Neutral Citation Number: [2017] EWHC 2309 (Admin)

Case No: CO/1011/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/09/2017

Before :

MR JUSTICE DOVE

- -

Between :

(1) THE ROYAL SOCIETY FOR THE PROTECTION OF BIRDS **(2) FRIENDS OF THE EARTH LIMITED** **(3) CLIENT EARTH**	**Claimants**
- and -	
(1) SECRETARY OF STATE FOR JUSTICE **(2) THE LORD CHANCELLOR**	**Defendants**
- and -	
CIVIL PROCEDURE RULES COMMITTEE	**Interested Party**

- -

- -

David Wolfe QC & Andrew Parkinson (instructed by **Leigh Day**) for the **Claimants**
James Maurici QC (instructed by **The Government Legal Department**) for the **Defendants**

Hearing dates: 18th & 19th July 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. This is an application for judicial review of the amendments made to Part 45 Section VII of the Civil Procedure Rules ("CPR") by Rule 8(5) of the Civil Procedure Amendment Rules 2017/95 ("The 2017 Amendments"). The 2017 Amendments affected changes to the bespoke costs arrangements which arise in cases which, broadly speaking, involve legal disputes in relation to environmental law and engage aspects of the Aarhus Convention (which is further explained below). This bespoke costs regime is referred to hereafter as the "ACR", denoting Aarhus Costs Rules. The amendments were laid before Parliament on 2nd February 2017 and came into force on 28th February 2017.

2. The claimants are all organisations which have a particular interest in the protection of the environment. They each have a different focus in terms of their environmental concerns. They are supported in bringing this claim by a broad range of other organisations who are also concerned in the protection of the environment. Whilst the 2017 Amendments made a number of changes to the ACR, the claimant's challenge is focused upon three aspects of the ACR which are set out below.

3. The structure of this judgment is to, firstly, set out the history of the ACR together with the legal principles and requirements which are to be derived from the authorities, secondly, to set out the 2017 Amendments and, thirdly, to address individually each of the Grounds raised by the claimants and the conclusions which have been reached in relation to them. Finally, the approach proposed in relation to relief is set out.

The history and principles of the ACR

4. On 25th June 1998 the UK, European Union (the "EU") and other national and international parties entered into the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("The Aarhus Convention"). Article 1 of the Aarhus Convention set out its objectives in the following terms:

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

5. Article 6 of the Convention provides as follows:

> "PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

> Each Party:
>
> Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
>
> Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; …"

6. The effect of Article 6 is to mandate the application of the public participation principles to decisions in relation to the environment that are of sufficient significance such that they attract the requirements of Environmental Impact Assessment under the EU Directive 2011/92/EU which deals with Environmental Impact Assessment development (the "EIA Directive") and decisions in which the Industrial Emissions Directive 2010/75/EU are engaged.

7. In relation to access to justice Article 9 sets out the requirements of the Convention. Article 9(1) deals with requests for environmental information and the need for there to be opportunities for review of such requests. Of greater centrality to the arguments raised in the present case are Articles 9(2)-9(4) which provide as follows:

> "Article 9 ACCESS TO JUSTICE…
>
> 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
>
> (a) Having a sufficient interest
>
> or, alternatively,
>
> (b) Maintaining an impairment of a right, where the administrative procedural law of a Party requires this as a precondition,
>
> have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, or other relevant provisions of this Convention.
>
> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the

requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

8. The Aarhus Convention is an unincorporated International Convention which has no direct effect in domestic law. Legal effect is however conferred upon the treaty to the extent that it has found expression in EU environmental legislation. Provisions in relation to access to justice are contained both within the EIA Directive and the Industrial Emissions Directive in similar terms. It suffices for present purposes to quote Article 11 of the EIA Directive:

"*Article 11*

1. 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…

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

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

9. Prior to April 2013 there was no ACR. The only jurisdiction which existed to enable the court to provide costs protection in an environmental law case was the wider jurisdiction described in the case of R (Corner House) v Secretary of State for Trade and Industry [2005] 1 WLR 2600. The Corner House case set out a sequence of now well-known principles to be applied in public law cases said to raise issues of general public importance so as to allow claimants with limited means to access the court to obtain relief without them being deterred by the possibility of facing substantial adverse costs consequences if the case proved to be unsuccessful. The principles were summarised in the court's judgment at paragraphs 74 and 75 in the following terms:

"74 We would therefore restate the governing principles in these terms.

(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.
>
> 75 A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimant's lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (*R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1296); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (*R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin)); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*R v Lord Chancellor, Ex p Child Poverty Action Group* [1999] 1 WLR 347); and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii)."

10. For completeness it should be noted that these common law principles have now been overtaken by the provisions of sections 88 and 89 of the Criminal Justice and Courts Act 2015. Those provisions do not apply to Aarhus cases as a consequence of the Secretary of State having exercised the power under section 90 to exclude these cases from the operation of sections 88 and 89 (see the Criminal Justice and Courts Act (Disapplication of Sections 88 and 89) Regulations 2017).

11. In R (Garner) v Elmbridge Borough Council [2010] EWCA Civ 1006 the Court of Appeal faced an argument that the Corner House principles needed to be modified in cases which involved EIA and in which the predecessor of the present EU legislation which has been set out above in respect of EIA was engaged. Sullivan LJ, delivering a judgment with which the other members of the court agreed, concluded that in cases where the EIA Directive was engaged there was no justification for the application of the requirement for there to be issues of "general public importance" or "public interest requiring resolution of those issues" from the Corner House principles (see paragraph 39). He went on to address how the question of whether proceedings would be "prohibitively expensive" should be addressed. He concluded at paragraph 46 of the judgment that a purely subjective approach to the evaluation of whether or not proceedings would be "prohibitively expensive", which focused solely on the means of the claimant, was not consistent with the objectives underlying the EIA Directive. Having noted at paragraph 49 that the claimant's solicitor had estimated a likely costs

liability of £60,000 plus VAT in the event that the claim failed he went on to observe as follows:

> "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 et cetera, to the opposing parties or to the court, in documents which are publicly available and which will be discussed, unless the judge orders otherwise, in an open forum. The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision.
>
> 52. The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions."

Having assessed the position Sullivan LJ concluded that an appropriate PCO in that case was one which limited the liability of the claimants to £5,000 and limited the liability of the defendant to £35,000.

12. At paragraph 43 of his judgment Sullivan LJ noted that the European Commission had sent the UK Government a reasoned opinion in which it contended that the UK was failing to comply with the Directive as a result of legal challenges in environmental cases being prohibitively expensive. He also noted at paragraph 44 that there was at that time an appeal to the Supreme Court arising out of the costs bill lodged by successful defendants in the case of Edwards v The Environment Agency and Others [2006] EWCA Civ 877. In fact, the Supreme Court referred the case of

Edwards to the Court of Justice of the European Union ("the CJEU") for examination of the correct approach to be applied in deciding whether or not costs in environmental cases were prohibitively expensive. In R (Edwards and Another) v Environment Agency and Others (No2) Case-260/11 the opinion of Advocate General Kokott commenced by examining the question of the discretion of the national court in determining whether litigation would be "prohibitively expensive". In relation to this issue she reasoned as follows:

