Neutral Citation Number: [2024] EWHC 154 (Ch)

Case No: PT-2024-BRS-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 2 February 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

COTHAM SCHOOL	**Claimant**
- and -	
(1) BRISTOL CITY COUNCIL	**Defendants**
(2) KATHARINE WELHAM	
(3) BRISTOL CITY COUNCIL	

- -
- -

Ashley Bowes (instructed by **Harrison Grant Ring**) for the **Claimant**
Douglas Edwards KC and Michael Feeney (written submissions only, instructed by **Bristol City Council Legal Department**) for the **First Defendant**
Andrew Sharland KC (instructed by **Direct Access**) for the **Second Defendant**
Paul Wilmshurst (instructed by **Bristol City Council Legal Department**) for the **Third Defendant**

Hearing dates: 24 January 2024

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 2 February 2024.

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment following a directions hearing in this matter. The claim itself is one brought under CPR Part 8 for an order amending the commons register kept by Bristol City Council ("the City Council"), in its capacity as commons registration authority for Bristol, so as to delete the entry relating to land known as Stoke Lodge playing fields ("the land"), in north-west Bristol. This was registered as a town green in August 2023, after an application for that purpose by the second defendant, who is a local resident. The claimant is an academy school, which in 2011 was granted a long lease of the playing fields by the freeholder, the City Council, for school use.

Representation

2. At the hearing on 24 January 2024, each of the claimant, the City Council (as landowner) and the second defendant was represented by counsel and solicitors. Ashley Bowes appeared for the claimant, Paul Wilmshurst for the City Council as freeholder of the land, and Andrew Sharland KC for the second defendant. The City Council had hoped to be separately represented in its capacity as commons registration authority, but its preferred counsel for this purpose, Douglas Edwards KC, was unfortunately engaged elsewhere, and so I had the benefit of detailed written submissions from Mr Edwards and Mr Michael Feeney. Paul Wilmshurst ably made the oral presentation for the City Council on the question whether it could appear more than once on the record. The claimant and the City Council had previously reached agreement on costs protection, and so Mr Bowes for the claimant made the case for it. I am very grateful to all of them.

Evidence

3. Evidence has been filed in this claim as follows. There are first of all the witness statements filed with the claim form. They comprise a witness statement from the claimant school's head teacher, Joanne Butler, dated 20 November 2023, two witness statements from the director of finance and resources of the claimant, Allison Crossland, of the same date, and a witness statement of Nathan Allen, the facilities manager for the claimant, also dated 20 November 2023. There is a witness statement from the second defendant, dated 16 January 2024. Finally, there is a third witness statement of Allison Crossland dated 19 January 2024. I record that none of these witnesses was cross-examined. Accordingly, for present purposes, I am not at liberty to disbelieve the evidence contained in the statements, unless I consider that it was manifestly incredible in light of all the circumstances: see *Long v Farrer & Co* [2004] BPIR 1218, [57], which was applied in *Coyne v DRC Distribution Limited* [2008] EWCA Civ 488, [58]. It was not suggested by any party that I should so consider, and I do not do so.

Nature of the claim

4. In substance, the present claim is a contest between the claimant school and local residents. The school wishes to be able to control the land, including by the use of fences and gates, primarily to ensure the use of the land as school playing fields, but secondarily (and subject to certain restrictions) to allow it to be used for the purposes of local recreation. The latter however wish to have unrestricted access to the land at all times and object to any fences and gates, and any other restrictions imposed by the school. This conflict appears very clearly from the recent decision of the Supreme Court in *TW Logistics Ltd v Essex County Council* [2021] AC 1050.

5. In that case, Lord Sales and Lord Burrows (with whom Lady Black, Lady Arden and Lord Stephens agreed) said:

> "2. Registration of an area of land as a [town or village green] has important legal consequences for the landowner and for members of the public wishing to make use of it for recreational purposes. Upon registration, the landowner becomes obliged to let members of the public enter and use the land in certain ways. Two Victorian statutes, which enacted criminal offences designed to protect the public's use of [town or village greens], also have a potential impact on the landowner. The central question on this appeal is whether the registration of the Land as a [town or village green] would have the consequence that the continuation of the landowner's pre-existing commercial activities would be criminalised under the Victorian statutes."

Applicable legislation

6. In the present case, if the land is a town or village green, the local residents will succeed, and the fences, gates and other restrictions will probably have to go. The school says that, in that case, it will be unable to use the land for the purposes of school playing fields, for security, health and safety reasons (among others). In this litigation, however, the court is *not* required to decide whether use by the school is more important or less important, or more or less in the public interest, than use by local residents. Instead, it is concerned only to decide whether the land concerned *is, or is not*, a town or village green within the legal definition. This is a question of mixed fact and law. The political and consequential issues raised by the facts of this case are wholly outside the court's jurisdiction. The lawyers involved know this, but the public needs to know it too.

7. There are two main pieces of primary legislation which are relevant to this case. They are the Commons Registration Act 1965 and the Commons Act 2006. The intention is that the regime of the latter should eventually replace that of the former. To this end, the 2006 Act prospectively repeals the whole of the 1965 Act. However, at present, that general repeal (and the new regime) applies to only a handful of so-called "pilot" or "pioneer" areas. Bristol is not one of them. But some elements of the new system do apply even in non-pilot areas. For example, the second defendant's successful application was made under the 2006 Act and not the 1965 Act, though the entry was made in the register under the 1965 Act. This makes the ascertainment of the relevant law much more difficult than it needs to be, especially when (as is obvious) this

area of the law is of great interest to ordinary people who are not lawyers (much less, judges) but who have an interest in green open spaces in their locality, whether as owners or as would-be users. Everyone is better off for knowing where they stand.

8. This claim is actually brought under section 14 of the Commons Registration Act 1965. As enacted (but not yet repealed for land in Bristol), this provides that:

> "The High Court may order a register maintained under this Act to be amended if—
>
> > (a) the registration under this Act of any land or rights of common has become final and the court is satisfied that any person was induced by fraud to withdraw an objection to the registration or to refrain from making such an objection; or
> >
> > (b) the register has been amended in pursuance of section 13 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act;
>
> and, in either case, the court deems it just to rectify the register."

This claim is not brought under section 14(a), and so only section 14(b) is relevant.

