Neutral Citation Number: [2023] EWHC 1662 (Admin)

Case No: CO/880/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 4th July 2023

Before:
MR JUSTICE FORDHAM

- -

Between:
THE KING (on the application of
THE ALL-PARTY PARLIAMENTARY GROUP
ON FAIR BUSINESS BANKING

Claimant

and
THE FINANCIAL CONDUCT AUTHORITY

Defendant

- -
- -

Thomas Roe KC and Anna Lintner (instructed by Hausfeld & Co LLP) for the Claimant
Richard Coleman KC and Simon Pritchard (instructed by Dentons LLP) for the Defendant

- -

Hearing date: 29.6.23

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This judgment is about cost capping orders (CCOs) in judicial review. It is a speedy sequel to my judgment [2023] EWHC 1616 (Admin) (29 June 2023), which ended with my announcement that I was going to Order a reciprocal costs cap, applicable to both parties, set at 40% of the funds raised by the APP Group for this claim (currently £101,130); and I was going to extend time for the Defendant's Detailed Grounds of Resistance and Evidence to 29 September 2023. Having exhausted the time available in the one day allocated for arguments and rulings, I said I would give my reasons in writing for these decisions, and the decision I need to make about joinder of an individual co-claimant. I told the parties I would do this, in a second judgment which would be circulated in draft, with a truncated timetable for corrections, and then handed-down virtually in the usual way. Here it is.

CCOs

2. The criteria which govern the judicial review Court's jurisdiction to grant a CCO in non-environmental cases are set out in the Administrative Court Judicial Review Guide 2022 at §9.8. They derive from the Criminal Justice and Courts Act 2015 ss.88-89 and CPR46.17 to 46.19. I have read and considered them in full and the sequence of questions that they raise. I do not propose to block and paste them into this judgment. The purpose of the CCO regime is identified in the commentary in the White Book 2023 Vol.2 at p.2747: CCOs are reserved for cases where there are serious issues of the highest public interest, in cases granted permission for judicial review, which would otherwise not be able to be taken forward. The pre-existing common law principles were identified and applied in R (Corner House) v Secretary of State for Trade and Industry [2005] EWCA Civ 192 [2005] 1 WLR 2600 (at §§74-76 and §§136-145) and were recently discussed by Lord Sales and Lord Hamblen in Responsible Development for Abaco Ltd v Christie [2023] UKPC 2 [2023] 4 WLR 47 at §§80-85.

Preconditions

3. There are prescribed preconditions which need to be satisfied. The APP Group has made an application (s.88(4)) and the specified information has been provided (s.88(5)(a) and CPR46.17(1)(b)). I cannot accept Mr Coleman KC's suggestion of non-compliance, raised for the first time at the hearing. I referred in my first judgment to the snapshot of annual income £15,952.60 in 2022. The evidence describes how that is needed by the non-profit secretariat to pay salaries, and the donations on which the APP Group relies for its workstreams. There is no undisclosed pot of gold, as was confirmed on instructions. I am satisfied, based on the evidence of Ms Buchanan – which Mr Coleman KC rightly did accept – that the APP Group would withdraw from the claim in the absence of the CCO (s.88(6)(b)). I am also satisfied – notwithstanding Mr Coleman KC's contrary invitation – that the APP Group would be acting reasonably in doing so (s.88(6)(c)). A further precondition is that permission for judicial review has been granted (s.88(3)).

4. The first big issue of controversy is whether these are "public interest proceedings" (s.88(6)) applying the criteria (s.88(7)), informed by the prescribed mandatory

