Neutral Citation Number: [2008] EWCA Civ 1209

Case No: C1/0612/2008 & C1/1355/2008

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ADMINISTRATIVE COURT
MITTING J
[2008] EWHC 475 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2008

Before :

SIR ANTHONY CLARKE
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE STANLEY BURNTON

– –

Between :

THE QUEEN on the application of BUGLIFE−THE INVERTEBRATE CONSERVATION TRUST	**Claimant/ Appellant**
− and −	
THURROCK THAMES GATEWAY DEVELOPMENT CORPORATION	**Defendant/Respondent**
− and −	
ROSEMOUND DEVELOPMENTS LIMITED	**Interested Party**

(Transcript of the Handed Down Judgment of
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Michael Fordham QC and **Emma Dixon** (instructed by **Richard Buxton**) for the **Appellant**
Timothy Straker QC and **Caroline Bolton** (instructed by **Berwin Leighton Paisner LLP**) for the **Respondent**
Reuben Taylor (instructed by **Wragge & Co**) for the **Interested Party**

Judgment
As Approved by the Court

Sir Anthony Clarke MR:

This is the judgment of the court.

Introduction

1. There are two matters before the court, each raised by the claimant. They both raise questions which relate to the granting of protective costs orders ('PCOs') in judicial review proceedings which raise environmental issues. The first is an application for permission to appeal out of time against that part of a PCO made by Sullivan J on 7 November 2007 in which he limited the amount of costs which the claimant could recover if it succeeded on the substantive claim for judicial review. In fact the claimant lost because its claim was dismissed by Mitting J on 22 February 2008. The claimant has now obtained permission to appeal against that dismissal from Laws LJ. The purpose of the proposed appeal against the order of Sullivan J is to enable the claimant to recover more than £10,000 in respect of its proceedings at first instance if its appeal against Mitting J's order succeeds. The second matter is an application for a PCO to protect the claimant against its liability for costs of the appeal if it loses the appeal. The respondent says that no such order should be made or, in the alternative, that a reciprocal order should be made as was done by Sullivan J.

Proceedings at first instance

2. The claimant is called Buglife - The Invertebrate Conservation Trust ('Buglife'). It is a small invertebrate charity set up in 2002 with the aim of halting extinctions and achieving sustainable populations of invertebrates through direct conservation work, education, raising awareness and lobbying. Its annual unrestricted income is less than £100,000. It challenges by way of judicial review the decision of the respondent, Thurrock Thames Gateway Development Corporation, to grant planning permission for a distribution hub at a site in West Thurrock. The projected sales revenue from the development for the Interested Party, Rosemound Developments Limited ('the developer') was some £28.5 million and the cost of holding the site is in the region of £100,000 a month.

3. Buglife's case in short is this. The site is one of the three most important sites in Britain for rare and endangered invertebrates and hosts a nationally important population of over 900 invertebrate species. The proposed development would destroy about 50% of invertebrate habitats at the site overall and about 70% of the herb−rich grassland which provides a crucial foraging area for many insects. There is a high probability of two national, 17 regional and 37 local invertebrate extinctions if the development goes ahead.

4. The application for permission to apply for judicial review was refused by the President of the Lands Tribunal, Mr George Bartlett QC, on 25 July 2007. He gave short reasons for his conclusions. Buglife renewed the application and the developer applied for expedition on the ground that the delay was causing it substantial loss. The application was considered on paper by Sullivan J, who decided that there should

be expedition, and on 7 November 2007 directed that there should be a ‘rolled up' hearing at which both the application for permission and, if permission was granted, the application for judicial review should be heard before a planning judge on 22 February 2008, with a time estimate of one day.

5. Sullivan J also considered an application by Buglife that it should be protected by a PCO against liability for the respondent's costs if it lost. Buglife set out its reasons for the grant of a PCO in its claim form and the respondent gave reasons why an order should not be made in its summary grounds for contesting the claim. In his order of 7 November the judge ordered that there be an upper limit of £10,000 on "the total amount of costs recoverable by/from [Buglife] in these proceedings up to and including the ‘rolled up' hearing". He gave reasons for limiting the amount payable by Buglife if it lost but gave no reasons for limiting the amount payable to Buglife if it won. In fact, no application had been made for an order limiting the amount payable to Buglife. It thus appears that the judge simply thought that such an order would be just.

