

[**2**] There is also an application for permission to appeal against a further order made by Nicol J on 27 April 2010 on the papers, refusing permission to add Keith Garner Ltd as an additional claimant and refusing an application for a PCO in respect of both that company and a Mr Gerald McAully, who was granted permission to be added as a second claimant. He has so far declined to take up that permission because he was not granted a PCO.

BACKGROUND

[**3**] On 16 June 2009 the respondent granted planning permission to the interested parties for a comprehensive redevelopment of Hampton Court Station and adjoining land at Hampton Court Way, East Molesey (the site). The site is on the opposite bank of the River Thames from Hampton Court Palace. The palace is a scheduled ancient monument and a grade I listed building. The appellant lives in London SW11. He is neither a local resident nor is he a local elector. He does, however, have a long-standing interest in Hampton Court Palace; he is an architect and his practice specialises in conservation of historic buildings. He worked for Historic Royal Palaces (HRP) from 1994 to 2004. During that time one of his duties was to advise the director of Hampton Court Palace on planning applications affecting its setting. He advised that objection should be made to a number of developments over the years which would have had an adverse effect on the setting of the palace. The applications for those developments were refused.

[**4**] After leaving HRP the appellant maintained his interest in the palace. In 2007 he objected to an earlier scheme for the redevelopment of the site. This proposal became known as 'the boathouse scheme' because of the architectural treatment of the hotel that was proposed within the scheme. The appellant did not object to the architectural treatment but to the scale of the proposed development and the effect of a redevelopment on the site of that scale on the setting of the palace. In the present scheme, for which planning permission was granted on 16 June 2009, the architectural treatment has been changed. It is known as the 'classical scheme'. The appellant says in his second witness statement that he was not sent a copy of the notice which the respondent sent to objectors to the boathouse scheme informing them of the new application for the classical scheme, but, in any event, when the appellant learnt of the new proposal he did not think it necessary to resubmit his objection because his objection in 2007 to the scale of the proposed redevelopment was, in his judgment, equally applicable to both the boathouse scheme and the classical scheme since the scale of the proposed redevelopment on the site remained the same. The only material difference was the architectural treatment to which he had not objected.

[**5**] The appellant's judicial review claim form was filed on 14 September 2009. The grant of planning permission was challenged on three principal grounds: (1) that the respondent had failed to give a summary of its reasons for granting planning permission; (2) that the respondent had failed to address or to apply the statutory requirement that when deciding whether or not planning

permission should be granted special regard should be had to the desirability of preserving the setting of listed buildings; and (3) that the respondent had not applied the sequential test set out in PPS 25 for development proposals in a flood plain. The claim included an application for a PCO.

[**6**] In a witness statement in support of the claim Ms Foster, a Californian lawyer employed by the appellant's solicitors, explained why the appellant was seeking a PCO. She said that although the appellant's funds were limited he had agreed to be responsible for lodging the proceedings so that they could be brought within the three-month time limit, but—

> '[g]iven his individual limit on funds, he could not and would not afford to take on the risk of fighting a judicial review without costs protection. If the PCO is no[t] granted, I am instructed that he would have no option but to withdraw from the proceedings or find a substitute claimant.'

[**7**] She said that the appellant's solicitors firm, which, I would add, has extensive experience in environmental judicial reviews, generally estimates each side's costs in a one-day straightforward judicial review, where permission to apply for judicial review is granted on the papers, as about £15,000 plus value added tax (VAT). However, if there are complications, for example if permission is refused on the papers and the application has to be renewed at an oral hearing, then the costs can easily double; so the appellant, if unsuccessful, would be facing a costs liability for £30,000 if the case was straightforward, or £60,000 if it proved to be complicated. The appellant could not afford such sums and, realistically, she said £1,000 to £1,500 could be raised from the local community.

