PROTECTIVE EXPENSES ORDERS:
AN ENCOURAGEMENT TO LEGAL CHALLENGE BY OBJECTORS?

1. Origins

The recent advent of Protective Expenses Orders ("PEO") in Scotland derive directly from what are known in England as Protective Costs Orders. They came into existence in cases where litigation had been commenced in the wider public interest but where the party or parties bringing the action were not in a position to bear the financial consequences of such an action being unsuccessful, and thereby being required to bear the expenses of the other side (since expenses generally follow success in court actions). The case law surrounding them has developed over many years culminating in what are known as the "Corner House Principles"[1] following the case of *R (Corner House Research) v Secretary of State for Trade and Industry*.[2] That was a case where a non-governmental organisation of limited means specialising in the prevention of bribery and corruption in international trade raised an action for judicial review against the Export Credits Guarantee Department of the DTI. The Department had allegedy issued amended procedures and standard forms without adequately consulting the claimant and other interested parties in breach of recognised public law standards of fairness and the Department's own stated policy.

Initially, the NGO was refused its application for a Protective Costs Order but this was reversed in the English Court of Appeal, who took the opportunity to set out the principles governing the making of such awards in public law cases raising issues of general public importance to allow claimants of limited means access to the courts without fear of substantial awards of costs being made against them if they should be unsuccessful.

They are as follows:

> (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

[1] Or, "Corner House Rules." PEOs are also sometimes referred to as "Restricted Expenses Orders": The terminology has yet to settle down in Scotland.

[2] [2005] 1 WLR 2600.

> is fair and just to make the order; and (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.

The reciprocal side of the PEO is that the claimant should not himself be able himself to obtain a generous award of expenses if successful. To that end, any claim granted a PEO in respect of it should be accompanied by what is known as a capping order restricting the claimant's expenses in all cases (unless their lawyers are acting *pro bono*). It can take many forms but should prescribe the total amount of expenses which would be recoverable and should in general be restricted to solicitors' fees and a fee of a single advocate whose status are both no more than modest. The overriding purpose of exercising the jurisdiction to grant a PEO 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 in the general public interest at all. The beneficiary of a PEO must not expect that the capping order to follow will permit for anything other than modest representation and must arrange its legal representation accordingly.[3]

2. Corner House in Scotland

The competency of granting a PEO in Scotland was first established in the case of *McArthur v Lord Advocate*[4] which concerned a challenge in terms of Article 2 ECHR in respect of the alleged failure of the Lord Advocate to hold a public inquiry into the deaths of close relatives from Hepatitis C in the course of receiving blood transfusions from the NHS during the late to mid-1980s. Lord Glennie held that expenses are within the discretion of the Court and the width of that discretion has been emphasised many times and doubted whether the Inner House would wish to place that discretion within any kind of framework or to lay down blanket guidelines in all such cases.

In the event Lord Glennie did not grant a PEO on the grounds that conditions (iv) and (v) noted above were not met. However, the finding in relation to competency was not

[3] So, a mixed blessing for any lawyer who successfully applies for a PEO for his client: It means that the action can proceed (and he or she might even get paid) but the Court has fully accepted that he or she is of "modest" status, providing "modest representation" and is merely "reasonably competent."
[4] 2006 SLT 170.

challenged and the principle of PEOs in appropriate actions has been accepted ever since. In *McGinty v Scottish Ministers* which was the next to follow, Lady Dorrian was persuaded to grant a PEO to an applicant seeking to challenge the inclusion of the new power station and transshipment hub at Hunterston. He was in receipt of Job Seeker's Allowance and had limited savings. The potential liability to Scottish Ministers might have been in the region of £90,000, and the petitioner's own expenses might have been in the region of £80,000. Fund raising had achieved approximately £15,000 at the time of the hearing. The PEO granted set a cap of recoverable expenses restricted to a solicitor and one senior counsel acting without a junior. However, the liability in the event of failure was restricted to £30,000. So, in answer to the question set in the title of this paper, as far as Mr McGinty is concerned, the existence of a PEO is unlikely to have acted as an encouragement to legal action by this particular objector.

