Editor's Note

An unseemly squabble amongst public authorities over costs

A.A.S. Zuckerman
Fellow of University College, Oxford

LT Coroners; Judicial review; Protective costs orders; Public authorities; Public interest

One particular feature of the English administration of civil justice sets it apart from virtually all other systems: its pervasive preoccupation with costs. There is no other system of justice where litigants devote so much time, effort and money to litigation over who should bear the costs of proceedings. There is no other system where the courts at all levels are called upon to adjudicate as many disputes over costs. Litigation in England has always been expensive, but never before has the eventual incidence of costs been so crucial as to drive litigants to seek court adjudication on the matter before proceedings, or early in the proceedings, rather than wait until after a final resolution on the merits. Today the fear of costs is no longer confined to private litigants of modest means, it affects even the rich (as the *Campbell* case, discussed below in Peysner's article and Ryan's note, shows). Yet, few could have predicted that concern with the cost of litigation would reach such a level as to drive government and local government bodies to vie with each other to avoid the costs burden arising from the need to seek court pronouncement on a question of law of public importance.

The case in point is *R. (on the application of Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (Admin); [2005] 4 All E.R. 40. An inquest was held into the death of a man who had died in 1953 from nerve-gas poisoning following a non-therapeutic experiment at a chemical defence experimental establishment. The proceedings before the coroner raised difficult issues of law relating to manslaughter. After a hearing lasting 54 days, and costing the local authority responsible for coroners' inquests over £600,000, the jury returned a verdict of unlawful killing. The Ministry of Defence sought to challenge that verdict in judicial review proceedings. The defendant to the Ministry's claim was the coroner. But he was concerned that he would have to pay the Ministry's costs in the event that the Ministry succeeded in overturning his decision.

To avoid this risk, the coroner applied to court for a prospective costs order (''PCO''), directing that no costs order would be made against him even if the Ministry of Defence were successful in their challenge to the coroner's verdict.

The coroner did not carry a personal risk of costs. Under the Coroners Act 1988, coroners are entitled to be indemnified for their costs by the local authority. But the coroner took the view that since the costs of the judicial review proceedings were likely to be high, it was unreasonable to expose the local taxpayers to a further financial burden, over and above the council's expenses in the conduct of the inquest. The coroner could avoid adverse consequences by refraining from actively defending his decision in the judicial review proceedings. This is because under rules governing costs in judicial review proceedings, if the respondent does not actively participate, no costs order could be made against him (*R. (on the application of Davies) v HM Deputy Coroner for Birmingham* [2004] 1 W.L.R. 2739). The coroner was reluctant to go down this route since his active participation in the Ministry's challenge would be of assistance to the court. In his application for a PCO the coroner argued that in the absence of a protective costs order, he would feel obliged to limit himself to neutral participation in the proceedings, by assisting the court on points of detail, and otherwise to refrain from taking any active adversarial role.

This placed the court in a difficult position because the issues raised by the case were both complex and of considerable public importance, and it was therefore desirable that they should be thrashed out in a fully fledged adversarial process, in which equally qualified and financed opponents presented the competing arguments to the court. Collins J. therefore cast around for other possible parties who would stand up the Ministry of Defence challenge. One such candidate was the deceased's family, who might have been able to obtain legal aid for the purpose. But the family were reluctant to oblige because they were seeking damages from the Ministry and were fearful that the Legal Services Commission (which provides the legal aid funds) might wish to recoup its costs from any damages recovered from the Ministry. The second candidate was the chief constable, who was concerned to learn whether there was a prima facie case of manslaughter to be pursued. Needless to say, the chief constable was no keener than the coroner to accept the honour. Collins J. was sympathetic to the chief constable's position, observing that:

> ''there is no reason why he should bear the brunt of the proceedings in terms of costs and if he appears to argue the matter, then he may find himself as the candidate for a costs order, should the claim succeed'' (at [29]).

A third possibility was to appoint an amicus curia. But it was rejected because of the likelihood that an amicus would have to be appointed in any event to support the coroner's decision on other grounds than those that the coroner gave for his decision.