6. On 14 December 2007 Buglife's solicitors wrote to the court, with copies to the other parties, asking the court to reconsider the order limiting Buglife's recovery of costs to £10,000, either on the basis of written submissions or orally. The letter added that in the latter case the most convenient and cost−effective course would probably be for the matter to be reconsidered at the ‘rolled up' hearing. The letter gave reasons for the suggested reconsideration and described the funding arrangements. They were that both solicitors and counsel would represent Buglife on a conditional fee agreement (‘CFA'), although it had agreed to meet the costs of solicitors and counsel before the CFA was made up to a maximum of £10,000 plus VAT. The letter concluded by asking that the cap on Buglife's recovery of costs be removed or, alternatively, that the cap should be varied to £70,000 plus VAT so as to allow for a total of £35,000 and an uplift of 100%. It was suggested that the solicitors were not at liberty to disclose the amount of the uplift but that, for cost−capping purposes, it should be taken as 100%.

7. The respondent wrote two letters addressed to the court. Each was dated 20 December, although the one relating to the CPO was not sent until 27 December. The letter referred to an earlier decision of Collins J in which he had made a PCO in favour of the claimants in the sum of £10,000 and directed "as a reciprocal measure × that the claimants' reasonable costs be limited to £20,000". The letter stated that the respondent was a public body funded by taxation and that its budget was to be spent in the public interest and not otherwise. It complained that, on Buglife's case, if the respondent lost it would have to pay its own professional fees at a market rate, the claimant's professional fees at a market rate and an unrevealed success fee to Buglife's lawyers, whereas if the respondent won it would still have to pay its own fees but only recover £10,000. The letter added that Sullivan J's order should be upheld and concluded by saying that, if the court proposed to depart from the order, the respondent requested the opportunity to argue the matter out at a hearing.

8. Neither side sought an oral hearing of the PCO issue or issues before the ‘rolled up' hearing which came before Mitting J on 22 February 2008. In Buglife's skeleton argument for that hearing it was simply stated at paragraph 47 under the heading PCO that there was an outstanding issue relating to the PCO about which the parties were agreed that there needed to be further submissions to the court. It concluded:

> "Whether the issue arises depends on who prevails. That, and the very tight one day estimate on which the [respondent] and the [developer] have insisted, indicates that the issue should be left over until after judgment is given on the substantive issues."

Buglife thus made no written submissions on the PCO issues.

9. For its part, the respondent referred in paragraph 3 of its skeleton argument to the fact that there was an argument by which Buglife sought to avoid responsibility for costs. It added that this issue was dealt with in a schedule but that the court might find it convenient to deal with the issue of judicial review and then, possibly through written submissions, deal with any residual questions of costs. The respondent's submissions in the schedule dealt only with the question whether Buglife should have the benefit of a PCO at all. It submitted that it should not.

10. In the event the judicial review argument lasted all day on 22 February and Mitting J delivered judgment orally late in the afternoon. He refused Buglife's application for judicial review. We have a transcript of the post−judgment discussion. Mr Straker QC applied for costs but he expressly accepted that they were capped and he did not challenge the cap. He told us that he had taken instructions and that his instructions were not to pursue the argument advanced in the schedule. The judge accordingly made an order that Buglife pay costs limited to £10,000 subject to a detailed assessment and subject to a stay pending a possible appeal, although he himself refused permission to appeal. The judge also refused the developer's application for costs. Buglife having lost, the question whether its costs should be capped did not arise and was not further addressed.

Proceedings in the Court of Appeal

11. Buglife renewed its application to this court for permission to appeal. Laws LJ considered it on paper on 22 May 2008. In granting permission he said:

> "Mitting J may well have been right, but the public interest requires the issues raised to be ventilated in the Court of Appeal."

In addition to a justified complaint about the length of the skeleton argument, Laws LJ added that he would not deal with the issues relating to PCOs referred to in paragraphs 84 to 88 of Buglife's skeleton argument on a without notice basis. He said

that, if Buglife wanted to pursue such matters, it should issue a fresh application notice for permission to appeal against Sullivan J's order and seek a hearing before two LJJ on notice to deal with all PCO points.