> "19 As Ireland points out, under the third paragraph of article 288 FEU of the FEU Treaty a Directive is binding, as to the result to be achieved, upon each member state to which it is addressed, but is to leave to the national authorities the choice of form and methods. This fundamental freedom of choice enjoyed by the member states is not called into question because the Directives also implement an essentially identical provision of an international convention entered into by the European Union.
>
> 20 In the present case, the discretion thus granted is particularly broad because the above-mentioned provisions do not contain any further rules on how prohibitive costs are specifically to be prevented.
>
> 21 The great diversity of cost regimes in the member states underlines the need for that discretion. Neither article 9.4 of the Convention nor the provisions of the directives are intended to effect a comprehensive harmonisation of those cost regimes. They require only the necessary selective adaptations.
>
> 22 It can therefore be stated by way of an interim conclusion that it is in principle for the member states to determine how the result provided for in article 9.4 of the Aarhus Convention, article 10a of the EIA Directive and article 15a of the IPPC Directive, namely that the judicial proceedings covered are not prohibitively expensive, is achieved.
>
> 23 Nevertheless, the discretion enjoyed by the member states is not unlimited. The court has already pointed out in connection with the Convention that in the absence of the European Union ("EU") rules governing the matter, it is for the domestic legal system of each member state to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The member states are, however, responsible for ensuring that those rights are effectively protected in each case: see *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09) [2012] QB 606; [2011] ECR 1-1255,

> para 47; see also *Impact v Ministry of Agriculture and Food* (Case C-268/06) [2008] ECR 1-2483; [2009] All ER (EC) 306, para 44 et seq.
>
> 24 Consequently, the member states' rules must actually prevent in each individual case the judicial proceedings covered from being prohibitively expensive."

13. She went on to consider the approach which should be taken to whether or not proceedings were prohibitively expensive and provided the following opinion:

> "28 However, reducing costs protection to the principle of proportionality would fall short. In the three binding language versions of the Convention the concept of "excessive" is not used. According to the French version, costs of procedures may not be prohibitive and according to the English version the procedures are not to be prohibitively expensive. The Russian version does not use the concept of "prohibitive", but also seeks to ensure that procedures are not inaccessible on account of high costs.
>
> 29 Consequently, it is not only a question of preventing costs which are excessive, that is to say disproportionate to the proceedings, but above all the proceedings may not be so expensive that the costs threaten to prevent them from being conducted. Reasonable but prohibitive costs are a possibility in particular in environmental proceedings relating to large-scale projects, since these may be very burdensome in every respect, for example with regard to the legal, scientific and technical questions raised and the number of parties.
>
> 30 It is therefore now possible to give a helpful answer to the first and third questions: under article 9.4 of the Aarhus Convention, article 10a of the EIA Directive and article 15a of the IPPC Directive, it is in principle for the member states to determine how to avoid the judicial proceedings covered by not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law."

14. In assessing the relevant criteria to determine whether the costs of litigation would be "prohibitively expensive", and in particular whether it should be determined on an objective or a subjective basis or using a combination of both, she offered the following views:

"40 Legal protection in environmental matters, on the other hand, generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims under article 191(2) FEU of the FEU Treaty and article 37 of the Charter: see also recital (9) in the Preamble to the Treaty on European Union and article 11 FEU.

41 The Convention has this two-fold interest in view. Under article 1, each party must guarantee the right of access to justice in environmental matters in order to contribute to the protection of the right of *every person* of present and future generations to live in an environment adequate to his health and well-being. The seventh and eighth recitals in the Preamble to the Convention confirm that aim and supplement it with the *duty* of every person to protect and improve the environment for the benefit of every person to protect and improve the environment for the benefit of present and future generations. Consequently, according to its eighteenth recital, the Convention seeks to make effective judicial mechanisms accessible to the public, including organisations, so that its legitimate interests are protected and *the law is enforced*.

42 Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations.

43 The two-fold interest in environmental protection precludes risks in terms of prohibitive costs from being prevented only having regard to the capacity to pay of those who seek to enforce environmental law. They cannot be expected to bear the full risk in terms of costs of judicial proceedings up to the limit of their own capacity to pay if the proceedings are also, or even exclusively, in the public interest

44 Consequently, in assessing whether costs of proceedings are prohibitive, due account must be taken of the respective public interest. Furthermore, the Compliance Committee rightly also infers this from the fair procedures likewise required by article 9.4.

45 Taking the public interest into account does not, however, rule out the inclusion of any individual interests of claimants. A person who combines extensive individual economic interests with proceedings to enforce environmental law can, as a rule, be expected to bear higher risks in terms of costs than a person who cannot anticipate any economic benefit. The threshold for accepting the existence of prohibitive costs may thus be higher where there are individual economic interests. This possibly explains why, in a dispute over odour nuisance between persons who were neighbours, hence a case with a relatively low public interest, the Compliance Committee did not consider a claim of more than £5,000 in respect of part of the costs to be prohibitive.

46 Conversely, the presence of individual interests cannot prevent all account being taken of public interests that are also being pursued. For example, the individual interests of a few people affected by an airport project cannot, upon assessment of the permissible costs, justify disregard for the considerable public interest in the case which in any event stems from the fact that the group of those affected is very much wider.

47 The prospects of success may also be relevant with regard to the extent of the public interest. A clearly hopeless action is not in the interest of the public, even if it has an interest in the subject matter of the action in principle.

48 As regards the level of permissible costs, it is lastly significant that provisions of the Convention on judicial proceedings are to be interpreted with the aim of ensuring "wide access to justice": see the *Djurgården-Lilla* case, para 45, on the recognition of non-governmental organisations. "[Wide] access to justice" is admittedly only expressly mentioned in article 9(2) of the Convention and the corresponding provisions of the Directives in connection with the preconditions for an action relating to a sufficient interest and the impairment of a right. However, article 9(2) at least makes clear that this is a general objective of the Convention. This principle of interpretation must therefore also apply in determining permissible costs. It would not be compatible with wide access to justice if the considerable risks in terms of cost are, as a rule, liable to prevent proceedings.

49 The answer to the second question is therefore that in examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the

> claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue."

15. The judgment of the CJEU commenced by examining the notion of "not prohibitively expensive" as follows:

> "25 As the court has already held, it should be recalled, first of all, that the requirement, under the fifth paragraph of article 10a of Directive 85/337 and the fifth paragraph of article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive does not prevent the national courts from making an order for costs: see Commission of the European Communities v Ireland (Case C-427/07) [2009] ECR I-6277, para 92.
>
> 26 That follows expressly from the Aarhus Convention, with which European Union law must be "properly aligned", as is evident from recital (5) in the Preamble to Directive 2003/35, which amended Directives 85/337 and 96/61, since article 3(8) of that Convention states that the powers of national courts to award reasonable costs in judicial proceedings are not to be affected.
>
> 27 Next, it must be pointed out that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings: see Commission of the European Communities v Ireland (Case C-427/07), para 92.
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> 28 The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned
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> …
>
> 31 As is expressly stated in the third paragraph of article 10a of Directive 85/337 and the third paragraph of article 15a of Directive 96/61, the objective of the European Union legislature is to give the public concerned "wide access to justice".
>
> 32 That objective pertains, more broadly, to the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role.
>
> 33 Moreover, the requirement that the cost should be "not prohibitively expensive" pertains, in environmental

> matters, to the observance of the right to an effective remedy enshrined in article 47 of the Charter of Fundamental Rights of the European Union (OJ 2010 C83, p389), and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law: see, inter alia, Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky (Case C-240/09) [2012] QB 606; [2011] ECR I-125 , *para 48*
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> ...
>
> 35 It follows from the foregoing that the requirement, under the fifth paragraph of article 10a of Directive 85/337 and the fifth paragraph of article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required—as courts in the United Kingdom may be—to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment."

