Editor's Note

Protective Costs Orders—A Growing Costs-Litigation Industry

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The idea of protective costs orders is not new. Traditionally, such orders were sought by persons who were bringing proceedings on behalf of others and who wished to ensure that they would be entitled to recover their legal costs from those who would benefit from the proceeding. For example the Beddoe jurisdiction (after *Beddoe, Re* [1893] 1 Ch. 547) enabled trustees who brought proceeding on behalf of the trust to seek an order that their costs shall be paid out of the trust fund. Similar applications could be made in derivative proceedings. However, such applications were few and rarely gave rise to hotly contested disputes. In the closing years of the 20th century the protective costs order (PCO) began to be sought for a different purpose altogether: to obtain protection from having to pay the other side's costs in the event that the applicant were unsuccessful.

The first to seek such orders were voluntary organisations who wished to bring public interest proceedings. Organisations that devote themselves to promoting public causes often lack the resources needed for underwriting an open-ended costs liability. Such organisations may be able to appeal to the public for donations to a fighting fund to finance their costs, but given the uncertainty and unpredictability of the opponent's costs they cannot normally raise the resources needed to underwrite the liability of an adverse costs order. This is particularly true of organisations devoted to promoting the interests of disadvantaged groups. Exposing such organisations to the vagaries of the normal costs regime would in many situations leave the groups that they seek to protect without effective legal redress. The new PCO breed offers the only means of bringing proceedings without ruinous consequences.

One of the early cases to discuss the new PCO jurisdiction was *R. v Lord Chancellor Ex p. Child Poverty Action Group* [1999] 1 W.L.R. 347. It established

that a voluntary organisation can apply in advance of proceedings for a protective costs order, which would determine its exposure to costs and thereby enable it to make an informed decision whether to proceed with the case, and what provision to make.

The next key decision was *R. (on the application of Corner House Research) v Secretary of State for Trade* [2005] EWCA Civ 19; [2005] 1 W.L.R. 2600 in which the Court of Appeal reviewed the PCO jurisdiction and provided guidelines for the exercise of discretion and for the application process. It explained (at [6]) that the purpose of such orders,

> ''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 being made against him, a fear which would inhibit him from continuing with the case at all''.

The court took a good deal of trouble to elaborate the principles governing applications for a PCO in public law litigation. Lord Phillips M.R. set out the following principles (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:
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> (i) The issues raised are of general public importance;
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> (ii) The public interest requires that those issues should be resolved;
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> (iii) The applicant has no private interest in the outcome of the case;
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> (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;
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> (v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
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> 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.
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> 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.''

In both decisions the court went out of its way to stress that the jurisdiction should not be invoked on a regular basis. In the seminal *Child Poverty Action Group* case Dyson J. said that 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. And in the *Corner House* case the Court of Appeal stressed that it agreed with Dyson J.'s statement and, indeed, gave the exceptionality of the circumstances of the case before it as a reason for granting the PCO (see [72] and [144]). In none of early cases did the court envisage that applications invoking the PCO jurisdiction would become commonplace,

much less that such applications would become a new branch in the already bloated costs-litigation industry.

Two factors have combined to make such applications popular. First, the expense of litigation is such that few charitable organisations can afford to undertake the full financial burden of litigation (and even those who could would rather avoid it). As this was already the situation when the jurisdiction was first developed, it should have been realised from the start that the limitation to ''exceptional cases'' was impractical if not pointless. However, the court may be forgiven for not appreciating the impact that a further factor would have in pushing for PCO applications: the availability of conditional fee agreement (CFA) representation, which offers lucrative opportunities for lawyers in the field of public interest litigation as in other fields.

The effect of these two factors is well illustrated in *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 (*Buglife* or *B*). *Buglife*, a conservation trust wished to bring judicial review proceedings to challenge the decision of the local planning authority to grant planning permission for the development of a site that contained endangered invertebrate species. It applied for permission for judicial review and at the same time also applied for a protected costs order capping its liability in costs. The judge refused B's application for judicial review, but acceded to the PCO application and ordered that there be an upper limit of £10,000 on the total amount of costs recoverable by and from *Buglife*. B sought permission to appeal the refusal of judicial review, which was granted on the basis of public interest. It also sought to challenge the PCO decision and asked that the cap on its liability of £10,000 should be extended to the appeal proceedings, so that the total amount of costs payable by B if the appeal failed would be £10,000. *Buglife* also sought an order varying the PCO so as to remove the reciprocal costs cap of £10,000 on any costs recoverable by it if the appeal succeeded.