relevancies (s.88(8)). I agree with Mr Roe KC that they are. There must be an "issue" which is "of general public importance". I wonder whether the Corner House first "matter of general public importance" – the central merits question about corporate bribery-related transparency in obtaining export credit guarantees (§137) – would now fall within this, as an "issue" which is "the subject of the proceedings" as a means of "resolving it" (s.88(7)). That had really been the concern of the High Court Judge in that case (see §139), since the actual issue in the judicial review was a context-specific consultation point. I wonder too whether the required "issue … of general public importance" (s.88(7)(a)) and the relevancy "point of law of general public importance" (s.88(8)(c)) really come down to the same thing. Mr Coleman KC submitted that the judicial review issues – reasonableness and fairness – are not issues of "law" (s.88(8)(c)) but are issues of context-sensitive application of public law principle. But so then was the other "matter of general public importance" – the consultation issue – in Corner House (§140). That was the issue which sufficed to be an issue "of general public importance" (§74), and this is the phrase used by Parliament as the precondition (s.88(7)(a)). In any event, I do not think Mr Coleman KC is correct. All judicial review grounds do raise issues of "law": cf. James v Hertsmere Borough Council [2020] EWCA Civ 489 [2020] 1 WLR 3606 at §§18, 31.

5. I am satisfied that "the public interest requires" the issues in this case to be resolved, to which end the proceedings are appropriate (s.88(7)(b)(c)). I explained in my first judgment (§§15-16), in the context of standing, that the APP Group is acting so as to represent the public interest; and it is doing so as a group of Parliamentarians with a directly-relevant foundational purpose and a role, as they see it, in promoting policy outcomes in the interests of customers and the public interest.

6. In my judgment, the issues in this case – whose resolution is required in the public interest – are issues "of general public importance". The case will determine this question: whether a maintained merits-disagreement was a legally sufficient reason not to accept a key evaluative conclusion of an independent review. The case will determine this question: how the standards of reasonableness and legally adequate reasons operate in such a context. As to that, this was not an adjudicative tribunal (cf. R (Evans) v Attorney General [2015] UFKSC 21 [2015] AC 1787 at §§59, 66, 130, 145). But the cases about "clear and cogent reasons" for a departure are not restricted to adjudicative tribunals (cf. R (A) v Newham LBC [2008] EWHC 2640 (Admin) [2009] 1 FCR 545 at §§61-63 and 71). The questions to be determined arise in an important context, which adds force to their importance. This was a regulatory intervention on an issue, so important that its subject-matter was the foundational purpose of the APP Group. The approach to it was so important as to call for a 2½ year Independent Review costing £8.6m. This was a situation where 34% of cases (10,604 sales) had been excluded from Scheme eligibility, with redress implications estimated at £350m to £3.2bn. There is, in principle, an interrelationship between (i) an issue of general public importance whose suitable resolution is required by the public interest and (ii) the question of significant direct effects of judicial review proceedings on large numbers of people. That interrelationship is reflected in the statutory relevancy (s.88(8)(a)(b)) which informs the answer given to the statutory test (s.88(7)). I also think there is a procedural issue of general public importance (cf. Corner House §140). It is whether the Authority – anticipating calls for action – could fairly organise the procedural sequence of events so as to exclude the informed opportunity for voices to be heard, in an attempt to persuade, while its mind is ajar.

Indeed, the greater the depth of Mr Coleman KC's submissions on his contract and legitimate expectations points – which will doubtless feature at the substantive hearing both in relation to the substantive ground and materiality – the more convinced I became that these too involve extremely important issues of law. Has this regulator really contracted-out, or engendered a legitimate expectation, as to its ability to take any further regulatory action? Has it done this, in relation to the very cases which were being excluded as ineligible from a redress scheme? Could it even do that, and be understood to do that, given its statutory functions? These are, in my judgment, themselves issues of general public importance. All of this goes far beyond the recognised, and important, general public interest (Abaco §73) in upholding the rule of law and ensuring that public bodies comply with their obligations under public law.

Exercise of the Power

7. Having concluded, in all the circumstances and for all these reasons, that the preconditions for a CCO are met, I need also to be satisfied as to the appropriateness of the exercise of the power and the terms of any CCO. I approach these questions in light of my conclusions so far, and having regard to all relevant considerations including the statutorily-prescribed relevancies (s.89(1)). That is the second big issue of controversy. I agree with Mr Roe KC that the absence of a benefit for the APP Group itself – beyond vindication – that victory in the claim would mean is a feature (s.89(1)(b)) which supports the grant of a CCO. It arises – albeit as a factor and not a precondition – out of Corner House §74(1)(iii).

