IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM

THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY LIST

BUSINESS LIST

BETWEEN:

JOLYON MAUGHAM QC

Claimant/Appellant

-and-

UBER LONDON LIMITED

Defendant/Respondent

_________________________________________________________

APPELLANT’S SKELETON ARGUMENT

Dated 18 March 2019

In support of an application for permission to appeal

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References in the form [X] are to paragraphs in the judgment

Introduction

1. This is the Appellant’s skeleton argument in support of an application for permission to appeal against the decision of William Trower QC sitting as a deputy High Court Judge, by which the Judge dismissed the Appellant’s application for a Protective Costs Order (“PCO”) in relation to a claim brought by the Appellant to obtain a VAT receipt from the Respondent under regulations 13 and 14 of the Value Added Tax Regulations 1995 (“the 1995 Regulations”).
2. The Appellant further seeks permission to appeal against the Judge’s summary assessment of the costs payable by the Appellant to the Respondent, by which the Judge ordered the Appellant to pay £101,032.82 in respect of the costs of resisting the PCO.

Grounds of appeal

3. There are two grounds of appeal in respect of the refusal to make a PCO, the second of which has a number of sub-grounds:

   (i) The Judge erred in concluding that the decision of the Court of Appeal in Eweida v British Airways [2010] EWCA Civ 80; [2010] I.C.R. 890 constrains the exercise of its discretion so that a PCO cannot be made in private litigation (paragraph 47) and/or that the present case counts as private litigation in the relevant sense (paragraph 53).

   (ii) The Judge erred in its application of the Corner House principles, in the following respects:

      (a) The Judge erred in treating examples given in Corner House as defining general public importance and then concluding that the claim did not raise issues of general public importance which should be resolved in these proceedings. The proceedings raise the plainly important general issue of whether Uber (a large business with millions of customers) supplies transport services to passengers and is liable to charge VAT and account for it to HMRC. The stark tension between decisions of the courts (in particular the Court of Appeal and the Court of Justice of the European Union on the one hand) and the inaction of HMRC means that the issue goes right to the heart of public trust in the neutral operation of the tax system.

      (b) The Judge erred in considering that a possible claim for judicial review against HMRC is the only proper means of addressing the public interest issues at stake, when (due to Uber refusing to disclose the relevant correspondence and HMRC being bound by statute to maintain that confidentiality) such a claim against HMRC would be impossible.

      (c) The Judge erred in considering that the Appellant would need to establish that “the public interest requires resolution of this particular
aspect of Uber’s tax affairs to be taken over by him” in order to satisfy the general public importance test.

(d) The Judge erred in concluding that the fact that the black cab trade is the likely source of much of the crowdfunding in support of the litigation was a relevant factor and/or a significant factor against granting a PCO.

(e) The Judge erred in concluding that the level of crowdfunding/the Appellant’s means meant that the fourth principle was not sufficiently satisfied.

(f) The Judge erred in concluding that the possibility of applying for a costs capping order meant it was not likely that the claim would be discontinued if a PCO were not granted.

(g) The Judge erred in treating as the “final” Corner House principle the observation in Corner House that where a party’s representatives are acting pro bono that may tell in favour of making an order; and therefore appears to have considered the fact that the Appellant’s representatives were acting at discounted rates may tell against an order, as opposed to it being a positive factor, albeit less strong than if the representatives had been acting pro bono.

4. Challenges are mounted against both the substantive decision and against the summary assessment of costs, which (contrary to principle and the authority of Corner House) permitted the recovery of over £100,000 in costs for a one day hearing.

5. Permission should be granted because both grounds have a real prospect of success and, additionally, raise issues of public importance requiring resolution such that there is another compelling reason to grant permission.

6. The sole ground in respect of the assessment of costs is that the Court has failed properly to apply the guidance in Corner House as to the costs that should be recoverable and/or the risk that the making of very substantial costs orders in respect of an application for a PCO has a chilling effect on applying for such orders, that undermines the very purpose for which the power to make such orders exists.
Factual background

7. The Appellant, a leading tax barrister, brought a claim for a declaration and order requiring the Respondent to provide him with a VAT receipt in relation to a trip booked with the Respondent for business purposes. A VAT receipt is needed in order to enable the Appellant to claim input tax deduction (a fundamental aspect of the VAT regime: see Article 168 of the Principle VAT Directive). The underlying issue is whether, of a taxi booked through the Uber app, the taxi service is supplied for VAT purposes by the Respondent (in which case the Respondent would be obliged to charge VAT) or by the individual driver (whose earnings are likely to be below the VAT registration threshold of £85,000 per annum, such that he is not obliged to charge VAT).