2.1. <u>Content of an application for a PEO</u>

It is perhaps little understood by those outside the legal profession that an application for a PEO is a far from straightforward matter. Normally, applications are made to the court by way of motion which consists of a short paragraph contained on a prescribed notice sheet asking what order you wish the Court to pronounce e.g. further time to lodge defences, to accept amendment of pleadings and the like, as part of the main action. Not so with PEOs. It is necessary to lodge an incidental Minute with the Court which is similar in format and length to the substantive petition or appeal itself.

It is necessary to include a crave requesting the court to restrict the expenses of the action; and a full statement of facts narrating the general circumstances of the underlying action, the cause of action; the provisions being relied upon in support of the action; the fact that the action is of wider public importance and narration covering the Corner House conditions outlined above; the likely duration of the court hearing; the likely liability for expenses in the event that the application is not successful and most importantly, the financial means and assets of the party in whose name the application is being made.

That incidental Minute then requires to be answered by the other party or parties to the proceedings who then have the opportunity to oppose the application and to state upon which grounds they do so e.g. non compliance with any of the Corner House Conditions, or on grounds of limited prospects of success in the main action.

Presumably, it would be allowable for the applicant to adjust his or her pleadings to take account of anything said in the Answers to they Minute which he or she did not anticipate. The matter is then heard before a judge and unlike most interlocutory hearings, an application for a PEO could potentially take as much as a day in court if there is considerable dispute between the parties.[5] It can thus be seen that the process of applying for a PEO of itself has the effect of greatly increasing the costs of litigation, such that if the applicant fails to obtain a meaningful (or any) reduction in liability by virtue of a PEO being granted, the difficulties caused by only having limited means are aggravated. In a judicial review case set down for only one day, there is perhaps little point in seeking to obtain a PEO given those considerations.

Again, in answer to the question posed by this paper, the existence of the possibility of obtaining a PEO might serve as an encouragement to challenge on the part of objectors only to those who have the most significant cases to be heard, where a reduction in liability for expenses would be meaningful in the overall context of the case.

2.2. Road Sense

An example of the above is the recently concluded case of *William Walton v Scottish Ministers*[6] where it was expected that an appeal hearing against the Scottish Ministers' decision to proceed with the Aberdeen Western Peripheral Route in a modified form following upon a public inquiry would last four days with senior and junior counsel on both sides. In the event, the hearing lasted twice as long as that, but even on those shortened projections, it was estimated that Road Sense's liability for its own and the Ministers' expenses in the event of being unsuccessful would amount to between £82,000-£90,000, of which £52,000 was attributable to the Scottish Ministers. In the hearing in relation to the PEO, in the name of *Road Sense v Scottish Ministers*[7], Lord Stewart felt compelled to grant the PEO for reasons which I will discuss below, but capped the appellants' liability at £40,000, which again appears somewhat on the high side, but fortunately for Road Sense, their campaigning efforts meant that they had separately raised considerable funds as part of their public campaign.

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[5] Although apparently not so, in *McGinty's* case.
[6] [2011] CSOH 131.
[7] [2011] CSOH 10.

Interestingly, in the course of the substantive hearing before Lord Tyre, the Ministers took issue with the title and interest of Road Sense to sue which is the reason why the action proceeded in the name of Mr Walton alone. Again, fortunately for him, given the prolonged duration of the appeal hearing, and given its unsuccessful conclusion, the PEO restricting liability for expenses to £40,000 was transferred to him from Road Sense. It has now been confirmed that the case has been marked for appeal to the Inner House and we can expect a further PEO application in relation to those proceedings.[8]

3. The Aarhus Convention and EU Directive

The snappily entitled United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was ratified by the UK in February 2005 and by the European Union in the same month. It was signed in Aarhus, Denmark, hence the considerably more wieldy working title of Aarhus Convention. It has over 40 parties to it and a compliance committee was set up under it in order to ensure adherence to its terms by the Contracting Parties. The Convention formed the basis of the PEO applications in both *McGinty* and *Road Sense*.