[**8**] The respondent and the two interested parties filed acknowledgments of service; they contended that the grounds of challenge had no merit; but they also contended that the appellant did not have a sufficient interest to bring the proceedings and that the proceedings had not been brought promptly. They also opposed the grant of a PCO.

[**9**] It is relevant to note that both the respondent and the second interested party claimed the costs of their acknowledgments of service. The amounts claimed were £6,080 and £8,839·60 respectively: a total of £14,919.60 before the papers had even gone before a judge.

[**10**] On 9 December 2009 Mr George Bartlett QC, sitting as a deputy High Court judge, considered the matter on the papers and refused permission to apply for judicial review. He said:

> 'There was a failure to give a summary of the reasons for granting permission in accordance with art 22(1) of the Town and Country Planning (General Development Procedure) Order 1995, SI 1995/419, as the defendant accepts. Such a failure may well not justify the grant of permission where it is otherwise apparent that the planning authority have taken into account and weighed properly the relevant policies and other material considerations. Here, however, the council were required to have special regard to the desirability of preserving the setting of Hampton Court Palace, and, in view of the duty, an important issue was whether the river frontage of the site should be kept free of substantial development. There is in any view a clearly arguable case, as evidenced by the officer's report, that, while detailed consideration was given to the design of the proposed buildings, the council failed to apply the statutory requirement, of which there is no mention in the report, and failed to address this important issue, which the report does not discuss, by reference to it.

There is no reasonably arguable case on the application of PPG25, in my view. This matter, which was not apparently of concern to the claimant at any earlier stage, was dealt with in paras 8.4.1–8.4.6 of the officer's report in a way that appears to me to address properly both the sequential test and the criteria in the exception test.

Had the claimant objected to the application for planning permission, he would have had sufficient standing. On what is not simply a local issue but one of national significance because of the importance of Hampton Court Palace, his interest, as a person concerned with the protection of historic buildings, and the palace in particular, and as one whose views appear to accord with those of many individuals and groups, including Historic Royal Palaces, would have qualified him to bring proceedings. I would also have considered it an appropriate case for a protective costs order. But he did not object to the application, despite the fact that the committee resolution in December 2008 to grant permission must have alerted him to the need for the council, when determining the applications in June 2009, to consider the issue of keeping the river frontage substantially free of development. Not having sought to influence the decision, I do not think that he has sufficient standing.

In addition the application was not made promptly, in that over five weeks elapsed before he sought legal advice and a further five weeks elapsed before the pre-action protocol was issued. It appears that delay is financially prejudicial to the charity the Royal Star & Garter.

Despite the importance of the issue that the claimant seeks to bring before the court I do not think in these circumstances that permission should be granted.'

[**11**] Mr Bartlett did not think it was appropriate to award costs. On 16 December 2009 the appellant gave notice of renewal of his claim for permission to apply for judicial review. After a certain amount of procedural toing and froing the position that was reached before Nicol J on 2 March 2010 was that the parties were agreed that there should be a 'rolled up' hearing of the renewed application of permission to apply for judicial review, to be followed by the substantive hearing if permission was to be granted, and that this rolled up hearing should be listed with reasonable expedition. As Nicol J said, that left the question whether a PCO should be granted.

[**12**] In his judgment dated 3 March 2010 Nicol J explained (at [12]):

'The first interested party (Gladedale) indicated that it would not be seeking an order that the claimant pay its costs even if the judicial review application was dismissed. So far as its costs were concerned, the application for a protective costs order was therefore academic. For the defendant and the first interested party (Network Rail Infrastructure, hereafter "Network Rail") the issue was potentially a real one. They opposed the making of a PCO. In the alternative, they asked that, if one was to be made, an order should also be made limiting their costs liability in the event that the judicial review application should be successful.'

[**13**] Nicol J said (at [13]):

'For the principles to be applied in relation to a PCO, both parties referred me to *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600. Lord Phillips of Worth Matravers MR said this (at [74]):

"We would therefore restate the governing principles in these terms: (1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (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." '

[14] Nicol J (at [15]) set out the relevant provisions of art 10a of Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment) (OJ 1985 L175 p 40):

'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.'