8. By consent, the Respondent did not serve a defence, but it denies that it is the relevant supplier.

9. The claim is brought in association with the Good Law Project (“GLP”) of which the Appellant is the founder and director, and which is dedicated to litigating cases of significant public importance, with some success.

10. The sum of input at stake - £1.06 - is trivial for the Appellant, and the Appellant has no other private interest in the proceedings. However, there are important public interests at stake. The question whether the Respondent is liable for VAT for journeys booked through its platform has significant implications for the public interest, which may be summarised as follows:

(a) raising substantial revenue (the Appellant’s unchallenged estimate is that if he were to succeed, there could be arrears of £1 billion and an annual liability of £200 million going forward);
(b) fair administration of VAT by HMRC;
(c) maintaining public trust and confidence in the fair administration of VAT (and therefore of the tax regime generally, which is important in turn for the willingness of others to pay taxes (tax morale);
(d) the public law issue as to whether Uber has failed to account for, and HMRC has failed to oblige Uber to account for, a liability which amounts to £1bn is a matter
of general public importance, especially having regard to importance of
clarification of the general principles that companies operating in the novel “gig
economy” must observed within tax law, the sums involved and the number of
people affected.

11. HMRC is not taking any protective action to defend against the potential loss of
substantial revenue and has not provided any satisfactory explanation of that position.
HMRC is barred from disclosing information in respect of a specific taxpayer and Uber
does not consent to the release of information.

12. Given the sums at stake, there is no doubt that the Respondent will fight this litigation
hard. The Appellant’s unchallenged estimate is that the Respondent’s costs could reach
£1 million at first instance alone, which estimate the judge accepted.

13. The Appellant has been candid about his financial circumstances and those of the GLP.
The GLP has an annual income of £25,000 [6]. The Appellant is, compared to the
average, a wealthy man.

14. The GLP has raised £107,650 to fund this litigation by way of crowdfunding, from
3,400 separate donations [8]. The Appellant estimates that more than 50% of those
donations have originated from the black cab trade. GLP has also received a donation
of £20,000 from an organisation connected with that trade. [8] The Appellant has no
personal connection with the black trade, is not motivated by any desire to advance the
black cab trade’s interests and the black cab trade has no influence or control over the
conduct of the litigation [9].

15. The Appellant hopes to pay his legal team at government rates but there is an
understanding that, depending on costs orders, they may not get paid at all.

16. The Appellant’s clear evidence was that he will not be able to continue with this
litigation without meaningful costs protection. A costs capping order was floated in the
evidence but it is clear that would not provide adequate costs protection, not least
because it would not apply in respect of costs already incurred. The Respondent’s costs
of resisting the PCO alone were assessed at just over £100,000.
The Judgment

17. The Judge’s key conclusions for refusing the application for a PCO were as follows: (1) He was bound by Eweida; (2) the requirements in Corner House (as modified by the judge) were not met.

18. On the first point, at [38], the Judge found that it was an essential part of the Court of Appeal’s reasoning in Eweida v British Airways Plc [2009] EWCA Civ 1025 that “…the fact that the claim was a private claim brought in private litigation was fatal to the application [for costs protection]…”. The Judge appears to have accepted that section 51 of the Senior Courts Act 1981 conferred jurisdiction to make a PCO (see [22]) but concluded that he “…should exercise [his] discretion under section 51 in accordance with the conclusion reached in Eweida to the effect that a PCO cannot be made in private litigation” [47].

19. The Judge went on to conclude that the present case amounted to “private litigation” in the sense intended by the Court of Appeal in Eweida [48 – 52] and therefore that he should not make a PCO.

