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public interest law alliance
a project of FLAC

PUBLIC INTEREST LITIGATION

THE COSTS BARRIER & PROTECTIVE COSTS ORDERS

REPORT

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This report examines one of the most significant barriers to public interest litigation: costs. It focuses particularly on the use of the protective costs order.

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PILA is a project of FLAC which facilitates and promotes the use of law in the public interest for the advancement and protection of human rights and for the benefit of marginalised and disadvantaged people.

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PREFACE

PILA aims to facilitate and promote the use of the law in the public interest for the advancement and protection of human rights and for the benefit of marginalised and disadvantaged people. One of its objectives is to raise awareness about and seek to overcome the barriers to public interest litigation.

We would like to acknowledge and thank a working group of practitioners, who met four times from June to September 2010. Their considered and lively discussion greatly benefitted this report: Ms Hilkka Becker, Senior Solicitor of the Immigrant Council of Ireland; Ms Patricia Brazil BL; Ms Siobhán Cummiskey, Managing Solicitor of the Irish Traveller Movement Law Centre; Mr Michael Cush SC; Mr Colin Daly, Managing Solicitor of Northside Community Law Centre; Mr Michael Farrell, Senior Solicitor of the Free Legal Advice Centres; Mr James MacGuill of MacGuill & Company Solicitors, Ms Siobhán Phelan BL and Mr Patrick Treacy BL.

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Jo Kenny Legal Officer with the Public Interest Law Alliance (a project of FLAC) researched and wrote this report with the generous assistance of other PILA and FLAC staff.

INTRODUCTION

Justice is open to all, like the Ritz Hotel [1]

Costs as a barrier

1. Costs have been identified as the single biggest barrier to public interest litigation in Ireland.[2] Not only does the applicant incur their own legal fees; they run the risk of incurring the other side's.

2. For all potential litigants, the risk of exposure to an adverse costs order is a critical consideration in deciding whether to proceed with litigation. Irish law centres have confirmed that public interest cases are not being pursued because of the costs exposure for clients. On one view, the public interest applicant should be expected to assume that risk like any other litigant. Yet by its very nature public interest cases often involve applicants who cannot afford such exposure. Should this prevent an issue of public importance and interest from being heard? Lord Diplock's dictum in *IRC* comes to mind: "*... it would, in my view, be a grave lacuna in our system of public law if a pressure group... or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the lawful conduct stopped...*".[3] This reasoning is equally relevant to a situation where the risk of an adverse costs order (rather than standing rules) operates as a barrier to public interest litigation. [4]

3. As Judge Toohey commented in Australia: "...there is little point opening the doors of 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 cases to court...". [5]

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[1] Sir James Matthew, 19th Century jurist.

[2] Mel Cousins BL (2005) *Public Interest Law and Litigation in Ireland*, Dublin: FLAC, October 2005 and see Stein R. & Beageant J., "*R (Corner House Research) v the Secretary of State for Trade and Industry*" (2005) 17(3) *Journal of Environmental Law* 413.

[3] *R (ex parte National Federation of Self-Employed and Small Businesses Ltd) v Inland Revenue Commission* [1981] UKHL 2.

[4] See Fordham M. QC & Boyd J., "Rethinking costs in judicial review" Blackstone Chambers at www.blackstonechambers.com.

[5] Toohey J.'s address to the International Conference on Environmental Law, 1989 quoted in *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150 [19].

4. This report will examine the ways in which the courts in Ireland and other jurisdictions have applied costs rules in public interest cases. The "costs follow the event" rule is a blunt instrument in the context of public interest litigation and other jurisdictions have developed special costs rules to counteract its resulting "chilling effect".[6] Although it is true that the Irish courts have occasionally departed from the usual costs rules in public interest cases, they have not developed specific rules or guidance for public interest litigation comparable to other common law jurisdictions. On the contrary, the Supreme Court has emphatically asserted the view that the costs issue is one to be addressed in the Court's discretion.[7]

[6] See Humby T., "The Biowatch case: major advance in South African law of costs and access to environmental justice" (2010) 22(3) *Journal of Environmental Law* 125 at p.129, which notes that a primary justification for the South African rule that unsuccessful litigants against the State should not pay costs is the "chilling effect" adverse costs orders could have on constitutional litigation.

[7] *Curtin v Clerk of Dáil Eireann & Ors* [2006] IESC 27, *Dunne v Minister for the Environment, the Attorney General and Dun Laoghaire-Rathdown County Council* [2007] IESC 60.

IRELAND

Funding public interest litigation

5. The Legal Aid Board (the "Board") provides civil legal aid to the public and uses a dual test of means and merits to determine eligibility. At the time of writing, the average waiting time for a first consultation with a solicitor in the Board is roughly four months. In addition, the means test is quite narrow as those with a disposable income greater than €18,000, subject to certain allowances, do not qualify. Certain areas of law are excluded; e.g. many housing matters and social welfare cases at tribunal level.