16. The court went on to consider the relevant criteria for assessing whether or not costs were "not prohibitively expensive" and offered the following conclusions:

> "38 It follows that, as regards the methods likely to secure the objective of ensuring effective judicial protection without excessive cost in the field of environmental law, account must be taken of all the relevant provisions of national law and, in particular, of any national legal aid scheme as well as of any costs protection regime, such as that referred to in para 16 of the present judgment. Significant differences between national laws in that area do have to be taken into account.
>
> 39 Furthermore, as previously stated, the national court called upon to give a ruling on costs must satisfy itself

> that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.
>
> 40 That assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since, as has been stated in para 32 of the present judgment, members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.
>
> 41 As regards the analysis of the financial situation of the person concerned, the assessment which must be carried out by the national court cannot be based exclusively on the estimated financial resources of an "average" applicant, since such information may have little connection with the situation of the person concerned
>
> …
>
> 46 It must therefore be held that, where the national court is required to determine, in the context referred to in para 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.
>
> 47 By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him."

17. At around the time of the decision of the CJEU in Edwards changes were made to the CPR so as to introduce for the first time a system of ACR. This 2013 system of ACR provided, in brief and broad terms, automatic costs protection in some Aarhus cases.

The costs protection was provided by fixed costs caps (limiting the liability of the unsuccessful claimant to £5,000 or £10,000 and that of the unsuccessful defendant to £35,000). It was open to the defendant to dispute that the claim was in fact an Aarhus claim, but once it had been accepted that it was there was no scope for variation of the amounts of the costs caps. The ACR only applied to judicial reviews and not other forms of environmental litigation such as statutory reviews (see below at paragraph 20).

18. In addition at around this time the European Commission had referred the position in relation to costs which pertained at the time of its reasoned opinion of March 2010 to the CJEU for a declaration that the UK had failed to fulfil its obligations under the EU legislation set out above pertaining to proceedings not being "prohibitively expensive". The judgment of the CJEU in Commission v UK [2014] QB 988 provides as follows:

> "33 According to settled case-law, the transposition of a directive does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, to this effect, inter alia, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and *Commission* v *Ireland*, paragraph 54).
>
> 34 In particular, where the relevant provision is designed to create rights for individuals, the legal situation must be sufficiently precise and clear, and the persons concerned must be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (see, to this effect, inter alia, Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 76).
>
> 35 The Court has thus ruled that a judicial practice under which the courts simply have the power to decline to order an unsuccessful party to pay the costs and can order expenditure incurred by the unsuccessful party to be borne by the other party is, by definition, uncertain and cannot meet the requirements of clarity and precision necessary in order to be regarded as valid implementation of the obligations arising from Articles 3(7) and 4(4) of Directive 2003/35 (see, to this effect, *Commission* v *Ireland*, paragraph 94)
>
> …
>
> 54 Having regard to the foregoing, it should be stated first of all that the discretion available to the court when applying the national costs regime in a specific case cannot in itself be considered incompatible with the requirement that

proceedings not be prohibitively expensive. Furthermore, the possibility for the court hearing a case of granting a protective costs order ensures greater predictability as to the cost of the proceedings and contributes to compliance with that requirement.

55 However, it is not apparent from the various factors put forward by the United Kingdom and discussed, in particular, at the hearing that national courts are obliged by a rule of law to ensure that the proceedings are not prohibitively expensive for the claimant, which alone would permit the conclusion that Directive 2003/35 has been transposed correctly.

56 In that regard, the mere fact that, in order to determine whether national law meets the objectives of Directive 2003/35, the Court is obliged to analyse and assess the effect – which is moreover subject to debate – of various decisions of the national courts, and therefore of a body of case-law, whereas European Union law confers on individuals specific rights which would need unequivocal rules in order to be effective, leads to the view that the transposition relied upon by the United Kingdom is in any event not sufficiently clear and precise.

57 Thus, the very conditions under which the national courts rule on applications for costs protection do not ensure that national law complies with the requirement laid down by Directive 2003/35 in several respects. First, the condition, laid down by the national case-law, that the issues to be resolved must be of public interest is not appropriate and, even should it be accepted, as the United Kingdom pleads, that this condition was removed by the judgment of the Court of Appeal in *R (on the application of Garner)* v *Elmbridge Borough Council and Others*, that judgment, which was delivered after the period laid down in the reasoned opinion expired, could not be taken into account by the Court in the present case. Second, in any event, the courts do not appear to be obliged to grant protection where the cost of the proceedings is objectively unreasonable. Nor, finally, does protection appear to be granted where only the particular interest of the claimant is involved. These various factors lead to the conclusion that in practice the rules of case-law applied do not satisfy the requirement that proceedings not be prohibitively expensive within its meaning as defined in the *Edwards* case.

58 It is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs

> of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees."

19. It is important to emphasise that these observations and conclusions were reached in relation to the application of the Corner House principles, as adjusted by Garner, and did not pertain to the ACR regime that had by then been introduced into the CPR. Three features of the EU jurisprudence are however of considerable importance to the arguments which are raised in this case. The first point is that the requirement that costs in cases covered by the EU Directives addressing the requirements of the Aarhus Convention must not be "prohibitively expensive" arises from the public interest in the protection of the environment and the need for the public to play an active role in that protection. The requirement is therefore in place to ensure that meritorious environmental claims are not deterred by prohibitive expense in terms of legal costs and that there is wide access to justice in environmental cases. Secondly, as observed at paragraph 40 of Edwards, "the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable." Thirdly, as paragraph 58 of the Commission v UK case observed, to reflect the requirements of the Directive it is necessary for there to be "reasonable predictability" in relation to both whether costs are payable and also their amount. The CJEU observed that this was "particularly necessary" as a consequence of high lawyers' fees in judicial proceedings in the UK.

20. As set out above the original ACR introduced in April 2013 applied to applications for judicial review. The case of Venn v Secretary of State for Communities and Local Government and Others [2014] EWCA Civ 1539 concerned a statutory challenge to a planning inspector's decision on an appeal. Claims of that kind are not brought by judicial review because there is a bespoke statutory remedy under section 288 of the Town and Country Planning Act 1990. The question arose as to whether or not a protective costs order should be made. The court held that the exclusion of statutory appeals of the kind in question from the operation of the ACR, as then configured, was not an oversight but a deliberate expression of legislative intent and that it would be inappropriate to exercise a judicial discretion to side step that deliberate exclusion. In the course of his judgment (with which other members of the court agreed) Sullivan LJ concluded as follows:

> "34 For these reasons I would allow the appeal. I do so with reluctance. In the light of my conclusion on article 9(3), and the decisions of the Aarhus Compliance Committee and the CJEU in Commission v UK [2014] QB 988 referred to in para 24 above, it is now clear that the costs protection regime introduced by CPR r 45.41 is not Aarhus-compliant in so far as it is confined to applications for judicial review, and excludes statutory appeals and applications. A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the legal principles on which it

> may be challenged, but on the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance.
>
> 35 This court is not able to remedy that flaw by the exercise of a judicial discretion. If the flaw is to be remedied action by the legislature is necessary. We were told that the Government is reviewing the current costs regime in environmental cases, and that as part of that review the Government will consider whether the current costs regime for Aarhus claims should make provision for statutory review proceedings dealing with environmental matters: see the speech of Lord Faulks in the House of Lords Committee stage of the Criminal Justice and Courts Bill: Hansard (HL Debates), 30 July 2014, col 1655. That review will be able to take our conclusions in this appeal, including our conclusion as to the scope of article 9(3), into account in the formulation of a costs regime that is Aarhus-compliant."