20. The Judge went on to consider the application of the Corner House principles in the alternative to his conclusion that the decision in Eweida prevented him from making a PCO. The governing principles were set out by the Court of Appeal as follows:

“74 We would therefore restate the governing principles in these terms.

(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 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.”
21. The Judge considered the first two principles together at [53 – 72]. The Judge’s conclusions were as follows:

(1) The Judge accepted that it is a matter of general public importance that HMRC’s procedures for enforcing the payment of taxes should be lawful but “…just because there is public interest in issues illustrated by and surrounding this case does not mean that the issues actually raised in these proceedings are themselves of general public importance…” [56]

(2) The Judge doubted that the proceedings could be said to raise issues of general public importance “merely because they might establish a basis on which HMRC could then proceed to raise an assessment for a substantial amount of unpaid tax” [57]

(3) Matters of tax assessment and enforcement are normally for HMRC and the Appellant would “need to establish that the public interest requires resolution of this particular aspect of Uber’s tax affairs to be taken over by him” [67, in the context of 59 – 67]. There was evidence from Uber that HMRC were aware of its trading arrangements and that there had been regular dialogues between Uber and HMRC [68]. If HMRC were failing in their duty to assess and enforce, the public interest did not require that issue to be investigated in these proceedings and a properly formulated public law challenge by way of judicial review would be the right way to pursue that [70 – 72].

(4) As to the third principle, the Judge accepted that the Appellant had no private interest in the outcome of the case [76]. However, it was relevant to have regard to the extent to which any person who has provided financial support is likely to benefit if relief were granted [77]. The interests of black cab trade funders in the outcome of the litigation was a factor against making a PCO [78]; [84].

(5) As to the fourth principle, the fact that the defendant was a private commercial organisation seeking to defend its own private commercial interests, rather than a public body, weighed against making a PCO [82]. The existence of a significant body of people [the black cab trade] with a commercial interest in the outcome of proceedings, who had already provided some funding, meant that the fourth principle was not sufficiently satisfied to outweigh the factors pointing the other way [87].
(6) As to the fifth principle, the Judge accepted that the Appellant would “certainly not continue with these proceedings without the benefit of some form of meaningful costs protection” and that was reasonable “balancing his own personal circumstances against the extent of his potential exposure to an adverse costs order” [88]. However, the Judge considered that the Appellant’s indication that he may apply for a costs capping order “made it difficult to conclude that he will probably discontinue the proceedings (and will act reasonably in so doing)” if the Judge refused the relief sought.

(7) The Judge went on to state that “the final Corner House principle is that, 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”. The Judge considered that principle to be satisfied “to an extent” because the legal team were acting on much reduced rates and on the understanding they may not get paid at all, but it was not a case in which representation was being conducted in all respects pro bono because the proposal was for at least £100,000 of the crowdfunding to be paid to the Appellant’s own lawyers [90].

Submissions

Ground One

22. The Judge was wrong to hold that the jurisdiction/proper exercise of discretion in relation to costs conferred by s.51 Senior Courts Act 1981 does not extend to the making of a PCO in relation to a claim in private law, as a matter of principle, and authority.

23. As a matter of principle the discretion to make a costs order is wide, and does not include a limitation as to the type of proceedings in which a PCO may be made. It is trite law that “As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule”: Bolton MDC v Secretary of State for the Environment [1995] 1 WLR 1176, 1178 per Lord Lloyd of Berwick. This decision directly contradicts that accepted principle. Further, Eweida, on its true construction, does not preclude a PCO on the facts of this case, either because it does not apply, or because the court should not regard itself bound by Eweida.
24. It is plain that there is jurisdiction to limit costs prospectively in private law proceedings: see e.g. *King v Telegraph* [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282 at paragraph 85, in which the Court recognised that it had the power under s. 51 of the SCA and CPR r 3.1(2)(m) to make what is effectively a costs capping order, before the introduction of an express power to make costs capping orders to the CPR. If the Court’s discretion extends to the making of an order capping costs prospectively, there is no reason why it should not extend to the making of an order capping costs in total, as a PCO would. The only difference is the capping of the recoverability of costs already incurred. Whether such a limit is imposed cannot be a matter of jurisdiction, or a rigid rule preventing its exercise in all cases, particularly because the supposed “rule” has clearly been doubted or contravened in a number of cases since *Corner House*, which the judge failed to properly recognise.