9. It will be noted that section 14(b) refers to "amendment in pursuance of section 13" of the 1965 Act. This latter section, as amended by the Law of Property Act 1969, provided that:

> "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where—
>
> > (a) any land registered under this Act ceases to be common land or a town or village green; or
> >
> > (b) any land becomes common land or a town or village green; or
> >
> > (c) any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed;
>
> […]"

10. I say "provid*ed*", because paragraph (a) of section 13 was repealed by the 2006 Act, as partially brought into force on 1 October 2006 by virtue of the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (England) Order 2006, SI 2006 No 2504. Yet article 3(3) of the order provides that

> "(3) In relation to any area of England, section 13(a) of the 1965 Act and regulations made under it shall, until the coming into force of section 14 of the 2006 Act in relation to that area, continue to have effect insofar as they relate to land which ceases to be common land or a town or village green by virtue of any instrument made under or pursuant to an enactment."

11. In like fashion, section 13(b) was repealed by the 2006 Act as partially brought into force on 20 February 2007 by virtue of the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007 No 456. But article 4(1) of the order provided that

> "(1) Where a commons registration authority grants an application under section 15 of the 2006 Act for the registration of land as a town or village green before section 1 of the 2006 Act has come into force in relation to the area in which the land is situated—
>
> (a) it shall register the land in the register of town or village greens maintained for that area under the 1965 Act; and
>
> (b) until the coming into force of section 1 of the 2006 Act in relation to that area, the 1965 Act shall apply in relation to the registration as if it had been made pursuant to section 13(b) of that Act."

12. Neither section 1 nor section 14 of the 2006 Act has yet come into force in relation to land in Bristol, and (as I shall recite shortly) the second defendant's successful application was indeed made under section 15 of the 2006 Act. Accordingly, this claim concerning land in Bristol which has been registered as a town or village green pursuant to that application is still subject to section 13 of the 1965 Act in the form in which it is set out above, notwithstanding that the relevant provisions of the 2006 Act repealing section 13(a) and (b) have been brought into force. This kind of legal treasure hunt, searching in the interstices of secondary legislation for the text of the currently applicable law, and holding several inconsistent ideas in your mind simultaneously, is certainly not for the faint-hearted. How lay people can deal with it is beyond me. Little wonder that George Bernard Shaw once wrote that professions "are all conspiracies against the laity" (Preface to *The Doctor's Dilemma*, 1906).

The hearing on 24 January 2024

13. The hearing on 24 January 2024 was concerned not with the substance of the case, but instead with some preliminary matters. One of these matters – raised by me and not by the parties – was the fact that the City Council appeared in two places on the court record, as both first and third defendant. More than that, it filed two (inconsistent) acknowledgments of service. As "first defendant", the city council filed an acknowledgement of service "in its capacity as commons registration authority", and stated that it intended to contest the claim. However, at the same time it rather curiously said that it considered that it was "appropriate to adopt a neutral position in response to the claim". On the other hand, as "third defendant", the City Council filed an acknowledgement of service "in its capacity as landowner and education

authority", and stated that it did not intend to contest the claim, although it wished to make representations to the court (because in effect it supported the claim). It sought to maintain two different and entirely independent teams of lawyers representing the various different capacities which it had. I will come back to this shortly.

14. The second matter relates to the application in the claim form by the claimant for an order limiting its exposure to liability for costs incurred by other parties, in case it should be unsuccessful in its claim. This application was put on three distinct bases. The first was the incorporation into English domestic law of aspects of the so-called Aarhus Convention, originally to be found in Part 45 of the CPR, but now in Part 46. The second was the jurisdiction to make so-called "protective costs orders", derived from section 51 of the Senior Courts Act 1981, as developed in the case law and generally referred to as the *Corner House* principles, from *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, CA. The third was the jurisdiction to make a "costs capping order" under CPR rule 3.19. I shall have to explain all this in more detail later.

BACKGROUND

15. For the purposes of deciding these preliminary matters, the historical background to this claim is largely noncontentious, although some aspects of the matter, dealing with satisfaction of the test for registration as a town green, which will have to be gone into at a later stage, are highly contentious. For present purposes, I summarise the former as follows. Part of the land in question (about 5.5 acres) was acquired, initially for temporary housing, but thereafter for education purposes, by the City Council or its predecessor in title shortly after the end of the Second World War. The remainder (about 16.5 acres) was acquired, again for education purposes, by the City Council in 1947. In 1974, when local government in England and Wales was reorganised, the land was vested in Avon County Council. But, in 1996, when that council ceased to exist, the land was revested in the City Council.

Academy status

16. Following the enactment of the Academies Act 2010, the existing school known as Cotham School, previously owned and run by the City Council as local education authority, applied for and obtained academy status. In so doing, it acquired independent legal personality, as a company limited by guarantee. It also acquired the school buildings from the City Council, and henceforward obtained its funding from central government. The City Council as local education authority ceased to have any direct responsibility for the school. On 1 September 2011, the City Council granted a long lease (125 years) to the claimant of the land as school playing fields. The land is however not contiguous with the main school site, but lies some distance away to the north-west.

First application

17. On 7 March 2011 a local resident called David Mayer made an application to register the land as a town or village green under section 15 of the Commons Act 2006. As I have said, the commons registration authority for Bristol is the City Council. As appears to be common practice in such cases (see *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951, [29]; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, [29], HL), the City Council appointed a barrister, Mr Philip Petchey, experienced in this area of the law to conduct a (non-statutory) public inquiry to ascertain the facts, to report on the application, and to recommend whether it should be accepted or rejected. This inquiry was held between 2011 and 2013. The claimant, Mr Mayer (and other residents) and the City Council all participated in that inquiry, instructing counsel for the purpose. On 22 May 2013, Mr Petchey recommended that the land be registered as a town or village green. However, this was not in fact done at that time, apparently because of other developments with which I am not concerned.

18. Ultimately, the City Council asked Mr Petchey to hold a second public inquiry, which he did in 2016. Again, the claimant, local residents and the City Council participated. His report, dated 14 October 2016, this time recommended that the application be rejected. City Council officials produced a report recommending that the authority reject the application, for the reasons given by Mr Petchey. It also recommended that, if it were to approve the application, it should provide reasons for its decision. But, on 12 December 2016 the Public Rights of Way and Greens Committee, which is the relevant committee of the City Council (and to which the duties and powers of the commons registration authority had been delegated, under section 101 of the Local Government Act 1972), resolved to register the land as a town or village green. The committee was split 3-3, and the resolution was passed only on the casting vote of the chair. It is clear (from the decision of Sir Wyn Williams to which I am about to refer) that the decision was a highly contentious one, and that the members of the committee were subject to lobbying by interested persons.