21. In the light of the judgments in Edwards and Commission v UK the defendant decided to consult about changes to the ACR so as to address some of the issues which the cases had raised. The consultation closed on 10th December 2015. In November 2016 the Government provided a document responding to the consultation and indicating its proposals. As will become apparent from the discussion below, amongst the particular concerns of the present case are firstly, the opportunity under the 2017 Amendments to vary the costs cap and secondly, the chilling effect of the requirement to provide financial information not simply from the claimant but also from any third party supporter, and the potential for that financial information to be disclosed in any hearing in respect of any proposed variation of the costs cap. In respect of those issues the response to the consultation provided as follows:

> "*Level of costs protection available: varying the costs caps*
>
> 21. The consultation proposed moving away from the current, fixed-costs-cap model, under which there is no ability to vary the costs caps. The government notes some respondents' concerns that variable caps might lead to less certainty about levels of costs protection and would involve increased complexity, and it recognises the EU law requirement that the costs of bringing Aarhus Convention claims must not be prohibitively expensive. Since the current ECPR was introduced in 2013, however, the CJEU has in the *Edwards*[5] case set out principles regarding the approach to determining what level of costs would be prohibitively expensive in any particular case. These principles have been reiterated by the Supreme Court in the same case. These principles are that the costs of proceedings must not exceed the financial resources of the claimant and must not appear to be objectively unreasonable, having regard to certain factors including

the merits of the case. The current fixed-costs-cap model does not allow for costs caps to be varied to take account of what prohibitive expense means in an individual case, based on an application of these *Edwards* principles. Accordingly, the government proposes to introduce a power to vary the costs caps, both upward and downward.

22. The government considers that its proposed 'hybrid' model, although more complex than the current fixed-costs-cap model, would nevertheless provide claimants with sufficient certainty about costs protection and how the courts would determine the level of a costs cap. The model would do this first by setting default starting points for costs caps (at the same levels as now), which would remain in place unless the court considered that they should be varied. Secondly, it would provide a clear process for the courts to follow whenever they determined whether to vary a costs cap. It is an important safeguard that, at whatever stage of the proceedings an application to vary was brought, costs caps could not be varied in a way which made the costs of the proceedings prohibitively expensive for the claimant. The government considers that these factors mean the introduction of the 'hybrid' model will not deter meritorious claims. The model provides some flexibility in the levels of costs caps, accommodating the CJEU's approach to assessing prohibitive expense from *Edwards* and recognising that different claimants will have different financial resources.

23. The government recognises that respondents were concerned that the proposed model, whereby either party could seek to vary the level of a costs cap, would lead to additional hearings. It considers, though, that the number of additional hearings would be minimised by the approach taken in the proposed rules and by the general principles governing who pays the costs of hearings. First, those applying to vary the costs caps will need to demonstrate clearly to the court that they have a valid case for a variation. Secondly, the draft rules include provision that it should be exceptional for the court to vary the caps to give a claimant more costs protection: the court would have to be satisfied that, without the variation, the costs of the case would be prohibitively expensive for the claimant. Thirdly, parties who are unsuccessful in asking the court to vary a costs cap should expect to pay the costs of that application. Together, these factors should deter parties from making unmeritorious or speculative applications to vary costs caps. In addition, almost all defendants in these types of cases are publicly-funded bodies and would need to be

> satisfied that they had sufficient grounds to justify spending public money on seeking a variation.
>
> …
>
> 38. Turning to respondents' concerns over the complexity of the process, privacy issues and the potential chilling effect of disclosing financial information, it is not and has never been the intention that the level of detail that claimants will be required to provide should be unnecessarily burdensome. Information will only be required which the government anticipates will allow the court and the defendant to determine whether a costs cap variation might be appropriate. As to concerns about privacy, the government notes that hearings can be in private if they involve confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.
>
> 39. The government is proposing a similar approach to that which it adopted when implementing the recent Judicial Review Cost Capping Order reform, whilst recognising that there are different requirements in the context of the ECPR, where a key consideration is that the costs of challenges should not be prohibitively expensive. Unless the court ordered otherwise, the claimant would provide information on significant assets, income, liabilities and expenditure. This information would take account of any third-party funding which the claimant had received. It is anticipated that this approach would limit the burden and intrusion on the claimant and, alongside the possibility that hearings could be held in private, means the approach would not deter claims. It is not intended that charities should provide details of individual donors or individual donations."

22. As set out above, on 2nd February 2017 the 2017 amendments were made and they were laid before Parliament on the following day. Concerns were expressed by the claimants in relation to the impact of the proposed changes to the ACR. Their concerns were drawn to the Secondary Legislation Scrutiny Committee who reached the following conclusion:

> "18. The requirement of Article 9 if the Aarhus Convention is that, in relation to environmental matters, contracting parties "*shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*". The MoJ has not provided a convincing case for changing from the previous standardised system of cost capping, which was well understood, to this more complex system which appears to have significant potential to increase

both the costs for public administration and the uncapped litigation costs of the claimant.

19. While asserting that the changes are to "discourage unmeritorious claims" no figures are presented that illustrate the proportion of Aarhus claims that fall into that category. We are told that the financial impact on the public sector is minimal, so there does not appear to be a significant saving to the tax payer from these changes. Although the MoJ states that its policy intention is to introduce greater certainty into the regime, the strongly negative response to consultation and the submission received indicate the reverse outcome and that, as a result of the increased uncertainty introduced by these changes, people with a genuine complaint will be discouraged from pursuing it in the courts. **The Ministry of Justice has not addressed any of these concerns in its paperwork and we therefore draw the matter to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation. We have also written to the Minister to express our concerns over the way that this policy change was presented.**"

23. The 2017 Amendments came into force on 28th February 2017 in accordance with Rule 2 of the 2017 Amendments. The full text of Rule 8(5) which creates the new ACR provisions that are the subject of this challenge provides as follows:

"**Scope and interpretation**

45.41.—(1) This section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section —

(a) "Aarhus Convention claim" means a claim brought by one or more members of the public —

(i) by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention"); or

(ii) by judicial review which challenges the legality of any such decision, act or omission and which is within the scope of Article 9(3) of the Aarhus Convention;

(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention.

(3) This Section does not apply to appeals other than appeals brought under section 289(1) of the Town and Country Planning Act 1990 or section 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which are for the purposes of this Section to be treated as reviews under statute.

(Rule 52.19A makes provision in relation to costs of an appeal.)

The Aarhus Convention is available on the UNECE website at https://www.unece.org/env/pp/welcome.html.)

Opting out, and other cases where rules 45.43 to 45.45 do not apply to a claimant

45.42.—(1) Subject to paragraph (2), rules 45.43 to 45.45 apply where a claimant who is a member of the public has—

(a) stated in the claim form that the claim is an Aarhus Convention claim; and

(b) filed and served with the claim form a schedule of the claimant's financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant and which is verified by a statement of truth.

(2) Subject to paragraph (3), rules 45.43 to 45.45 do not apply where the claimant has stated in the claim form that although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

(3) If there is more than one claimant, rules 45.43 to 45.45 do not apply in relation to the costs payable by or to any claimant who has not acted as set out in paragraph (1), or who has acted as set out in paragraph (2), or who is not a member of the public.

Limit on costs recoverable from a party in an Aarhus Convention claim

45.43.—(1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered

to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.

(2) For a claimant the amount is—

(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) £10,000 in all other cases.

(3) For a defendant the amount is £35,000.

(4) In an Aarhus Convention claim with multiple claimants or multiple defendants, the amounts in paragraphs (2) and (3) (subject to any direction of the court under rule 45.44) apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.

Varying the limit on costs recoverable from a party in an Aarhus Convention claim

45.44.—(1) The court may vary the amounts in rule 45.43 or may remove altogether the limits on the maximum costs liability of any party in an Aarhus Convention claim.