6. Crucially for the purposes of considering public interest cases, legal aid will not be granted in "*...a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest...*".[8] This provision precludes the Legal Aid Board from funding test cases. Given the financial constraints under which the Board now operates, the recruitment freeze and an increased demand on the Board's services, this subsection is unlikely to be interpreted liberally by the Board. In addition to this, representative actions are excluded.[9] As FLAC has observed, "*...the legislation itself directs the Board to provide an individually-focused, non-contentious service by excluding test cases or the kind of group actions which ought to be a tool to vindicate rights...*". [10]

7. However it is important to remember that even if legally aided, an unsuccessful litigant may still face an order of costs against them. The Board does not ordinarily pay costs for an unsuccessful litigant, although there is provision for it to make ex gratia payments.[11]

8. Alternatively, there is a long and honourable tradition amongst practitioners of offering legal services on a "no foal, no fee" basis or on a pro bono basis. This tradition has enabled litigants to bring cases safe in the knowledge that they will incur no liability for their own legal costs. However, just as with the provision of legal aid, this provides no safeguard against the risk of incurring an order for costs in favour of the opposing party in the event of the litigation being unsuccessful.

[8] s.28(9)(a)(viii) of the Civil Legal Aid Act 1995.

[9] s.28(9)(a)(vii) of the Civil Legal Aid Act 1995.

[10] FLAC (2005) *Access to justice – a right or a privilege*. Dublin: FLAC.

[11] s.36 of the Civil Legal Aid Act 1995.

The protective costs order

9. A protective or pre-emptive costs order ("PCO") is an order made at the outset of litigation by which the applicant can ensure certainty as regards costs.[12] A PCO has been described as a "*...flexible remedy which can take a variety of forms...*".[13] The English organisation Liberty identified three types of PCOs in their report on public interest litigation (the "Liberty Report").[14] The Court can order that:

- The plaintiff will pay no costs if they lose but will recover costs if they win;
- There will be no order as to costs;
- The losing party will be liable for capped costs.

As a "quid pro quo" for granting a PCO the Courts have made PCOs which cap costs recoverable by the Applicant.[15] In determining what type of PCO to grant, proportionality should be the guiding principle to ascertain what is fair and just in the circumstances of the case.[16] The criteria for granting a PCO will be discussed in detail in considering English caselaw below.

Costs rules

10. 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...*".

11. The usual costs order applied is under Order 99 Rule 1(4), which provides: "*...the costs of every issue of fact or law raised upon a claim or counterclaim, shall, unless otherwise ordered, follow the event...*".

After-the-event cases

12. The Irish courts have on occasion exercised their inherent discretion to disapply the usual costs rule where they consider the circumstances of the case to justify it. They have done so not only because of the parties' conduct but also where they consider the public interest to warrant it. Below are some examples of the latter.

13. Where planning cases involved issues of public importance, the Court has departed from the usual costs rule e.g. by making no order as to costs or ordering costs in favour of an unsuccessful applicant.[17] In *McEvoy* the High Court classified the matter as a "public interest challenge" of the kind described by Dyson J. in *R (on the application of Child Poverty Action Group) -v- Lord Chancellor's Department* [1998] EWHC Admin 151.[18]

[12] PCOs are not the first example of the courts exercising their discretion to make costs order at early stages of litigation. They have previously done so in relation to trust matters, pension schemes and minority shareholders.

[13] *R (ex parte Compton) v Wiltshire Primary Care Trust* [2008] EWCA 749 per Smith L.J..

[14] Liberty/The Civil Liberties Trust (2006) *Litigating the public interest – report of the working group in facilitating public interest litigation* London: Liberty/The Civil Liberties Trust.

[15] This may raise issues for equality of arms, see below at paragraphs 42 -43.

[16] *Compton* above n.13 per Smith L.J..

[17] *O'Connor v Nenagh Urban District Council and Dunnes Stores* (Notice Party) (Unrep. Supreme Court, Denham J, 16/05/02), *McEvoy and Smith v Meath County Council* [2003] 1 IR 208, *Harrington v An Bord Pleanála & Ors* [2006] IEHC 223, *Sweetman v An Bord Pleanála* [2007] IEHC 361.

[18] *McEvoy*, above.

