Protective Costs Orders in Judicial Review

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Wednesday 5\textsuperscript{th} December 2007
**Introduction**

1. The issue of costs in judicial review proceedings is one of fundamental importance. The important right of access to the Courts can be restricted if litigants are deterred in bringing challenges because of the potential costs liability if the case is lost.

2. In the public law context the chilling effect of costs orders which have been made in public interest litigation has been long recognised. As Toohey J, a member of the High Court of Australia observed in his address to the Australian National Environmental Association in 1989:

   “Relaxing the traditional requirements of standing may be of little significance unless other procedural reforms are made. There is little point in opening the doors to the courts if litigants cannot afford to come in...The fear, if unsuccessful, of having to pay the costs of the other side-with devastating consequences to the individual or environmental group bringing the action-must inhibit the taking of the case to court.”

3. Extensive and detailed reform of the legal system is discussed elsewhere¹. This paper addresses a solution within the current system, that of Protective Costs Orders (PCOs). In recent times this area of the law has undergone significant development, culminating in the leading decision of *R (Corner House) v Trade & Industry Secretary* [2005] 1 WLR 2600 (CA).

4. This paper examines the development of the law in this area and, in particular, looks at the *Corner House* decision and the cases which have followed in order to identify the principles which are applied and the likely areas for future determination by the Courts.

5. An application for a PCO has to be seen within the current legal context. Whilst the Court has a complete discretion as to costs², the general rules are (i) that the determination as to costs takes place at the end of the litigation and (ii) the “loser” pays the “winner”.

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² Section 51 of the Supreme Court Act 1981, CPR Part 44.3 and Lord Lloyd’s observation in Bolton Metropolitan District Council v. Secretary of State for the Environment [1995] 1 WLR 1176, at 1178, “As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule”.

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The law pre-Corner House

6. Prior to the decision in Corner House the Courts had determined that they had jurisdiction to make a PCO, however the principles to be applied were somewhat unclear. In *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347 Dyson J attempted to lay down some clear guidance as to the basis upon which such orders could be made. Having noted that it was common ground that a PCO would not be available in a private law action,\(^3\) he considered whether different considerations might apply in the public law context in cases which could aptly be characterised as “public interest challenges”. He stated that:

\(\text{it was only in the most exceptional circumstances that the discretion to make a PCO should be exercised in a case involving a public interest challenge}.\)

(i) the court must be satisfied that the issues raised are truly ones of general public importance; (ii) the court must be satisfied, following short argument, that it has a sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order; (iii) the court must have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue; (iv) the court will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

7. On the facts of the two cases before him Dyson J said that he had his doubts about (i) above, and was unable to assess the merits sufficiently to be able to arrive at the conclusion required by (ii) above. In respect of the judicial review claim brought by CPAG, he thought that (iii) and (iv) appeared to be satisfied. However, the claim brought by Amnesty International failed to satisfy any of the tests he had laid down.

8. Following the decision in the *Child Poverty Action Group* case:

a. The Divisional Court made a partial protective costs order in respect of CND’s challenge to the legality of the Iraq war – see *Campaign for Nuclear Disarmament v Prime Minister & Others* [2002] EWHC 2777 (Admin). A PCO was made on the basis that any award of costs against the CND should be

\(^3\) Following the decision in *McDonald v Horn* [1995] ICR 685
capped at £25,000, but that if successful, their reasonable costs would be reimbursed if they won in full.

b. The Court of Appeal granted a protective costs order by consent to allow the Refugee Legal Centre to challenge the fast-track asylum system at Harmondsworth – see *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1296. In that case 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.