19. Whether it is desirable that a quasi-judicial decision as to whether particular land does or not meet the legal definition of town or village green should be taken by a committee of elected local politicians subject to political influence, and untrained in law or legal procedure (including in giving reasons for their decisions), is, happily, not a matter for me. Before the decision was implemented, however, the claimant on 9 March 2017 commenced judicial review proceedings of that decision. On 3 May 2018, Sir Wyn Williams, sitting as a judge of the High Court, quashed the decision: *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin). The decision was based on (i) an error of law by the authority in concluding that the use of the land by local inhabitants between 1991 and 2011 was "as of right" and (ii) its failure "to provide adequate and sufficient reasons" for that conclusion. On 25 June 2018, the committee resolved to reject the application by the casting vote of the chair (the committee being split 3-3).

Second and third applications

20. On 14 September 2018, a lady called Emma Burgess made a second application to register the land under section 15 of the 2006 Act. On 22 September 2019, a third application so to register the land was made, this time by the second defendant, also a local resident. As on previous occasions, the City Council appointed Philip Petchey once again to report and make a recommendation. His report was dated 14 March 2023. His recommendation was to reject both the second and the third applications. His report was given to the interested parties, and they commented on it. Mr Petchey was asked to consider those comments, which he did. He produced a Note dated 18 May 2023, in which he adhered to his recommendation.

21. However, on 28 June 2023, the relevant committee resolved, by six votes to one, to register the land as a town or village green on the second defendant's application. A pre-action protocol letter was sent on behalf of the claimant on 20 July 2023, intimating a (fresh) claim for judicial review, and a response was sent by the City Council on 3 August 2023 (which incidentally accepted that the intimated judicial review would in its view be an Aarhus Convention claim). And on 22 August 2023, the land was so registered. Following that registration, the claimant commenced judicial review proceedings for a second time. However, on 11 September 2023, Eyre J stayed these proceedings until 1 March 2024. On 20 November 2023 the claimant issued the present claim under CPR Part 8, pursuant to section 14 of the Commons Registration Act 1965.

THE FIRST ISSUE: THE COURT RECORD

22. As I have already said, the first issue for me to decide is whether the City Council should continue to appear in two places on the court record, as both first and third defendant, with two entirely separate legal teams, potentially arguing inconsistent cases, or whether it should have a single place and a single legal team, albeit comprising several team members, who might have different responsibilities and skills. This is an entirely procedural matter, dealing with the rules of procedure for litigation. There are a number of authorities which bear upon it, and in my judgment they embody a procedural rule.

Authorities

23. In *Neale v Turton* (1827) 4 Bing 149, one member of a partnership drew a bill of exchange on that partnership (including himself), which was accepted. He subsequently sought to sue the whole partnership (including himself) on it, Best CJ said (at 151):

> "There is no principle by which a man can be at the same time Plaintiff and Defendant."

24. In *Hardie & Lane Ltd v Chiltern* [1928] 1 KB 663, CA, a claim in tort was brought against members of an association, three of whom were mentioned twice over, being sued first on their own behalf, and then secondly on behalf of all the other members of the association. Sargant LJ said (at 699):

> "I desire to add, though the matter is perhaps one of form rather than substance, that it is incorrect to make any individual the defendant twice over because he happens to fill two capacities or has two different interests. The case often arises in actions in relation to trusts and the practice to the contrary is, in my experience, invariable."

And Lawrence LJ said (at 700):

> "This action is unusually constituted in that the three defendants are named as parties twice over, first, without any statement as to the capacity in which they are sued, and secondly, with a statement that they are sued on their own behalf and on behalf of all other members of the Association. Two separate sets of counsel have been briefed for the three defendants, one set to represent them in their personal capacity and another set to represent them in their representative capacity. In my opinion, this double naming on the record and double representation by counsel is altogether irregular."

25. In *Re Phillips, Public Trustee v Meyer* [1931] WN 271, 101 LJCh 338, the Public Trustee brought a summons for the construction of a will, but was also the personal representative of the testator's widow, and so appeared in two capacities, one on either side of the record. At the hearing before Maugham J there were two sets of counsel for the Public Trustee, though apparently only one set of solicitors for both. The judge said (101 LJCh 338-39):

> "I am unable to see how the Public Trustee can appear on both sides of the record, and accordingly I direct that the summons be amended by striking out the Public Trustee as defendant and substituting a person beneficially interested."

26. In *Allnutt v Wilding* [2006] EWHC 1905 (Ch), Rimer J said:

> "4. Suing oneself (even purportedly in a different capacity) is something that traditionally could not be done. 'There is no principle by which a man can be at the same time Plaintiff and Defendant', said Best CJ in *Neale v. Turton and Others* 4 Bingh. 149, at 151; and see to the same effect *In re Phillips, Public Trustee v. Meyer* (1931) WN 271, per Maugham J. Mr Hall Taylor, for the claimants, disclaimed any suggestion that the CPR have altered that, and so the naming of Mr Allnutt and Mr Parsons as defendants would appear to have been a step in the wrong direction. I propose to strike them out as defendants. That will make no difference to the substance of the claim as all the right people are before the court."

A similar point was made by Lewison J in *Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch 395, [11]-[12], [49].

Discussion

27. From these authorities I derive the rule that a person who takes part in civil litigation before the courts of England and Wales may appear only once on the court record, whether as a claimant or a defendant, even though that person

may have multiple interests, and may have more than one capacity, *eg* trustee and beneficiary of the same trust, trustee or executor of more than one trust or estate, individual party and representative party, individual claimant and partner in the defendant partnership, and so on. Where it is necessary that those other interests be separately represented, an appropriate person must be joined for that purpose, for example a person beneficially interested in a trust or estate can be appointed instead of the trustee or executor.

28. The purpose of the rule is not only to reflect the practical reality that a single legal person ought not to be capable of adopting different positions in the same litigation, able to blow hot and cold simultaneously (or, as Sills J put it in *Theriault v Theriault*, 2007 CanLII 13519 (Ont SC), [3], "to suck and blow at the same time"). It is also to avoid unnecessary legal complication. Multiple legal representation takes longer, can produce duplication of effort, and leads to multiple sets of costs. There are also potential problems of claims between the different emanations of the same person, of set-off between that person and others, of making costs orders against one emanation and not another, and of enforcement of orders more generally. The rule is a sensible one in the context of litigation.