14. They ordered that the Respondent pay 50 per cent of the Applicants' costs. Quirke J. cited Denham J. in *Lancefort*,[19] noting that the question of whether applicants are acting in the public interest is to be analysed on a case-by-case basis.[20]

15. Where a case involved novel and crucial constitutional questions and raised serious and broader issues concerning the separation of powers, the Supreme Court awarded the unsuccessful applicant half his costs.[21] *Curtin* concerned the removal of a judge from office. It is notable that the Supreme Court emphasised that this was an exceptional case and that it was not desirable to stipulate a definite rule on exceptions to the usual costs rules. Similarly, in *Roche v Roche*, the Supreme Court ordered the successful Respondent to pay the costs of the unsuccessful parties in relation to the High Court proceedings, on the ground that the case raised a unique and exceptional issue of public importance, which "*...surpassed, to an exceptional degree, the private interests of the two parties...*".[22]

16. That a case must be exceptional for deviation from the customary costs rule was confirmed in *Dunne*.[23] This concerned the construction of a motorway through a site of archaeological note. In the High Court, Laffoy J. found against the Applicant but nevertheless awarded him costs. This was on the grounds that the Applicant had no private interest and raised issues of public importance. The Supreme Court endorsed the finding on the substantive issue but overturned the costs order. Murray C.J. stated:

    "*undoubtedly the fact that a plaintiff is not seeking a private personal advantage and that the issues raised are of special and general public importance are factors which may be taken into account, along with all other circumstances of the case, in deciding whether there is sufficient reason to exercise a discretion to depart from the general rule that costs follow the event. However, insofar as the learned High Court Judge may have considered that the two principles to which she referred are in themselves the determining factors in a category of cases which may be described as public interest litigation, I do not find that the authorities cited support such an approach…*".

17. *Dunne* illustrates the Supreme Court's approach as to whether different cost rules should necessarily apply to "public interest litigation". Murray C.J. was at pains to emphasise that judicial discretion on costs ranges far beyond considerations of public interest, for example characterising the *McEvoy* costs decision as one which turned on conduct, not the public interest of the case. The Supreme Court was reluctant to provide prescriptive rules or even guidance as to when it might be appropriate to depart from the usual cost rules. They reaffirmed the view expressed in *Curtin* that it was not desirable to set down such a code. However, it is worth noting that the Supreme Court stated that where a matter raises legal issues of special and general public importance, this may warrant disapplying the usual costs rules.

18. The Supreme Court invokes "exceptionality" as the applicable standard for diverging from the usual costs rule. A difficulty with this approach is that it draws no distinction between the type of cost order which might be made e.g. no order as to costs or

[19] *Lancefort Ltd. v An Bord Pleanála* (No 2) [1999] 2 IR 270.

[20] *McEvoy* above n. 17.

[21] *Curtin v Clerk of Dail Eireann & Ors* [2006] IESC 27.

[22] *Roche v Roche* [2010] IESC 10.

[23] *Dunne v Minister for the Environment, the Attorney General and Dun Laoghaire-Rathdown County Council* [2005] IEHC 94 & [2007] IESC 60.

awarding the unsuccessful applicant costs. It is questionable whether the bar should be set as high as "exceptional" for both such orders.

Protective cost orders in Ireland

19. To date, the Irish Courts have considered the making of a PCO in two reported cases. They declined to grant an order in both instances.

20. In *Village Residents* the Applicant was a company incorporated by a concerned residents' group.[24] They sought to judicially review a decision of An Bord Pleanála to allow McDonalds to change hotel premises into a drive-through restaurant. The Applicant applied for a PCO. The High Court found that in principle it had jurisdiction to grant a PCO. However, Laffoy J. held that the Applicant had failed to satisfy the exceptional criteria articulated by Dyson J. in *CPAG*. It was not clear that the challenge raised an issue of general public importance; it was no different from many other planning judicial reviews. In addition, the Association members clearly had a private interest in the outcome of the application. This case pre-dates *R (ex parte Cornerhouse Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

21. This was followed by *Friends of the Curragh*.[25] The Applicants' principal objective was to preserve, protect and improve the environment and heritage of the Curragh by representing the interests of members of the community. They sought to judicially review two decisions of An Bord Pleanála concerning the realignment of a section of roadway and the approval of plans to construct a hotel on the Curragh racecourse. The High Court held that none of the grounds advanced raised issues of general public importance. The case involved the application of well-established principles to new facts. The Court accepted that the Applicants, as distinct from at least some of its members, may well have had no private interest in the outcome of the case. However, there was no evidence that those acting for the Applicant were doing so on a pro bono basis. It was difficult for the Court to see how it would be fair or just to make a PCO in this case as "*...such orders are most exceptional. This case exhibits no circumstances which would merit such an order...*".

22. It is perhaps unsurprising that a PCO was not granted in either case. In *Village Residents* the Court considered that the case was no different to many other planning judicial reviews whilst in *Friends of the Curragh* the Court found that the matter involved applying familiar principles to new facts. More developed caselaw on PCOs has made clear that the threshold for a PCO is higher than this, requiring issues of application beyond the individual and clarification of issues of legal complexity or a novel point of law or interpretation. Not every judicial review will satisfy this high threshold.