**Corner House**

9. The leading guidance on PCOs is now found in *R (Corner House) v Trade & Industry Secretary* [2005] 1 WLR 2600 (CA).

10. The facts were as follows. The Export Credit Guarantee Department (ECGD) of the Department of Trade and Industry (DTI) provided finance or security to UK exporters in international trade. One of its purported aims was to help eradicate or minimise bribery and corruption. Between March and November 2004 it carried out a consultation process and then altered its procedures and forms. The applicant, Corner House, was an NGO interested in issues concerning bribery and corruption. It brought proceedings for judicial review on the ground that the failure by the ECGD to consult on measures appropriate to prevent corruption and bribery breached public law standards of fairness and the DTI’s own published consultation policy. It complained that the consultation process had been one-sided and that the changes all weakened anti-bribery and anti-corruption protection. The applicant made an interlocutory application for a PCO limiting its exposure to costs whatever the result. At first instance Davis J declined. The Court of Appeal disagreed.

11. The court concluded that there were features of public law litigation which distinguished it from private law civil and family litigation. In particular:

a. The appellate courts have jurisdiction to consider appeals involving a public authority as to a question of public law even when the dispute between the parties has ended and
b. There was often a public interest in the elucidation of public law by the higher courts in addition to the interests of individual parties (see paragraph 69 and 70)).

Consequently the court took the view that those differences justified a different approach to the question of costs in public law cases.

12. Having considered the previous circumstances in which PCO’s had been ordered, the Court of Appeal concluded that, although the case brought by the Refugee Legal Centre had ultimately failed, nevertheless it was “a good example of the way in which PCOs can be harnessed in cases of general public importance where it is in the public interest for the courts to review the legality of novel acts by the executive in a context where it is unreasonable to expect that anyone would be willing to bear the financial risks inherent in a challenge” (paragraph 52).

13. When considering whether to make a PCO, the Court of Appeal offered the following guidance:

a. It was correct to state that the jurisdiction to make a PCO should be exercised only in the “most exceptional cases” as stated by Dyson J in Child Poverty Action Group; however the Court of Appeal took the view that this statement did not assist in identifying when those circumstances were likely to occur (paragraph 72).

b. No PCO should be granted unless the judge considered that the application for judicial review has a real prospect of success and that it is in the public interest to make the order. The Court of Appeal took the view that Dyson J’s requirement in Child Poverty Action Group that the courts should have a sufficient appreciation of the merits of the claim after hearing ‘short argument’ (such that it was more than merely arguable) tended to preclude the making of a PCO in a case of any complexity. Consequently the court had to do not more than conclude that the case was “properly arguable” or had a real (as opposed to a fanciful) prospect of success (paragraph 73).
c. A PCO may be made at any stage and on such conditions as the court thinks fit provided that:

i. the issues raised are of general importance;
ii. the public interest requires that those issues be resolved;
iii. the applicant has no private interest in the outcome of the case;
iv. having regard to the financial resources of both parties and to the amount of costs involved it is fair and just to make the order;
v. if the order is not made the applicant will probably discontinue and will be acting reasonably in so doing (paragraph 74).

d. If those acting for the applicant are doing so pro bono it is likely that this will enhance the merits of the application (paragraph 74).

e. It was for the Court, in its discretion, to decide whether it is fair and just to make the order in light of the above (paragraph 74).

14. The Court of Appeal further explained that a PCO can take a variety of forms, including:

a. An order that the defendant only can recover no costs.

b. An order that the defendant can recover only a maximum sum in costs (as in the £25,000 suggested in the CND case).

c. An order that neither party can recover costs (see paragraph 76).

The Court of Appeal stated that there was room for considerable variation, depending on what was appropriate and fair in each of the “rare” cases in which the question may arise.

15. Where a PCO was made against a defendant and the claimant was not represented pro bono, then the costs of the claimant would probably be capped to a modest amount. The Court of Appeal stated:
(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 (paragraph 76).

16. These principles derived from the decision in King v Telegraph Group Ltd (Practice Note) [2005] 1 WLR 2282. In that case the Court of Appeal highlighted the "obvious unfairness" of the arrangement from the defendant's perspective where an impecunious claimant sued the defendant in libel proceedings with the benefit of a CFA (which may have borne a success fee of 100%) without the benefit of after the event insurance cover. In that case, by prescribing a costs capping order (inclusive of any uplift under the CFA) the Court of Appeal attempted to achieve justice to the defendant in an otherwise unfair situation. (If in defamation cases because of the relatively low amounts at stake, this resulted in the CFA assisted claimant receiving nothing more than a modest fee for legal representation; that was no different to the position in legal aid cases and any reluctance on the part of legal representatives to enter into CFAs in these circumstances was a small price to pay in contrast to the perceived injustice of the current situation.)