Notwithstanding the earlier judicial commitment to a parsimonious approach to PCO application and the resulting requirement of showing exceptional circumstances, it became clear that the normal costs rules were choking access to justice. The Court of Appeal acknowledged this in *R. (on the application of Compton) v Wiltshire Primary Care Trust* (*Compton*) [2008] EWCA Civ 749; [2008] C.P. Rep. 36, a decision given five months before *Buglife* (which is reviewed below by Professor Aileen McColgan). In this case Waller L.J. drew attention to the *Report of a Working Group on Public Interest Litigation* (chaired by Maurice Kay L.J.), which recommended that the definition of public interest should be given a broad, purposive interpretation in order to promote access to justice. Attention was also drawn to the 2008 *Report of the Working Group on Access to Environmental Justice* (chaired by Sullivan J.) which questioned whether the current restricted approach to granting PCOs was compliant with the UNECE Aarhus Convention, which is concerned with access to justice in environmental matters. The report stated (*Compton* [19]):

> ''In Corner House, the Court of Appeal accepted that PCOs should only be granted in 'exceptional' cases. But it now seems this 'exceptionality' test

> is being applied so as to set too high a threshold for deciding (for example) 'general public importance', thus overly restricting the availability of PCOs in environmental cases. . . . Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with Aarhus.''

The Court of Appeal in *Compton* decided to adopt a more relaxed and flexible approach to the finding of public interest so that the jurisdiction were not to become confined to exceptional cases. This view has now been endorsed by the Court of Appeal in *Buglife* where Sir Anthony Clarke M.R. referred to *Compton* and stated:

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

However, since the test of ''general public importance'' is a matter of degree, and since no clear guidelines can be devised to identify deserving causes, the outcome of PCO applications is inherently uncertain. Not only is there open ended judicial discretion involved in the decision whether to accede to a PCO application, even greater discretion is involved in the kind of protection that may be granted, a matter to which I will return below. The point that needs stressing now is that the discretionary nature of PCO applications makes it difficult to predict the outcome, with the result that such applications are bound to give rise to contested proceedings, which may well require an appeal to be finally resolved, as the cases mentioned above illustrate. Thus, the unaffordability of litigation and the unpredictable nature of PCO applications contribute to the increased volume of PCO litigation and ensure that it will continue to grow.

A further factor has now emerged; it arises from the incentives offered by CFA representation. It may be recollected that in the *Corner House* case the court stressed that if those acting for the applicant are doing so pro bono this would be likely to enhance the merits of the application for a PCO. This was far from the case in *Buglife*. The applicant was represented by solicitors and counsel on a conditional fee agreement. In the Court of Appeal *Buglife* was arguing for the removal of the reciprocal cap imposed on the costs that it would be entitled to recover from the planning authority so that its legal representatives could recover from the latter their full hourly fees plus up to 100 per cent success fee. Alternatively, *Buglife* argued that the cap should be varied to £70,000 plus VAT so as to allow for a total of £35,000 and an uplift of 100 per cent. It would therefore appear that not all the jostling in this case was about access to justice; there was also the small matter of the lawyers' potential rewards.

On the face of it, this aspect of *Buglife's* application seems brazen, for while *Buglife* was seeking protection from costs in the event that it lost, it was also seeking an order that would entitle its lawyers to recover from the planning authority, and thereby from the taxpayer, double the amount of the reasonable and proportionate costs to which the planning authority would otherwise be liable. This brings us to the question of reciprocity and, indeed, to the variety of protective orders that can be made. The planning authority argued for reciprocity in the sense that it should enjoy the same protection from costs accorded to *Buglife*, so that if the latter were successful the local authority exposure to costs would also be limited to £10,000.

The case law has shown considerable ambivalence to the reciprocity argument. In the *Corner House* case the Court of Appeal stated (at [76]):

> ''(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.''

Although these *Corner House* guidelines are not framed in terms of reciprocity, it is clear that the court considered that respondents should also be protected from adverse costs so that their liability too would be ''modest''. But this view has not been taken as laying down a principle of mutual protection. Far from it; in the *Compton* case Smith L.J. said at [86]:

> ''At one end of the scale, the judge may make a PCO which imposes on a defendant the burden of bearing its own costs even though it wins on the merits and does not relieve it of the prospective burden of paying the applicant's costs in the event that the applicant succeeds. However, Corner House makes it plain that it will be usual to limit the successful claimant to recovery of modest costs, comprising the fees of the solicitor and one junior counsel. That is the 'strongest' form of order which will usually be made. It puts the defendant at a major disadvantage; on costs it is in a 'heads you win tails I lose' position. At the other end of the scale, the court can make a much more modest order, whereby the claimant's

> liability to pay the defendant's costs is capped not at nil but at a specified level and where the defendant is given a guarantee that it will not be required to pay any of the claimant's costs.''

The same open ended approach was adopted by the court in *Buglife*, where Sir Anthony Clarke said at [25]–[26]:

> ''We would certainly accept that there can be no absolute rule limiting costs [which the successful claimant would be able to recover from the defendant] to those of junior counsel because one can imagine cases in which it would be unjust to do so. However, in Corner House this court laid down guidance which, subject to the facts of a particular case and unless and until there is a rule which has statutory force to the contrary, we must follow, albeit in a flexible way. That was the unanimous view of the court in Compton . It follows that, as the court put it in Corner House , the costs should in general be reasonably modest and the claimant should expect the costs to be capped as set out in [76(ii) and (iii)] of the judgment in that case . . .
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> We entirely agree that there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. As just stated, the amount of any cap on the defendant's liability for the claimant's costs will depend upon all the circumstances of the case.''

