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COSTS UPDATE FOR ENVIRONMENTAL LITIGATION

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Developers, environmental groups and community organisations promoting or challenging shale gas/fracking or renewable energy schemes through the planning process should be aware of the caps on costs that may apply in applications for judicial review.

The 1998 Aarhus Convention requires that access to environmental justice is not "prohibitively expensive".

A Claimant for judicial review after 1 April 2013 which concerns an environmental matter may choose to subject the claim to the cost caps in Civil Procedure Rules 45.41 to 45.43. The caps will apply where the Claimant indicates that it wishes the caps to apply by simply ticking the appropriate box on the claim form.

The effect of the caps is that individual Claimants cannot be ordered to pay more than £5,000 to other parties should they lose; and commercial entities and not for profit organisations cannot be ordered to pay more than £10,000 should they lose. And both types of Claimant cannot recover more than £35,000 if they win. The figures include VAT and disbursements.

The caps are likely to be attractive to environmental groups and community groups challenging planning decisions. Developers and commercial organisations challenging decisions are less likely to be interested in the caps.

Where developers and commercial organisations wish to join a judicial review as an interested party in order to oppose a challenge to a planning decision, the cost caps are likely to prevent the developer or commercial organisation recovering costs in excess of the cap from an unsuccessful Claimant.

A Defendant in a judicial review (usually a government department or local authority) may dispute whether the Aarhus Convention applies when completing the Acknowledgement of Service, but:

- If the Court decides the claim is an Aarhus Convention claim it will make an order for costs against the Defendant on the indemnity basis (i.e. a higher level of the Claimant's costs will be recovered).

- If the Court decides the claim is not an Aarhus Convention claim it will *normally* make no order for costs (.i.e. there is no penalty for the Claimant).

- Given this unattractive costs regime together with the *Venn* judgment (see below), there is only likely to be a limited number of cases where a challenge as to whether the matter is within the scope of the Aarhus Convention is going to be worthwhile.

The rules have, not surprisingly, generated satellite litigation, which has added some clarity to the application of the rules in practice:

- The rules only apply to claims for judicial review. They do not apply therefore to statutory appeals of planning decisions (s.288/289 Town and Country Planning Act 1990 and s.113 Planning and Compulsory Purchase Act 2004) see: *Venn v SSCLG* [2014] EWCA Civ. 1539.

- The rules will apply to almost any judicial review of a planning decision (see Sullivan LJ in *Venn* at [15]-[18]).

- Multiple claimants (such as unincorporated action groups) could benefit from a single £5,000 cap provided they all pursue the same case (otherwise it might be appropriate to cap each case at £5,000) see: *R (Botley Action Group) v Eastleigh BC* [2014] EWHC 4388 (Admin.) per Collins J at [125].

Practical points for Claimants are:

- Use individual Claimants where possible.

- Raise the costs matter in pre-action correspondence.

- Provide full reasons why the Aarhus Convention should apply within the claim form.

- If not a judicial review claim, consider applying for a Protective Costs Order applying the *Corner House* [2005] EWCA Civ. 192 criteria.

Practical points for Defendants or developers whose planning permission is being challenged and who are thinking about joining the judicial review as an interested party are:

- Take a realistic view (will the litigation cost more than £5,000 – £10,000 to defend?).

- Is it worth a hearing with negative cost consequences to dispute it?

- Remember the £35,000 cap on a successful Claimant's recovery.

Introduction to Prospect Law and Ashley Bowes

Prospect Law Ltd is an energy specialist UK law firm which is based in London and the Midlands. Prospect Energy Ltd is its sister company providing technical expertise. The two firms provide advice on energy development projects and energy related litigation concerning shale gas, nuclear and renewable energy schemes for clients in the UK and internationally.

Ashley Bowes is a barrister who specialises in planning and environmental law matters at planning appeals and in statutory challenges and judicial review cases in the High Court. He is involved in energy related development projects around the UK.

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