[15] Having noted that the respondent and the second interested party had agreed that the appellant had no private interest in the outcome of the case, the judge said that the other *Corner House* conditions were all in issue. He considered the two questions of whether the issues raised were of general public importance and whether the public interest required them to be resolved together, and concluded at [27] that '[t]he challenge is not one where the issues in the case are of general public importance and which the general public interest requires to be resolved'.

[16] The judge then turned to the questions:

'1.28. 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, is it fair and just to make the order; and if the order is not made will the applicant probably discontinue the proceedings and be acting reasonably in so doing?'

[17] He answered those questions at [29] by saying:

'1.29. Even if I was wrong about the general public importance of the case, I am quite clear that the claimant has not satisfied me of these next matters.'

[18] The judge said that so far as the appellant's resources were concerned, the only evidence which he had was Ms Foster's witness statement. Having referred to the passages which I have mentioned, Nicol J continued:

'[31] In his witness statement the claimant said only this:

> "During this period from 1 September I then had to consider if my funding would permit me to proceed and whether I could raise a community fund to help depending on Elmbridge's response to the pre action letter. Once we had Elmbridge's response on the 7th, I decided I would act individually as the claimant and set up [a] fund which local residents could contribute to. Because I was concerned about an adverse cost award in the event the claim was unsuccessful, it has been explained to me that I am acting on a matter of great public interest, in a situation where the HRP hasn't acted although the advice of counsel is that the permission is potentially unlawful."

[32] In my judgment, the defendant and Network Rail were entitled to observe that the lack of information about the claimant's resources was striking. Ms Foster's statement is vague in the extreme. It entirely lacks the detail which would allow the defendant and Network Rail to test it, or for the court to determine its accuracy. Even these general comments about the claimant's means are presented in just her witness statement. They are not indorsed, let alone elaborated on, in the claimant's own witness statement beyond the even vaguer statement that he was "concerned about an adverse costs order". The point as to the paucity of evidence on this issue was taken clearly in the acknowledgments of service. Yet there has been no evidence subsequently to fill that gap. The claimant has provided a second witness statement which speaks to his standing to bring these proceedings, but that, too, is silent on the question of his resources.

[33] Mr Barnes, the director of conservation and learning at HRP, has provided a witness statement in which he says that the claimant has his organisation's full moral and some limited financial support. The amount is not specified in the evidence, but the claimant's reply to the acknowledgment of service says that it amounted to £5,000. In the course of submissions, I was told that the claimant had contributed £2,000 to the fund for costs, and other donations had amounted to about £1,630.

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

[35] Because I have insufficient evidence as to the claimant's financial position, it is also not possible for me to determine whether it would be reasonable for him to discontinue the proceedings if a PCO is refused. Of course, in a general sense, legal proceedings can be very expensive. But generalities of that kind are not much use. They have to be related to the financial position of the particular claimant.

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

[**19**] The appellant applied for permission to appeal on 24 March. I refused permission to appeal on consideration of the papers, observing inter alia that this was a kind of satellite litigation in respect of case management decisions that the Court of Appeal had deprecated in *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp*

[2008] EWCA Civ 1209, [2009] 1 Costs LR 80. The appellant then renewed his application for permission to appeal, and at an oral hearing before Munby LJ on 10 June he granted permission to appeal, saying inter alia:

> 'I am left with the uncomfortable feeling that the significance of art 10a and the centrality of the arguments based on art 10a has been more prominent in the submissions put before me today by Mr Drabble than had been the case before either Nicol J or Sullivan LJ …'

[**20**] Munby LJ said:

> 'If this was a case which had to be determined purely according to domestic *Corner House* principles, it seems to me that, for all the reasons given by Sullivan LJ, there is no conceivable basis upon which this court should be invited to intervene. But the fact is, as is common ground before me today, that this is a case in which there is a directly applicable European Directive and it was arguable that Nicol J was wrong in his approach in terms of law and principle to art 10a.'