12. The hearing of the substantive appeal is fixed for 18 November 2008 with an estimated length of 1œ days. The hearing of the PCO applications contemplated by Laws LJ has come before us. There are three of us because it seemed to us that the applications should be heard by three LJJ. Buglife seeks two orders. The first is an order extending the costs protection granted by Sullivan J to the proceedings in this court, so that the total amount of costs payable by Buglife if the appeal fails is £10,000. If that application succeeds, Buglife will be exposed to no liability for costs in this court because it has already been ordered to pay the capped amount of £10,000 by the judge. The second order sought is an order, by way of appeal from the decision of Sullivan J, varying the PCO made by him so as to remove the reciprocal costs cap of £10,000 on any costs recoverable by Buglife if the appeal succeeds. If both the application for permission to appeal and the appeal succeed, the respondent's liability to Buglife for costs will be unlimited both here and below.

The legal principles

13. Before considering these specific applications, it is we think appropriate to consider the relevant legal principles and the correct procedural approach to PCOs in the light of the authorities. The authorities focus on two distinct aspects of PCOs, namely the relevant principles for granting a PCO and the appropriate process at first instance and in this court. We will consider them in turn.

14. The leading case is *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600. After considering the state of the authorities as at that date, Lord Phillips CJ, giving the judgment of the court which also comprised Brooke and Tuckey LJJ, summarised the position at [74] to [76]:

> 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).

76. There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is likely that a cost capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in *King* at paras 101−2 will always be applicable. We would rephrase that guidance in these terms in the present context: (i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA−funded party is concerned, of any additional liability. (ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest. (iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from

> advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly."

15. In the later case of *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 this court, comprising Waller, Buxton and Smith LJJ, returned to the relevant principles. At [10] Waller LJ quoted the principles set out in [74] of *Corner House* . At [18] he referred to the Report of a Working Group on Public Interest Litigation which was chaired by Maurice Kay LJ and comprised representatives from PLP, public law claimants and their representatives, senior representatives from the Department of Constitutional Affairs, and (in a personal capacity) a member of the staff of the Treasury Solicitor. Waller LJ noted that the Group was agreed that to be suitable for a PCO a case must be a "public interest case", but found it difficult to define what sort of case fell within the definition a "public interest case" and what did not. Ultimately the Group concluded as follows:

> "75. After much discussion the Group came back to the first two criteria identified by the Court of Appeal in *Corner House* and agreed that these provided a definition that was both workable and sufficiently flexible. A public interest case is one where:
>
> > (i) the issues raised are ones of general public importance, and
> >
> > (ii) the public interest requires that those issues should be resolved.
>
> 76. The Group agreed that the definition should be given a broad, purposive interpretation. The definition should not be allowed to become unduly restrictive."

16. Waller LJ further noted that the court was also shown a Report from a Working Group on Access to Environmental Justice, which was chaired by Sullivan J and published on 9 May 2008 (‘the 2008 Report'). That was of course after the decision of Sullivan J in this case. As Waller LJ observed, the main concern of the 2008 Report was with the question whether the current approach of the courts in relation to costs was compliant with the UNECE Aarhus Convention, which is concerned with access to justice in environmental matters. Its conclusion was that it is not. Waller LJ quoted from Appendix 3 of the 2008 Report, to which we too were referred, where the ‘exceptionality test' was addressed in these terms:

> "In *Corner House* , the Court of Appeal accepted that PCOs should only be granted in "exceptional" cases. But it now seems this ‘exceptionality' test is being applied so as to set too high a threshold for deciding (for example) ‘general public

> importance', thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case, *Bullmore* , the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with Aarhus."

17. At [20] Waller LJ expressed the opinion that there should be no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and *vice versa* . At [21] Waller LJ expressed the view that the two tests of general public importance on the one hand and the public interest in the issue being resolved on the other were difficult to separate. We agree. The court was there considering a rather different problem from that here: see eg at [23]. However, Waller LJ said that the paragraphs in *Corner House* quoted above are not to be read as statutory provisions or in an over−restricted way and approved the flexible approach of Lloyd Jones J in *R (Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin).