(2) The court may vary such an amount or remove such a limit only if satisfied that—

(a) to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and

(b) in the case of a variation which would reduce a claimant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the claimant.

(3) Proceedings are to be considered prohibitively expensive for the purpose of this rule if their likely costs (including any court fees which are payable by the claimant) either—

(a) exceed the financial resources of the claimant; or

(b) are objectively unreasonable having regard to—

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the claimant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

(4) When the court considers the financial resources of the claimant for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to the claimant.

(Rule 39.2(3)(c) makes provision for a hearing (or any part of it) to be in private if it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.)

Challenging whether the claim is an Aarhus Convention claim

45.45.—(1) Where a claimant has complied with rule 45.42(1), and subject to rule 45.42(2) and (3), rule 45.43 will apply unless—

(a) the defendant has in the acknowledgment of service—

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant's grounds for such denial; and

(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant denies that the claim is an Aarhus Convention claim, the court must determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim—

> (a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;
>
> (b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings to be assessed on the standard basis, and that order may be enforced even if this would increase the costs payable by the defendant beyond the amount stated in rule 45.43(3) or any variation of that amount."

24. The effect of Rule 8(5) of the 2017 Amendments is to completely substitute a new ACR for that which was put in place in April 2013 with a series of bespoke provisions designed to give effect to the requirements of the Directives. In addition, as Mr David Wolfe QC (who appeared on behalf of the claimants) pointed out, the extent of the costs protection under the ACR in fact exceeds that which is required by EU law to the extent that CPR 45.41(2)(a)(ii) includes judicial review claims within the scope of Article 9(3) of the Aarhus Convention. The EU Directives only cover those claims which are connected with Article 9(1) or Article 9(2) of the Aarhus Convention.

25. I propose to turn now to the Grounds of challenge. There are three Grounds raised by the claimants. The first Ground is that the provisions of the rules which enable a variation of the costs limits at any point in the litigation are in breach of the requirements of EU law as set out above. The second Ground is that it is unlawful for the 2017 Amendments to fail to provide for private hearings when a claimant or a third party supporter's financial details may be discussed and examined at such a hearing. The third Ground is that the claimants seek a declaration that in the light of the CJEU jurisprudence the claimant's own costs of bringing the litigation should necessarily be included within the assessment of the financial resources of the claimant for the purposes of evaluating whether or not costs protection should be afforded and whether or not the proceedings are "prohibitively expensive".

Ground 1: Varying the limits of the costs cap

26. The focus of this Ground of challenge is the new CPR 45.44. This part of the ACR has the effect of providing the court with a discretion to vary the default cost caps set out in CPR 45.43(2) and (3). The practical concern which this arrangement gives rise to, and which is spoken to in the claimant's evidence, is that there will be a significant deterrent or chilling effect on meritorious claims if there is not certainty at the outset as to the potential cost liabilities of a claimant in an environmental law case. The April 2013 ACR, which lacked the breadth of coverage of the present rules, nevertheless provided at least reasonable predictability through the provision of an automatic costs cap in every case to which it applied. The practical concern is that whilst a claimant may be willing to advance a potentially meritorious claim in the clear and certain knowledge of the costs liability were it to be unsuccessful, a claimant may be unwilling to commence a claim in circumstances where the court rules provide the opportunity for the costs liability in the event of failure to be varied upwards following an application under CPR 45.44 which can be made at any stage of the proceedings.

27. In his submissions Mr Wolfe reinforced this concern by reference to further practical features. Firstly, in a claim for judicial review or, for instance, under section 288 of the 1990 Act, where there is a preliminary permission stage on paper, if permission is refused then it is open to the claimant at that stage to discontinue and experience suggests that it is very unlikely that any costs sought for the acknowledgment of service could possibly exceed the default costs cap in CPR 45.43 in any event. If, however, at a later stage after permission has been granted, an application to vary the costs caps is successful that will be at a stage when a defendant's costs will have increased, perhaps significantly, as a consequence of further preparatory work. Mr Wolfe submitted that the existence of that risk of a far higher costs liability following the variation of costs caps after the permission stage would, at the outset, be a deterrent to bringing meritorious claims and have a chilling effect upon the propensity of parties such as the claimants on bringing claims in cases of this kind.

28. This Ground, as in common with all of the other Grounds, proceeds on the basis that, for instance, the provisions of Article 11 of the EIA Directive set out above are designed to ensure wide access to justice (see paragraph 31 of Edwards) and that each of the features in Article 11(4) including the requirement that procedures should not be "prohibitively expensive" are designed to ensure that the public plays an active role in the preservation, protection and improvement of the quality of the environment (see paragraph 32 of Edwards) such that access to justice in environmental cases is secured given the public interest in the protection of the environment. Furthermore, in relation to the requirement that proceedings should not be "prohibitively expensive" it is a guiding principle that a claimant should be provided with "reasonable predictability" not only as to whether costs of proceedings may be payable but also as to their amount (see paragraphs 34 and 58 of Commission v UK). The principles are designed to ensure that procedural rules in relation to costs do not give rise to inappropriate disincentives or a chilling effect on bringing meritorious environmental cases.

29. In the light of these principles Mr Wolfe submits that provisions permitting variations in the costs caps during the course of the litigation, and in particular after costs caps may have been initially determined at an early stage, is fundamentally inconsistent with the requirements of access to justice in environmental cases and reasonable predictability in relation to the costs which may be incurred if a claim proves to be unsuccessful. The risks of costs caps changing during the course of litigation, and at a point in time when a defendant may have perfectly properly incurred significant additional costs for which a claimant may find itself liable, would have a significant chilling effect on the propensity of claimants to bring meritorious cases. In making these submissions he relies upon the evidence of the claimants and the other environmental organisations supporting this claim which demonstrate their concerns and their view that the existence of CPR 45.4(4) would have a very material impact upon whether or not they might bring a case.

30. I did not understand Mr James Maurici QC (who appeared on behalf of the defendants) to gainsay the general principles set out in paragraph 28 above. Against the background of accepting these principles his submissions commenced by observing that in paragraph 33 of the Commission v UK case the CJEU observed that it is not necessary to require provisions of a Directive to be enacted in national law in precisely the same words as the Directive. A general legal context, in other words an

examination of the surrounding legal framework, will suffice to achieve compliance if it ensures the full application of the Directive in a sufficiently clear and precise manner. Further, in reliance on paragraph 36 of the CJEU's judgment in Commission v UK he submitted that a judicial discretion or judicial practice can be relied upon provided it is not uncertain or inherently incapable of meeting the requirements of the objective. Paragraphs 19-23 of the Advocate General's opinion in the Edwards' case were, he submitted, to complementary effect in the sense that member states were afforded a broad discretion as to how to achieve the objectives of the Directives given the great diversity of cost regimes across the EU.

31. Against the background of these observations Mr Maurici submitted that the ACR had to be considered in the context of both other relevant provisions of the CPR and also the practice of the court. Mr Maurici submitted that in practice the requirement of CPR 45.4(2)(i)(b) to provide details of the claimant's financial resources and any third party support alongside the claim form would mean that were there to be any application by the defendant for a variation of the default costs caps it would have to be applied for at the time when the defendant provided an acknowledgement of service. That application for variation of the costs caps would in practice at first instance be determined on the papers at the point in time when the question of permission to apply was being determined. The claimant would thus have a certain answer as to whether the default costs caps or varied cost caps applied at the point in time when permission was considered and either refused (when as observed above the costs would very seldom exceed the costs cap in any event) or be granted permitting the claimant to proceed on the basis of a decision as to the level of costs caps which would be operational.