Reports

23. The Law Reform Commission has considered the topic of PCOs.[26] The Commission recommended that the jurisdiction of the Courts in relation to PCOs be exercised in the

[24] *Village Residents Association Ltd. v An Bord Pleanála and McDonalds* [2000] 4 IR 321.
[25] *Friends of the Curragh Environment Limited v An Bord Pleanála & Ors* [2006] IEHC 243.
[26] Law Reform Commission (2003) *Judicial Review Procedure* Dublin: Law Reform Commission.

most exceptional circumstances. If doubt exists on the issue, the Court should instead indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings. The difficulty with this second recommendation is that it remains an after-the-event approach. This does not address the core of the problem, which is that uncertainty caused by risk to costs exposure deters public interest litigation.

24. Different considerations may apply to environmental cases and this will be discussed in more detail below. The Law Society of Ireland published a report on reforming environmental law in 2008 which gave considerable attention to PCOs.[27] Its recommendations include: the development of statutory framework to allow for PCOs; the development of a definition of public interest litigation; and the identification of different forms of PCOs. They concluded that "...*judicious use of PCOs could represent an efficient allocation and use of public funds*...". [28]

[27] Law Society of Ireland (2008) *Enforcement of Environmental Law: The Case for Reform* Dublin: Law Society of Ireland.

[28] See McIntyre O., "The role of pre-emptive/protective costs orders in environmental judicial review", (2006) 13(2) *Irish Planning and Environmental Law Journal* 51, which draws this conclusion.

ENGLAND AND WALES

Cornerhouse

25. *Cornerhouse* is the lead English authority on PCOs.[29] There, the Court of Appeal stated that "*...the general purpose of a PCO is to allow a claimant of limited means access to the court in order to advance his case without the fear of an order for substantial costs...*".

26. In *Compton* the Court of Appeal observed that the purpose of the *Cornerhouse* guidance was to facilitate the exercise of a "*...necessary power to enable to be decided issues of general public importance in the public law field, which might not otherwise be capable of being heard...*".[30]

27. In other words, a functional test is applied. The courts accept that public law litigation is distinguishable from private litigation in that it may provide an opportunity for the Courts to clarify a public law issue which goes beyond the individual's interests.

28. The *Cornerhouse* criteria, outlined at paragraph 74 of the judgment, are as follows:

- The issues raised are of general public importance;
- The public interest requires that those issues should be resolved;[31]
- The applicant has no private interest in the outcome of the case;
- 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;
- If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.[32]

The Court of Appeal added that (a) if those acting for the applicant are doing so pro bono, this will enhance the application's merits; and (b) it is for the court, in its discretion, to decide whether it is fair and just to make the order.

[29] *R (ex parte Cornerhouse Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

[30] *Compton* above n.13.

[31] For example, where a case raises a point which arises in several existing cases or is likely to arise again.

[32] Although it is not necessary to show that failure in the case would be "financially fatal", see *R (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Department*, [2006] EWHC 250. The courts consider statements of financial means submitted by applicants for PCOs, see *R (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* and *Compton* above n.13.

29. As this report goes on to discuss, some of the *Cornerhouse* criteria are subject to interpretation and others are open to criticism. Nevertheless, they have been applied in subsequent English caselaw and have been endorsed in principle by the Irish High Court.[33]

"Public importance" and "public interest"

30. In a definition which would guide later judgments, the English High Court has characterised a public interest challenge as one which "*...raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case...*".[34] A public interest matter is probably easier to recognise than to define in theory.[35] In considering whether a matter raises "public interest" issues, both the English and Irish courts have attached weight to whether the matter truly requires elucidation on a point of law; raises a novel point of law; or raises a novel interpretation of the law. Where it is more likely to be an exercise in applying familiar principles of law to new facts, the Court will be less inclined to grant a PCO.

31. The Liberty Report observed that for a case to be in the public interest, it does not suffice for it simply to raise an issue of public law. This would bring most, if not all, judicial reviews within its remit.

32. It is interesting to consider the English judiciary's approach as to what constitutes a case of public importance. Where they considered there to be an arguable case of systemic unfairness and that it was sensible to resolve the issue in one case rather than invite multiple claims, they granted a PCO.[36] Where they judged the law to be perfectly clear on a particular point they did not.[37] Nor did they grant a PCO where the issues were "*...narrow and substantially factual...*".[38] Importantly, they have accepted the notion of public importance as being a question of degree. Even where an issue did not affect a huge number of people, it could nevertheless qualify for a PCO.[39] It is worth noting that the dissenting opinion in *Compton* considered that "general public importance" required something more than that the issue affect a section of the public – a catchment area of 30,000 – 50,000 in this case. Buxton L.J. added that to say that a decision is "important and not trivial" says no more than that it is susceptible to judicial review. The Liberty Report concluded that assessment of general public importance was not a mere numerical exercise.[40] The fact that the Court was divided on the issue in *Compton* highlights the difficulties arising.