18. Although those statements were made in a somewhat different context, they appear to us to be of general application. Thus Waller LJ held at [24] that there is no principle of exceptionality which imposes additional criteria to those set out in *Corner House* at [74] and that the issue whether the cases raises matters of general public importance is a question of degree and one "which *Corner House* would expect judges to be able to resolve". Throughout his judgment Waller LJ makes it clear that the question is essentially one for the judge.

19. Buxton LJ and Smith LJ both concluded that the principles stated in *Corner House* are binding on this court. We agree. As we read Smith LJ's judgment, she essentially agreed with Waller LJ, while Buxton LJ, who dissented, took a different and somewhat narrower view of the public interest and of what can amount to general public importance. It follows that the correct approach is for us to follow *Corner House* as explained by Waller LJ and Smith LJ.

20. Smith LJ summarised the position as she saw it at [87]:

> "It seems to me as a matter of common sense, justice and proportionality that when exercising his discretion as to whether to make an order and if so what order, the judge should take account of the fullness of the extent to which the applicant has satisfied the five *Corner House* requirements. Where the issues to be raised are of the first rank of general public importance and there are compelling public interest reasons for them to be resolved, it may well be appropriate for

> the judge to make the strongest of orders, if the financial circumstances of the parties warrant it. But where the issues are of a lower order of general public importance and/or the public interest in resolution is less than compelling, a more modest order may still be open to the judge and a proportionate response to the circumstances."

As we see it, the correct approach is to take account of all the circumstances of the case.

21. The cases have also focused on the question whether, where a PCO is made in favour of the claimant, it may also be appropriate to make an order capping the liability of the defendant to pay the claimant's costs if the claimant wins. In both *Corner House* and *Compton* the court recognised that, in a case where it was making a PCO in favour of a claimant, the answer might well be yes. Thus at [76 (ii)] the court in *Corner House* said:

> "The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest."

22. Similarly in *Compton* Smith LJ said at [86]:

> "At one end of the scale, the judge may make a PCO which imposes on a defendant the burden of bearing its own costs even though it wins on the merits and does not relieve it of the prospective burden of paying the applicant's costs in the event that the applicant succeeds. However, *Corner House* makes it plain that it will be usual to limit the successful claimant to recovery of modest costs, comprising the fees of the solicitor and one junior counsel. That is the ‘strongest' form of order which will usually be made. It puts the defendant at a major disadvantage; on costs it is in a ‘heads you win tails I lose' position. At the other end of the scale, the court can make a much more modest order, whereby the claimant's liability to pay the defendant's costs is capped not at nil but at a specified level and where the defendant is given a guarantee that it will not be required to pay any of the claimant's costs. Holman J made a modest order of this type. He directed that, if the defendant PCT were to succeed, the claimant would be liable for £20,000 of its costs; that was two−thirds of the sum which the defendant PCT (then) estimated its costs would be. If the claimant were to win, the defendant would not have to pay any of the claimant's costs. (In fact, the claimant's costs will be minimal, as she has no solicitors and has the benefit of counsel

> acting *pro bono* .) Under that order, the defendant has the comfort of knowing that it cannot be required to meet any bill of costs other than its own and, over that, it has a large measure of control. Between the two extremes of the forms of order I have mentioned, it is possible for the judge to tailor the terms of the order to meet what he sees as the justice and fairness of the case."

23. That approach shows that all depends upon the circumstances, which are very wide. However, Mr Fordham submits that we should not follow the approach described in *Corner House* and *Compton* , so far as capping the defendant's liability for the claimant's costs is concerned. He draws our attention to paragraphs 3 to 5 of Appendix 3 of the 2008 Report under the heading "Tightened King cap", which is, of course, a reference to *Musa King v Telegraph Group Ltd (Practice Note)* [2004] EWCA Civ 613, [2005] 1 WLR 2282. Those paragraphs say that the consequence of *Corner House* is to set PCO levels too low.

