FAQ on Protective Costs Orders

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What is a Protective Costs Order ("PCO")?

In litigation the normal rule in this jurisdiction is that 'costs follow the event'. This means that at the conclusion of the litigation the loser pays the winner's costs.

A PCO is a costs order which differs from the normal costs order in two ways:

- It is made at the outset of the case. In this way the parties ensures certainty as regards costs and manages risk.
- It does not follow the event e.g. it might provide that each side will bear their own costs whatever the outcome or that the losing side will recoup part of their costs (see below: 'What form can a PCO take?').

What are the relevant court rules?

Order 99 Rule 1(1) of the Rules of the Superior Courts provides: "...costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those courts respectively..."

Order 99 Rule 1(4) of the Rules of the Superior Courts provides: "...the costs of every issue of fact or law raised upon a claim or counterclaim, shall, unless otherwise ordered, follow the event...."

Why shouldn't normal costs rules apply?

The risk of exposure to an adverse costs order is a real deterrent to potential litigants. This is particularly the case in public interest litigation, which typically involves people who are not in a position to bear the risk of costs, let alone pay their own legal fees.

The reason the courts have been prepared to not apply the usual 'costs follow the event' rule is that they acknowledge that it is in the public interest to hear certain matters of public importance which might not otherwise be heard.

What form can a PCO take?

The court can make a variety of PCOs including:

- there will be no order as to costs
- the unsuccessful applicant will not pay costs but may recover costs if successful
- the parties' liability to pay costs will be capped

The English courts have emphasised the relevance of proportionality in determining what kind of PCO is appropriate in the circumstances.

Have the Irish courts ever granted a PCO?

There is limited precedence when it comes to PCOs in Ireland. There are two reported cases of applications for PCOs in which the High Court accepted in principle that it might have jurisdiction to grant a PCO, however found that the facts before it did not satisfy the relevant criteria. See Village Residents Association Ltd. -v- An Bord Pleanála and MacDonalds [2000] 2 IR 321 and Friends of the Curragh Environment Ltd -v-An Bord Pleanála & Ors [2006] IEHC 243.

The first PCO was granted in Ireland by the High Court in the case of Max Schrems v Data Protection Commissioner [2014] IEHC 310. Costs were limited to €10,000 on the basis of financial barriers facing the applicant in pursuing his challenge and the considered importance of the case in the wider public interest. Without further guidance from the courts, judicial discretion remains broad and somewhat unpredictable for those seeking a PCO.

When do the English courts grant a PCO?

The lead English authority R (on the application of Cornerhouse Research) -v- Secretary of State for Trade and Industry EWCA Civ 1342 provides that a PCO may be granted where:

- the issues are of general public importance
- the public interest requires that the issues be resolved
- the applicant has no private interest in the case
- it is fair and just to make the order
- the applicant will probably discontinue the proceedings if no PCO is made

Who pays for the cost of the PCO application?

The English courts have found that the applicant may obtain their costs of a successful application for a PCO. An English working group report proposed that there should be no order for costs in respect of the application for a PCO, such a rule to be departed from only where a party acts unreasonably.

What does 'public importance' mean?

The English courts will be more likely to consider a matter to be of 'public importance' where it raises a novel point of law or a point which requires clarification. Both the Irish and English courts are resistant to making PCOs where the judicial review is a matter of applying familiar principles of law to new facts.

In English case-law, examples of matters of 'public importance' have included the lawfulness of:

- a fast-track pilot scheme to deal with asylum claims;
- an export credit guarantee consultation process relating to anti-bribery and corruption in international trade;
- licences granted to a university for animal experimentation;

- planning permission regarding a site for rare endangered invertebrates;
- a decision to close a hospital section; and
- whether a registered social landlord was a "public authority" under the Human Rights Act.

In a recent English case the Court considered "public importance" to be a question of degree. The fact that the issue (a hospital closure) affected a particular catchment area did not mean it was not of public importance.

What does 'no private interest' mean?

The 'no private interest' requirement means that the applicant should have no motive of personal gain.

This requirement has been subject to much criticism for two reasons:

- It sits uneasily with the judicial review requirement to show "sufficient interest"; and
- Private interest and public interest are not necessarily mutually exclusive. For example, the fact a female social welfare applicant may personally gain from successful litigation, in the sense that the benefit in question becomes payable, does not negate the fact it was in the public interest to ascertain the unlawfulness of excluding women from payment of that benefit.

The Court of Appeal recently noted that whilst it had not expressly overruled itself on the private interest point, it advocated a flexible approach to all elements of the guidance set out in R (on the application of Cornerhouse Research) -v- Secretary of State for Trade and Industry EWCA Civ 134, including on private interest.

Some commentators argue that in stipulating "no private interest" the Court really intended to exclude those whose primary interest was personal gain, but not those whose personal interest is no greater than any other member of the affected class.

At what stage of litigation should I apply for a PCO?

At the outset, when applying for leave for judicial review or leave to appeal a refusal for judicial review.