17. At paragraph 77 of the judgment the Court of Appeal concluded that in this jurisdiction there was no power to make an order which required the defendant to finance the claimant's costs (paragraph 77).

18. At paragraphs 78-79 detailed procedural guidance was given:
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 r 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 R (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346 at [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 which we have set out in para 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 r 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 r 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 r 44.5(2).

19. As to the position of parties other than the defendant, interested parties may also be heard on PCO applications, although the judge should not normally allow more than one set of additional costs because he will expect different interested parties to make common cause on the issue (see paragraph 80).
20. On the facts of the case before them, the Court of Appeal decided to award a PCO. On the question of the public interest test, the Court of Appeal stated:

137 We had no hesitation in concluding for two quite different reasons that the case raised issues of general public importance. The first reason was that it relates to the way in which major British companies, supported by credit guarantees backed by the taxpayer in accordance with a statutory scheme, do business abroad. Obtaining contracts by bribery is an evil which offence against the public policy of this country. When the interests of the taxpayer are involved, the question whether or not companies are obliged to provide details of money paid to middlemen, such as were required by ECGD with the strong endorsement of the relevant minister before the changes were made, is a matter of general public importance.

138 The second reason is that the case raised important issues arising out of the implementation or non-implementation of ECGD's published consultation policy... The judge was influenced by the consideration that Corner House's challenge related to procedural unfairness and not to any alleged irrationality in the eventual outcome, and he took note of the fact that the issue in the centre of the case was whether or not ECGD should have consulted Corner House in the circumstances of this particular case.

140 Procedural issues, however, are often of greater importance than issues of substantive law. It is in our judgment a matter of general public importance if a division of a department of state publishes and adopts an open consultation policy of general application and then reverts to a timeworn practice of privileged access, particularly on an issue as obviously sensitive as measures to combat bribery and corruption in connection with the attainment of major contracts abroad.

21. As to the prospects of success, the Court of Appeal decided that, using its substituted test, Corner House had a real prospect of success in the sense that that phrase is used in CPR Pts 24 and 52.

22. Further as to the remaining aspects of the test, the Court of Appeal concluded:

144 Finally, we considered that the public interest required that these issues should be litigated, and since Corner House had no private interest in the outcome of the case, and since our fourth and fifth principles (see para 74 above) were both satisfied, we considered in the exercise of our discretion that it was appropriate to permit Corner House to proceed with the benefit of a PCO, and that this was one of those exceptional cases in which such an order should be made. Corner House had a real prospect of showing that they had been wronged. Whether ECGD's procedural principles promised them consultation or dialogue, they had received neither. In 2003 they had been promised a substantive response to their report, and they never received it. In
2004 they were offered a meeting with the minister, and the offer ran into the sand. ECGD told them (and TI) that it regarded them as their primary NGO partners on the topic of bribery and corruption, yet what occurred in the spring, summer and early autumn of 2004 was the antithesis of partnership. And all through 2004 ECGD was affording privileged access to the representatives of commerce and banking which it wholly denied to Corner House, despite its acknowledged expertise in the topic and in the face of ECGD's own consultation policy.

145 In R v Somerset County Council, Ex p Dixon [1998] Env LR 111, 121 Sedley J said: "Public law ... is not about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power." In the present case Corner House asserted that it had been wronged, and if all the criteria for the grant of a PCO were otherwise met, we were satisfied that it was necessary in the interests of justice that it should be permitted to continue with the proceedings with the protection of a PCO. If we had not taken that course, the issues of public importance that arose in the case would have been stifled at the outset, and the courts would have been powerless to grant this small company the relief that it sought.