8. One of the features which I needed to keep in mind, throughout, is this. In order to get this case off the ground, the APP Group launched a Crowd Justice funding exercise. It started on 9 February 2022, the day after the letter before claim. By 11 March 2022 – when the claim was issued – it had raised £101,130 against a basic target of £100,000 and a 'stretch' target of £150,000. There, I am told, the fund-raising rests. As Crowd Justice pledgers were told, the APP Group's lawyers had "all committed to offer at least 75% of their time on a contingent basis (limited to any costs that may be recovered from the [Authority])". This is not pro bono representation (s.89(1)(d)) but it is plainly in my judgment a legitimate and constructive practical approach. The costs estimate, filed with the CCO application (CPR46.17(1)(b)(ii)) when the proceedings were commenced, projected the APP Group's own costs at £511,274. That estimate was through to a two-day substantive hearing but did not build in a one-day permission stage hearing, because it was hoped that permission and the CCO could be dealt with on the papers. I record that the Authority's costs schedule accompanying its Acknowledgment of Service and Summary Grounds of Resistance was £129,281.61 in costs of these judicial review proceedings, already incurred as at 27 May 2022. I reject Mr Coleman KC's unforeshadowed oral suggestion that a statement on the Crowd Justice page risked inadvertently misleading funders. The page said that success in the judicial review meant the Authority "may be required to establish" a further redress scheme. This did not say that the claim would be asking for a mandatory court order requiring a redress scheme. It was consistent with the Authority recognising a need to establish a scheme, as a possible outcome of an informed reconsideration, after a quashing and remittal by the Court.

9. Another feature which I have borne in mind is this. Those businesses who were being excluded as ineligible under the Scheme were characterised by reference to

parameters including their size. They were supposed to be the larger of the victims of misselling. The 10,604 sales transactions have a potential redress estimate which starts at a minimum of £350m, which would mean an average of some £33,000 per transaction. I have tried to get as clear a picture as I could – on the evidence – of who these businesses are. I bear in mind that they have not yet been asked to contribute to a fighting fund which includes any element for the Authority's costs and the costs exposure which – for what the law assesses to be sound reasons of legal policy – normally accompanies defeat for a judicial review claimant. This engages the question of the benefit which a grant of a remedy could bring for a person who may – even if they have not yet – provide financial support (s.89(1)(d)). I have kept in mind the idea which has been articulated as the public interest that the resources of (or accessible) to a public authority should not be unduly depleted in meeting claims which it transpires have no merit (Abaco §73), and the idea of achieving a reasonable balance between competing public interest imperatives (Abaco §74).

10. I think there is a healthy cross-check. The questions relating to the regulatory response to IRHP misselling were considered so important by the Authority that it spent £8.6m on an administrative review by the Independent Reviewer, including £1.5m in the Authority's own legal and other support costs. Such expenditure, as Mr Coleman KC emphasises, comes not from the Authority's 'own resources' but from 'the industry'. The Independent Review concluded and the Authority responded. There is now, of course, a judicial review by this Court. One way to think of it is as a 'legal audit', which will either vindicate the Authority for having acted lawfully, or it will demonstrate that a public interest duty of public law has not been discharged by the Authority. As I have recorded, the Authority has spent £129,281.61 on seeking to persuade this Court that the 'legal audit' can stop now, because the vindication is clear-cut. It has not succeeded in that endeavour. Further costs will now be incurred. But these circumstances are, at least, a healthy cross-check in examining the justice of the position regarding a CCO.

11. With a candour which, in my judgment, was not only welcome but entirely appropriate in making a claim for a judicial review CCO, Mr Roe KC told me three updating things. First, that the APP Group and its legal team had assessed that it would be necessary to embark on some further fund-raising, even if viably to operate the arrangements which need 25% of the lawyers' time plus disbursements. Secondly, that the APP Group and the legal team had assessed that up to £40,000 of the funding £101,130 could be available, as a last resort if this Court were to refuse permission for judicial review and make an order for costs. Thirdly, that this would involve the lawyers foregoing at least part of the portion of their minimum time (25%) which they agreed to charge the APP Group. The exercise of considering what – if absolutely necessary, if ordered by the Court and as a last resort – the APP Group would have been able to pay from the £101,130 was a proper and responsible evaluation.