At the end of the litigation it is open to you to apply for "no order as to costs" if you lose, or even that the unsuccessful respondent pays your costs.

Does my lawyer have to be acting pro bono to obtain a PCO?

The English courts have indicated that pro bono representation will enhance the merits of an application for a PCO. This has been subject to criticism on the ground that the same requirement is not made of the other side. This may compromise true equality of arms by encouraging lesser representation in a matter which by its nature is required to be of "public importance".

Do I have to show that I will drop the case if I don't obtain a PCO?

The English courts have indicated that it will enhance the merits of your application for a PCO if you can show that you are likely to withdraw the matter without a PCO. The reason for this is that the intention of granting a PCO is to manage a costs risk which a litigant is unable to bear and which would otherwise prevent the issue from being ventilated.

The Court of Appeal has found that it is not necessary that an unfavourable outcome would be financially fatal to the body applying for a PCO.

Won't it look like I think my case is weak if I apply for a PCO?

An application for a PCO is not an admission of weakness. It is no more than an acknowledgment of the costs risk inherent in all litigation. The English courts will not grant a PCO unless it considers that the case has real prospects of success.

We are an NGO – can we obtain a PCO?

The English courts have granted NGOs a PCO. However, the prior question is whether the NGO has standing to take the case in the first place, see our FAQ on Standing.

Should I apply for a PCO in any judicial review?

The case-law to date on PCOs indicates that PCOs are very much the exception to the rule. They are to be reserved for cases of public importance which raise novel issues of law or points of law which require clarification. Not all issues amenable to judicial review will meet this threshold.

Do different rules apply in environmental matters?

EU legislation provides that member states are to provide the public with the right to participate in environmental decision making and that procedures governing environmental matters should not be unduly prohibitive in terms of cost (Article 10a of EC Directive 85/337, incorporating international obligations under the UNECE Aarhus Convention). The ECJ found that the failure of Ireland to put in place costs rules in relation to environmental review procedures was in violation of EU legislation and it was not enough that the Irish courts have discretion to not apply the usual costs rule (Commission -v- Ireland C-427/07).

The Court of Appeal has commented that it would be unsatisfactory to develop different PCO rules in environmental issues. An English report on environmental litigation recommended a bespoke approach to PCOs in environmental matters to which the Aarhus Convention applies. They noted that the Aarhus obligations were not limited to matters of "general public importance" (as required by guidance set out in R (on the application of Cornerhouse Research) -v- Secretary of State for Trade and Industry EWCA Civ 1342), it being assumed that upholding environmental law was inherently of public importance.

If the Irish courts refuse to grant a PCO, can I take my case to the European Court of Human Rights?

If you consider that refusal of a PCO has breached your rights under the European Convention on Human Rights, it is open to you to take a case to the ECtHR and they will decide whether your case is "admissible" and merits a full hearing.

However, the ECtHR accepts that the "costs follow the event" rule pursues a legitimate aim (Allen & Ors -v- UK App. no. 5591/07 6th October 2009). A claimant alleging a breach of Article 6 would have to show that refusal of a PCO impaired the very essence of their right of access to the courts under Article 6. They may also be able to argue breach of the right to a remedy under Article 13. If the courts have heard the substance of the application, even if only to determine whether to grant leave for judicial review, the ECtHR would be less likely to find a breach.

PILA (Public Interest Law Alliance)

PILA is a public interest law network that seeks to engage the legal community and civil society in using the law to advance social change.

PILA was established in 2009 as a project of FLAC (Free Legal Advice Centres), an independent human rights organisation that promotes equal access to justice for all.

PILA aims to:

1. Driving and growing a diverse alliance of people and organisations who are committed to the development of public interest law in Ireland.

2. Promoting and facilitating pro bono in order to build the capacity of organisations to engage in public interest law work.

3. Mobilising emerging lawyers through clinical legal education programmes with a focus on public interest law.

4. Conducting research on barriers to public interest litigation in Ireland, raising awareness and working to remove these barriers.

What is public interest law?

Public interest law is the law that goes to the very core of our society – affecting the rights, well-being, health, or finances of our people as a whole – but, most commonly, the law that advocates for those who are disadvantaged or marginalised.

It involves using law reform, litigation and legal education as tools of change. We approach public interest law work in its broadest sense; not specifically having to involve the courts, but also assisting vulnerable groups to participate in processes that affect them.

PILA Pro Bono Referral Scheme

Central to PILA's work is the Pro Bono Referral Scheme, which supports social justice non-governmental organisations (NGOs), independent law centres and community organisations in obtaining legal assistance where they do not have the resources or in-house expertise.

PILA receives and assesses requests for assistance from over 110 NGOs, filtering matters that meet our criteria and referring them on to a pro bono barrister, solicitor or law firm with suitable skills.

The Pro Bono Referral Scheme gives NGOs access to:

- Legal advice – on organisational issues or in line with policy and campaign work;
- Law reform working groups – where lawyers and NGOs come together to work to implement social change;
- Litigation support – including pre-litigation advices and casework; and

- Legal education sessions – to better equip NGO staff in navigating the law.