Whether the court makes the ''strongest'' form of PCO or a modest order is, again, a matter for discretion depending on all the circumstances and therefore liable to debate and disagreement not only amongst the parties but amongst different judges. This too can only increase unpredictability and fan satellite litigation.

The CFA success fee has now become a major issue in this context. *Buglife's* lawyers argued that because of the principle that the success fee is not to be disclosed before the conclusion of the case, a maximum 100 per cent success fee must be assumed, resulting in a cap twice the size of the claimant's capped base costs. They argued that since Parliament has legislated to provide CFA jurisdiction as part of the range of measures in place to achieve access to justice any costs cap should allow for a success fee on top of the capped amount. The Court of Appeal rejected this view holding that the,

> ''agreed success fee is relevant to the likely amount of the liability of the defendant to the claimant if the claimant wins. It is therefore relevant to the amount of any cap on that liability. In our opinion the court should know the true position when deciding what the cap should be.'' ([27])

But the Court of Appeal did not exclude the possibility that there might be cases where a success fee of 100 per cent would be allowed on top of the capped amount.

On *Buglife's* application the Court of Appeal ruled that the just order would be to limit *Buglife's* costs on the appeal to £10,000. Thus if *Buglife* lost in the

appeal and below its total liability for costs could be £20,000. It then addressed the question of whether the respondent should have any protection. Sullivan J. thought that it should have protection in the same amount. The Court of Appeal saw no reason for criticising his decision as far as capping the costs of the application for judicial review. As for capping the respondent's cost of the appeal, the Court of Appeal held that since *Buglife's* prospects of success did not appear to be strong it was just to cap the respondent's liability in costs to *Buglife* to £10,000.

This disposed of the costs as between *Buglife* and the planning authority. But there was another party to the proceedings, the developers who obtained the development permission from the planning authority. Although no application for the developers' costs had been made, the Court of Appeal ended its judgment by saying that it,

> "assumed that there is no possibility of Buglife being liable in costs to the developer, whatever the outcome of the appeal. If that is or might be wrong, we would be willing to provide further protection for Buglife." ([45])

This qualification keeps open the possibility, if not in this case certainly in other similar cases, of more wrangling about the protection that a PCO offers.

In addition to the discussion of the principles governing PCOs, the Court of Appeal was critical of the procedural shortcomings of the PCO application in the court below and stressed the importance of following the guidelines laid down in the *Corner House* case, where the Court of Appeal stated (at [78]–[81]):

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

> 79. The judge will then consider whether to make the PCO on the papers and if so, in what terms, and the size of the cap he should place on the claimant's recoverable costs, when he considers whether to grant permission to proceed. If he refuses to grant the PCO and the claimant requests that his decision is reconsidered at a hearing, the hearing should be limited to an hour and the claimant will face a liability for costs if the PCO is again refused. The considerations as to costs we have set out in paragraph 78 above will also apply at this stage: we would not expect a respondent to be able to demonstrate that proportionate costs exceeded £2,500. Although CPR 54.13 does not in terms apply to the making of a PCO, the defendant will have had the opportunity of providing reasoned written argument before the order is made, and by analogy with CPR 52.9(2) the court should not set a PCO aside unless there is a compelling reason for doing so. The PCO made by the judge on paper will provide its beneficiary with costs protection if any such application is made. An unmeritorious application to set aside a PCO should be met with an order for indemnity costs, to which any cap imposed by the PCO should not apply. Once the judge has made an order which includes the caps on costs to which we have referred, this will be an order to which anyone subsequently concerned with the assessment of costs will be bound to give effect (see CPR 44.5(2)).
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> . . .
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> 81. It follows that a party which contemplates making a request for a PCO will face a liability for the court fees, a liability (which should not generally exceed a proportionate total of £2,000 in a multi-party case) for the costs of those who successfully resist the making of a PCO on the papers, and a further liability (which should not generally exceed a proportionate total of £5,000 in a multi-party case) if it requests the court to reconsider an initial refusal on the papers at an oral hearing. We hope that the Civil Procedure Rules Committee and the senior costs judge may formalise these principles in an appropriate codified form, with allowance where necessary for cost inflation in due course.''

''In our opinion'', Sir Anthony Clarke M.R. said in *Buglife* (at [31]),

> ''the courts should do their utmost to dissuade parties from engaging in expensive satellite litigation on the question whether PCOs and thus cost capping orders should be made. The expenditure of such costs cannot be in the public interest.''

Judging by the examples set in this very case and in the earlier *Compton* case, it is doubtful whether the courts will succeed in keeping down the cost of litigation about PCOs. The underlying pressures of high litigation costs and the rewards to be gained from advantageous PCO rulings are sure to keep this new costs-litigation industry in business for some time to come.