January 2018

Friends of the Earth

Briefing

The cost of bringing environmental judicial reviews

This is an update by the legal team at Friends of the Earth for civil society organisations, to help clarify the costs rules for environmental Judicial Review (JR) following the case 'RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor [2017] EWHC 2309'.

Introduction

The Aarhus Convention is an international treaty whose objective is to contribute to an environment that is adequate to everyone's health and wellbeing. It sets out practical measures to achieve this ambition: public access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters. This briefing focuses on access to justice.

Due to the recognised public interest nature of environmental legal challenges, the Convention requires wide access to justice, and that people should not be put-off due to "prohibitive expensive". The UK government has in practice limited this legal requirement to environmental JRs and some statutory reviews.[1]

In a "loser pays" legal system, such as we have in the UK, financial protection is very important for environmental claims, so that cases can be heard for all of our benefit. Without it many people are excluded from an expensive legal system, and the excesses of bad governance not so readily checked.

Changes to environmental JR costs rules

Between April 2013 and February 2017 England and Wales had a simple scheme of fixed costs protection for environmental claimants. If you lost, the legal bill you paid for the other side's costs and expenses was automatically capped: £5,000 if the claimant is an individual; £10,000 in all other cases (e.g. an NGO). This was on top of your own legal costs and disbursements. The government made new rules for England and Wales (Northern Ireland and Scotland have different rules) in February 2017.[2] The previously

[1] Those familiar with the Convention will know that the requirement it sets out for access to justice in environmental matters to not be "prohibitively expensive" is much broader than this and can include private claims, for example.

[2] Civil Procedure (Amendment) Rules 2017/95

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fixed costs limits would now be a default starting point – the limit on what you paid to the defendant if you lost to cover their legal costs could go up and down during the case.

1. You would now have to disclose your financial resources at the start of a claim. This is to let a defendant consider asking the court to raise the limit so you pay more to them if you lose.

2. The rules did not restrict this to any particular point. You could be faced with a large hike in potential costs liability late on, to an amount you were not prepared or able to pay.[3]

3. There was no requirement for your financial information to be heard in private – anybody could learn about your financial affairs at court and journalists could report on them.

Legal challenge to the changes

The NGOs challenged the statutory instrument based on EU law. See: 'RSPB, Friends of the Earth Ltd and ClientEarth v SofS for Justice and Lord Chancellor [2017] EWHC 2309'. The challenge was largely successful and mitigated some of the worst aspects of the changes.

The outcome – current situation

The judge's ruling restricts the way in which the new costs system operates in practice (although the system remains problematic as noted below), and the Ministry of Justice has agreed to change the rules as a result. This judgement considerably mitigates the damage of the new changes and restores much of the certainty for claimants of the pre-Feb 2017 rules.

- The previous fixed limits (£5,000 for an individual and £10,000 for an organisation) remain a default starting point. But, any challenge to this by a defendant must be done at the 'acknowledgement of service' stage when a case is started, save for exceptional circumstances. **This means costs protection should be fixed early and before significant legal costs have been accrued – limiting uncertainty for claimants.**

- **A claimant's financial disclosure should remain private**, and a new rule is required to provide for a private hearing where this information is to be argued over in court.

- The Secretary of State for Justice also conceded that **what a claimant pays for their own legal representation can be part of the calculation of how expensive the overall proceedings are to a claimant**, and so inform where the limit should be on what it pays a defendant if it loses. This issue – recorded in the Judgment – can be important for those of lesser means.

Remaining problems – an imperfect system

[3] One of the major problems of variable caps is that once you have initiated a case, if the cap goes up it is too late to then withdraw and avoid increased liability. You are in principle liable for the other side's costs when you withdraw.

It was not possible to challenge the principle that variation could occur (though the ruling means it can only happen right at the start of the case) or that financial information was needed to facilitate it. And the current system as a whole is also not fully compliant with the Aarhus Convention. There are situations where prohibitive expense can be incurred and the heavy reliance on Judges' discretion could lead to inconsistency.

Appropriate changes to the new rules in response to this case are still to be made.

Summary example – the current costs rules in practice

Step 1	The claimant produces a schedule of their financial resources, including relevant third party support, which is provided to the court alongside other legal documentation when initiating the JR. This This should explain what financial resources are available. The rules provide for the default cost protection upon this step being completed.
Step 2	The Defendant may challenge the default cost protection granted when they file their 'acknowledgement of service' (their first response to the claimant's legal case) based on the financial information filed. Claimant can then respond, or if the Defendant has not challenged the default costs protection confirm this and that it is 'now or never' (and refer to this case).
Step 3	Await decision from the Court on costs protection variation (if any). Then Claimant needs to decide whether to take the case forward. Consider any need to appeal the Court decision on costs variation.
Step 4	Claimant monitors their financial position as case progresses. This may be complex for NGOs. If significant changes to available resources occur then they may need to disclose this to the Court. Such changes could increase or decrease the level of costs protection.

This briefing is intended to help non-lawyers with an initial understanding of the new rules following the case. It should not replace specific advice from a legal advisor relevant to your situation.

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