12. I considered whether I had the power, and if so whether its exercise would be appropriate, to defer the issue of making or finalising a CCO, to allow some further step to be taken. It was common ground that I have this power. Neither party invited its exercise, except as a final fall-back position. I decided against deferral.

13. I have identified the CCO which I am making. I am not prepared to order a zero cap, whether for the APP Group's costs exposure or for the Authority's costs exposure. I do not regard that course to be justified, necessary or appropriate. Nor am I ordering

caps in fixed amounts. Instead, I am adopting a mechanism which was identified as the Authority's fallback, albeit that I have adjusted from 50% to 40%. The mechanism involves taking a cap which is a percentage of the funds raised by the APP Group, including those raised already and any raised from here on. It is common ground that my power (s.88(2)) has this flexibility. I am required to impose a reciprocal cap (s.89(2)) and I choose parity: the same 40% of the same funds. In my judgment, this was an ingenious mechanism for the Authority's lawyers to have put forward as a possible solution, albeit without advocating it as their primary position. I think it is a Solomon's solution. I am satisfied that this degree of protection is necessary, for the APP Group not (reasonably) to withdraw. I am satisfied that my Order will preserve what the Court of Appeal called the "overriding purpose" (Corner House §76): to enable the APP Group 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 of general public importance at all.

14. I think this solution reconciles the public interest imperatives, secures fairness to the parties, recognises the practicalities, incentivises the APP Group to do what it can and should, and gives crystal clarity. As things stand, if the claim were withdrawn tomorrow – or were withdrawn or failed at some later stage – the APP Group's current maximum costs liability is £40,000. That, I would accept, is the maximum that it could reasonably be expected to bear given the current fund-raising and the way in which it has structured its approach to funding the litigation. As things stand, and absent further fund-raising, if the defence to the claim were withdrawn tomorrow or in the future – or if the claim succeeded – the APP Group would have access to the £101,130 plus a maximum costs order against the Authority of £40,000.

15. Everybody knows and understands that the APP Group intends to do more fund-raising. It can now do so, armed with a reasoned judgment of the Court granting permission for judicial review. Everybody will know that, for every further £1,000 raised, a maximum of £400 is money which could be accessed by the Authority if the claim were to fail, and the Authority were to obtain a costs order at that level. Everybody will also know that every further £1,000 raised has another consequence. It would make a further £400 accessible by the APP Group from the Authority, if the claim were to succeed and the APP Group were to obtain a costs order at that level. There is clarity and certainty. Targets – whether based on what is now necessary or what is now optimal – can be set against that backcloth. I see no prospect of unjust consequences. And there is always the safety net of variation (CPR46.19) and, of course, the judgment and discretion governing the actual decision on whether and what costs order to make.

Co-Claimant

16. I am going to refuse the Authority's application for a direction to "require" (JR Guide §3.2.1.3) that a co-claimant be an individual officeholder or member of the APP Group. I do not accept Mr Coleman KC's submissions that this is necessary for judicial review proceedings and court directions to be workable. The Court can give directions and default can have consequences for what happens next to the claim. Issues of disclosure and confidentiality – which would not disappear through having an additional claimant – can be addressed through sensible liaison between the parties. The only reason for joining a co-claimant would be to enforce a costs order. But I see no realistic prospect of an Order by the Court, which these Parliamentarians

have asked to resolve legal issues raised by their claim, going unsatisfied. Even if such a step did – unthinkably – become necessary, that future necessity is what should trigger it.

Extension of Time

17. I acceded to the Authority's application to extend time to 29 September 2023 for its Detailed Grounds and evidence, being satisfied in all the circumstances that this was justified and proportionate. But I see no reason why this claim should not proceed with expedition, once all the evidence is in. I see every reason why it should. I would be willing to make a direction to that effect. I obtained the distinct impression that each team would have been in a position – at this stage – to undertake a full dress rehearsal of the arguments in this case. That, of course, was not appropriate. But – having reached this position – the retention of a momentum will I think promote everybody's interests and the public interest.

30.6.23