THE PARTIES' SUBMISSIONS

[**21**] On behalf of the appellant, Mr Drabble QC submitted that European Parliament and Council Directive (EC) 2003/35 (providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment) (OJ 2003 L156 p 17), which amends Directive 85/337 (the EIA Directive, hereinafter referred to as the Directive) and Council Directive (EC) 96/61 (concerning integrated pollution prevention and control) (OJ 1996 L257 p 26) (the IPPC Directive), by inter alia of the insertion of art 10a, has incorporated the principles in the Aarhus Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus, 25 June 1998; ST 24 (2005); Cm 6586) into a Directive which has direct effect in domestic law. This places the United Kingdom under an obligation to ensure that the procedure for challenging the lawfulness of the planning permission in the present case is not 'prohibitively expensive'. It is not sufficient to rely on an exercise of judicial discretion after the event (see *European Commission v Ireland* Case C-427/07 [2009] ECR I-6277 at paras 92–94). 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. He submitted that there is no requirement in art 10a, nor indeed in Aarhus, that the issues raised in challenge to an environmental decision should be of 'general public importance' or that the public interest should require that those issues should be resolved. In applying Aarhus principles, art 10a is based upon the premise that public involvement in decision-making in the environmental field is in the public interest, and that it is in the public interest that members of the public concerned, having a sufficient interest, should be able to ensure, through an effective review procedure, that environmental decisions are lawfully taken. Alternatively, he submitted that the judge failed to apply the public importance and public interest conditions in the *Corner House* case with sufficient flexibility.

[**22**] In *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] 2 P & CR 30, Carnwath LJ, giving the judgment of the court, reviewed the relevant authorities relating to PCOs. He drew the threads together (at [47]):

> 'It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:

i) The requirement of the Convention that costs should not be "prohibitively expensive" should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.

ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases [*European Commission v Ireland* Case C-427/07 [2009] ECR I-6277], the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.

iv) This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The *Corner House* statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied "flexibly". Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of [the Coalition for Access to Justice for the Environment]) to provide guidelines on the operation of the Aarhus convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the Convention requires remedies to be "adequate and effective" and "fair, equitable, timely". The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives.'

[**23**] Turning to the second reason why Nicol J refused the application for a PCO, Mr Drabble submitted that an approach which placed the onus on the individual claimant to demonstrate, by the production of detailed evidence as to his means, that the proceedings would be prohibitively expensive for him was not art 10a compliant. 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.

[**24**] In any event, he submitted that the prospective costs of what was agreed by 2 March 2010 to be a one-and-a-half day rolled up hearing would be prohibitively expensive for an 'ordinary' member of the public, and there was nothing to contradict the appellant's evidence that he would not be able to afford them. Mr McAully had been denied a PCO by Nicol J because he was not prepared to make a public disclosure of his assets. However, on the basis of such disclosure as Mr McAully had made, it should have been concluded that, while relatively fortunate, he is still a person of relatively modest means. As Mr McAully put it in his witness statement:

> 'We live off primarily my company pension although I also have a state pension. I also hold investment portfolio which reflects the savings of my life's work. I consider myself to be a normal citizen who worked hard for over 40 years and I am now able to enjoy a comfortable retirement with moderate good health. I could not put our home or investments at risk to join this case since I have no significant assets or income other than as stated above.'

[**25**] A little later on in his witness statement he put it perhaps a little more graphically when he said:

> '… I am not remotely in the league of rumoured wealth referred to at the hearing before Nicol J for example pertaining to the owner of a well known department store or certain footballers.'

[**26**] Mr Drabble submitted that 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.