23. As to the appropriate PCO to be made on the facts of the case, it is apparent that the Court of Appeal ran out of time to debate this issue as fully as it would have liked. At paragraph 146 it stated:

146 If we had not been under such time pressures we would no doubt have explored with the parties the possibility of making a PCO which had the effect, say, of requiring Corner House to meet the first £10,000 of the defendants' costs if its substantive application had been dismissed in due course. In general a PCO in that form, or in the form in which one was made in R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1296 (in which the claimants undertook to seek no order for costs from the defendants if they won) are preferable to a PCO in the form in which we made it on the evening of 22 December.

147 Our order as drawn provided:

"4. The court directs that the defendant is not permitted to recover its costs of the judicial review proceedings from the claimant.

"5. The claimant's costs are to be capped applying the decision of the Court of Appeal in the case of King v Telegraph Group Ltd (Practice Note) [2005] 1 WLR 2282, paras 101-102.

"6. The claimant to apply to the senior costs judge to set the level of the court's cap."
Key points emerging from Corner House

24. Whilst the Corner House decision provides useful guidance as to the making of PCOs, it has given rise to considerable discussion particularly in the following areas:

   a. **The scope of the public interest test.** In Corner House the Court of Appeal took a "broad brush" approach to the public interest test. Both reasons given by the Court of Appeal as to why the case was a matter of public importance (i.e. (1) because of the importance of corruption/bribery to the taxpayer and as an "evil" which offends public policy and (2) the wider interest in ensuring that public bodies stand by their commitment of open consultation), demonstrate that a wide and lateral approach to the public interest test is permissible.

   b. **Private Interest.** The need for a claimant to have no "private interest" in the outcome of the judicial review has been doubted in subsequent cases. This is discussed in more detail below.

   c. **Impact of lawyers acting pro bono** – As set out above the Court of Appeal stated that if those acting for the applicant are doing so pro bono (as opposed to under some other form of funding arrangement such as a CFA), it is likely that this will enhance the merits of the application (paragraph 74). No reasons are provided as to why this is the case and this ignores the practical difficulty of securing legal representation on this basis. It is however of interest that in Corner House itself a PCO was awarded despite the fact that the legal representatives were acting under a CFA.

   d. **Costs capping** – the impact of the guidance on costs capping has the effect that, in cases of general public importance, there is no role for a silk unless he or she is acting pro bono. It is of note that this would have precluded the legal team acting in Corner House itself.

   e. **Costs protection guidelines** – Despite the fact that the Court of Appeal limited the costs of making the PCO to £1,000 for a paper application and £2,500 for a hearing, this ignores the fact that many small NGOs would not have this sort of
sum available and therefore would be deterred in making an application on that basis (particularly in cases where there may be multiple defendants). In such situations it may be that the issue has to be canvassed carefully in any letter before action and costs exposure minimised by attempting to engage in a dialogue pre-proceedings.

**General Importance and Public Interest**

25. Given the Court of Appeal’s comments in *Corner House*, it is, of course, key that an applicant for a PCO is able to satisfy the court that the issues which he or she seeks to bring to the court are of (i) general importance and (ii) in the public interest. There has been a lot of debate as to what suffices. It is agreed that it is not enough that the case raises public law issues, even significant ones, as this would bring most, if not all, judicial review challenges within the definition. However, it is difficult to be more prescriptive. As Clayton observed⁴, “it may well be that [it] is easier to recognise in practice than to define in theory”. Although various tests were suggested within the Working Group on Facilitating Public Interest Litigation (chaired by Sir Maurice Kay)(15th June 2006)⁵, the Report declined to lay down any more precise definition but concluded that a broad purposive interpretation ought to be given and the definition ought not to become unduly restrictive (see paragraphs 75 and 76).

