

Protective Costs Orders in Northern Ireland:

**A Guidance Note**

**Introduction**

Protective Costs Orders (PCOs) are orders from the court which limit the costs to be awarded in legal proceedings. A PCO allows an applicant of limited financial means access to the courts, in order to advance their case. PCOs enable legal issues to be clarified for the benefit of the public, without substantial costs being made against the applicant if the case is lost.

The PILS Project is committed to supporting public interest litigation and to tackling barriers which hinder people using public interest litigation to effect change. PCOs help to make justice more accessible.

The PILS Project has produced this guidance note on PCOs to assist those who wish to apply for such an order or who wish to find out more about them. There is limited court guidance on PCOs. Therefore this guidance note will attempt to steer people on how to apply for a PCO.

The PILS Project would like to acknowledge and thank Ms Orla Rooney BL who assisted in the research and compilation of this guidance note.

**Disclaimer**

This guidance note is for information only. The PILS Project does not accept any legal responsibility for any errors, howsoever caused. It should not be construed as legal advice.

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**1. Definitions**

**Affidavit –** A sworn statement lodged in court proceedings.

**Appellant** – A person/organisation who applies to a higher court for a reversal of the decision of a lower court.

**Applicant –** A person/organisation bringing court proceedings.

**Judicial Review** - Judicial review is a form of court proceeding in the High Court in which a judge reviews the lawfulness of a decision or action, or a failure to act, by a public body. Judicial review is concerned with whether the law has been correctly applied. PCOs are most commonly used in judicial review.

**Order 53 Statement** – A specified court form which initiates a judicial review.

**Pre-action letter** – A letter written before court proceedings are initiated.

**Protective Costs Orders (PCOs) –** PCOsare court orders that impose a limit on the costs that can be awarded against an unsuccessful applicant who brings a court case which addresses public interest issues. An applicant who applies for a PCO will either not be liable for the other party’s costs, or will only be liable up to a fixed amount, if the case is lost. If the applicant is, on the other hand successful, then s/he may recover all or part of the costs from the other party.

**Protective Costs Agreement** – A Protective Costs Agreement is an agreement, made between the parties to legal proceedings, limiting the costs awarded against one or more parties.

**Pro Bono** – Work (usually legal) undertaken without charge, or at a significantly reduced rate.

**Public Interest Litigation** - Public interest litigation is the use of the law to advance human rights and equality, or to raise issues of broad public concern. Public interest litigation is most commonly used to challenge the decisions of public authorities by judicial review.

**Respondent** – The opposing person/organisation bringing court proceedings.

**2. Value of PCOs**

It is important to understand PCOs in the context of the court’s general power to award costs following the outcome of a case. Whilst the High Court has a complete discretion as to costs, the general rule is that the losing party will pay the winning party’s costs. A PCO therefore provides an applicant with security by limiting the costs that will be awarded against him/her should they lose the case.

PCOs allow public interest litigation to be pursued where an applicant does not have adequate funding. The risks of accumulating unknown costs where the case is lost can deter potential applicants from bringing important public interest cases. PCOs therefore increase access to justice and ensure more public interest cases are brought to court.

**3. PCO Criteria**

The court has a discretionary power to decide whether or not to make a PCO. The court will consider whether it is fair, just and reasonable in all the circumstances to make a PCO, having given consideration to all the criteria.

The criteria for PCOs are set out in Corner House Research, R (on the application of) v Secretary of State for Trade & Industry[[1]](#footnote-1). In this case the court held that a PCO 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 (person/organisation defending legal proceedings) and to the amount of costs that are likely to be involved it is **fair and just** to make the order;

v) If the order is not made the applicant will probably **discontinue the proceedings** and will be acting **reasonably** in so doing.

The court held that if those acting for the applicant are doing so pro bono this would be likely to enhance the merits of the application for a PCO.

The court further explained that a PCO can take a variety of forms, including:

a) An order that the respondent only can recover no costs.

b) An order that the respondent can recover only a maximum amount in costs.

c) An order that neither party can recover costs.

There have been a number of cases since Corner House that have further developed the criteria the court should consider when deciding whether to grant a PCO.

**4. Caselaw**

In Re McHugh’s Application for Judicial Review[[2]](#footnote-2) an application for a PCO in advance of the hearing was made. The appellant asked for an order that there be no order for costs against her irrespective of the outcome of the appeal.