[**27**] The respondent and the two interested parties all appeared at the hearing before Nicol J. At the hearing before Munby LJ the respondent and the second interested party were represented. At the hearing before us only the respondent was represented. On its behalf, Mr Findlay QC submitted that the judge was right to refuse to grant a PCO and right to refuse to join the additional claimants. He submitted that in order to take advantage of art 10a the appellant had to be both a member of the public concerned (which he was not) and have a sufficient interest (which was a matter to be decided at the rolled up hearing which, it is hoped, will be heard in October). The appellant's company was in no better position than the appellant, although Mr Findlay had accepted that as a local resident Mr McAully would have a sufficient interest in the matter. He submitted that the *Corner House* principles remained binding upon this court; flexibly applied they were not necessarily inconsistent with art 10a. The public importance and public interest tests were not inconsistent with the broader framework of the Directive. As for the requirement that the procedure should not be prohibitively expensive, there was no warrant in the Directive for a wholly objective approach, regardless of the means of the individual claimant. The court was entitled in an art 10a case to have regard to an individual claimant's circumstances, and the evidence before Nicol J was not such as to enable him to reach a conclusion that the proceedings would be prohibitively expensive for either the appellant or for Mr McAully.

[**28**] Applying *Corner House* principles—in so far as it was necessary to do so to comply with art 10a—the court still had to consider (a) should there be a PCO?, and (b) if the answer to that question is Yes, in what sum should the PCO be made? The second question, he submitted, could not be answered

a without knowledge of the individual claimant's means. If we were to reject those submissions and a PCO was to be granted, he submitted that the court should also cap the costs that could be recovered from the respondent should the appellant be successful. In open correspondence the respondent had made an offer to agree to a PCO on the basis that it would limit its costs claim to £5,500 in exchange for a reciprocal cap on its liability in the sum of £35,000.

b [**29**] This was rejected by those acting on behalf of the appellant. Mr Drabble submitted that in an art 10a case there was no reason to impose additional limitations on the remuneration of a claimant's lawyers, which would have the practical effect of either penalising a successful claimant in costs or requiring his legal advisers to subsidise the litigation. The ordinary costs provisions were

c sufficient to ensure that only reasonable and proportionate costs could be recovered.

[**30**] The *Corner House* case was not concerned with environmental litigation of this kind, and the reciprocal costs capping provisions referred to in that case were dealing with a different position which is now addressed by CPR Pt 44.

[**31**] For the record I should mention that the second interested party made it

d clear, in a letter dated 11 June, that if a PCO was ordered it would not claim its costs on the basis that the appellant if successful would not seek its costs against the second interested party. I should also mention that we gave WWF-UK Ltd and Friends of the Earth (two non-governmental organisations concerned with environmental matters) permission to intervene by way of written submissions. We were assisted by those submissions and by brief oral

e submissions from Mr Hyam on the matters of general interest raised by this appeal.

DISCUSSION AND CONCLUSIONS

[**32**] It is unnecessary to rehearse the authorities which deal with the application of *Corner House* principles. The threads are drawn together in

f *Morgan*'s case (see [22], above). Although the principles must be applied flexibly, they are settled so far as this court is concerned. However, this court has not had to consider whether those principles do comply with the requirements of art 10a in a case where the Directive applies. It is common ground that the Directive has a direct effect in our domestic law. In such a case, the Court of Appeal recognised in *Morgan*'s case (see [2009] 2 P & CR 30 at [47](ii)) that

g some more specific modification of our domestic costs rules may be required.

[**33**] There is no dispute that the decision to grant planning permission in the present case is a decision to which the Directive applies. The council required that an EIA should accompany the planning application. It seems to me, therefore, that we must modify the *Corner House* conditions in so far as it is

h necessary to secure compliance with the Directive, but only in so far as it is necessary to secure such compliance.