29. I emphasise that I say nothing about the position in arbitration (which is a dispute resolution process based on agreement to arbitrate, and therefore governed by that agreement). The parties to an arbitration can, within public policy limits, agree what they like. Nor am I dealing with the position in public inquiries, which are generally not litigation: Sir Richard Scott, *Procedures at Inquiries: the duty to be fair* (1995) 111 LQR 596, 598–599; *R (IPCC) v West Mercia Police* [2007] EWHC 1035 (Admin), [16]. But in any event, procedure in statutory inquiries will be regulated by the relevant statute, and statute can override judge made rules if the legislator thinks fit. Procedure in non-statutory inquiries (such as took place earlier in this case) is not governed by any statute or agreement. It is an *ad hoc* procedure whereby one person (usually a legal rather than natural person) appoints and instructs another (usually natural) person to collect evidence and reach factual conclusions (and perhaps make recommendations) so that the first person can make a decision on some matter. As I say, this is not litigation, and the same considerations do not apply.

First submission: restricted scope

30. Mr Wilmshurst for the City Council sought to argue that, even if this principle existed, it applied only to trust and estate cases. It certainly did not apply to town and village green registration cases. But *Neale v Turton* concerned an action on a bill of exchange, and *Hardie & Lane Ltd v Chiltern* concerned a claim in tort. Counsel also argued that the principle was really concerned with the same person being on *both* sides of the record ("you cannot sue yourself") rather than with this case, where the City Council appeared twice on the *same* side of the record. But that was what happened in *Hardie & Lane Ltd v Chiltern*, and Sargant LJ expressly referred to making "any individual the defendant twice over because he happens to fill two capacities".

31. I can see no reason of principle why this practical rule should not apply generally to all kinds of civil litigation, including this one. Even if (which I doubt, but cannot assess) most such cases occurred in trust or estate litigation, the mischief would still be the same in other kinds of case. Nor is there any reason why it should not apply to cases where the same party appears more than once on the same side of the record as well as where it appears on opposite sides. Co-defendants often have inconsistent interests, and make indemnity, contribution or other claims over against each other which could as easily be made in separate litigation in which one will be claimant and the other defendant, where they will certainly be on opposite sides. The happenstance of its taking place in the same claim cannot make a difference.

Second submission – authorities as separate legal persons

32. The next argument was that, even if *Hardie & Lane Ltd v Chiltern* and the other decisions expressed a procedural rule, it did not apply here, because statutory authorities such as (say) the education authority, the planning authority, the housing authority, and indeed the commons registration authority, were separate legal persons, distinct from the elected councils which made and implemented decisions as such authorities. Hence it was not the same legal person twice on the record, but instead two different persons once each. However, there is no sound basis for this argument. Human beings are separate legal persons. Partnerships and unincorporated associations (at least in our law) are not. But our legal system also recognises the existence of separate legal personalities constituted by groups of human beings. The creation of this kind of separate legal personality may be effected by the grant of a charter, or by legislation, incorporating a body of persons. Either way it will be clear.

Legislation

33. There can be no doubt that a local authority, whether (for example) a county or district council, has a legal personality separate and distinct from the persons who comprise it. For example, the Local Government Act 1972, section 2(3), provides that every (non-metropolitan) county or district council "shall be a body corporate". And section 222 of the same Act relevantly provides that

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and
>
> (b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment."

(Section 270(1) relevantly defines "local authority" in England as "a county council … a district council, a London borough council or a parish council …")

34. But the legislation that I have seen dealing with the appointment of local councils as various kinds of authority for the purposes of carrying out administrative functions, such as planning, housing, highways, and so on, does not provide that the authority in question shall also have separate legal personality. Instead it designates a specific local authority as the planning, housing, or highway authority for its own area. For example, the Commons Registration Act 1965, section 2 (as amended, and still in force in Bristol) relevantly provides merely that

> "(1) The registration authority for the purposes of this Act shall be—
>
> > (a) in relation to any land situated in any county … the council of that county or, if the country is a metropolitan county, the council of the metropolitan district in which the land is situated; and
> >
> > (b) in relation to any land situated in Greater London, the council of the London borough in which the land is situated;
>
> except where an agreement under this section otherwise provides."

35. There is no provision in the 1965 Act for the registration authority to be a corporate body. It is not necessary, because it already is one, namely, the local authority concerned. There is no provision for the authority to bring or defend legal proceedings, again because it is a local authority with power so to do under section 222 of the 1972 Act. Indeed, I might also observe that the 1965 Act contains no provision enabling the authority to delegate its functions to a committee of itself, or to any other person or persons. This is because it is a local authority, with power to do so under section 101 of the 1972 Act. So, if counsel were right, and the commons registration authority *were* a separate legal person from the City Council, it could not have delegated its functions to the Public Rights of Way and Greens Committee of the City Council.

36. What the 1965 Act does (like the Acts dealing with planning, highways, education and so on), is to appoint local authorities as the relevant authority, and to impose obligations and confer powers on that local authority, so that the purposes of the relevant legislation (here the 1965 Act) are carried out by that authority. I was not shown any legislation stating, or even suggesting, that a planning, highway, or education authority (for examples) was a separate person in law, distinct from the local authority so appointed.

Judicial decisions

37. What I *was* taken to were judicial decisions dealing with quite different matters, from which *dicta* were adroitly harvested with a view to suggesting separate personality. In *Gulliksen v Pembrokeshire County Council* [2002] QB 825, the defendant council's predecessor, acting as a housing authority, had constructed a footpath leading to a housing estate. Over time, that footpath became subject to public rights of way. The claimant tripped on the footpath and claimed damages against the defendant for personal injury. By that time, the defendant was not only the housing authority, but also the highway authority for the same area. The claim was based on the duty of a highway

authority under section 41 of the Highways Act 1980 to maintain at public expense a "highway constructed by a highway authority" within section 36(2)(a) of the Act. The footpath (which fell within the definition of a "highway") was said to be such a highway. The county court judge (HHJ Hickinbottom, later Hickenbottom LJ) held that the defendant indeed had the duty to maintain the footpath. On appeal, Neuberger J held that that was wrong. He held that, in order for the footpath to be a "highway constructed by a highway authority" within section 36(2), it had to have been constructed by the defendant's predecessor *in its capacity as a highway authority*. But this footpath had been constructed by the defendant's predecessor in its capacity as a *housing* authority. So section 41 did not apply.

38. This decision was taken to the Court of Appeal, where it was overturned: [2003] QB 123. The primary ground for the decision, however, was based on a point which had not been taken in the courts below. This was that section 36(1) of the 1980 Act provided that all highways already maintainable at the public expense under the Highways Act 1959 (which had not been referred to below) should continue to be so under the 1980 Act. And section 38(2)(c) of the 1959 Act covered the case of a highway constructed by local authority under Part V of the Housing Act 1957. It appeared that section 107, in that Part of the 1957 Act, was the legislative basis for the construction of this footpath. Hence there was no need to resort to section 36(2) of the 1980 Act at all. Section 36(1) was all that was necessary.