25. Section 51 is cast in wide terms: see *Aiden Shipping Co. Ltd. v Interbulk Ltd.* [1986] A.C. 965 at 975. There is no enactment or rule of court that prevents the making of a PCO in a private law claim. The sole basis for the Court’s conclusion on this issue is the decision of the Court of Appeal in the employment appeal case of *Eweida*.

26. In relation to both *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347 and *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 W.L.R. 2600; [2005] EWCA Civ 192, the reasons for recognising the power to make a PCO and the factors to be taken into account are applicable as much to public interest challenges which are brought in private law proceedings as to public interest challenges brought in public law proceedings. In *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam) at [28] – [29] the President expressly recognised that CPAG and Corner House had been concerned with public law proceedings and found that that was no reason not to apply the *Corner House* principles to the case before his Lordship. That case was quasi-public in the sense that the proceedings went to matters of status (here tax status), they are essentially directed to the elucidation of public law (equally true here) and the proceedings might appropriately be brought in the Administrative court (also theoretically possible here). In *Morgan and Baker v Hinton Organics (Wessex) Limited* [2009] 2 P & CR 4 Carnwath LJ (as he then was) specifically analysed *Corner House* as applying to public interest cases (rather than public law cases): [28] – [40], esp at [29] and [31].
27. It is the substance of the issues and interests in play rather than the conceptual nature of the cause of action as belonging to public or private law, or the procedural route by which the issue arises before the Court that is key. It is clear that claims involving public law issues may be brought by means of private law proceedings where appropriate and that there is no strict rule procedural exclusivity: see e.g. Clark v University of Lincolnshire and Humberside [2000] 1 W.L.R. 1988.

28. There is no principled reason why the procedural form of the claim or cause of action should govern the question whether a PCO can be made. The judge accepted this submission at [49], yet he went on to ignore that finding in holding there was a rigid rule preventing PCOs being ordered in any private law litigation. The judge so found on the basis that there was such a concept as a public law cause of action which required a public body to be joined to proceedings, relief sought to depend on abuse of power by a public body, and there being a finding that a public body has failed to perform its duties: [49]. This finding fundamentally misunderstands the purpose of the power to order a PCO, namely that it exists to permit access to justice in public interest litigation. There is no reason in principle why it should be restricted to judicial review proceedings, as a number of the cases recognise.

29. Eweida was a paradigm example of a purely private claim pursuing a purely private interest. As Lloyd LJ observed at paragraph 38, the Court was faced with a “private claim by a single employee against her employer”; “the issue may be of general importance, but the claim is a private claim, for the benefit of the employee”.

30. It is in that context that the Court stated a PCO “cannot be made in private litigation”; but critically that statement has to be understood in the context of the particular proceedings with which the Court was concerned. See e.g. the observations of the Earl of Halsbury LC in Quinn v Leathem [1901] AC 459 at 506:

“…there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to
be found. The other is that a case is only an authority for what it actually
decides...”

When so understood, *Eweida* does not preclude a PCO on the facts of this case.

31. Lloyd LJ did not give any reasons as to why a PCO could not be made in any claim
brought by way of a private law action, and did not have to give such reasons because
that would go far beyond the facts of the case before it. Nor did his Lordship rely on
any binding authority, rather the lack of a precedent either way, and the distinction made
in *Corner House* between private law civil and family litigation. However that
distinction was made in *Corner House* to justify a different rule than costs follow the
event in certain judicial review cases in which there was an issue of general importance.
It did not purport to address the distinct question whether certain private law cases
raising public interest issues could also benefit from a PCO, to ensure access to justice.

(paragraph 21) and Master MacLeod in *Dring v Cape Distribution* [2017] EWHC 2103
(paragraph 78) doubted that *Eweida* goes so far as to exclude the possibility of a PCO
in any private law litigation.

33. Alternatively, the present claim should not be understood as private litigation in the
sense used by Lloyd LJ at paragraph 38 of *Eweida*, which was intimately connected
with the fact that it was a private claim for the employee’s own benefit. The present
claim delivers materially no private benefit to the Claimant. The judge appears to have
deviated from the accepted distinction between private law and public law proceedings,
in holding tax appeals to be public law proceedings. If tax appeals are included, there
is no principled reason for excluding these proceedings.