The relevant part of the Convention for present purposes is Article 9 which provides as follows at Art 9(2)-(5):

> "(2) Each Party shall within the framework of its national legislation, ensure that members of the public concerned
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> (a) having a sufficient interest or, alternatively,
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> (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,
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> have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of the other relevant provisions of this Convention.
>
> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and *consistently with the objective of giving the public concerned wide access to justice* within the scope of this Convention.

[8] BBC1, *Reporting Scotlsnd*, 7 September 2011.

(3) In addition and without prejudice to the review procedures referred to in paragraph 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and *not prohibitively expensive*. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

(5) In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms *to remove or reduce financial and other barriers to access to justice.*" (emphasis added)

So it can be seen from paragraph 9(2) above that members of the public having sufficient interest must have access to a review procedure before a court of law. Effectively, this amounts to cases in the UK where an EIA has been required, although that need not form the subject-matter of the challenge.

In terms of paragraph 9(4), where there has been an EIA, there must be adequate, effective and timely remedies which are not prohibitively expensive. It is those last two words which are the subject of most discussion, since they are nowhere defined, but they are obviously critical in terms of whether a PEO ought to be granted considering the financial resources of the party raising the environmental challenge.

It should also be borne in mind that the Convention is drawn in very wide terms aimed at ensuring the widest possible public participation which is illustrated by its seventh preamble and first Article, the latter of which runs as follows:

Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public

participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.

The Aarhus Convention was implemented into the EU by virtue of the Public Participation Directive 2003/35/EC. This it did by amending Council Directive 85/337/EEC[9] on the assessment of public and private projects on the environment ("the EIA Directive"), by introducing a new Article 10a which effectively replicates Article 9(2) and 9(4) of the Aarhus Convention. That is to say it guarantees in the EU area a right to access to a court of law in respect of environmental matters to people having sufficient interest and guarantees effective and timeous remedies which are not prohibitively expensive. It enshrines the general principle of access to justice in environmental matters as set out in Article 1 Aarhus set out above.

It does, however exclude those rights in relation to the broader rights under Article 9(3) to bring challenges in terms of purely national legislation in deference to the principle of subsidiarity. Article 9(3) therefore does not have direct effect,[10] that is to say is not directly enforceable by individuals in national courts, although Articles 9(2) and 9(4) do have such enforceability.

The provisions of the EIA Directive as amended were transposed into Scotland by the Environmental Impact Assessment (Scotland) Regulations 1999. The relevant rules in relation to EIA applications are now contained in the Town and Country Planning (Environmental Impact Assessment)(Scotland) Regulations 2011.[11]

4. Criticism of the Corner House Principles

[9] As amended by Directive 97/11/EC

[10] Case C-240/09) *Lesoorchranarske zoskupenievVLK v Ministerstvo Slovenskej republiky*, judgment of the ECJ, 8 March 2011.

[11] SSI 2011/139.

As will be noted above, the Corner House Principles were not originally formulated with environmental cases specifically in mind. However, the Aarhus Convention represents an international obligation now part of EU law with which the UK requires to comply. To this end, a Working Group chaired by Lord Justice Sullivan issued a report entitled "Ensuring Access to Environmental Justice in England and Wales" in May 2008 which was updated in August 2010. It is a lengthy report, but in short queries certain of the Corner House requirements such as there having to be a matter of general public importance to be litigated which excludes any private interests being protected, even if there are nonetheless significant environmental impacts at stake.[12]

The report suggests that, in England at least, only three questions should be asked: Does the case fall within the Aarhus Convention?; Has permission for judicial review been granted? (an English only requirement, although perhaps to be introduced in Scotland); and are the costs prohibitively expensive? Sullivan LJ's report is against the notion of reciprocal caps outlined above and the updated report suggests that the question of what is prohibitive in terms of expenses should be judged objectively, that is to say by reference to what an average member of the public who is neither rich nor legally aided, would find prohibitively expensive, rather than by reference to the means of the particular claimant.