39. Nevertheless, Sedley LJ (with whom Lord Woolf CJ and Waller LJ agreed) commented on the reasoning of Neuberger J. He said:

> "18. I would nevertheless venture the following observations on the provisions which were canvassed in the courts below. By s.2(1) and (3) of the Local Government Act 1972 a county council, like every other local authority, is a single body corporate. A local authority may well have to take care from time to time (for example when considering whether to grant itself planning permission) to keep its various capacities distinct, but it is one body in law. Agreements between its departments may be necessary for budgetary purposes, but they are not contracts because a legal person cannot contract with itself. For this reason I would not in any event have found it easy to adopt the view of Neuberger J that s.36(2)(a) contemplated a highway authority acting as such."

40. Those *obiter* remarks were the subject of comment by the Court of Appeal in the more recent decision in *Barlow v Wigan MBC* [2021] QB 229. This also was the case of a claim for damages for personal injury arising out of a tripping accident on a footpath, though this time through a public park owned by the defendant authority. The park, and its footpaths, had been constructed by the defendant's predecessor in the 1930s under its common law powers as landowner, and not under any powers conferred upon it as a highway authority or housing authority. Judge Platts, sitting in the County Court at Manchester, held that the claim failed, because the path was not a "highway constructed by a highway authority" within section 36(2)(a) of the Highways Act 1980, not having been constructed by the defendant acting as a highway authority. An appeal to the High Court was allowed by Waksman J, on the basis that that

provision applied even though the defendant's predecessor had not been acting in its capacity as highway authority when constructing path, but simply in its capacity as landowner.

41. Once again, there was an appeal to the Court of Appeal. Relevantly for our purposes, the Court of Appeal held that the expression "highway constructed by a highway authority" in section 36(2)(a) of the Highways Act 1980 meant one which had been constructed by a highway authority *acting as such*, and, since this path had been constructed by the defendant's predecessor under its common law powers as landowner, and not acting as highway authority, it did not fall within section 36(2)(a). So Judge Platts had been right about that, and Waksman J wrong (though he had simply followed Sedley LJ's remarks which, though *obiter*, were both directly on point and expressly agreed by the two other judges).

42. The Court of Appeal nevertheless dismissed the appeal, on a quite different (and previously unargued) basis. This was that the extent of public use of the path since it was constructed in the 1930s was sufficient to infer that it had been dedicated as a highway *before* the coming into force of the National Parks and Access to the Countryside Act 1949. By section 47(1) of that Act the path was accordingly deemed to be "repairable by the inhabitants at large". This in turn meant that the path fell under the provisions of the Highways Act 1959, section 38(2)(a), and *this* engaged section 36(1) of the 1980 Act. Hence the highway authority had the duty to maintain it, and was therefore liable on the claim. This tortuous trail of legislative "pass the parcel" is fortunately not relevant to our case. But it is nevertheless concerning that laws intended to protect the rights of citizens and others not to be harmed by the failures of others are discoverable only with such difficulty that teams of lawyers and first instance judges cannot ascertain them, and must go to the Court of Appeal to do so.

43. What *is* relevant to our case is the discussion on the first point, about the expression "highway constructed by a highway authority" in section 36(2)(a) of the Highways Act 1980. Bean LJ (with whom Macur and Singh LJJ agreed, though each added some additional words) said this:

> "47. Mr White rightly accepts that these remarks [that is, para 18 of Sedley LJ's judgment in *Gulliksen*] were *obiter dicta* and thus not binding on us: the case had already been decided on another point. With respect to Sedley LJ and his colleagues who agreed with him, I cannot accept them. It may well be true that for the purposes of the law of contract a local authority is a single body corporate. But it does not follow that it is indivisible for all purposes. To take only one example, a council which is both housing authority and planning authority is not exempt from the need to obtain planning permission if it wishes to construct new housing. On the capacity issue under s 36(2)(a) of the 1980 Act I entirely agree with the reasoning and conclusions of Neuberger J."

44. Singh LJ added this:

> "69. Neuberger J [at first instance in *Gulliksen*] appeared to accept the submission made by counsel in *Gulliksen* that the interpretation he would give to s. 36(2)(a) would involve the reading in of the words 'as such' into that provision, in other words to make it clear that it only applies where a highway authority constructs a highway acting in its capacity as such. I do not consider that any words have to be read into the provision. In my view, it has the effect that Neuberger J thought it had, simply on its face. This is because, in my view, the words 'highway authority' are used by Parliament to mean 'an authority exercising its highway functions'.
>
> 70. This is consistent with how Parliament refers to all kinds of public authorities in many different statutes. For example, planning legislation refers to a 'planning authority'; housing legislation refers to a 'housing authority'; education legislation refers to an 'education authority' and so on. Often the body that exercises the relevant functions will be the same entity: for example, a district council will often have planning functions and housing functions; a county council will often have highways functions and education functions. But Parliament is not referring to that entity as such. It is referring to that entity only in so far as it exercises the functions referred to in that particular statutory provision. This is why I disagree with the analysis of Sedley LJ in *Gulliksen*. His analysis turned simply on the fact that a local authority is a single body corporate. So it is but that does not lead to the conclusion that it does not matter in what capacity it was acting in a particular context, that is what statutory functions it was exercising."

45. Macur LJ joined in the dissent of Bean and Singh LJJ from Sedley LJ's views in *Gulliksen*,

> "and prefer the construction placed upon section 36(2)(a) of the 1980 Act by Neuberger J … for the reasons they both give, feeling it unnecessary to add to the discussion above."

46. In my judgment, two things are clear from this case. The first is that, like *Gulliksen*, it was a question about the true construction of the phrase "highway constructed by a highway authority" in section 36(2)(a) of the Highways Act 1980, and not about the legal personality of a highway authority. It certainly does not support the proposition that a highway authority is a separate legal person, distinct from the local authority appointed to carry out the functions of the highway authority. Indeed, Singh LJ specifically said that he agreed with Sedley LJ that a local authority was a single body corporate. He also said that "the words 'highway authority' are used by Parliament to mean 'an authority [that is, the local authority] exercising its highway functions'."

47. The second thing is that the disagreement between the judges in *Gulliksen* and the judges in *Barlow* was about that statutory construction, and, again, not about legal personality. The judges in *Barlow* were of the view (disagreeing with Sedley LJ) that the fact that a local authority was a single legal person did not help in the construction of the statutory phrase with which they were concerned. As Singh LJ said, Sedley LJ's "analysis turned simply on the fact that a local authority is a single body corporate". It follows that the part of

Sedley LJ's *obiter* remarks with which they actually disagreed was simply the last sentence.