The appellant, who suffered from multiple sclerosis, applied for judicial review of a decision of the health trust not to make arrangements to provide her with assistance for adaptation of her home. The appellant was ineligible for legal aid and was being represented on a pro bono basis. She asserted that while the appeal was very important to her, the issues raised by it would impact on vulnerable members of society. She stated that although she was advised that there was a real prospect that her appeal would succeed, she would discontinue it if she did not obtain a PCO. The financial disparity between the applicant and the health trust was stressed. The respondents declined an invitation from the appellant's solicitors to agree to a Protective Costs Agreement.

The court dismissed the application, as it was not satisfied that the issues raised were of general public importance. However, the case did widen the criteria for PCOs as the court noted the fact that an applicant had a personal interest in proceedings did not invariably amount to a complete bar to the making of a PCO.

In Re Thompson’s Judicial Review[[3]](#footnote-3) the court considered a PCO application in respect of a judicial review challenge to planning permission for a proposed housing scheme in Bryansford village. The applicant resided close to the proposed development and was part of a forum of community groups objecting to the development. Whilst eligible for legal aid, it was refused because she was part of a group who were deemed to be in a financial position to pay for the litigation. The judge hearing the case stated;

*“Although the applicant is a person of limited means it is clear that she is supported by a wider community….The evidence before me indicates, however, that exposure to unlimited costs would make it inevitable that the applicant could not proceed…..I consider that there is one issue of general public importance…and that the public interest requires that the issue should be resolved. I consider that what is fair and just is recognised by me making an order that any award of costs against the applicant in respect of the hearing at first instance should not exceed £10,000.”[[4]](#footnote-4)*

In Commissioner of Valuation v Doherty[[5]](#footnote-5) the President of the Lands Tribunal granted a PCO to a respondent in an appeal by the Commissioner of Valuation before the Lands Tribunal for Northern Ireland. The issue for the court was whether the primary occupation of the respondent was carrying on agricultural operations so as to entitle her to rate relief under the Rates (Northern Ireland) Order 1977 (as amended). In granting the PCO the President of the Land Tribunals held that it was a test case which had sufficient public interest. Although the respondent had a personal interest in the outcome, this, following the judgment in McHugh’s Application, was not a bar to the making of a PCO. The President also considered the financial circumstances of the parties,

*“As a public body the appellant has access to substantial material resources. I have recorded at paragraph [3] the respondent’s original written statement confirmed that her income is made up to some £5000 per annum…..Accordingly, in my view, the respondent would be justified in reaching a reasonable and common sense decision not to resist the appeal.”[[6]](#footnote-6)*

The terms of the PCO granted were for the appellant to bear the respondent’s costs together with its own costs, regardless of whether the case was won or lost.

**5. Procedure**

There is no established procedure for applying for a PCO. However, there are a number of ways in which legal practitioners can apply for such an order.

**Protective Costs Agreement**

Consideration should be given to a Protective Costs Agreement before applying for a PCO. Seeking a Protective Costs Agreement involves writing to the other party asking them to consent to the proposed terms. It may be necessary to negotiate with the other party as to the specified costs which will be payable on the conclusion of the case. If a Protective Costs Agreement is made then the court can be notified, however, there is no necessity to do so. If there is no agreement then an application can be made to the court for a PCO.

**PCO**

An application can be made at any stage of the proceedings but it is advisable to apply as early as possible. The pre-action letter should state that the applicant wishes to apply for a PCO. The applicant can then make the application in one of three ways:

1. Writing a letter to the court.

2. Lodging an affidavit with the court.

3. Including the application in the Order 53 Statement (if the case is a judicial review.)

There are no rules on what should be included in the application. However, it is advisable to fully address the *Cornorhouse* criteria and include the following details:

(a) the issue being challenged

(b) how the issue is of public interest and should be resolved

(c) whether or not the applicant has a private interest in the issue

(d) the financial circumstances of the parties

(e) whether or not there are other sources of funding available to the applicant, i.e. legal aid, crowdfunding etc.

(f) the need for a PCO and the suggested terms of the PCO

For further guidance please see the template PCO application.

**6. Fees**

There may be a fee payable to the court for lodging a PCO application. The fee can depend on where and how the application is made. Information in relation to court fees is available on the Northern Ireland Courts and Tribunals Service (NICTS) website (<https://www.justice-ni.gov.uk/articles/court-fees-0> ). In some situations help may be available in paying court fees. Information in relation to the NICTS Fee Exemption and Remission Policy is also available on the website.