24. For example paragraph 3 of the Appendix complained that, while *Musa King* said that the costs capped in advance should be reasonable and proportionate, *Corner House* introduced the further constraint that the costs capped should be ‘modest'. In addition in paragraphs 4, 5 and 6 Appendix 3 said this:

> "4. As a consequence, caps on claimant costs are being set at levels that (in general even if not necessarily in each particular case) are unsustainable and as a result stifle litigation. If unrealistic caps are set on a claimant's costs, lawyers who specialise in such cases will not be able to continue to work in this field. The impact of this requirement therefore threatens to undermine the contribution PCOs can make to access to justice generally and, if applied to environmental cases, to Aarhus compliance.
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> 5. The Court of Appeal approach in *Corner House* , which limits capped costs to cover junior counsel only, also causes difficulties. By their very nature, complexity and public importance, a significant number of cases worthy of a PCO will justify the instruction of leading counsel. Indeed, there will frequently be leading counsel instructed for the defendant (as well as the developer or other interested third party) and in such cases their automatic exclusion for claimants would result in substantial inequality of arms.
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> 6. There is a fundamental difference in the ways in which the burdens of costs caps fall on the claimant and defendant. The PCO limiting the defendant's costs recovery is paid by the defendant public body itself (in the same way as if the claimant were legally aided). There is no impact on the fees paid to the defendant's lawyers. Any cap on the claimant's costs is almost inevitably paid for by reducing the fees recovered by the

> claimant's lawyers. In effect, claimant's lawyers are bearing the burden of subsidising the provision of access to justice for their clients."

25. Mr Fordham submits that, for the reasons there set out, it is wrong in principle to limit the recoverability of claimants' costs either to reasonably modest costs or to the costs of junior counsel. We would certainly accept that there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases in which it would be unjust to do so. However, in *Corner House* this court laid down guidance which, subject to the facts of a particular case and unless and until there is a rule which has statutory force to the contrary, we must follow, albeit in a flexible way. That was the unanimous view of the court in *Compton* . It follows that, as the court put it in *Corner House* , the costs should in general be reasonably modest and the claimant should expect the costs to be capped as set out in [76 (ii) and (iii)] of the judgment in that case.

26. There is a further point of some potential importance in this appeal. Paragraph 7 of Appendix 3 begins in this way:

> "7. There have been worrying examples where the implicit (or even explicit) assumption by the court is that the capped limit on the claimant's costs should somehow reflect the PCO limit imposed on the defendant. This is taken to represent an equitable approach as between the parties. We remind ourselves that this is not the way the Corner House principles are formulated and its adoption is unhelpful in the application of the PCO jurisdiction."

We entirely agree that there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. As just stated, the amount of any cap on the defendant's liability for the claimant's costs will depend upon all the circumstances of the case.

27. Paragraph 7 of Appendix 3 continues:

> "This problem is further exacerbated in cases where the claimant's lawyers are acting under a Conditional Fee Arrangement (CFA). When taking a view as to the reasonable costs cap to be imposed on the claimant, judges are reluctant to order what they consider at first glance to be excessive cost caps, resulting from the existence of the CFA. Because of the principle that the success fee is not to be disclosed before the conclusion of the case, a maximum 100% success fee must be assumed, resulting in a cap twice the size of the claimant's base costs. Parliament has legislated to provide CFA jurisdiction as part of the range of measures in place to achieve access to

> justice. The costs cap base level should not therefore be reduced."

We do not accept that approach in this context. The agreed success fee is relevant to the likely amount of the liability of the defendant to the claimant if the claimant wins. It is therefore relevant to the amount of any cap on that liability. In our opinion the court should know the true position when deciding what the cap should be.

28. Before considering the application of those principles to this case, it is appropriate for us to consider the procedure which ought to be adopted at first instance and on appeal.

The correct procedure - first instance

29. In *Corner House* the court set out at [78], [79] and [81] the procedure which ought to be followed at first instance. It also expressed the hope that the Civil Procedure Rules Committee would consider the matter, which it has not so far done in any detail. The court said this:

> "78. We consider that a PCO should in normal circumstances be sought on the face of the initiating claim form, with the application supported by the requisite evidence, which should include a schedule of the claimant's future costs of and incidental to the full judicial review application. If the defendant wishes to resist the making of the PCO, or any of the sums set out in the claimant's schedule, it should set out its reasons in the acknowledgment of service filed pursuant to CPR 54.8. The claimant will of course be liable for the court fee(s) for pursuing the claim, and it will also be liable for the defendant's costs incurred in a successful resistance to an application for a PCO (compare *Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346 at para 76(1)). The costs incurred in resisting a PCO should have regard to the overriding objective in the peculiar circumstances of such an application, and recoverability will depend on the normal tests of proportionality and, where appropriate, necessity. We would not normally expect a defendant to be able to demonstrate that proportionate costs exceeded £1,000. These liabilities should provide an appropriate financial disincentive for those who believe that they can apply for a PCO as a matter of course or that contesting a PCO may be a profitable exercise. So long as the initial liability is reasonably foreseeable, we see no reason why the court should handle an application for a PCO at no financial risk to the claimant at all.
>
> 79. The judge will then consider whether to make the PCO on the papers and if so, in what terms, and the size of the cap he should place on the claimant's recoverable costs, when he

considers whether to grant permission to proceed. If he refuses to grant the PCO and the claimant requests that his decision is reconsidered at a hearing, the hearing should be limited to an hour and the claimant will face a liability for costs if the PCO is again refused. The considerations as to costs we have set out in paragraph 78 above will also apply at this stage: we would not expect a respondent to be able to demonstrate that proportionate costs exceeded £2,500. Although CPR 54.13 does not in terms apply to the making of a PCO, the defendant will have had the opportunity of providing reasoned written argument before the order is made, and by analogy with CPR 52.9(2) the court should not set a PCO aside unless there is a compelling reason for doing so. The PCO made by the judge on paper will provide its beneficiary with costs protection if any such application is made. An unmeritorious application to set aside a PCO should be met with an order for indemnity costs, to which any cap imposed by the PCO should not apply. Once the judge has made an order which includes the caps on costs to which we have referred, this will be an order to which anyone subsequently concerned with the assessment of costs will be bound to give effect (see CPR 44.5(2)).

×.

81. It follows that a party which contemplates making a request for a PCO will face a liability for the court fees, a liability (which should not generally exceed a proportionate total of £2,000 in a multi−party case) for the costs of those who successfully resist the making of a PCO on the papers, and a further liability (which should not generally exceed a proportionate total of £5,000 in a multi−party case) if it requests the court to reconsider an initial refusal on the papers at an oral hearing. We hope that the Civil Procedure Rules Committee and the senior costs judge may formalise these principles in an appropriate codified form, with allowance where necessary for cost inflation in due course."

30. In *Corner House* the court did not make detailed references to the various potentially relevant provisions of the CPR. In *Compton* it did; see per Waller LJ at [31] to [43], especially at [41] to [43] where he in effect followed the guidance set out at [79] of *Corner House* . Smith LJ expressly agreed: see her [90]. In the result the court underlined the principles in that case and emphasised that it should not rewrite them. Nor should we.

31. Unfortunately the parties did not proceed in this way at first instance in this case. Neither party chose to challenge Sullivan J's PCO in the way suggested in *Corner House*. Moreover, the respondent did not submit on paper that, if a PCO was made, it would be just to make an order capping the respondent's liability for costs. If a defendant wishes to make such a case it should make it in the acknowledgment of

service. It appears to us that, whatever the outcome of this appeal, parties should follow the guidance in the above paragraphs in order to limit the costs of arguing about PCOs. In our opinion the courts should do their utmost to dissuade parties from engaging in expensive satellite litigation on the question whether PCOs and thus cost capping orders should be made. The expenditure of such costs cannot be in the public interest. Judges in the administrative court have considerable experience in this area and their decisions should not be revisited save in exceptional circumstances, as this court made clear in [79] of *Corner House* quoted above. In the rare case in which it is necessary to have an oral hearing, it should last a short time as contemplated in *Corner House* and it should take place in good time before the hearing of the substantive application for judicial review so that the parties may know the position as to their potential liabilities for costs in advance of incurring the costs.