48. Counsel also prayed in aid the comment by Neuberger J at first instance about benefits given to the employees of the highway authority:

> "26. … For example, if money was left by someone to enable the employees of the highway authority to enjoy a Christmas party, I would have thought that it could not seriously be argued that all employees of the local authority were entitled to attend the Christmas party because the local authority was the highway authority: it would only be those employees in the highways department."

But, with respect, this does not show that in the view of Neuberger J the highways department of the local authority was a separate legal person from the local authority. It was simply a question of the construction of the words of gift, an exercise which chancery judges perform every day. The words "the employees of the highway authority" in the judge's view meant the employees of the local authority who performed the functions of the highway authority, and they would be the employees in the highways department of the local authority. This, if I may respectfully say so, seems unsurprising.

49. I was also referred to the decision of Thornton J in *London Historic Parks and Gardens Trust v Minister of State for Housing* [2022] EWHC 829 (Admin). This concerned the siting of the Holocaust memorial in central London. The proposal, promoted by the Secretary of State for Housing Communities and Local Government, was to construct the memorial in the Victoria Tower Gardens, London SW1, which is on the embankment immediately adjacent to the Victoria Tower, part of the Houses of Parliament. The planning application was made to Westminster City Council as the local planning authority, but was "called in" for determination by the Secretary of State under section 77 of the Town and Country Planning Act 1990. Because the Secretary of State was the applicant, it was decided that the application would be determined by the Minister of State for Housing. A minister of state is a member of the government in the second tier of ministers in a given department, behind the secretary of state (or equivalent) and before any parliamentary under secretary of state (the third tier).

50. At an earlier stage in the proceedings (see [2020] EWHC 2580 (Admin)), Holgate J decided that the arrangements ultimately put in place for the Minister to determine the application would satisfy the obligations contained in article 9a of Directive 2011/92/EU and regulation 64 of the Town and Country Planning Environmental Impact Assessment Regulations 2017 to avoid any conflict of interest in the process of carrying out an environmental assessment. The decision of the Minister of State was to grant planning permission on the application. The claimant was a small charity with the principal object of preserving and enhancing the quality and integrity of London's green open spaces. It had been actively involved in the planning process as an objector to the proposed development. It now sought a statutory review of that decision under section 288 of the Town and Country Planning Act 1990. The first and second defendants were the Minister of State and

Westminster City Council respectively. But the Secretary of State was one of the interested parties. The Minister of State and the Secretary of State were separately represented by leading and junior counsel, although all were instructed by the Government Legal Department.

51. Although the Minister was the decision-maker, and the real contest was between the Secretary of State on one hand and the claimant on the other (although there were other persons interested), counsel for the Minister played a leading part in opposing the claim, and his name appears in the judgment more than three times as often as the name of counsel for the Secretary of State. Thornton J decided that the Minister's decision should be quashed, primarily because of longstanding legislative restrictions on the use of the particular land. She refused permission to appeal to both the Secretary of State and the Minister. I am not aware that any appeal has ever taken place. Instead, the government has introduced a hybrid Bill into Parliament to remove the statutory restrictions on the use of the land which led the judge to her conclusion. Of course, I am not concerned with any of that.

52. But what this case does show is that those involved in the statutory review (not least, the judge) saw nothing wrong with the decision-maker (the Minister) descending into the arena and defending the decision, instead of just leaving it to the parties whose interests lay on one side or the other to do so. That is after all the norm in judicial review cases. But I do not consider that it assists me in determining whether a commons registration authority has legal personality separate from that of the local council which is appointed to carry out the functions of that authority. Each of the Secretary of State and the Minister of State is a human being with separate legal personality. Indeed, most secretaries of state are also corporations sole: see *eg* the Secretaries of State for Transport, Local Government and the Regions and for Environment, Food and Rural Affairs Order 2001, article 4; the Secretary of State for Education Order 2010, article 3; and the Transfer of Functions (Secretary of State for Levelling Up, Housing and Communities) Order 2021, article 3. In any event, this case was concerned with planning law, and not with the law relating to registration of town and village greens.

Third submission – history of separate representation

53. Mr Wilmshurst also sought to make something of the fact that the City Council acting as commons registration authority and the City Council acting as landowner have been separately represented since 2011. In my judgment, there is nothing in this. There have been two occasions (one a non-statutory public inquiry) on which the City Council as commons registration authority has appointed an inspector to receive evidence, find facts and make recommendations. That is the common and sensible practice in this area of the law, where a quasi-judicial function is conferred upon an elected, non-legally trained, political body. But, at least from a private law perspective, a landowner (as the City Council is) must be entitled to defend its proprietary interest in the land, and therefore to give evidence and make submissions to the inspector, like any other interested person. Meanwhile, the City Council *as commons registration authority* does nothing at all. There is no conflict, at least at that stage. When the inspector reports, then the City Council as

commons registration authority has to decide what to do. But (as I say) that is a quasi-judicial, and not a political, function.

54. The only time, since 2011, when there have been any court proceedings in this matter, is when judicial review proceedings have been taken. And I note that, in the first judicial review proceedings taken in 2017, the City Council appeared only *once* on the record, represented by one set of lawyers. If anything, that points *against* counsel's submission. (I do not know the position in the latest set of proceedings, currently stayed.)

Fourth submission: need for separate representation

55. A further submission by Mr Wilmshurst was that, even if they are not separate legal persons, the *Hardie & Lane* rule should not apply here, because separate authorities need separate representation. It builds on the idea (which I have already accepted) that the City Council as landowner should be able to protect its proprietary interest in the land. If this land had not been let to the claimant, the City Council would be using it itself for education purposes. For example, if the school had remained a local education authority school, and had not become an academy, the City Council might have allocated the land for the school's playing fields, and would now be seeking positively to defend that use against the application for town or village green registration. In accordance with the rules, the City Council as commons registration authority would serve notice of the second defendant's application upon itself as landowner. As landowner, it would then be able to participate in the non-statutory inquiry process, as in fact it did, though as reversioner rather than as occupier. (I emphasise that, at this stage, I am looking at matters from a private law, rather than a public law, perspective. I was not addressed on the latter, and am not now deciding whether there is any public law impediment to the City Council's participation *as landowner*. If the question is raised, it will have to be dealt with hereafter.)

56. Counsel asked rhetorically what would happen if the City Council as commons registration authority then acted unlawfully, in a sense which infringed the landowner's proprietary rights. For example, suppose it registered land as a town or village green when it did not meet the legal test. Would the City Council as landowner not be able to sue itself as commons registration authority? (He pointed out in passing that the Commons Act 2006 scheme foresaw the possibility of such a conflict, and made alternative arrangements in order to avoid it, by taking the judicial function away from the local authority.)