33. Matters of "public importance" have included:

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[33] *Friends of the Curragh Environment Ltd. v An Bord Pleanála & Ors* [2006] IEHC 243.

[34] *R (on the application of Child Poverty Action Group) v Lord Chancellor's Department* [1998] EWHC Admin 151.

[35] Clayton R., "Public interest litigation, costs and the role of legal aid", (2006) *Public Law 429*.

[36] *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1239.

[37] *Wilkinson v Kitzinger* [2006] EWHC 385.

[38] *R (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWCA Civ 609.

[39] *Compton* above n.13. See also *Thompson, Re Judicial Review* [2010] NIQB 38 for a more flexible approach to "public importance".

[40] See generally Chakrabarti S., Stephens J., Gallagher C., "Whose cost the public interest?" [2003] *Public Law* 697 for discussion of the relevance of qualitative as well as quantitative considerations in defining "public interest litigation".

- a fast-track pilot scheme to deal with asylum claims;[41]
- an export credit guarantee consultation process relating to anti-bribery and corruption in international trade;[42]
- licences granted to a university for animal experimentation;[43]
- planning permission regarding a site for rare endangered invertebrates;[44]
- a decision to close a hospital section; [45]
- whether a registered social landlord was a "public authority" under the Human Rights Act; [46]
- a planning service's obligations in granting permission for development of a housing scheme; [47] and
- planning permission for a power station on a site used for bird-watching.[48]

"No private interest"

34. The "no private interest" requirement has been subject to much criticism. If applied narrowly, it could place considerable limit on the potential of the PCO. Applicants for judicial review are required to demonstrate "sufficient interest" to bring the claim in the first place.[49] To be required also to demonstrate lack of any private interest appears to be a contradiction in terms. The Liberty Report agreed unanimously that lack of private interest should not be a prerequisite for a PCO, although they accepted it could be a relevant factor.

35. The "no private interest" requirement appears to have originated in *Maori*, in which Woolfe L.J. made no order for costs after the event, noting that "*...the applicants were not bringing the proceedings out of any motive of personal gain...an undesirable lack of clarity existed in an important area of the law which it was important that their Lordships should examine...*".[50] The English High Court subsequently applied this dictum in *CPAG*, as seen above at paragraph 34 of this report.

36. One view is that although the Court of Appeal in *Cornerhouse* included "no private interest" as a criterion, they did not elaborate on its meaning, which they might have been expected to do had they intended to exclude all applicants with a private interest.[51] In *Cornerhouse*, the Court of Appeal explicitly acknowledged that parties in public law cases will have an interest in bringing the case, the public interest being an additional feature.[52]

37. English caselaw has applied the "no private interest" requirement in different ways. In one case the Court of Appeal took a narrow view, finding that the applicant's interest in

[41] *Refugee Legal Centre* above n.36.

[42] *Cornerhouse* above n.29.

[43] *British Union for the Abolition of Vivisection* above n.32

[44] *R (on the application of Buglife – the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation & Rosemound Developments Limited* [2008] EWCA Civ 1209.

[45] *Compton* above n.13.

[46] *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235.

[47] *Thompson* above n.39.

[48] *McGinty, Re Judicial Review* [2010] CSOH 5.

[49] s.31(3) of the Supreme Court Act 1931.

[50] *New Zealand Maori Council v Attorney General of New Zealand* [1994] 1 AC 406.

[51] Stein R. & Beageant J. above n. 2.

[52] *Cornerhouse* above n.29 at paragraph 70.

seeking a fresh enquiry into her father's death was a factor mitigating against the award of a PCO. They stated that *Cornerhouse* had expressed the "no private interest" rule "*...in unqualified terms...*".[53] The Court noted that litigants with sufficient standing for judicial review would normally have a private interest in the case's outcome; however they did not grapple with the quandary which this presents. In another case, the Court of Appeal attached little weight to the fact that an applicant had a private interest where that interest was "*...no greater than that which will accrue to the benefit of all [tenants] in the same position that she is...*".[54] On various occasions the Courts have questioned (albeit obiter in certain instances) the workability of the private interest rule.[55] Recently the Court of Appeal noted these criticisms and recommended that a flexible approach be adopted towards all aspects of the *Cornerhouse* guidance. [56]

38. Public interest and private interest are not necessarily mutually exclusive. The suggestion that they are has been labelled a "false dichotomy."[57] It is difficult to understand that on the one hand, the Courts will deny standing to a body which does not have sufficient interest in the case yet on the other hand, will insist that a person applying for a PCO does not have a "private interest" in the matter at hand. The effect of a narrow approach to "private interest" is to ensure that certain issues of public importance may never be ventilated in court.