32. This decision as to the effective costs caps would remain throughout the litigation unless an application were made at a later stage of the proceedings to vary the costs caps. General rules in relation to applications for court orders are contained within CPR 23. Whilst CPR 23.5 would not directly apply since there is no specified time for the making of such an application, the Practice Direction 23A in relation to applications would apply. In respect of application notices the Practice Direction provides as follows:

> "2.7 Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."

33. Two consequences flow from the application of the Practice Direction. Firstly, if the application to vary the costs caps was made on the basis that the defendant had forgotten or otherwise omitted to make it as part of the acknowledgement of service it would fall to be dismissed by application of this Practice Direction. Mr Maurici submitted that such an approach would fit with the overriding objective. Furthermore, when pressed in the course of argument, Mr Maurici accepted that it would also be a breach of EU law to grant such an application in circumstances where the defendant had failed without good reason to request a variation of costs caps in the acknowledgement of service, since to permit such an application without good reason at that stage would be in breach of the general principles which have been set out above, in particular in relation to reasonable predictability.

34. It follows that an application after the grant of permission could only be properly contemplated if there was good reason for making it. Mr Maurici submitted that in

reality there were only two bases upon which good reason for a late application could be founded, namely that the claimant had provided false or misleading information as to available financial resources at the outset or, alternatively, that there had been a change in the claimant's financial circumstances after permission had been granted and the default costs caps applied so as to justify an alteration to the costs caps bearing in mind the relevant principles as to how the question of "prohibitively expensive" is to be determined which have been set out above. If, for instance, a claimant had suddenly and unexpectedly come by a very substantial amount of money, in accordance with the principles of openness in the conduct of public law litigation they would have to disclose such circumstances and if, as a consequence, the assessment of "prohibitively expensive" changed then it would only do so on the basis that in the light of the altered circumstances it was appropriate that the costs cap was altered. It would only be altered through the proper application of the relevant legal test.

35. Measured against a fuller appreciation of the legal context in which the question of variation of costs caps might arise it was submitted by Mr Maurici that reasonable predictability was provided. He stressed that the test of whether or not the purpose of the Directives was to be achieved was not certainty but reasonable predictability. It was an uncontroversial proposition that variation in cost caps was not inconsistent with EU law and therefore having rules in that respect was entirely appropriate. When read against the background of the entirety of the legal context in which CPR 45.4(4) is set claimants would be provided with reasonable predictability as to their costs exposure.

36. In evaluating the competing submissions in my view it is important to note, as Advocate General Kokott stated in Edwards, that there is a discretion afforded to member states as to how to achieve the requirements of the Directives. Further, as she also pointed out, that discretion is not unlimited. The rights which are provided under the Directive have to be effectively protected. Whether or not they are effectively protected by the national law has to be examined on the basis both of the detailed terms of the law in question and also having regard to the surrounding legal framework and judicial practice. This approach is in my view clear from paragraphs 33-36 of the Commission v UK case. There are in my view two key questions which are raised as to whether or not the existence of CPR 45.44 provides the reasonable predictability necessary to ensure that there is sufficient precision and clarity in relation to the potential costs exposure of a claimant and avoid the chilling or deterrent effect on meritorious claims which is of concern. Those two questions are firstly whether there would be a determination of any variation in the costs caps at an early stage of proceedings so that absent any other application the claimant would have reasonable predictability in relation to costs in the event of failure and, secondly, (if there is a determination at an early stage) whether the possible opportunity for later variation of the costs caps conflicts with the requirement that there should be reasonable predictability of the claimant's costs exposure.

37. Dealing with the first question it is apparent from CPR 45.4(2)(1)(b) that it is a requirement of the ACR that if a claimant wishes to contend that the claim being brought is an Aarhus Convention claim then it is necessary to file and serve with the claim form a schedule of the claimant's financial resources. It is notable that CPR 45.45 effectively states that the default costs caps will apply unless the defendant has

in the acknowledgement of service denied that the claim is an Aarhus Convention claim and provided the grounds for doing so. Whilst the provisions of CPR 45.45 do not specifically include a requirement for the acknowledgement of service to specify whether it is the defendant's case that the default costs caps should be varied if the claim is an Aarhus Convention claim, it is nevertheless clear from the Rules that that issue is potentially to be joined in relation to whether or not the claim is one to which the ACR applies in the acknowledgement of service. As a matter of practice, when a defendant applies its mind to the question of whether or not the claim is an Aarhus claim it will also have all of the necessary material in the form of the schedule of financial resources to consider whether or not the default costs caps should apply if it is. Any application based on the claimant's schedule of financial resources should, therefore, be made by the defendant at the stage of filing the acknowledgement of service so that any such application can be addressed by the judge considering the question of permission on the papers.

38. I am therefore satisfied that whilst it would have been beneficial for the Rules to have specified within CPR 45.45 that any application to vary the default costs caps should also be included within the acknowledgement of service, nevertheless as a matter of practice reading the ACR as a whole, if a defendant proposes to contend that the default costs caps should be varied they need to do so (and as a matter of proper procedure bearing in mind the overriding objective must do so) in their acknowledgement of service. Although they were not canvassed in the course of the parties submissions I am aware that there are forms of statutory review which do not have a permission stage, for example under section 23 of the Acquisition of Land Act 1981. Nevertheless the practice of the court would be to expect any disputes in relation to the application of the ACR or the level of cost caps to be raised at the point of acknowledging service and resolved by the court at the earliest possible stage of the litigation. I am satisfied, therefore, in relation to this first question that there would be a decision on cost capping at an appropriately early stage of the proceedings.

39. The second question then falls to be answered in the context that there will have been, at the time when permission is granted, a determination of the applicable cost caps in an ACR claim. I accept the submissions made by Mr Maurici in relation to the consideration of any applications to vary the costs caps thereafter. If the application was made because the defendant had failed for whatever reason to engage with the question of whether or not the default levels of the costs caps were appropriate at the permission stage, then it would be too late for that issue to be raised subsequently in the absence of good reason. Such an application would not have been brought as soon as it became apparent that it was necessary or desirable to make it. It would additionally, in principle, be in breach of the EU principles which have been set out above.

40. It has to be accepted that there may be exceptions to this if either it is demonstrated that the claimant has provided false or misleading information in the schedule of financial resources, or there has been a material change in the claimant's financial resources which justifies a re-examination of the question of whether or not the default costs caps can be increased without the litigation becoming "prohibitively expensive". I can see no proper objection to CPR 45.44 applying in those circumstances. The requirement of CPR 45.42(1)(b) to have the claimant's schedule of financial resources verified by a statement of truth reinforces that if that schedule

proves to be untrue or misleading then the claimant should not be allowed to take advantage of that if, gauged against the true picture, the costs caps could be increased without the litigation becoming "prohibitively expensive". Furthermore, if the claimant's financial circumstances change for instance through the unexpected acquisition of a significant sum of money or valuable asset then, again, there can be no realistic objection to CPR 45.44 applying on the basis that whether the costs of the case are "prohibitively expensive" will or may have changed. In my view a system which provides for the accommodation of variation in the costs caps in these circumstances still remains reasonably predictable. It is in my view reasonably to be anticipated that if the defendant has not been provided with a true schedule of the claimant's financial resources or if the claimant's financial resources substantially changes then a reassessment of the costs caps may be undertaken. The existence of that opportunity in those circumstances does not in my judgment render the ACR incapable of providing reasonable predictability. It would fail to provide reasonable predictability if the costs caps could change based upon the same financial information which had been provided by the claimant at the outset of the proceedings in accordance with the ACR.

