Government Closes Consultation On Costs Regime: Proposed Changes That Would Affect Environmental Cases

Environmental Law Monthly has reported on the changes in the last few years to the costs regime in environmental cases [see ELM August 2014 issue. Prior to 2013, if a claimant in an environmental claim required protection to his or her exposure to the adverse costs in a public law case (e.g. judicial review) or a private law case (e.g. nuisance), he would need to apply for a protective costs order with very little certainty or confidence in the outcome.

Subsequently, smarting from the decision in C-260/11 Edwards v. Environment Agency [2013] 1 W.L.R. 2914 at the European Court of Justice and infraction proceedings brought against the UK (C-530/11 European Commission v. UK [2014] 3 WLR 853) where the domestic costs regime was found to be at odds with the UNECE Aarhus Convention and European Directives, the Government introduced costs caps through amendments to the Civil Procedure Rules (CPR) – r45.41-43 which provided and continues to provide an automatic costs caps of £5, 000 for an individual claimant or £10, 000 for an organisation or group in "Aarhus Convention claims".

There continues to be a twin track for environmental claims in the sense that the new regime only applies to environmental judicial review - and not to s 288 statutory appeals (see Venn article in ELM . . .) and private nuisance cases where a Protective Costs Order application is required. But at least there is certainty for the Claimant in environmental judicial reviews.

Now, however, the Government has just closed its consultation on Costs Protection in Environmental Claims, ominously expressing concern that:

"There is presently no subjective element to the regime, in that no account is taken of the particular claimant's financial position (i.e. the only question is whether or not the claimant is claiming as an individual) or the strength of their particular case. Other than the distinction drawn between claimants who claim as individuals and all other claimants, the rules do not take into account the nature of the claimant."

The proposals which the consultation sets out include bringing s 288 challenges within the "Aarhus Convention Claim" definition. But there is a catch as this will not include cases which do not engage EU environmental legislation such as the Environmental Impact Assessment Directive.

The consultation also proposes restricting costs capping to "members of the public" (i.e. not organisations such as charities); making the granting of a costs cap contingent upon being granted permission to proceed to judicial review; raising the level of the cap (suggesting up to £20, 000); requiring evidence of financial resources to include whether third parties are standing behind the claimant; introducing multiple costs caps for each individual; removing the indemnity costs disincentive for Defendants seeking to challenging the status of a case as an Aarhus Claim and the introduction of a subjective test for cross undertakings in damages where injunctions are sought.

The collective environmental group Wildlife and Countryside Link have commented that the proposals would "put the UK in breach of international legislation on human rights and access to justice."

Given the Government's track record on pushing through unpopular changes to legislation and, in particular costs and funding, it is likely that these changes will be implemented and the UK will then be subject to further infraction proceedings by the Court of Justice of the European Union.

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