57. For my part, at least from a private law perspective, I simply do not see the problem. There is no requirement in the legislation for a claim under section 14 of the 1965 Act to be brought against the commons registration authority. In the case of a landowner whose land is registered as a town or village green against its wishes there will *ex hypothesi* always be someone with a sufficient adverse interest to such a landowner who can be joined, namely, the applicant for registration. For example, in *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2010] EWHC 3045 (Ch), the claimant landowners brought a claim under section 14 of the 1965 Act to cancel the registration of

their land as a town or village green. The registration authority took no part in the proceedings. The second defendant was a local resident, representing an association of such residents, who supported the registration and opposed the claim.

58. The position is analogous to that which obtains in relation to registered land. Where A claims to be the owner of an estate in land registered in the name of B, and B refuses to consent to an alteration or rectification of the register, A sues B, rather than the land registrar: *cf National Provincial Building Society v Ahmed* [1995] 2 EGLR 127, 128-129, CA. Where B files a unilateral notice against A's registered title, the court has jurisdiction to vacate the notice in proceedings by A against B where the registrar is not a party: *Subhani v Sultan* [2017] EWHC 1686 (Ch). I accept that, where the registration authority is joined, even if it plays no part, it is bound by the order automatically. On the other hand, in disputes about registered land, the registrar, being not joined, is bound only once the order of the court is served upon him or her: Land Registration Act 2002, Sch 4 para 2(2). But, frankly, it is unthinkable that a commons registration authority should refuse to implement the decision of the High Court made after argument between two opposing parties.

59. In some of the cases a question has been raised as to whether a registration authority should remain neutral in a claim under section 14. This is relevant to the question whether "separate authorities need separate representation". I was referred by both the second defendant and the City Council to the decision in *TW Logistics Ltd v Essex County Council* [2017] Ch 310, albeit in a different context. There, the authority registered part of a private port as a town or village green, and the owner of the port brought a claim to delete the registration.

60. Barling J (at first instance) referred to the question of possible neutrality, and said:

> "41. … I see nothing in [*Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch)] nor in the dicta in [*Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674] which denies the [commons registration] authority the right to take a more active role in section 14 proceedings, should it wish to do so. Lord Hoffmann simply referred to the absence of a *duty* on the part of the registration authority to investigate or to adduce new evidence.
>
> 42. Without having heard full argument, I am inclined to the view that the fact that the authority has a quasi-judicial role at the decision-making/registration stage does not and should not preclude it, where appropriate, from fully defending its decision in the context of a subsequent section 14 claim, including by challenging new evidence and new submissions and/or by calling new evidence of its own. By the same token, if, having heard new evidence and submissions, an authority were to take the view that its original decision was wrong, it would surely not be right for it to defend it."

61. The Court of Appeal ([2019] Ch 243) dismissed an appeal from Barling J's decision to dismiss the claim, without commenting on these *dicta*. The Supreme Court ([2021] AC 1050) dismissed a further appeal, also without commenting on these *dicta*. (I understand that counsel for the second defendant in this case was also of counsel in that case.) Since in the present case the City Council has stated explicitly in its acknowledgment of service that, in its capacity as commons registration authority, it intends to adopt a neutral position, and to take part merely to assist the court, it is not necessary for me to consider this question further. It would arise only if the City Council as commons registration authority later sought to take a non-neutral position.

62. I note that Barling J said that he had "not heard full argument" on the point. I have not heard any. I will therefore simply observe that I am less confident than Barling J that it was open to the authority "to take a more active role in section 14 proceedings, should it wish to do so". My immediate reaction, unenlightened by argument, is that the authority's statutory role was not (for example) to *inquire* into an event or set of circumstances (as, say, a coroner might do). Instead, it was to *decide*, on the basis of opposing evidence and submissions between competing parties, whether or not the legal test for registration of a town or village green was met in the circumstances of the case. This is a judicial role, and on the face of it one not well suited for descent into the arena by the person deciding. The members of the committee would appear to be judges of both fact and law, just like the members of the House of Lords in its judicial capacity formerly were in trying one of its members for felony: see *R v Earl Ferrers* (1760) Fost 139, 143 (the jurisdiction, last exercised in 1935, was abolished by the Criminal Justice Act 1948, s 30).

Conclusion on the first issue

63. In my judgment, on the facts of this case, there is no good reason why the *Hardie & Lane* rule should not apply. The City Council should appear on the record once only. I will order that the two acknowledgments of service filed by the City Council be withdrawn, to be replaced by *one* such acknowledgment setting out its position in relation to the claim. The City Council may participate in these proceedings represented by one legal team and funded by one set of costs. But it is of course open to the City Council to have more than one barrister appearing in court, for example, to deal with different legal specialisms. However, a they must all sail under one flag. If the City Council considers that it has a conflict which prevents it presenting arguments in support of any particular interest, then an appropriate person will have to be joined to ensure that that interest is represented. The court would obviously co-operate in that endeavour.

SECOND ISSUE: COSTS

Aarhus Convention

General

64. As I have said, there are three aspects to the costs protection argument. The first derives from the so-called "Aarhus Convention", signed at Aarhus in Denmark on 25 June 1998. The full title of the Convention is the "Convention on access to information, public participation in decision-making and access to justice in environmental matters". It was sponsored by the United Nations Economic Commission for Europe. The United Kingdom ratified it on 23 February 2005 (thus engaging the UK's obligations towards the other parties from that moment).

65. As is well known, in English law an international treaty or convention between states creates no rights or obligations justiciable in English domestic law. The obligations undertaken by the UK are at best obligations in (public) international law only, justiciable in international law institutions such as the International Court of Justice at The Hague (as indeed provided by art 16(2)(a) of the Aarhus Convention). If the international law obligation so undertaken requires a change to be made to UK domestic law, then it is up to the UK Government to procure that change by conventional legislative means (including, during the UK's membership of the European Economic Community – later the European Union – via the European Communities Act 1972). This is often called "transposition". In the case of this convention, the relevant transposition was effected by way of amendment of the Civil Procedure Rules 1998, originally in Part 45, but now Part 46.