26. It is therefore instructive to consider what approach has been adopted in subsequent cases.

27. In *Goodson v. HM Coroner for Bedfordshire and Luton & anor* [2005] EWCA Civ. 1172, the Claimant brought judicial review proceedings on the ground *inter alia* that the inquest held into the death of her father, which occurred as a result of injury sustained during surgery at Luton & Dunstable hospital, did not comply with the procedural obligation under Article 2 of the ECHR. Richards J dismissed the proceedings. He made an order for costs against the Claimant in favour of the hospital, who had intervened in the inquest proceedings as an interested party. However, he granted permission to appeal on the basis that the issue raised was one of general

⁴ See PL [2006] 429 at 441
⁵ See paragraph 70, “the case should raise a serious issue which affects or may affect the public or section of it; the case should raise issues which transcend the interests of the person bringing the case; the case should raise issues which it is teh collective interest to resolve”
importance. On an application for a PCO to cover the costs of the hospital in appellate proceedings, the Court of Appeal declined to make a PCO. Moore-Bick LJ concluded at [17],

“...I think that it is right to point out that it does not necessarily follow from the fact that the issue is one of general importance or from the fact that the judge, quite rightly in my view, expressed the view that it was appropriate to be heard by this court, that the public interest requires it to be resolved. ... At the end of the day, therefore, the court had to decide whether, having regard to the nature of the issue and the position of the parties, it was in the public issue that it should be determined in this case rather than any other, even though that could only be achieved at the expense of the Hospital, at least as regards its own costs. The satisfaction of this particular criterion will in my view often be affected by the fact that the application is made at the appellate stage. In the present case the question that [the Claimant] wished to raise has been considered by the court and has been dealt with in a long and carefully reasoned judgment which will continue to be available to provide guidance to Coroners. However important that question, therefore it cannot be said that it is one on which the courts have yet to pronounce. The question for the court now, therefore, is whether it is in the public interest that the matter be decided at the appellate level.”

28. Moore-Bick LJ went on to conclude that it was not in the public interest for two reasons:

a. There was another appeal (R(Takoushis) v. Inner London North Coroner) which raised the issue which was due to be heard “within the next few weeks” (paragraph 21);

b. “The fact of the matter is that the position has been clarified by the judgment in this case and although in some cases it may be difficult to draw a line between gross negligence and simple negligence, there is no evidence that the problem is one which arises with any frequency or that Coroners up and down the land are currently being hampered in discharging their duties by uncertainty over the legal position” (paragraph 23).

29. In Wilkinson v. Kitzinger [2006] EWHC 835 (Fam), the Petitioner sought a declaration that her Canadian marriage to the Respondent was valid as a marriage in the United Kingdom, rather than only as a Civil Partnership under the Civil Partnership Act 2004. The Petitioner contended that the inability or failure to recognise her Canadian
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marriage as a marriage in the United Kingdom constituted a breach of Articles 8, 12 and 14 of the ECHR and that the applicable statute (section 11(c) of the Matrimonial Causes Act 1973) should be declared incompatible in those respects (under section 3 of the Human Rights Act). In the circumstances, the Lord Chancellor’s department intervened in the proceedings.

30. The Petitioner sought a PCO to protect herself against the Lord Chancellor’s costs. The President (Sir Mark Potter) granted the PCO. He limited any award which to be made in favour of the Lord Chancellor’s department to £25,000. Sir Mark Potter P made the order notwithstanding that he was of the view that it was questionable whether the case was one of general public importance or one which the public interest required to be resolved. At [53], he concluded,

This is indeed a case where the law is clear, that is to say where the distinction between marriage and civil partnership is clearly laid down and readily applicable without doubt or difficulty. No process of clarification is necessary. There is no question as to whether the law is being fairly or evenly applied; nor is the action brought to uphold or further some matter of broad environmental or social benefit to the community. In short, the action is being brought, not to uphold the law, as recently laid down by Parliament, but to secure its change. Put in that way, it is difficult to see that the public interest requires change so soon after the passage of the relevant legislation and the general welcome it has received.

