

## Aarhus Costs

### What are they and why are they so significant?

- The costs-capping regime within English civil procedure pursuant to the Aarhus Convention. Briefly, if your claim in judicial review or under section 288 of the Town and Country Planning Act 1990 is, put broadly, an ‘environmental’ challenge, you may be able to obtain a costs-capping order in respect of it.
- Enhanced protection is given in recognition of the fact that (a) many cases raise issues that are more important than can be measured in costs, and (b) defendants to environmental challenges can often be extremely well-resourced, creating a substantial imbalance.
- The central provision is Article 9(4) of the Convention, which provides that environmental decisions falling within the Convention shall be open to legal challenge by a procedure that is “fair, equitable, timely and not prohibitively expensive”.

### What was the position when the Aarhus Convention was first ratified in 2005?

- Protective costs orders are not specific to the Aarhus Convention. They have always been a part of English public law.
- The ratification of the Convention in February 2005 had no effect domestically, as a result of the ‘dualist’ system in UK law (which essentially provides that conventions which take effect as a matter of international law are not incorporated into domestic law until Parliament incorporates them).
- The principles for costs capping orders in environmental cases were therefore the same as in any other kind of judicial review challenge (Waller LJ in *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749).
- The leading case: Lord Phillips CJ at [74] of *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. In essence, court must be satisfied that:
  - (i) the issues raised are of general public importance,
  - (ii) the public interest requires those issues to be resolved,
  - (iii) the applicant has no private interest in the outcome of the case,

- (iv) having regard to the financial resources of the parties, it is just and fair to make an order, and
- (v) if the order is not made, the applicant will “probably” discontinue proceedings, and act reasonably in doing so.
- Ultimately, a test which was satisfied only in exceptional circumstances.

#### Sullivan Review of Environmental Litigation 2008

- A much wider review of environmental litigation. One of the relevant questions was whether the current approach to costs was compliant with the Aarhus Convention.
- Sullivan J’s conclusion was ‘no’, as the requirement to establish an issue of general public importance was too high a bar.
- Sullivan J also examined the question of ‘prohibitively expensive’, and concluded that the applicable test should be: “if they would reasonably prevent an ‘ordinary’ member of the public (that is, ‘one who is neither very rich nor very poor, and would not be entitled to legal aid’) from embarking on the challenge falling within the terms of Aarhus”.

#### The *Edwards* litigation

- The genesis of some of the most important elements of the Aarhus regime we now have in the CPR.
- The case went before the High Court ([2005] EWHC 657 (Admin)) then the Court of Appeal ([2006] EWCA Civ 877), then the House of Lords ([2008] UKHL 22), with the claimant losing at every stage.
- The House of Lords also refused to make a protective costs order in favour of the Claimant. The Supreme Court Costs Officers took the view that they were required to apply the Aarhus Convention (by now implemented into EU law), and decided simply to disallow any costs they considered “prohibitively expensive”.
- The Supreme Court made a reference to the European Court of Justice on the question of what constituted ‘prohibitively expensive’ ([2010] UKSC 57).
- ECJ handed down a judgment on the reference ([2013] 1 W.L.R. 2914). They concluded that ‘prohibitively expensive’ is partly subjective and partly not subjective. It is necessary to look at the applicant’s resources, but also examine the extent to which a costs capping order would be objectively unreasonable, looking at a variety of factors including merits of the case.

- ECJ also expressed its view on a number of other important points, which are essential reading for those grappling with the outer edges of the Aarhus reforms.
- It is the judgment of the ECJ in *Edwards* which now forms the basis for many of the rules in the Civil Procedure Rules as now drafted.

### Civil Procedure Rules

- Now in CPR Part 46 (recently shifted from CPR Part 45).
- First set introduced in April 2013:
  - Quite basic, and skeletal.
  - Most problematically, applied only to challenges brought by way of judicial review.
- This was challenged before the High Court, in a roundabout fashion:
  - Lang J granted a protective costs order on a section 288 challenge on the basis that, notwithstanding the limitations of the CPR as then in force, the Aarhus Convention compelled a relaxing of the *Corner House* principles ([2013] EWHC 3546 (Admin)).
  - The Court of Appeal disagreed ([2014] EWCA Civ 1539), concluding that the Civil Procedure Rules were clear that the Aarhus Convention provisions applied only to judicial review challenges.
    - Sullivan LJ at [34]: “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 upon which it may be challenged, but upon the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance.”
- 2017 and 2019 amendments heralded a number of important changes.
  - Most importantly, they expanded scope of the protections to challenges under s.288 as well as judicial review.
  - Also introduced two important requirements which remain in force today: (1) requirement that claimant file a schedule of assets and income (CPR r.46.25(1)), and (2) applications to vary (CPR r.46.27).

### Applications to Vary

- Standard caps are now set at £5,000 for an individual claimant, £10,000 for a claimant but not an individual (CPR r.46.26(2)), and £35,000 reciprocal cap (CPR r.46.26(3)).

- However, all of those can be varied, pursuant to an application under CPR r.46.27.
- There is unfortunately, very little authority on the principles to be applied on applications to vary (save *CPRE (Kent) v SSCLG* [2019] EWCA Civ 1230, in which the Court of Appeal confirmed that Interested Parties can also be subject to the Aarhus protections).
- Ultimately, therefore:
  - Applications will be extremely fact-specific. Much will depend on the conduct of the parties.
  - Some guidance can be found in the CPR, in r.46.27. In particular, at CPR r.46.27(3), there are a list of factors that the court will take into account when assessing whether a variation would be ‘prohibitively expensive’.