39. Even accepting that private interest may be a relevant (if not determinative) factor, thought should be given as to what is meant by the term. English caselaw indicates that it can refer both to a personal interest and a financial interest. Yet even if a financial benefit might accrue to an applicant, there would seem no good reason to preclude a PCO being granted in an issue of public importance. By way of hypothetical example, the fact a female social welfare applicant might benefit from her case's successful outcome in being awarded payment does not negate the fact that it was in the wider public interest to ascertain the unlawfulness of excluding women from that payment.

40. Considerations of "private interest" should focus on whether the benefit to be gained is any greater than that which would be enjoyed by other members of the affected class; whether the case is primarily driven by private interest; or whether the public interest argument is being used tactically.

Exceptionality

41. The English High Court found that "exceptionality" is not a discrete criterion but rather an umbrella principle.[58] This is important to bear in mind when one considers the strict approach adopted by the Irish judiciary in considering whether to disapply the usual costs rules in public interest cases. They do appear to treat "exceptionality" as a discrete requirement.

[53] *Goodson v HM Coroner for Bedfordshire and Luton & Luton and Dunstable Hospital NHS Trust* [2005] EWCA Civ 1172.

[54] *Weaver* above n.46.

[55] *Wilkinson* above n.37, *Weaver* above, *R (on the application of England) v London Borough of Tower Hamlets and Ors & Team Limited and Ors* [2006] EWCA Civ 1742.

[56] *Morgan v Hinton Organics (Wessex) Ltd & CAJE* [2009] EWCA Civ 107.

[57] See Chakrabarti & Ors. above n.40.

[58] *British Union for the Abolition of Vivisection* above n.32

Equality of arms

42. The impetus for making a PCO is to ensure that an issue of public interest and importance is heard. It is not clear to what extent equality of arms in the sense of legal representation is, or should be, ensured by provision of a PCO. In *Cornerhouse* the Court of Appeal commented that recipients of a PCO which permits them to recover costs if successful should incur only modest costs. This finding has been criticised on the basis that it is incongruous to encourage a situation where junior counsel are instructed for a matter which is by definition of public importance. The Liberty Report concluded that it was in the general interest that both parties have equal levels of representation. Costs-capping in PCOs can cause difficulties for the level of legal representation which the applicant will be able to afford.

43. In addition to this, in *Cornerhouse* the Court of Appeal found that pro bono representation will enhance the merits of an application for a PCO (although Counsel did not act pro bono in *Cornerhouse*). The Liberty Report criticised this factor on the ground that it might restrict the pool of practitioners available to act in such matters.[59]

[59] See also Stein R. & Beagent J. above n.2.

ENVIRONMENTAL CASES & THE JACKSON REPORT

44. A separate consideration arises in relation to environmental public interest cases. EU legislation provides that member states are to provide the public with environmental information held by public authorities and with the right to participate in environmental decision making.[60] It stipulates that member states are to provide review procedures by which to challenge public decisions in environmental law.[61] Under Article 10a, such procedures shall not be "prohibitively expensive".

45. In a case on Council Directive 85/337 EEC, the ECJ noted the Irish courts' power to decline to order an unsuccessful party to pay costs. However they did not accept that this discretionary practice of itself implemented the costs requirement under Article 10a.[62]

46. The UN Aarhus Compliance Committee has agreed with this approach in finding that the UK is prohibitively expensive for citizens to take environmental cases.[63] They concluded that judicial discretion in deciding costs without legally binding rules led to considerable uncertainty where claimants legitimately pursued environmental concerns. Although Ireland has not ratified the Aarhus Convention, the relevant costs provisions are incorporated through EU law, as noted above.

47. A working group report on environmental litigation observed that PCOs can provide certainty on the limits of a claimant's costs liability and ensure that costs exposure will not be prohibitively expensive, in line with obligations under the Aarhus Convention.[64] This report 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 *Cornerhouse* guidance); it being assumed that upholding environmental law was inherently of public importance. Their updated report concluded that judicial discretion to grant a PCO did not suffice to comply with the Aarhus Convention and that law reform was required.[65] It broadly endorsed the conclusions of the Jackson Report (discussed below) as regards one-way costs shifting.

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[60] Council Directive 85/337 EEC.

[61] Article 10a of Council Directive 85/337/EEC. These provisions on access to justice incorporate international obligations under the UNECE Aarhus Convention (the "Aarhus Convention").

[62] Case C-427/07 *Commission v Ireland* ECR 1-000.

[63] ACCC/C/2008/33 www.unece.org/env/pp/compliance.