31. In *R (Bullmore) v. West Hertfordshire Hospitals NHS Trust* [2007] EWCA Civ. 609, the Court refused to make a PCO in respect of a claim brought by members of a local hospital action or pressure group challenging the Trust’s decision to close certain hospital services at Hemel Hempstead hospital. On the application for permission to appeal, Hughes LJ concluded that Lloyd Jones J was entitled to conclude that the case did not raise sufficient issues of general public importance so as to require, in the public interest, that they should be litigated at the expense of the defendants whether they succeeded or not.

32. In *R (A & ors) (Disputed Children) v. Secretary of State for the Home Department* [2007] EWHC 2494 (Admin), Munby J held that, although a challenge brought by an asylum-seeker to the Secretary of State’s policies in respect of Disputed Children raised matters of general importance and it was in the public interest to resolve them, it
was nonetheless not in the public interest to make a PCO. He set out his reasoning in the following terms at [38],

“Why does the public interest require the Secretary of State to be subjected now – he has not been hitherto in this litigation – to a protective costs order under which he is (this is what Ms Harrison is suggesting) exposed to costs in an amount which could reach £30,000 if unsuccessful whilst being denied his costs if successful? In my judgment it does not. Superficially it may seem that the Secretary of State’s pocket is deep, but as Moore Bick LJ pointed out in Goodson at para [30] a public authority’s resources are not unlimited and money spent on litigation is money that would otherwise be available for its ordinary operations.”

33. As Moore-Bick LJ made clear in Goodson this analysis is better made in considering whether it is just and fair to make the PCO (having been satisfied that the case raises matters of general importance which the public interest requires them to be resolved). To that end, it is of note that Munby J was prepared to conclude that the matters did satisfy the general importance and public interest requirements even though, for the Claimant, the resolution of those matters was academic⁶.

34. A challenge brought by the British Union for the Abolition of Vivisection to the decision of the Secretary of State to grant Cambridge University licences under the Animals (Scientific Procedures) Act 1986 was held to raise matters of general importance in the public interest: see Bean J’s judgment [2006] EWHC 250 (Admin.) at [3] and [15].

Private Interest

35. In Corner House, the Court of Appeal adopted Dyson J’s analysis in Child Poverty Action Group that the applicant for a PCO should have no private interest in the outcome of the proceedings. However, the issue was irrelevant and not the subject of argument. It was common ground that Corner House had no private interest and this

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⁶ See the comments of Lord Slynn in R. Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450 at 456-457 where he concluded that in public law matters, the Courts possessed a discretion to hear an appeal which involved an issue which concerned a question of public law even when the parties to the appeal had ended the ‘lis’ between them.
issue was not addressed in the submissions of either party or in the Court of Appeal’s judgment.

36. The genesis of this requirement is Dyson J’s judgment in *Child Poverty Action Group*. Neither applicant in that case had a private interest in the outcome. Dyson J defined a public interest challenge as one which raised public law issues of general importance where the applicant had no private interest in the outcome. It appears that he was concerned to frame it in this way out of a desire to prevent the widespread availability of PCOs (in that they would not be available in the most judicial review challenges). That might also explain why the applicant’s Counsel framed his argument in those terms. Dyson J appears to have been fortified in his view that this was a necessary requirement by reference to Lord Woolf’s remarks in *New Zealand Maori Council v. Attorney-General (New Zealand)* [1994] 1 AC 466. In that case, the Claimant’s appeal was dismissed but the Court made no order for costs on the basis that they were not bringing the proceedings out of any motive of personal gain but in the interest of taonga which was an important part of the heritage of New Zealand. Dyson J regarded it as “a good example of a public interest challenge”.

37. However, it is clear that that conclusion could be reached irrespective of whether the applicant had a “private interest in the outcome”.