34. The report of Sir Maurice Kay’s Working Party dated 15 June 2006 recommended that
PCOs should be available in private law, to enable access to justice (see paragraphs 65
– 66).

35. No principled reason has been identified as to why a PCO should not be available, in
appropriate circumstances, in public interest litigation brought by way of a private law
claim and *Eweida* should not be read as narrowing the Court’s discretion in that way. That circumstance was not envisaged in *Eweida*.

**Ground Two: Errors in applying the principles**

36. First, the issues raised by this claim are plainly of general public importance, and it is plainly important that they be resolved, for the several reasons relied on by the Appellant in his evidence and in the legal arguments advanced on his behalf. The public law issue as to whether despite the written contract it is Uber rather than the drivers that provides transport services to passengers, and that Uber has failed to account for, and HMRC has failed to oblige Uber to account for, a liability which (as is uncontested) amounts to £1bn is a clearly matter of general public importance, as is the proper approach to costs assessment in PCO applications. This is so having regard to the importance of clarification of the general principles that companies operating in the novel “gig economy” must observe within tax law, the sum of public money at stake and the numbers of people affected. A resolution of the issue is also important for public confidence in the administration of the tax system. These are not issues that are simply “illustrated by and surrounding the case” as the judge found at [56]. The evidence of the Claimant is that the very purpose of the litigation is addressing public confidence in the tax system. Determining the question whether the Appellant was entitled to a VAT invoice would require determination of whether Uber was making a taxable supply. The Court was wrong to discount the real world effects of that issue being resolved in the Appellant’s favour, as it does at paragraphs 57 – 59.

37. The Judge erred in its consideration as to the relevance of a possible claim for judicial review of HMRC (paragraphs 70 – 72). The point is not simply that a claim for judicial review would be difficult. Without disclosure which HMRC cannot, and Uber will not, provide, a claim to establish that Uber is obliged to account for VAT cannot get off the ground at all. It would be impossible to draft any coherent grounds of review; and it would not establish the arguable case required for permission to be granted. Even if a claim could be brought, the issue would be characterised by HMRC as whether its failure to require an assessment is “Wednesbury” unreasonable.
38. Moreover, the fact that the Appellant considers that HMRC’s *procedural* failure to raise a protective assessment to protect hundreds of millions of pounds of tax – a different contention to the present *substantive* contention whether Uber is liable to charge VAT – is “outrageous” [70], is beside the point; the judge misunderstood the Appellant’s comments as applying to the substantive judicial review claim. A judicial review of that procedural failure to raise a protective assessment would not resolve the question whether it is Uber or the driver making a taxable supply.

39. The reality is that the present claim is the only proceedings in which the issue of the identity of the supplier of services can in practice be resolved. In any event, the theoretical possibility of judicial review proceedings which could themselves only be brought with the benefit of costs protection is not a reason for refusing costs protection in the present case.

40. The Judge erred in saying at paragraph 67 that the Appellant would need to establish that “the public interest requires resolution of this particular aspect of Uber’s tax affairs to be taken over by him”. The Judge accepted at paragraph 66 that questions of standing are not addressed as they were at the time of the Fleet Street Casuals case, in light of the decision in *Uncut Legal*, but at paragraph 67 imposes a rigid test for which there is no authority and which is inconsistent with the principles underpinning the wider approach to standing.

41. The judge failed to appreciate that both the standing test in judicial review and the test for general public importance in a PCO are guided by similar policy considerations, in particular whether it is legitimate for a third party to bring a challenge concerning another legal person’s tax affairs. In *Fleet Street Casuals* the majority (3:2) of the House of Lords considered that there was no such legitimate interest, and there was no standing. In *R (UK Uncut Legal Action Ltd) v HMRC* [2012] EWHC 2017 (Admin) Simon J (as he then was) stated as follows at [9]:

“Secondly, Mr Eadie submitted that the claimant did not have standing to bring a claim about the way in which the tax affairs of an individual taxpayer are dealt with. He referred to the important statements of principles in the speeches in the Fleet Street Casuals case. The majority confined standing in such cases to an extremely limited class. The minority, Lords Diplock and Scarman, were prepared to draw a distinction between the gratuitous actions of busybodies
complaining about public administration to the general detriment of the high standards of public administration that they sought to uphold and that of public pressure groups whose purpose was to vindicate the rule of law and to stop unlawful action. In my view, this is not by itself a knockout blow. The claimants have legitimate arguments that the courts have recently adopted a more relaxed approach to the rules about standing compared to the position in 1982, and that they fall into a category which has standing to bring judicial review proceedings in the present case.” (emphasis added)

42. The Judge accepted that the Appellant has no private interest in the claim. However, the Judge was wrong to conclude that the likely source of much of the crowdfunding in support of the litigation was a factor, alternatively a significant factor, pointing against the making of a PCO (see paragraphs 77 – 78 and 84 – 85). That is not a factor identified in Corner House, or any in subsequent case, and nor does any rule that applies in the present case provide for that to be a relevant factor. It would be unprincipled to use that factor to make it less likely for a PCO to be obtained against a commercial entity seeking to protect its own commercial interests, where the dispute raises a public interest issue. The Appellant’s motivation in bringing the claim had nothing to do with the black cab trade and the black cab trade has no control or influence over the conduct of the litigation. The fact that the black cab trade responded to the Appellant’s request for funding should not have been treated as a factor, alternatively significant factor, pointing against the making of a PCO. That the statutory CCO regime (which only applies to judicial review claims) takes note of such considerations is irrelevant. The judge distinguished judicial review claims for the purposes of deciding general public importance, and yet treated the claim as if it were a judicial review claim for the purposes of this factor.

43. In considering whether it was fair and just to make a PCO, the Judge was wrong to conclude that the level of crowdfunding realistically possible and/or the Appellant’s individual means meant that principle was not sufficiently satisfied. That test is not an overall test as to whether it would be fair and just to make the order; it is a question whether it is fair and just to make the order, having regard to the financial resources of the applicant and respondent and to the amount of costs that are likely to be involved.

44. The reality is that the effect of the decision means it would be futile or irrational for any person to bring a claim for a VAT receipt from Uber having regard to the likely costs
exposure were they to do so and the claim fail. That is inconsistent with access to justice: see by analogy the decision in *Unison v Lord Chancellor* [2017] UKSC 51; [2017] 3 W.L.R. 409 at paragraphs 93 and 96. Even if one assumes that a marginally greater sum of money might become available, that does not come close to answering the point that the Appellant’s contingent liability to adverse costs could reach £1 million pounds at first instance, as the Judge recognised at paragraph 15. It cannot be sensibly suggested, and there is no evidence to support, the notion that such a sum, or anything like it, could be crowdfunded.

45. It is submitted that this requirement is plainly satisfied.

46. As to the fifth *Corner House* principle, the Judge was wrong to conclude at paragraph 89 that the possibility of applying for a CCO means that it was not likely that the claim would be discontinued if a PCO were not granted. The quantum of costs sought to be recovered by the Respondent for resisting a PCO illustrates powerfully the inadequacy of a theoretical prophylactic against adverse costs at some later stage in proceedings. The judge appeared to accept this reasoning when describing the Appellant’s approach not to seek a costs capping order under CPR 3.19 (see [24.1]), but then failed to adopt the same approach when considering the fifth *Corner House* principle.

47. In any event, that possibility would not justify the refusal of the PCO in circumstances where what matters is the substance of the costs protection provided. It cannot be right as a general rule that the available of costs protection under mechanism X is grounds for refusing costs protection under mechanism Y. The question is, which mechanic better meets the result sought to be served by the costs protection and, in public interest litigation, the appropriate mechanic is a PCO.

48. The Court erred at paragraph 90 in treating as the “final” *Corner House* principle, the observation in *Corner House* that where a party’s representatives are acting pro bono that may tell in favour of making an order. The fact that the Appellant’s representatives are acting at discounted rates (recognising the possibility of going unpaid) did not tell against the making of a PCO, though it is accepted it may be relevant to the quantum of the PCO.
49. For these reasons, there is, at the very least, a real prospect of success on appeal. In any event, resolution of the question whether a PCO can be obtained in private law proceedings and of the scope of the decision in Eweida; the nature of “general public importance” in the tax sphere; and the approach to assessment of costs in PCO applications are plainly matters of general importance that needs resolution. There is already judicial doubt as to the scope of the supposed principle in Eweida, and that is itself a further compelling reason to grant permission to appeal.

