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Costs Protection in Environmental Claims Consultation

The City of London Law Society Response

December 2015

Introduction

1. The City of London Law Society ("**CLLS**", "**we**") is one of the largest local law societies in the United Kingdom. There are 17,000 solicitors practising in the "Square Mile", who make up 15% of the profession in England and Wales, and the CLLS represents over 14,000 of these solicitors through individual and corporate membership.

2. The CLLS Planning and Environmental Law Committee, which is co-ordinating this particular response, includes a wide range of practitioners with expertise in environmental and planning law working both in London and also across England and Wales.

3. Please find below our responses to the 15 questions proposed in the Consultation.

Question 1: Do you agree with the revised definition proposed for an "Aarhus Convention claim"?

4. We support an extension of the potential cases that may be brought under the Environmental Costs Protection Regime (the **"Regime**") to include reviews under statute.

5. However, we are concerned with the lack of clarity in the revised definition and, consequently, potential issues as to whether the revised definition complies with the Aarhus Convention (the "**Convention**"). We consider that further work is needed to clarify the definition and to ensure that its scope is not narrower than that of the Convention.

6. The revised definition does not touch on the subject matter of a claim and, as we will explain in a number of our answers below, we think it is important to take account of the subject matter of a claim as part of this consultation process.

7. We support the court's power to determine whether or not the Regime shall apply, as currently drafted.

Question 2: Do you agree with the proposed changes to the wording of the rules and Practice Directions regarding eligibility for costs protection?

8. Whilst we agree with the proposed change to expressly specify the type of claimant (*i.e.*, a "member of the public") eligible for costs protection, the proposal is unclear as to its scope.

9. We are concerned that the proposed changes might be construed so as not to include organisations and companies. To do so would be inconsistent with the Convention.

Question 3: Should claimants only be granted costs protection under the Regime once permission to apply for judicial review or statutory review (where relevant) has been given?

10. Whilst costs provisions of this type could provide a suitable disincentive to bringing weak and/or vexatious claims, we also recognise that continuing to apply costs protection from the time a claim is issued can provide certainty for claimants and reduce the risk of satellite litigation and delay.

11. We would suggest that it be considered whether costs protection provisions could be designed so as to provide protection for genuine claims. A hard-and-fast rule on costs protection may not adequately distinguish between these types of genuine claims and more vexatious, speculative claims designed to delay. Accordingly, we propose that the costs protection rules are revisited in more detail by the Ministry of Justice to take account of this concept.

Question 4: Do you agree with the proposal to introduce a "hybrid" approach to govern the level of the costs caps?

12. The current approach (*i.e.*, the court not taking into consideration a claimant's financial resources) appears to be unsatisfactory as it does not meet the requirements of the Edwards case.

13. The proposed introduction of a hybrid approach whereby the court may review the costs caps on a case-by-case basis upon application by either party appears to be appropriate in order to distinguish between a vexatious, speculative claim designed to delay and a genuine claim.

Question 5: Do you agree that the criteria set out at proposed rule 45.44(4) at Annex A properly reflect the principles from the Edwards case?

14. The proposed drafting at 45.44(4) is generally reflective of the Edwards case, save for its use of the disjunctive rather than the conjunctive (which is inconsistent with the Edwards case).

15. We have concerns regarding the drafting of 45.44(4)(b)(i): it is our belief that this is too vague. We propose that this sub-section is removed.

Question 6: Do you agree that it is appropriate for the courts to apply the Edwards principles to decide whether to vary costs caps?

16. We agree that it is appropriate for the courts to consider whether the costs of the proceedings exceed the financial resources of the claimant and appear to be objectively unreasonable.

Question 7: Should all claimants be required to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings?

17. We propose that a schedule of financial resources should be a requirement to be filed at court only in instances where a claimant is seeking to vary the costs cap (*i.e.*, not all claimants must file a schedule).

18. We also consider that the schedule should be provided directly to the court, with the court to determine whether it should also be provided to the defendant in light of the facts and circumstances of each case.

19. Our reasoning for this is to reduce unnecessary burdens on claimants and the court and also to remove a potential deterrent to bringing valid claims.

Question 8: Do you agree with the proposed approach to the application of costs caps on claims involving multiple claimants or defendants?

20. Yes, we agree with this approach. This is an equitable way to ensure that each party to a claim has its costs capped appropriately.

Question 9: At what level should the default costs caps be set?

21. We do not agree to raising the level of caps for individual claimants and reducing the cap for defendants to a seemingly arbitrary level, as suggested in the consultation.

22. Instead, we suggest that further research/statistical work is undertaken in order to have empirical evidence from which the right balance can be found (*i.e.*, between ensuring access and preventing vexatious litigation).

23. For example, it may be more suitable to implement different quantum of costs caps dependent on the subject matter of a claim as some subject matters may require significantly larger costs caps than others.

Question 10: What are your views on the introduction of a range of default costs caps in the future?

24. We agree that this may be a "future" alternative approach to cost caps. However, as referenced in the consultation paper, to fully understand the efficacy of this approach we will be required to wait until a body of case law has become available, which will be the case only once the "hybrid" approach has been implemented for some time.

Question 11: Do you agree that where a defendant unsuccessfully challenges whether a claim is an Convention claim, costs of that challenge should normally be ordered on the standard basis?

25. We agree with this approach, provided that, as currently drafted, the court may order costs on an indemnity basis if it considers that appropriate.

Question 12: Do you think the Regime should make specific provision for how the courts should normally deal with the costs of applications to vary costs caps?

26. We believe the approach as proposed in paragraphs 49-50 of the consultation paper, and referenced above in question 11, is adequate, and no further specific provisions are required.

Question 13: Do you have any comments on the proposed revisions to Practice Direction 25A?

27. We agree that the proposed amendment provides additional clarity in regards to: (i) how courts assess whether a cross-undertaking would be "prohibitively expensive", and (ii) the additional clarity regarding claims involving multiple claimants.

Question 14: Are there other types of challenge to which the Regime should be extended and if so what are they and why?

28. Pursuant to recent case law on point[1], we suggest that the Regime should be extended to apply to private nuisance cases and cases relating to licensing decisions made by environmental regulators.

Question 15: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals to revise the Environmental Costs Protection Regime?

29. We have no specific examples to add.

[1] *Austin v Miller Argent (South Wales) Ltd; R (on the application of Richard McMorn) v Natural England.*

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PLANNING & ENVIRONMENTAL LAW COMMITTEE

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