41. In the light of the above analysis I am satisfied that the provisions of the ACR in relation to varying the default costs caps is consistent with the applicable EU law when considered in the context of the surrounding procedural rules and practices.

Ground 2: Failure to provide for mandatory private hearings in relation to a claimant or third party supporter's finances

42. As set out above the ACR requires the provision of a schedule of the claimant's financial resources which includes "any financial support which any person has provided or is likely to provide to the claimants". CPR 45.4(4)(4) reinforces that when considering the financial resources of the claimant for the purposes of determining under CPR 45.44(3) whether the proceedings are "prohibitively expensive" the court must have regard not only to the resources of the claimant but also "any financial support which any person has provided or is likely to provide to the claimant".

43. CPR 5.4C(1)(a) provides as follows:

> "The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it"

44. Thus, the schedule of financial resources required by CPR 45.42(1)(b) would be a confidential document which a member of the public would not have access to, and any determination on the papers of the question of whether or not the claim was an Aarhus claim or whether the default costs caps should be varied would be a confidential procedure. No doubt judges would be astute to respect this in providing the reasons for any order in relation to the variation of costs caps so as not to place confidential financial information into the public domain.

45. It is the provision into the public domain of confidential financial information, and the chilling effect which that may have as a deterrent to the bringing of meritorious claims in environmental law cases, which is the claimants' concern. The concern arises in a number of connections. Firstly, in relation to a claimant who is a private individual the claimants in these proceedings raise concerns as to the chilling effect if an application to vary the costs caps is heard in public and private financial information as to their means would be disclosed. Reliance is placed on the observations of Sullivan LJ Garner at paragraphs 50-52 set out above. Secondly, in relation to organisations such as the claimants, concern is expressed in their evidence both as to the requirement to disclose financial information which is otherwise confidential, and in particular the potential to have to disclose confidential information as to the donations which are or may be received by their organisations either generally or specifically to support the litigation. Thirdly, concern is expressed in relation to the reach of the provisions and the extent to which it is to be expected that the financial information provided would have to include financial information pertaining to third party supporters, both as to the extent of the contributions which they have made as private contributions to a voluntary organisation and also as to their propensity to provide further funding to support the costs of the litigation.

46. The general rule under CPR 39.2(1) is that a court hearing is to be held in public. Under CPR 39.2(3) there is specific provision that a hearing or part of it may be held in private in certain circumstances. One of the instances identified is as follows:

> "39.2
>
> (3) A hearing, or any part of it, may be in private if – …
>
> c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality"

47. This provision of the Rules is supported by Practice Direction 39A which at paragraph 1.5 sets out no less than ten different types of hearing which shall be listed by the court as a listing in private under CPR 39.2(3)(c) in the first instance. The types of claim which are listed includes, for instance, the following:

> "(7) the determination of the liability of an LSC funded client under regulations 9 and 10 of the Community Legal Service (Costs) Regulations 2000, or of an assisted person's liability for costs under regulation 127 of the Civil Legal Aid (General) Regulations 1989,
>
> (8) an application for security for costs to be provided by a claimant who is a company or a limited liability partnership in the circumstances set out in rule 25.13(2)(c), …"

48. As set out above a particular concern of the claimants relates to how the requirements of CPR 45.4(2)(1)(b) are to be met, or, alternatively, what it is expected that a financial schedule should include given that the ACR does not provide any details of the specifics which it is intended should be included. This is particularly concerning

for these claimants in the light of the fact that they are supported by voluntary donations and they are concerned as to whether the requirements include the identification of individual donors and donations which may have a deterrent effect on individuals supporting their organisations if it were to be the case that what they had regarded as a private donation would be placed into the public domain as a consequence of the ACR. That would have a deterrent effect on litigation since claimants who are voluntary organisations like the claimants may be deterred from bringing otherwise meritorious claims if, in order to do so, they have to disclose the identity of those providing them with donations and the amount of those donations.

49. Responding to these concerns and without prejudice to the defendant's general contention that changes to the CPR are not required, on 6th July 2017 the defendant wrote to the claimant setting out their position regarding potential amendments to the Rules (which had been foreshadowed in their Summary Grounds of Defence). They advised as follows:

> "At paragraph 29 of the Summary Grounds of Defence, the Defendant indicated that, to the extent it was considered necessary or desirable to do so, it would be prepared to recommend to the Master of the Rolls that a further sub-paragraph be inserted into CPR PD 39 paragraph 1.5 (hearings that will, in the first instance, be listed for hearing in private) referring to applications for variations for the default costs caps in Aarhus Convention claims where the claimant/s is or are private individuals.
>
> At paragraph 32 of the Summary Grounds of Defence, the Defendant indicated that, to the extent it was considered necessary or desirable to do so, it would be prepared to recommend that express reference be made in CPR Part 45 Section VII to the provisions contained in CPR Part 46 Section VI, and/or Practice Direction 46 para 10, which set out the information which a claimant is required to provide on an application for a cost cap in judicial review proceedings.
>
> In my letter of 4 May 2017, which responded to your letter of 28 April 2017, I confirmed that it would not be possible to provide any further clarification regarding the implementation of changes alluded to in the Summary Grounds before the election, by reference to election purdah guidance. I confirm that relevant Ministers have now had an opportunity to consider the potential changes alluded to in the Summary Grounds. Strictly without prejudice to the Defendant's position, set out in the Summary Grounds of Defence, that such changes are not required, Ministers have confirmed that they will invite the Civil Procedure Rules Committee and/or Master of the Rolls to consider what amendments to the Rules and/or Practice Directions would be appropriate to reflect the matters set out above."

50. The reference in the second paragraph is a reference to the following provision of the Practice Direction CPR 46 which provides as follows:

> "**46PD.10**
>
> **10.1** Unless the court directs otherwise, a summary of an applicant's financial resources under rule 46.17(1)(b)(ii) must provide details of—
>
> (a) the applicant's significant assets, liabilities, income and expenditure; and
>
> (b) in relation to any financial support which any person has provided or is likely to provide to the applicant, the aggregate amount—
>
> (i) which has been provided; and
>
> (ii) which is likely to be provided."

51. In his submissions, Mr Maurici observed that there was nothing in the CJEU jurisprudence which required any hearing in respect of costs capping to be in private. He pointed out that in the case of Edwards there was no suggestion that procedures in relation to costs capping should be conducted privately and he drew attention to the circumstances of that case in which one of the claimants had declined to provide details of her means or alternatively had provided information in general terms without particularity. I am unconvinced that citation of Edwards is of any great assistance to Mr Maurici in this respect. The question of whether or not hearings in relation to variation of costs caps should be heard in private (as opposed to the provision of adequate financial information to justify them) was not in issue. In my view the without prejudice concessions which have been made in the letter of 6th July 2017 are well made, and the changes are required to meet the principles of providing wide access to justice in environmental law cases and not deterring meritorious claims through the chilling effect of providing financial information which may find its way into the public domain if proper safeguards are not in place. My reasons for concluding this are as follows.

52. Firstly, it is clear that a hearing in relation to whether or not there should be a variation of a costs cap is a hearing at which confidential information including that relating to personal financial matters would arise such that the discretion under CPR 39.2(3) for the hearing to be in private is engaged. I can see no basis to distinguish in principle the kind of subject matter to be discussed in hearings covered by Practice Direction 39A paragraph 1.5(7) and (8) and the kind of issues which would be explored in a hearing in relation to variation of costs caps. Secondly, in my view the observations of Sullivan LJ in Garner are highly persuasive of the need to alter the CPR in the manner contemplated in the letter of 6th July 2017. In his written submissions Mr Maurici sought to distinguish Sullivan LJ's observations on the basis that they were obiter and without full reference to the relevant Rules and Practice Directions in the CPR. Whilst the observations, in particular in paragraphs 51 and 52 were obiter, in my view they were nevertheless powerful observations from an authoritative source which are strongly underpinned by common sense. I am therefore

satisfied that the changes contemplated to CPR PD 1.5 in the letter of 6th July 2017 are required.