The correct procedure - Court of Appeal

32. Similar considerations apply in this court. Waller LJ so stated concisely at [47] to [49] in *Corner House* :

> "47. As to the procedures to be used in the Court of Appeal, having upheld the guidance in paragraph 79 of *Corner House* it seems to me that any procedure in the Court of Appeal should follow that guidance as far as possible. Let me deal first with cases where PCOs have been granted and the proceedings have been fought out. The governing principles identified in paragraph 74 can be taken to have been established so far as the case at first instance is concerned. If the person benefiting from a PCO is the would−be appellant, they may however have to be re−examined at the appellate stage. It may have become clear that no issue of general public importance arises or it may be clear that there is no public interest in bringing the case to the Court of Appeal. If the beneficiary of a PCO has succeeded in the court at first instance, it is difficult to think that some protection will not be appropriate in the Court of Appeal.
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> 48. So far as procedure is concerned, if the recipient of the PCO in the court below is wishing to appeal, an application for a PCO should be lodged with the application for permission. The respondent should have an opportunity of providing written reasons why a PCO is now inappropriate. The decision will be taken on paper by the single Lord Justice. If a PCO is refused the applicant can apply orally. If it is granted then a respondent will need compelling reasons to set it aside.
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> 49. What about PCOs on appeals from a refusal to grant a PCO or from the granting of a PCO? Again the matter should be dealt with by a single Lord Justice on paper and the normal order should be that there will be no order for costs save in

> exceptional circumstances, for example where the application is an abuse of process."

Smith LJ expressly agreed at [95].

33. The procedure at [47] was not followed in this case. So far as we are aware, the respondent's case was not put before the court on paper before the applications for permission to appeal and for a PCO were considered by Laws LJ. If it had been, he would have been able to consider both issues together. It is of great importance that issues relating to permission to appeal and to a PCO and a consequent cost capping order or orders should all be considered at the same time and on paper. This should avoid further hearings of the kind which has taken place here. Such further hearings should be very rare.

34. The importance of the two aspects of the case being considered together at the first stage is underlined by our experience in this case. As already stated, in giving permission to appeal, Laws LJ said:

> "Mitting J may well have been right, but the public interest requires the issues raised to be ventilated in the Court of Appeal."

That led to an argument that Laws LJ had formed the view that Buglife had a thin case on the merits and that we should revisit the grant of permission or, at least, that we should hold that Buglife is unlikely to succeed on the merits and, for that reason, we should hold that it would not be just to grant a PCO in respect of Buglife's liability for the respondent's costs of the appeal.

35. There is undoubtedly some overlap between the issue whether to grant permission to appeal and the issue whether to grant a PCO. They both involve some consideration of the merits and should therefore be considered together. The general principle is that, where permission to appeal is granted, the court will not readily set the order aside. CPR 52.9(2) expressly provides that it will only do so if there is compelling reason and the cases show that it will only do so in very restricted circumstances. It would not be appropriate to do so in this case, where Laws LJ formed the view that there was a sufficient public interest in the issues raised to require permission to be granted.

36. Mr Straker sought to persuade us that, even if the permission to appeal could or should not be set aside Buglife's prospects of success are poor and therefore that we should not grant a PCO in favour of Buglife. In particular he drew our attention to the fact that, although Laws LJ said that the public interest required a hearing in the Court of Appeal, so that the test in [74 (ii)] of *Corner House* that the public interest required that the issues be resolved was satisfied, he did not say that it raised a question of general public importance, so that the test in [74(i)] was not satisfied.

Problems of this kind would be avoided (and would have been avoided in this case) if all these matters had been considered together by Laws LJ.

Application to the facts

37. The respondent does not now challenge the PCO made in favour of Buglife in the court below. Mr Fordham QC submits on behalf of Buglife that in these circumstances the order made by Sullivan J should be extended to include the costs in this court. Alternatively he submits that Buglife's liability for costs should be capped in this court. Mr Straker submits that the fact that an order was made by Sullivan J is irrelevant and that no PCO should be made in this court. Alternatively he submits that, if Buglife's liability is to be capped, fairness demands that the respondent's costs should be capped too. The first question is therefore whether Buglife's liability for costs should be capped in this court.

38. Mr Fordham submits that, given that Laws LJ gave permission to appeal and said that the public interest required that the appeal be heard, a PCO should be made. He submits that all the considerations which led Sullivan J to make a PCO in favour of Buglife equally apply in this court. He notes that the respondent does not challenge the order made against Buglife in the court below and he further submits that it would be just to protect Buglife entirely from the costs consequences of losing.