[**34**] Approaching the matter in that way, I do not accept Mr Findlay's submission that the appellant is not 'a member of the public concerned' for the purposes of art 10a. Article 3 of Directive 2003/35 adds to the definitions in the Directive a definition of 'the public' and 'the public concerned'. The definitions

j are as follows:

> '… the "public" means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;
>
> "the public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures

> referred to in Article 2(2); 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 …'

[**35**] Even if the appellant is not 'affected or likely to be affected by the decision to grant planning permission' he does, in my judgment, have an interest in the decision-making process in respect of applications for planning permission which affect the setting of Hampton Court Palace. In reaching that conclusion I bear in mind that art 10a leaves member states to decide what constitutes a sufficient interest, provided they do so 'consistently with the objective for giving the public concerned wide access to justice'. If the underlying objective is to give the public wide access to justice then it seems to me that the appellant at least does have an interest. I have summarised his involvement over many years with applications which affect the setting of Hampton Court Palace; these include his objection to the boathouse scheme on the ground that a redevelopment of such a scale on the site would adversely affect the setting of the palace. The appellant has explained why, having made that objection, he did not think that it was necessary for him to object to the 'classical scheme' because it was in his view objectionable in principle on exactly the same grounds. As the appellant said in para 13 of his second witness statement:

> 'Thus, over the course of 13 years, leading up to the council's decision on the [classical scheme] in December 2008, I had detailed meetings and discussions with Elmbridge Borough Council, English Heritage, the Thames Landscape Strategy, Railtrack, local residents and a succession of developers and their professional advisers and have made numerous written submissions both on behalf of the HRP and, more recently, in my own name.'

[**36**] The question whether the appellant has a 'sufficient interest' for the purposes of s 31(3) of the Senior Courts Act 1981 is one of the matters to be considered at the rolled up hearing. I realise that Mr Bartlett refused permission to apply for judicial review on the basis that 'not having sought to influence the decision' the appellant did not have sufficient standing, but it is important to bear in mind that when he did so he did not have the benefit of the fuller explanation of the appellant's involvement in earlier schemes affecting the setting of Hampton Court Palace. That is contained in the appellant's second witness statement.

[**37**] On the basis of that further information it is, in my judgment, at the very least arguable that the appellant does have a sufficient interest for the purposes of s 31(3). That is the only test we have in the United Kingdom for deciding whether a member of the public should be able to access the review procedure to challenge the lawfulness of environmental decisions.

[**38**] It is unnecessary to consider whether there is a different test for a sufficiency of interest for the purposes of art 10a, and whether such a test, if it was to be more stringent, would offend the principle of equivalence, because if the question of whether the member of the public concerned does have a sufficient interest is to be resolved in the review procedure itself, as it is in the present case, then the procedure for resolving that issue must be art 10a compliant and must not be prohibitively expensive. I would add that, to the extent there is any doubt as to whether the appellant has a sufficient interest,

there are powerful reasons for permitting Keith Garner Ltd and Mr McAully to be joined as claimants, since the former, we are told, wrote a letter objecting to the application for planning permission which is under challenge in these proceedings and the latter is a local resident.

[**39**] Turning then to the two grounds on which Nicol J refused a PCO, I accept the appellant's submission that in an art 10a case there is no justification for the application of the issues of 'general public importance' / 'public interest requiring resolution of those issues' in the *Corner House* conditions. Both Aarhus and the Directive are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases (those cases that are covered by the EIA and IPPC Directives); and an important component of that public participation is that the public should be able to ensure, through an effective review procedure that is not prohibitively expensive, that such important environmental decisions are lawfully taken. In summary, under EU law it is a matter of general public importance that those environmental decisions subject to the Directive are taken in a lawful manner, and, if there is an issue as to that, the general public interest does require that that issue be resolved in an effective review process. The *Corner House* principles are judge-made law and in accordance with the *Marleasing* principle (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990] ECR I-4135) those judge-made rules for PCOs must be interpreted and applied in such a way as to secure conformity with the Directive.