53. That does not resolve the questions arising as to the maintenance of privacy in respect of financial information at a hearing in relation to a variation of costs caps. This is because the claimant raises the concern that the requirements of the Rules extend to the disclosure of third party support which has been, or is likely to be, provided to the claimant. The changes proffered in the letter of 6th July 2017 in respect of CPR PD 39 paragraph 1.5 are limited to variation hearings where the claimant is a private individual. That would not therefore apply to the claimants in the present case and does not engage with the protection of the confidentiality of financial information in relation to third party supporters.

54. In my view the starting point must be that I am unable to discern any justification for differential treatment of the confidentiality of financial information dependant upon whether the claimant is a private individual or a voluntary organisation or whether the information is that of the claimant or that of third party donors. Mr Maurici submitted that it was not intended by the language of CPR 45.42(1)(b) or 45.44(4) that any donor who has provided third party support to the litigation should be identified. He submitted that the language of the rules was not intended to require the source of the third party funding. The difficulty in relation to that submission is, in my view, that is not what is specified in the language. Indeed, the enquiry which the court may have to make under CPR 45.44 on any application to vary the amount of costs caps includes an enquiry into "any financial support which any person…is likely to provide to the claimant". A defendant may wish to know the identity of the provider of third party support so as to make submissions about the likelihood of them providing future financial support to the claimant. It is important to recognise that it is not unusual or inconceivable that environmental cases are either crowd-funded or facilitated by the financial support of high net-worth individuals. Defendants may wish, and would be entitled, to argue that these sources of finance could be relied upon to be likely to provide further support to the claimant to enable the litigation to proceed. It appears to be the intention of the way in which CPR 45.44(4) has been framed that this argument should be available to a defendant.

55. This concern might be thought to be ameliorated to some extent by the second concession in the letter of 6th July 2017 that the schedule of the claimant's financial resources should be provided in the form specified in CPR 46 PD 10.1. That is because in relation to third party support what is required is simply provision of an aggregate amount which has been provided and is likely to be provided. This would avoid the necessity of providing information in relation to the size of individual donations. It does not, however, directly address the question of the identity of the sources of third party support. If it is contended that the identity of supporters is not required that would appear to frustrate the possibility of a defendant having the full information to enable it to argue that given the nature of the sources of the third party funding further financial support is likely, pursuant to CPR 45.44(4). If it is accepted that the identity of the sources of funding are required alongside the aggregate amount of funding then the issue of the protection of the confidentiality of donors' financial information arises. Ultimately, I am not satisfied that the form specified in CPR 46 PD 10.1 is fit for purpose given the clear intention of CPR 45.44(4) to enable a defendant to argue that given the nature and source of third party funding it is likely

that in truth more finances are likely to be made available to the claimant. Reference to this form does not in my view overcome the concerns in relation to the need for privacy at costs cap variation hearings so as to avoid the public disclosure of financial information of third parties.

56. I am not therefore satisfied that the suggestions in the letter of 6th July 2017 are adequate. I see no basis for differentiating between claimants who are private individuals and claimants who are other legal persons. The considerations which apply, namely the chilling effect of the disclosure of confidential financial information into the public domain upon the propensity to bring otherwise meritorious environmental claims applies equally to other legal persons as it does to private individuals, particularly in circumstances where those other legal persons (like these claimants) may be heavily dependant upon the donations of private individuals in order to support court action. It follows that I am satisfied that the concerns raised by the claimant under Ground 2 are legitimate and would not be wholly resolved by the compromise proposed in the letter of 6th July 2017.

57. To summarise my conclusions on Ground 2, I am satisfied that if a dispute in relation to the appropriate level of costs caps were to proceed to a hearing (as opposed to being dealt with on the papers at a time when the claimant's financial information would remain confidential) then the rules should provide for that hearing to be in private in the first instance. That is not simply for the same reasons that other analogous hearings identified in Practice Direction 39A are to be listed in the first instance in private to preserve confidentiality, but also because I am satisfied that the chilling effect which the prospect of the public disclosure of the financial information of the claimant and/or his or her financial supporters would have on the propensity to bring meritorious environmental claims would be in breach of the requirements to ensure wide access to justice set out in the CJEU jurisprudence set out above (for example in the Opinion of the Advocate General and the judgment of the Court in Edwards and set out above in paragraph 26). The reasons for the first hearing of a dispute in relation to the quantum of the costs cap to be heard in private apply equally whether the financial resources in question are those of an individual claimant or of a third party supporter. Given the breadth of the way in which the 2017 Amendments (in particular CPR 44.42(1)(b) and 44.44(4)) are drafted, it is clear that it is the intention that a defendant should be able to argue that the nature and extent of the sources of third party funding available to a claimant to support the litigation justify a variation in the costs cap. The suggestion by the defendant that the form of financial information required could be in the form provided by Practice Direction CPR 46PD.10 does not obviate this. Thus, in my judgment Practice Direction CPR 39PD paragraph 1.5 requires amendment to include the first hearing in relation disputes over the variation of cost caps in ACR cases. Whilst not strictly before the court, in the light of the arguments which have been raised in this case it would be clearly beneficial for specific definition to be provided as to the nature and content of the financial information required by CPR 45.42(1)(b).

Ground 3: The inclusion of the claimant's own costs in the assessment of whether proceedings are "prohibitively expensive"

58. The claimant seeks a declaration that in undertaking the assessment of whether or not proceedings are "prohibitively expensive" the court may take into account the claimant's own costs in bringing the claim. The defendant accepts the validity of the

claimant's position, namely that the claimant's costs may be a material matter for the court to consider in determining any application for a variation of the costs caps. In my view that concession is properly made. It is clear from the CJEU judgment in Edwards at paragraphs 27 and 28 that the question of whether or not litigation is "prohibitively expensive" concerns "all the costs arising from participation in the judicial proceedings". Thus all of the costs potentially involved in bringing a case, including a claimant's own costs, are matters which can properly be taken into account by the court in assessing whether the default costs caps are appropriate or not.

59. The question which then arises, in the light of this consensus, is whether or not the court should grant relief in the form of the express declaration which the claimant seeks. I am unpersuaded that any declaratory relief is necessary in this case. My endorsement of the consensus between the parties in this case as to the legitimacy of taking account of the claimant's own costs as a matter of discretion in considering whether or not the proceedings are "prohibitively expensive" provides the claimant with everything which might be accomplished by a declaration. My view reflects the position taken by the Court of Appeal in the case of R (Purja and others) v Ministry of Defence [2003] EWCA Civ 1345 at paragraph 73. Bearing in mind what I have set out above, as a matter of discretion I do not consider that it is necessary in this case for relief in the form of a declaration to be granted. Following my judgment, based upon the authority set out above, it will be clear that the court may take account of a claimant's reasonable costs in determining whether proceedings are "prohibitively expensive" and any application to vary the costs caps will be adequately guided.

Conclusion

60. It became clear at the hearing of this matter that it would be sensible for me to formulate my views on the claimants' Grounds and then for further consideration to be given to the question of any appropriate relief. I shall therefore await further submissions from the parties in relation to what relief should flow from this judgment