[64] Working Group on Access to Environmental Justice (2008) *Ensuring access to environmental justice in England and Wales* London: Working Group on Access to Environmental Justice.

[65] Working Group on Access to Environmental Justice (2010) *Ensuring access to environmental justice in England and Wales Update Report* London: Working Group on Access to Environmental Justice.

48. The Court of Appeal has commented that the risk of adverse costs orders could be a real deterrent to litigation directed to protect the environment.[66] In a separate case, they stated that it would be unsatisfactory to develop different PCO rules in environmental issues.[67]

49. In January 2010, a report on civil litigation was published in England which recommended qualified one-way costs shifting in all judicial reviews.[68] It concluded that it was in the public interest that financial risk should not deter potential claimants from bringing properly arguable judicial reviews.[69] There is clearly a balance to be struck in facilitating access to the courts; the report concluded that proper application of the permission stage of judicial review should suffice to weed out frivolous, vexatious or unarguable claims. Interestingly, as this report considers below, the Constitutional Court of South Africa applies a one-way costs shifting rule to litigants with a good faith concern who wish to protect a constitutional right.

[66] *R (on the application of Burkett) v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342.

[67] *Compton* above n.13 per Waller L.J..

[68] Lord Justice Jackson (2009) *Review of civil litigation costs: final report* London: The Stationery Office. By "qualified", the report means that unreasonable party behaviour may lead to a different costs order and that the financial resources available to the parties may justify two-way costs shifting.

[69] See also above n.4.

EUROPEAN COURT OF HUMAN RIGHTS

50. The European Court of Human Rights has considered whether the refusal of a PCO breached the Applicant's right to a fair hearing under Article 6.[70] The Court dismissed the application. Importantly, they accepted that the "costs follow the event" rule pursues a legitimate aim, namely to disincentivise unmeritorious claims and to protect the successful party. In accordance with English judicial review procedure, the Applicant had been afforded a few "bites at the cherry" for his application to be heard. The Court was unconvinced that refusal of a PCO had impaired his right of access to court in that particular case.

[70] *Allen & Ors v UK* App. no. 5591/07 6 October 2009.

AUSTRALIA, CANADA, SOUTH AFRICA

Australia

51. *Oschlack* is the lead Australian authority on costs in public interest litigation.[71] The question in this appeal was whether "*...in declining to make an order that an unsuccessful Applicant in litigation pay the costs of the successful Respondent, a Court can properly rely, in whole or part on the fact that the proceedings may be characterised as public interest litigation...*". The Court answered in the affirmative by a majority of three to two. However, the Court did not define the term "public interest". Their examination of the issue was mainly restricted to the legislative provisions which govern planning and environmental matters and costs. This may be one reason why subsequent decisions have applied the principles established in a limited fashion. Nevertheless, the fact that the Court did not shy away from accepting "public interest litigation" as a separate category for consideration in making costs awards may be contrasted with the Irish Supreme Court's approach in *Dunne*.

52. In addition, the Australian courts have exercised their discretion to make an advance costs order known as a "maximum costs order".[72] *Corcoran* concerned an allegation that requiring disabled passengers to travel with a carer was discriminatory. The Court capped the costs which the Respondents could claim should they be successful. The following were relevant factors for the court to consider when exercising its discretion in granting a "maximum costs order": the timing of the application; the complexity of the issues; the amount of damages; the nature of the Applicant's claims; whether there was any public interest in the action; and the undesirability of the litigation being ceased.

Canada

53. The "interim costs order" has received some attention in Canada since its introduction in *British Columbia*.[73] There, the Court ordered at a preliminary hearing that the Canadian government fund the full costs of the Plaintiff's claim. They reasoned that an award of this nature forestalls the danger that "*...a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed...*".[74] This case arose out of a dispute between native bands and the Canadian government

[71] *Oschlack v Richmond River Council* [1998] HCA 11.

[72] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

[73] *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 S.C.R. 371, 2003 SCC 71.

[74] Above at paragraph 31.

concerning ownership of land. Without an interim costs order, the bands contended that they would not be able to proceed with their claim that they had title to the land in question. The Court held that for such an order to be made, the Applicant must be able to prove that: (a) they could not afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial (the litigation would not proceed in the absence of an interim order); (b) the claim to be adjudicated was prima facie meritorious; and (c) the issues transcended the individual interests of the particular litigant, were of public importance and had not yet been resolved in previous cases.