38. This requirement has been subject to much criticism:

a. It is a false dichotomy to assume that “personal” or “private” interest and the notion of “public” interest are necessarily mutually exclusive. “Many interested parties would fall at this hurdle, serving as they inevitably do, planned agendas, however benign, such as environmental or human rights protection”. “… that the only worthy public interest litigant is an altruistic stranger to the cause is nonsensical”;
b. The requirement is in direct conflict with the standing principles and the “victim” test under section 7 of the Human Rights Act 1998. A person with no private interest will almost certainly not satisfy a Court that he is directly affected so as to be a victim within the HRA. It is difficult to imagine how there can be an alleged human rights violation without a specific victim. Alternatively, a pressure group which might qualify for costs protection as a public interest litigant would almost certainly fail the victim test and not be able to bring a human rights challenge;

c. The need for the requirement is inadequately reasoned. It is not clear why a private individual who is affected by a public decision (and who cannot obtain legal aid) should not be able to obtain a PCO to ensure that the decision which may be unlawful or flawed can be subject to scrutiny by the courts. If the other requirements are satisfied (general importance/public interest), it is far from obvious why the fact that the individual is personally affected should bar him from obtaining a PCO.

39. Nevertheless, the Court of Appeal in Goodson not only maintained that it was a requirement which needed to be established before a PCO could be obtained but interpreted the requirement narrowly. In that case, the Claimant contended that it was sufficient that the public interest in having the issue decided transcended or wholly outweighed the interest of the particular litigant and if an applicant for a PCO had to demonstrate that he had no private interest it would be “all but impossible to obtain an order of that kind”\(^\text{13}\). The Court of Appeal rejected that submission on two grounds:

a. Having considered the relevant authorities, the Court in Corner House was “well-placed to decide where to draw the line in terms of private interest. The requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have formulated this part of the guidelines in more qualified terms corresponding to the submission of [the Claimant] if it thought it appropriate to do so”\(^\text{14}\);
b. The requirement “may also be regarded as consistent with the rules relating to standing for the purposes of applying for judicial review”. The Claimant has a private interest in the outcome because this is the way in which she can obtain a fresh enquiry into the death of her father. “It is her relationship with her father that gives her both the interest in seeking relief by way of judicial review and sufficient standing in law to pursue her claim. As [she] was constrained to accept, it is unlikely that she would have been entitled to take similar action to challenge the verdict resulting from an inquest on a stranger whose death occurred at the same hospital”

40. Neither of the two reasons given withstands proper scrutiny. The first because the issue (and the arguments) were not canvassed by the Court of Appeal in Corner House. It is arguable that the Court of Appeal’s comments in this respect were obiter. Nor were they directly in issue in Child Poverty Action Group. In addition, it is clear from the judgment in Corner House that the Court was giving guidance to be considered rather than, as the Court in Goodson seems to have interpreted it, laying down binding requirements.

41. The second because it ignores the fact that “public” and “private” interests are not necessarily mutually exclusive and that the essential purpose of a PCO to provide equality of arms and to ensure that “public interest” litigation is not “stifled” at the outset.

42. The requirement that an applicant have no private interest was doubted by Sir Mark Potter P in Wilkinson v. Kitzinger. He stated at [54],

“I find the requirement that the applicant should have ‘no private interest in the outcome’ a somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case, it is difficult to see why, if a PCO is otherwise appropriate, the existence of the applicant’s private and personal interest should disqualify him or her from the benefit of such an order. I consider that, the nature and extent of the ‘private interest’ and its weight or importance in the overall context should be treated as a flexible element in the court’s consideration of the question whether it is fair and just to make the order. Were I to be persuaded that the remaining criteria are satisfied, I would not regard the requirement ... as to fatal to this application.”
43. Those doubts were shared by the Court of Appeal (on an application for permission to appeal) in *R (England) v. London Borough of Tower Hamlets & ors.* [2006] EWCA Civ. 1742 at [14].

44. These concerns were shared by the Working Group on Facilitating Public Interest Litigation (chaired by Sir Maurice Kay)(15th June 2006): see paragraphs 79 and 80 of the Report. The Report also expressed concern as to the lack of clarity as to “what constitutes a private interest” so as to disqualify consideration for a PCO (see paragraph 82). In the circumstances, the Report concluded (with unanimous support of the Group) that the lack of private interest should not be a condition for obtaining a PCO (paragraph 83) but, that, instead the “nature and extent” of the private interest is relevant to the court’s discretion as whether it is fair and just to grant a PCO.