[**40**] It follows that the judge was not entitled to reject the appellant's application for a PCO on the basis that the issues raised were not of general public importance which the public interest required to be resolved.

[**41**] I turn to the second reason why the judge refused to grant a PCO; that it was impossible to tell whether the proceedings would be 'prohibitively expensive' unless there was detailed information about the appellant's resources to fund the proceedings.

[**42**] This raises an important issue of principle. 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?

[**43**] In an ideal world, I would have preferred to defer taking a decision on such an important issue of principle until after the findings of the Aarhus Convention Compliance Committee as to whether our domestic costs rules are Aarhus compliant, are published (it is anticipated that the committee's draft findings will be published within the next two months or so) and until after we know whether the European Commission will accept or reject the United Kingdom's response to the Commission's reasoned opinion, announced in a press release dated 18 March 2010, in which the Commission is contending that the United Kingdom is failing to comply with the Directive because challenges to the legality of environmental decisions are prohibitively expensive.

[**44**] I am also mindful of the fact that we were told that an appeal to the Supreme Court is pending against the decision of Mrs Registrar di Mambro and Master O'Hare on preliminary issues which arose in the detailed assessment of the bills of costs lodged by the respondents in the case of *R (on the application of Edwards) v Environment Agency* [2006] EWCA Civ 877, [2006] All ER (D) 309 (Jun). They decided to disallow any costs that would be

prohibitively expensive and, in deciding whether the costs were prohibitively expensive, they adopted an objective test, but said that they should also have regard to other matters including the parties' financial resources (see paras [18] and [19] of the decision on the preliminary issues). Thus it seems likely that before too long this issue of principle will have been considered at the highest level by the Aarhus Convention Compliance Committee, the European Commission and the Supreme Court.

[**45**] Sadly, it is not an ideal world; it is now over a year since the planning permission was granted, and we are still no nearer to deciding whether it was lawfully granted. The parties anticipate that the rolled up hearing will be listed in October. This term ends tomorrow, so we must reach a decision today as to whether or not the judge was wrong to refuse to grant a PCO.

[**46**] Whether or not the proper approach to the 'not prohibitively expensive requirement under art 10a' should be a wholly objective one, I am satisfied that a purely *subjective* approach, as was applied by Nicol J, is not consistent with the objectives underlying the Directive. Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the Directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of 'the public concerned'.

[**47**] In the present case there was evidence that without a PCO the liability and costs of an unsuccessful appellant was likely to be prohibitively expensive to anyone of 'ordinary' means. Although, in the event, Mr Bartlett did not award costs at the refusal of permission to apply for judicial review stage, the costs claimed by the respondent and the second interested party at that preliminary stage, when the matter was simply being considered on the papers and before there had been any hearing, had reached nearly £15,000.

[**48**] Following the hearing before Nicol J the respondent applied for, and was awarded, £3,000 costs. It must be remembered that that was a hearing simply to determine whether there should be a PCO. At that hearing the two interested parties did not ask for their costs, but they did not give any undertaking that they would not be claiming their costs at the rolled up hearing which would be considering the substantive issue over one-and-a-half days.

[**49**] There was no evidence before the judge to suggest that the appellant's solicitor's estimate of a likely costs liability of £60,000 plus VAT if the case was not straightforward was an overestimate. If anything, the sum that was claimed by the respondent and the second interested party for their acknowledgments of service alone suggested that this figure was an underestimate. This was not a straightforward case, as evidenced by the refusal of permission to apply for judicial review, the participation of two interested parties in addition to the appellant and the respondent, the agreement that there should be a rolled up hearing and the fact that that hearing was listed not for one day but for one-and-a-half days. Even though an unsuccessful claimant would not as a general rule be ordered to pay two sets of costs, the possibility that the appellant might have to pay all or part of the costs of one or both of the two interested parties, as well as the costs of the respondent, could not be ruled out. Clearly, the second interested party considered that there was a real prospect that it might be awarded its costs. That, after all, was the reason why

it objected to the grant of a PCO. The fact that such an award might not be made as an exercise of judicial discretion was insufficiently certain for the purposes of art 10a (see *Commission v Ireland*).