The Judge’s Summary Assessment

50. It is trite law that a judge at first instance enjoys a wide discretion when conducting a summary assessment of costs, and that a Court will interfere on appeal only if there is an error of principle.

51. In the present case, the Court has ordered the Appellant to pay to the Respondent just over £100,000 in costs in relation to the application for a PCO (the Respondent had claimed £157,648).

52. Costs were assessed on the standard basis. CPR Rule 44.3(2) provides:

“Where the amount of costs is to be assessed on the standard basis, the court will –
(a) Only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.”

53. That reflects the amendment to the CPR by which the overriding objective was amended to identify the aim of the rules as “enabling the court to deal with cases justly and at proportionate cost.”

54. Rule 44.3(5) provides:

“Costs incurred are proportionate if they bear a reasonable relationship to –
(a) the sums in issue in the proceedings;
(b) the value of any non-monetary relief in issue in the proceedings;
(c) the complexity of the litigation;
(d) any additional work generated by the conduct of the paying party; and
(e) any wider factors involved in the proceedings, such as reputation or public importance.”

55. CPR r 44.4(1) provides that the court will have regard to all the circumstances in deciding whether costs were proportionately and reasonably incurred and proportionate and reasonable in amount. 44.4(2) – (3) provides:

“(2) In particular, the court will give effect to any orders which have already been made.
(3) The court will also have regard to –
(a) the conduct of all the parties, including in particular –
(i) conduct before, as well as during, the proceedings; and
(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute
(b) the amount or value of any money or property involved;
(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialised knowledge or responsibility involved;
(f) the time spent on the case;
(g) the place where and the circumstances in which work or any part of it was done; and
(h) the receiving party’s last approved or agreed budget”

56. The touchstone of what is reasonable and proportionate “is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party’s own account and not recoverable from the other party.” (Leggatt J in Kazakhstan Kagazy plc v Baglan Abdallayevich Zhunus [2015] EWHC 404 (Comm)).

57. In the context of applications for PCOs, in Corner House, Lord Phillips MR said the following [78]:

“…The costs incurred in resisting a PCO should have regard to the overriding objective in the peculiar circumstances of such an application, and recoverability will depend on the normal tests of proportionality and, where appropriate, necessity. We would not normally expect a defendant to be able to demonstrate that proportionate costs exceeded £1,000. These
liabilities should provide an appropriate financial disincentive for those who believe that they can apply for a PCO as a matter of course or that contesting a PCO may be a profitable exercise. So long as the initial liability is reasonably foreseeable, we see no reason why the court should handle an application for a PCO at no financial risk to the claimant at all.” (emphasis added)

58. Where a hearing was required, the Court said at paragraph 79:

“...The considerations as to costs which we have set out in para 78 above will also apply at this stage: we would not expect a respondent to be able to demonstrate that proportionate costs exceeded £2,500...” (emphasis added)

The rationale for these statements, and the need for a very strict approach to costs, is obvious. If the mere fact of applying for a protective costs order exposes an applicant to, as here, very, very substantial adverse costs the protective costs regime is, in practice, rendered a nullity. An applicant who needs the benefit of a protective costs order to bring litigation is unable, by reason of that exposure, to apply for one.

59. The Judge’s order that the Appellant pay in excess of £100,000 in respect of the costs of an unsuccessful application for a PCO cannot be reconciled with the guidance issued in Corner House as to the costs that might be proportionate. The risk of such an award is itself a massive disincentive even to apply for a PCO. A granular analysis of the costs claimed is unnecessary to see that the award is grossly disproportionate to defending against an application for a PCO. A sum of £15,000 would be a reasonable assessment having regard to the Corner House guidance and the facts of this case.

Conclusion

60. In conclusion, the Court is invited to grant permission to appeal, on the merits, and in view of the general importance of the questions raised by the appeal.

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