39. In considering what is the just order to make, we decline to enter into a detailed analysis of the facts. That will be the role of the court at the hearing of the appeal. We do not read Laws LJ as holding that Buglife has no prospect of success and, as already stated, we do not think it appropriate to set aside the permission to appeal. On the other hand, there are in our view formidable problems facing Buglife on the merits. It failed to persuade the President of the Lands Tribunal that its case was arguable and, although Mitting J gave permission to apply for judicial review, he dismissed the claim and refused permission to appeal. We do not accept Mr Straker's submission that the PCO should be refused because Laws LJ referred only to the public interest and did not say that the appeal raises a point of general public importance, especially since the two tests are difficult to separate: see [17] above. We do not think that he was considering the distinction when he considered the matter on paper.

40. We see no reason to disagree with the view formed on this issue by Sullivan J at first instance. He expressed the view that the conditions for a PCO were fulfilled. He noted the huge discrepancy in resources available between the parties and that a rolled up hearing exposes the claimant to a greater risk as to costs. On the other hand he said that, since permission had been refused, he did not think that the claimant should have full protection. He then limited the cap to £10,000 below. There is no reason to think that he misdirected himself in any way and it is not suggested on behalf of the respondent that he did. Since then Buglife has lost but has been granted permission to appeal. It appears to us that Buglife should have some protection in this court but it would in our opinion be unjust for Buglife to have 100% protection against costs, especially given the significant risk of its losing. The just order would

be to limit Buglife's costs in this court to £10,000. Thus if Buglife loses in this court and below its total liability for costs will be £20,000.

41. The question then arises whether the respondent should have any protection. Sullivan J thought that it should have protection in the same amount. Although he did not give reasons, we do not think that there can be any doubt that he thought that such an order would be just. He was plainly aware of the relevant authorities, notably *Corner House* , and there is no reason to think that he was not purporting to apply the principles there stated to these facts. It is therefore clear that he thought that justice required that the respondent too should have some protection. There is no reason to think that he simply ordered the same amount as some kind of automatic reaction to the £10,000 cap on the claimant's liability. He has a great deal of experience of this kind of case and would we are sure have thought that such an approach was unprincipled. It is clear from the reasons he gave that he had some regard to the merits and it seems reasonable to suppose that he had regard to the status of the respondent as a public body which depends upon the taxpayer for support.

42. Although, as was made clear in *Compton* , a judge in the position of Sullivan J deciding these issues on paper should give short reasons and he did not, no−one has asked him to give his reasons subsequently, although either party could have done. We detect no error in principle in the order made by Sullivan J capping the respondent's liability in the court below. Nor do we see any compelling reason for revisiting the exercise of his discretion. In these circumstances, we have reached the conclusion that an appeal by Buglife against Sullivan J's decision would have no realistic prospect of success. We therefore refuse the application for permission to appeal against it. In these circumstances there would be no purpose in extending the time in which to make the application.

43. We should add that there are in our view strong grounds for refusing permission to appeal on the further basis that the time to challenge Sullivan J's decision was before the hearing of the judicial review application and not afterwards. We are reluctant to do that on these facts because both parties and the court seem to have accepted that it was an appropriate procedure, although in our opinion it was not in the light of the decision in *Corner House* . In any future case permission to appeal would almost certainly be refused on this ground.

44. Should a similar order to that made by Sullivan J be made in this court? We have reached the conclusion that it should. Buglife's prospects of success do not appear to us to be strong and, for what are essentially the same reasons as led Sullivan J to make the order he did in the court below, we think it right to cap the respondent's liability in costs to Buglife in an appropriate sum. Again, a cap of £10,000 seems to us to be a fair sum.

CONCLUSION

45. For these reasons we refuse Buglife's application for permission to appeal against the PCO made by Sullivan J on 7 November 2007 capping the respondent's liability in costs to Buglife at first instance. However, we grant Buglife's application for a PCO capping its liability in costs in this court. We also grant the respondent's counter−application for an order capping its liability in costs to Buglife in this court. In each case the limit will be £10,000. Finally we should note that we have assumed that there is no possibility of Buglife being liable in costs to the developer, whatever the outcome of the appeal. If that is or might be wrong, we would be willing to provide further protection for Buglife.