[**50**] Against that background, 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). There is a further aspect to the purely subjective approach which may well have the effect of deterring members of the public from challenging the lawfulness of environmental decisions contrary to the underlying purposes of the Directive.

[**51**] Mr McAully 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 etc, 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.

[**53**] For these reasons, the judge's approach to the prohibitively expensive issue in this case, while it was wholly consistent with *Corner House* principles, was not consistent with art 10a. On the evidence before him, including evidence as to the costs that had already been incurred and the claimant's solicitor's estimates of potential costs, a PCO was necessary if these proceedings were not to be prohibitively expensive. What figure, if any, would be appropriate, and should there be some form of reciprocal limit on the respondent's liability for the appellant's costs? So far as these questions are concerned, it seems to me that the respondent's proposals, made in open correspondence, are eminently reasonable, and I am not persuaded by the appellant's submissions that their liability under the PCO should effectively be put at nil and that there should be no limit on the amount that the appellant can recover from the respondent. In my judgment, the appellant cannot have it both ways. If the test is not a wholly subjective one and does incorporate an element of objectivity, then the requirement in art 10a is that the review procedure shall not be prohibitively expensive, not that it shall not be prohibitively expensive for only one of the parties engaging in the review process.

[**54**] While I would accept Mr Drabble's submission that the *Corner House* case and the reciprocal cost cap provisions referred to therein were dealing with a different problem, I would also accept Mr Findlay's submission that the imposition of some form of reciprocal limit upon a respondent's liability for costs is not necessarily inconsistent with art 10a. Thus, unlike the general

public interest condition, which we are effectively obliged to disapply, this is a feature of the *Corner House* case which has to be considered on a case-by-case basis.

[**55**] I would accept that there may well be long-term problems if the courts were to consistently impose reciprocal caps that are 'modest' upon successful appellants' ability to recover costs from respondents because such a course might well have the effect either that the claimant's lawyers would subsidise the process or that successful claimants would be exposed to prohibitively expensive costs claims from their own lawyers. It seems to me that these are systemic problems which we simply cannot resolve in this appeal, nor should we seek to do so given that the wider issues concerning compliance with art 10a are to be considered elsewhere, as I have indicated.

[**56**] The only question, in my judgment, for this court is whether, on the facts available to us, the imposition of a reciprocal cap in the present case would be inconsistent with art 10a. I would answer that question No. It then falls for consideration as to whether the imposition of a cap would be fair and reasonable in all the circumstances. I would not for a moment suggest that the limit on the liability of each party must necessarily be the same. The limits should properly reflect the disparity of resources, but it does seem to me that the upper limit of £35,000, suggested for the respondent's liability if the appellant is successful, is fair and proportionate and, rather more importantly, it is consistent with a review process that must not be prohibitively expensive.

[**57**] Drawing the threads together, since the respondent is still taking the point against the appellant that he does not have a sufficient interest, I would allow the applications by Keith Garner Ltd and Mr McAully to be joined. I should mention that at the commencement of this hearing we granted them permission to appeal against the order that had been made by Nicol J.

[**58**] I would also grant a PCO for the three appellants. When considering what figure would be appropriate, it seems to me that there really is nothing whatsoever to suggest that a figure for the three appellants of £5,000 would be in any way a deterrent to them continuing with these proceedings. I will therefore make an order in that sum. I would not increase it by reason of the addition of the two appellants; thus a PCO overall of £5,000; and I would impose, by way of a reciprocal limitation on the respondent's liability, an order that they should not have to pay more than £35,000.

LLOYD LJ.

[**59**] I agree.

RICHARDS LJ.

[**60**] I also agree.

Appeal allowed.

Marie-Thérèse Groarke Barrister.