Inevitably the court had to return to consider the coroner's position and the principles governing protective costs orders. The principles concerning PCOs in public law litigation were set out by Lord Phillips M.R. in *R. (on the*

application of Corner House Research) v Secretary of State for Trade [2005] EWCA Civ 192; [2005] 4 All E.R. 1; [2005] 1 W.L.R. 2600 at [74]:

> ''1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> i) The issues raised are of general public importance;
>
> ii) The public interest requires that those issues should be resolved;
>
> iii) The applicant has no private interest in the outcome of the case;
>
> iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
>
> v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> 2. If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.
>
> 3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.''

Collins J. was troubled by the fact that in the past PCOs have been made only in favour of claimants in judicial review cases, whereas here a defendant was seeking such order. The concern was somewhat misplaced because PCOs, in the form of costs-capping orders, have been made at the behest of defendants in private law cases (e.g. *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB); *King v Telegraph Group Ltd* [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282). However, Collins J. was right in identifying the aim of PCOs as being:

> ''to ensure that in appropriate cases a litigant will not be precluded from bringing a valid claim because the costs of so doing are likely to be prohibitive and, more importantly, because the risk, if he loses, of having to pay the other side's costs are such as would inhibit him from bringing that claim'' (at [33]).

In this case, Collins J. found, the coroner did not need the protection of a PCO to fight his corner and that he did not fulfill the conditions set out in the *Corner House Research* case. The coroner was not lacking in resources because he had the backing of the county council, who were duty bound to reimburse his legal expenses, provided he acted reasonably. And in the circumstance of this case, Collins J. found, it would be reasonable for the coroner to take an active role in the proceedings. As for the coroner's concern for the council's finances, Collins J thought that the coroner should put them to one side and should:

> ''take the approach that he thinks on advice is right in terms of the way in which this should be properly resisted, and it does not seem to me that

> the concerns about whether the County Council should have to pay are material in that regard so far as my decision is concerned'' (at [37]).

He therefore acceded to the Ministry of Defence objections and refused to make a PCO in favour of the coroner.

Collins J. was not however indifferent to the council's plight. He accepted that the issues raised by the inquest were of more general concern than just for the county of Wiltshire. He therefore suggested that the county council might approach the government with a request for central government funding for their case. Several possible central government sources were mentioned. Funding could come directly from the Ministry of Defence budget, or from the Treasury Solicitor's budget, in the form of support for an amicus, or from the Department for Constitutional Affairs, in the form of legal aid for the family. These were very sensible suggestions but the fact remains that the outcome of the coroner's application was inconclusive. True, the coroner failed to obtain a PCO. Yet, he could not be forced to take an active part in the proceedings, if he preferred to spare the local taxpayers' resources (it is unimaginable that the Ministry of Defence would bring judicial review proceedings to force the coroner to take an active part in the proceedings).

The cost of reaching this inconclusive outcome must have been very considerable. For the Ministry of Defence was represented by a Queen's Counsel and a junior, as was the coroner. The family was represented by a junior (presumably paid by legal aid). The chief constable was represented by a solicitor advocate. It is therefore probable the total legal fees concerning this application exceeded £50,000. If the parties chose to spend this kind of money in fighting over the eventual, and as yet unknown, incidence of costs, they must have expected the costs of the substantive proceedings to be very high indeed. For there is no other explanation why the various public bodies involved in this case squabbled over who should bear the costs burden.

More important still, one should question whether it is reasonable to spend substantial amounts of public money for the purpose of determining which of various public bodies should bear the cost of obtaining a court decision on an issue of general public importance. But perhaps one should not rush to condemn the coroner, the county council and the Ministry of Defence. Like all litigants they run scared of costs. Given the mountainous costs burden of litigation it is perhaps understandable that local authorities and government departments try to protect their budgets. What is wrong therefore is not their attitude but the system that tolerates such painful costs levels that even the mighty are running scared.