45. In the circumstances, the Court is likely to re-examine the issue and adopt the approach of Sir Mark Potter P in *Wilkinson v. Kitzinger* and the Working Group on Facilitating Public Interest Litigation, i.e. to determine whether the public interest in the case points towards the making of a PCO notwithstanding the existence of a private interest. This approach also better explains the view taken by Munby J in *A (Disputed Children)* where he concluded that the Claimant retained a private interest (the ring-fencing of any damages due to him) which was the “driver” behind the application for a PCO and in the circumstances a PCO would not be granted (notwithstanding that the issues in the case were of general public importance).\(^{15}\)

**Impact of lawyers acting pro bono**

46. The Court of Appeal in *Corner House* was of the view that an application for a PCO would be enhanced if the applicant’s lawyers were acting *pro bono* (as opposed to acting under a CFA). There is no proper basis for this reasoning. It ignores the purpose of the PCO – which is to provide costs protection against the other side’s costs. It is that potential barrier to accessing the courts which the PCO is designed to remove. The fact that the applicant has secured representation on a *pro bono* basis is a matter which more properly goes to the form of the order which is made.

\(^{15}\) See [36].
47. Further, the Court of Appeal’s remarks ignore the practical realities. As the Working Group on Facilitating Public Interest Litigation Report notes\(^\text{16}\), such a requirement would unduly restrict the pool of lawyers who might be willing to act in a public interest challenge.

**Costs protection guidelines**

48. The Court of Appeal in *Corner House* indicated that, if an application for PCO failed, the applicant could expect to pay the costs of the Defendant and interested parties\(^\text{17}\). If the application were considered on paper, the Court indicated that no more than £1,000 would normally be recoverable and, if the application was considered at a hearing, no more than £2,500\(^\text{18}\). Interested parties could also expect to recover their costs in those sums, albeit that there would be only one set of costs ordered.

49. Thus, an applicant could be faced with a bill of £7,000 if unsuccessful in his or her application for a PCO.

50. The risks of such an adverse order are in themselves a powerful deterrent to bring an application\(^\text{19}\). This issue ought to be revisited. The Working Group on Facilitating Public Interest Litigation Report recommended that there should be no order as to costs save where a party has acted unreasonably\(^\text{20}\). This solution is more satisfactory than the present position. It provides a balance between, on the one hand, not deterring meritorious applications for PCO on grounds of cost and, on other hand, deterring abusive and wholly unmeritorious applications.

**Conclusion**

51. It was anticipated that, following *Corner House*, the courts would be more willing to grant PCOs in “public interest litigation”. This has not significantly proved to be the

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\(^\text{16}\) See paragraph 96
\(^\text{17}\) See [79]
\(^\text{18}\) The Court of Appeal was aware of the problems caused by applying for a PCO. It made an interim order to cover the costs of the application.
\(^\text{19}\) See Stein & Beagent [2005] JR 206
\(^\text{20}\) See paragraph 99.
case\textsuperscript{21}. This is probably a consequence of the Court of Appeal’s retention of the “lack of private interest” criterion and the risks which many public interest litigants perceive in an adverse costs order being made against them in simply applying for a PCO. Although the Court of Appeal in Goodson perpetuated the difficulties by restrictively applying the “private interest” requirement, subsequent Courts have doubted whether that is the proper approach. It is further hoped that the Courts will re-examine the costs approach relating to the application for a PCO to ensure that those guidelines (set out in Corner House) do not themselves restrict access to justice.

5\textsuperscript{th} December 2007

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\textsuperscript{21} A list of the cases in which a PCO has been considered since Corner House is set out at footnote 6 of Clayton QC [2006] PL 429 and paragraphs 56-64 of the Working Group Report. In addition to those, there have been (i) Bullmore (see paragraph 31 above (ii) A (Disputed Children) (see paragraph 32) (iii) England (see paragraph 43).