South Africa

54. The South African Constitutional Court uses the "one-way costs shifting order". This means that provided the litigation is taken in good faith and it is not vexatious, an unsuccessful applicant who seeks to vindicate their constitutional rights will not be required to pay the respondent's costs. Moreover, if they are successful they may be awarded costs. As Mahomed D.P. noted:

"... a litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries...This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party...". [75]

55. *Biowatch Trust* provides considerable analysis on costs and public interest litigation.[76] The Applicant was an environmental watchdog which sought information from governmental bodies with statutory responsibilities for overseeing genetic modification of organic material. Even though they had been largely successful in their claim against the government agencies and had obtained information which one Respondent had contested, the High Court had made an order of costs against them. The Constitutional Court overturned the High Court costs order and ordered costs against the State for the trial proceedings. No order of costs was substituted for the order against Biowatch with regard to its action involving the private entity Respondent.

56. The Court stated that the question should not be one determining the characterisation of the parties (i.e. their motives or financial resources), but instead one identifying the nature of the issues. It was a question of promoting constitutional justice. The Courts were open to all and should be a fair and equal forum. They should not discriminate against the deep pocket, nor favour the poor. Sachs J. emphasised that in constitutional cases, the general principle is that an unsuccessful litigant ought not to be ordered to pay costs to the state and this should not be departed from simply because the applicant is wealthy. Conversely, an impecunious applicant should not be encouraged to bring vexatious or frivolous claims.

[75] *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* [CCT39/95) [1996] ZACC 4; 1996 (4) BCLR 537; 1996 (3) SA 165 (4 April 1996).

[76] *Biowatch Trust v Registrar Genetic Resources and Others*, Case CCT 80/08 [2009] ZACC 14.

CONCLUSION

57. PCOs are potentially an additional tool for the public interest practitioner. That said, they are not a panacea and they are not appropriate for all judicial reviews. As noted above, English caselaw indicates that PCOs are to be reserved for cases of public importance.

58. On the basis of the English caselaw, the features of a case which might attract a PCO would appear to be as follows:

- It would be an arguable judicial review against the State (or an agency of the State) which had prospects of success.
- It would consider a matter of public importance, raising legal issues whose clarification or resolution was in the public interest or a novel legal point whose interpretation was in the public interest.
- It would raise legal issues which affected people beyond the individual applicant. The legal issue(s) would be such that if they were not resolved in that case, would probably arise on another set of facts.
- The applicant would be of limited means such that they would be deterred from proceeding with the case were a PCO not to be granted. It may be that more vulnerable applicants (such as children, the mentally ill, prisoners) would have more prospects of success in satisfying the Court that they required a PCO to proceed.
- A degree of private interest might be permissible - and indeed inevitable given standing requirements - but not such that it overrode the points of public importance raised.

59. As to whether the above is correct in assuming that the Irish courts would adopt broadly the same approach as the English courts, the High Court has endorsed the *Cornerhouse* guidance (and the *CPAG* guidance before it) in principle. It is true that in *Dunne* the Supreme Court stated that other jurisdiction's costs rules should be treated with caution. However, there is a sharp distinction to be drawn between borrowing foreign civil procedural rules which have no relevance to this jurisdiction and applying principles of access to justice for public interest litigants common to all the jurisdictions discussed in this report.

60. Above all, a purposive approach is appropriate.[77] PCOs depart from the usual costs rule for a specific objective: that arguable cases of public importance have their day in court.

[77] For a recent illustration of a purposive approach adopted by the High Court in relation to matters in the public interest, see *Digital Rights Ireland Limited v the Minister for Communication, Marine and Natural Resources & Ors* [2010] IEHC 221, a case concerning data retention. First, the High Court granted the Plaintiff standing and observed that given the costs associated with such a challenge, it would be unlikely that any other person would take proceedings. Secondly, McKechnie J. refused the Defendant's application for security for costs on the ground that the matter involved issues of public importance.

61. More broadly, whether the court considers costs before or after the event, the jurisprudence from other jurisdictions makes plain that there is potentially a variety of costs orders at their disposal. A more nuanced approach would be appropriate in public interest cases.

POSTSCRIPT

62. In response to the findings of the UN Aarhus Compliance Committee,[78] the UK government stated in September 2010 that it intends to consolidate caselaw on PCOs into rules of courts. It has submitted draft rules of court to the Civil Procedure Rule Committee and expects them to be implemented by April 2011. [79]

63. In response to the findings of the ECJ,[80] the Irish government has amended s.50B of the Planning and Amendment (Development) Act 2000 to provide that in judicial review proceedings brought under Council Directive 85/337 EEC, each party shall bear its own costs.[81] This removes the exposure to adverse costs awards in certain environmental matters of public interest. However, in precluding the possibility of recovering costs, it fails to address the other side of the two-sided costs barrier; funding legal representation.

[78] ACCC/C/2008/33 www.unece.org/env/pp/compliance.

[79] See www.unece.org/env/pp/compliance.

[80] Case C-427/07 *Commission v Ireland* ECR 1-000.

[81] S.33 of Planning and Development (Amendment) Act 2010 No.30/2010.

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