The applicant applying for the PCO will be liable for the other party’s costs should the PCO application be unsuccessful. In practice the amount of costs is likely to be minimal and usually the respondent does not seek recovery.

**7. Hearing of the PCO**

The court will usually consider PCO applications when the case is first listed before the court. In judicial review proceedings this is likely to be the leave (permission) hearing. If the PCO application is made after the leave hearing then the court will consider the PCO at the first available opportunity, usually at a review hearing.

**8.** **PCOs in environmental cases**

There are specific rules on legal costs regarding environmental cases. The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 provided for fixed costs in legal challenges to environmental decisions. In such cases the respondent, if the legal challenge failed, could recover no more than a prescribed amount from the applicant and, if the legal challenge succeeded, the applicant could recover no more than a prescribed amount from the respondent. The maximum amount recoverable from the applicant was capped at £5,000 + VAT where the applicant was an individual and £10,000 + VAT in other cases (for example where the applicant was a Non-Governmental Organisation). If the application succeeded, the amount recoverable from the respondent was £35,000 + VAT.

The 2013 Regulations have been amended by The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017, which came into force on 14th February 2017. The 2017 Regulations provide the courts with greater flexibility when setting the costs caps applicable to both the applicant and the respondent in environmental cases.

**9. Template**

Below is a sample PCO application made by way of an affidavit. It is provided for guidance only and should be adapted as necessary.

Respondent; *(NAME)* 1st Affidavit

*(DATE)*

2018*/(COURT REFERENCE NUMBER)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION

(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION

BY (*APPLICANT NAME)*

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**AFFIDAVIT OF (*SOLICITOR* *NAME)***

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

I, *(NAME OF SOLICITOR AND ADDRESS)*, aged 18 years and upwards, make oath and say as follows:

1. I am the solicitor acting for the applicant in these proceedings. I make this affidavit pursuant to my own knowledge of the proceedings and for the purpose of explaining the grounds upon which this application for a Protective Costs Order, in favour of the applicant, is based.
2. *(Give details of the issue being challenged by the applicant)*
3. *(Explain whether or not a Protective Costs Agreement was sought by the applicant. If not, explain why not.)*
4. The guiding principles for a Protective Costs Order as set out in *R (Corner House Research) v Secretary of State for Trade & Industry [2005] EWCA Civ 192* and refined by *McHugh’s application [2007] NICA* are applicable in this case and I will address them below.
5. **The issues raised are of general public importance:***(Explain referring to caselaw if appropriate)*
6. **The public interest requires that the issues be resolved:** *(Explain why)*
7. **The applicant has no private interest in the outcome of the case:** I accept that the applicant does have a personal interest in the outcome of the case. However, this was considered in *Re McHugh’s application* and the Northern Ireland Court of Appeal indicated that it was permissible for someone with a personal interest in the case to be granted a Protective Costs Order in an appropriate case.*(amend as appropriate)*
8. **Having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the Order:** *(Explain if the applicant has applied for and been turned down for other sources of funding, for example, legal aid. Explain the applicant’s financial circumstances and those of the respondent.)*
9. **If the Order is not made the applicant will probably discontinue the proceedings** *(Explain why the applicant would not be able to continue with the case if a Protective Costs Order was not granted, for example, costs liability would be too high for the applicant)*
10. **For these reasons I ask the court to make a Protective Costs Order in the following terms:** *(Insert proposed terms)*

Save as appears I depose to the foregoing from matters within my own knowledge.

SWORN at

in the County of the City of Belfast

this day of

before me a Solicitor of the

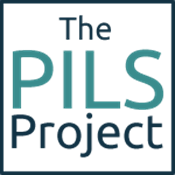
Court of Judicature in Northern Ireland

empowered to administer Oaths

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Solicitor

This Affidavit is served on behalf of the applicant by *(solicitor name and address)*



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1. [2005] EWCA Civ 192 at paragraph 74 [↑](#footnote-ref-1)
2. [2007] NICA 26 [↑](#footnote-ref-2)
3. [2010] NIQB 38 [↑](#footnote-ref-3)
4. At paragraph 15 [↑](#footnote-ref-4)
5. VT/4/2012, [2014] [↑](#footnote-ref-5)
6. At paragraph 14 [↑](#footnote-ref-6)