5. Further consideration of Corner House principles

Somewhat fortuitously, the matter subsequently came up before Lord Justice Sullivan in his judicial capacity in the case of *Garner v Elmbridge Borough Council*.[13] In that case, the first one brought following implementation of the Public Participation Directive, a Protective Costs Orders had been refused by the judge in the High Court in relation to a proposed development near Hampton Court Palace.

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[12] This being the reason why no PEO was sought in *Forbes v Aberdeenshire Council* [2010] CSOH 1, although ironically, Lady Smith seriously doubted whether title and interest had been demonstrated.

[13] [2010] EWCA Civ 1006.

Whilst recognising that his decision was to come prior to the final findings of the Aarhus Compliance Committee and a further decision of the Supreme Court and the ECJ,[14] Lord Justice Sullivan held that a purely subjective approach to the question of the "not prohibitively expensive" requirement of Article 10a EIA Directive was not consistent with the objectives underlying that Directive. He held that the underlying purpose of the Directive to ensure that members of the public concerned and having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter wholly by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of "the public concerned."

It should be noted that the above discussion arose in the context of the claimant refusing to reveal any details of his assets and income due to the "chilling effect" that such public disclosure would have on his willingness to continue the action. A comment somewhat derided by Lord Stewart in the *Road Sense* decision.[15] In the event, discussion of the legal costs to date was undertaken and a Protective Costs Order of £5,000 was granted which is considerably more modest than the Scottish examples referred to above. A cost cap of £35,000 was also imposed in the event of the claimant's success, which turned out to be academic as he lost the substantive case and the appeal against it.

I shall conclude by considering the case of *Edwards & Another v The Environment Agency* which was delivered after the case of *Garner* was decided. The appellant in that case challenged a decision to issue a permit for the operation of cement works which was allowed to use shredded tyres as fuel. She lost her appeal before the Court of Appeal and before the House of Lords. She applied for a Protective Costs Order in the House of Lords in March 2007 and in July 2008 she was ordered to pay the respondents costs. When the Supreme Court came into existence, two court appointed costs officers carried out a detailed assessment of those costs. The considered themselves to be bound by the terms of the Directive and disallowed expenditure which they considered to be prohibitively expensive in terms of the Aarhus principles. The Supreme Court unanimously set aside those rulings on the basis that the costs officers had no jurisdiction to amend the award of costs as they did, only to consider matters of detail.

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[14] *Edwards v The Environment Agency and Others* [2010] UKSC 57
[15] See paragraph 44.

However, by reference to *Garner*, the Supreme Court considered that the House of Lords in refusing the appellant's application for a Protective Costs Order and in ordering her to pay the costs of the House of Lords hearing, might have failed to fulfil its obligations under the EU Directive. As the question as to whether a subjective or objective view ought to have been taken regarding the question of what was prohibitively expensive, the order for costs was stayed meantime and the issue was referred to the ECJ for a determination.

6. Conclusions

As matters stand, there appears to be different regimes for consideration of PEOs in relation to actions raised on non-environmental public interest grounds and those raised on environmental grounds of EU provenance given that the Aarhus Convention only applies to the latter.

Further, there appears to be a disparity in approach as between England and Scotland with the English approach generally appearing to be more generous to the claimant/appellant than in Scotland. That might be connected with a more pronounced tradition of public interest litigation in England than in Scotland and also perhaps due to a cautious approach being taken in Scotland, given the recent acceptance of the concept of PEO and advent of the procedure.[16]

In final answer to the question posed in this paper, it would appear that once the procedure becomes embedded in Scotland and a body of precedent established, the English influence, tending towards greater generosity towards claimants, will take hold and will encourage a greater number of objector-led court actions in future.

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[16] The matter is still under discussion with the Rule Council and an Act of Sederunt covering the procedure is still at draft stage as at February 2011.

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