Text

66. First, however, it is necessary to set out some parts of the Convention in the official English version (there are also official French and Russian versions, equally authentic). These are 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.
>
> […]
>
> Article 2
>
> DEFINITIONS
>
> For the purposes of this Convention,
>
> 1. 'Party' means, unless the text otherwise indicates, a Contracting Party to this Convention;
>
> 2. 'Public authority' means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity; …

[…]

Article 3

GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

[…]

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed

> activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

[…]

Article 9

ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

> (a) Having a sufficient interest

or, alternatively,

> (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

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 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. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have

rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 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.

[…]

Article 15

REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

[…]"

Transposition to CPR

67. CPR Part 46 now relevantly provides:

"SECTION IX Costs Limits in Aarhus Convention Claims

46.24. (1) This section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section—

> (a) 'Aarhus Convention claim' means a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ('the Aarhus Convention');
>
> (b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention.

(3) This Section does not apply to appeals other than appeals brought under section 289(1) of the Town and Country Planning Act 1990(1) or section 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990(2), which are for the purposes of this Section to be treated as reviews under statute.

46.25. (1) Subject to paragraph (2), rules 46.26 to 46.28 apply where a claimant who is a member of the public has—

> (a) stated in the claim form that the claim is an Aarhus Convention claim; and
>
> (b) filed and served with the claim form a schedule of the claimant's financial resources, which is verified by a statement of truth and provides details of—
>
>> (i) the claimant's significant assets, liabilities, income and expenditure; and
>>
>> (ii) in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided.

(2) Subject to paragraph (3), rules 46.26 to 46.28 do not apply where the claimant has stated in the claim form that although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

(3) If there is more than one claimant, rules 46.26 to 46.28 do not apply in relation to the costs payable by or to any claimant who has not acted as set out in paragraph (1), or who has acted as set out in paragraph (2), or who is not a member of the public.

46.26. (1) Subject to rules 46.25 and 46.28, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 46.27.

(2) For a claimant the amount is—

(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) £10,000 in all other cases.

(3) For a defendant the amount is £35,000.

(4) In an Aarhus Convention claim with multiple claimants or multiple defendants, the amounts in paragraphs (2) and (3) (subject to any direction of the court under rule 46.27) apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.

46.27. (1) The court may vary the amounts in rule 46.26 or may remove altogether the limits on the maximum costs liability of any party in an Aarhus Convention claim.

(2) The court may vary such an amount or remove such a limit only on an application made in accordance with paragraphs (5) to (7) ("an application to vary") and if satisfied that—

(a) to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and

(b) in the case of a variation which would reduce a claimant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the claimant.

(3) Proceedings are to be considered prohibitively expensive for the purpose of this rule if their likely costs (including any court fees which are payable by the claimant) either—

(a) exceed the financial resources of the claimant; or

(b) are objectively unreasonable having regard to—

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the claimant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

(4) When the court considers the financial resources of the claimant for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to the claimant.

(5) Subject to paragraph (6), an application to vary must—

(a) if made by the claimant, be made in the claim form and provide the claimant's reasons why, if the variation were not made, the costs of the proceedings would be prohibitively expensive for the claimant;

(b) if made by the defendant, be made in the acknowledgment of service and provide the defendant's reasons why, if the variation were made, the costs of the proceedings would not be prohibitively expensive for the claimant; and

(c) be determined by the court at the earliest opportunity.

(6) An application to vary may be made at a later stage if there has been a significant change in circumstances (including evidence that the schedule of the claimant's financial resources contained false or misleading information) which means that the proceedings would now—

(a) be prohibitively expensive for the claimant if the variation were not made; or

(b) not be prohibitively expensive for the claimant if the variation were made.

(7) An application under paragraph (6) must—

(a) if made by the claimant—

(i) be accompanied by a revised schedule of the claimant's financial resources or confirmation that the claimant's financial resources have not changed; and

(ii) provide reasons why the proceedings would now be prohibitively expensive for the claimant if the variation were not made; and

(b) if made by the defendant, provide reasons why the proceedings would now not be prohibitively expensive for the claimant if the variation were made.

[…]

46.28. (1) Where a claimant has complied with rule 46.25(1), and subject to rule 46.25(2) and (3), rule 46.26 applies unless—

(a) the defendant has in the acknowledgment of service—

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant's grounds for such denial; and

> (b) the court has determined that the claim is not an Aarhus Convention claim.
>
> (2) Where the defendant denies that the claim is an Aarhus Convention claim, the court must determine that issue at the earliest opportunity.
>
> (3) In any proceedings to determine whether the claim is an Aarhus Convention claim—
>
> (a) if the court holds that the claim is not an Aarhus Convention claim, it shall, except for good reason, make no order for costs in relation to those proceedings;
>
> (b) if the court holds that the claim is an Aarhus Convention claim, it shall, except for good reason, order the defendant to pay the claimant's costs of those proceedings to be assessed on the standard basis, and that order may be enforced even if this would increase the costs payable by the defendant beyond the amount stated in rule 46.26(3) or any variation of that amount."

68. On the claim form as issued, the claimant stated that this was an Aarhus Convention claim. With the claim form, it filed a statement of assets and liabilities. This complies with two of the procedural requirements of CPR rule 46.25(1). The third requirement under that rule is that the claim is brought by a member of the public. I shall return to this third requirement shortly. First I need to deal with other aspects of the definition of "Aarhus Convention" claim in the rules.

Definition of Aarhus Convention claim for

69. The claim itself challenges the decision of the City Council as commons registration authority to register the land as a town or village green under the 1965 Act. The definition of "Aarhus Convention claim" is set out in CPR rule 46.24(1), as

> "a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3)"

of the Aarhus Convention.

70. This claim is not within article 9(1) because it does not concern information under article 4. It is not within article 9(2) because it does not concern a decision under article 6 (which deals with decisions to permit activities listed in Annex I, and use of the land as local recreation or school playing fields is not one of the listed activities). That leaves only article 9(3), concerned with

> "procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

71. In my judgment, the 1965 Act so far as relevant to this claim falls within the expression “provisions of … national law relating to the environment” in article 9(3) of the Convention. In *Venn v Secretary of State for Communities and Local Government* [2015] 1 WLR 2328, the Court of Appeal agreed with the judge at first instance that an appeal under section 288 of the Town and Country Planning Act 1990 fell within the scope of “national law relating to the environment” in Article 9(3) of the Convention.

72. Sullivan LJ (with whom Gloster and Vos LJJ agreed) said:

> “10. I can deal with this issue briefly because Mr. James Eadie QC on behalf of the Secretary of State did not take issue with Lang J's conclusion (see paragraph 11 of the judgment) that the description of "environmental information" in Article 2(3) of *Aarhus* was an indication of the intended ambit of the term ‘environmental’ in the Convention, and that the *Implementation Guide* to *Aarhus* was of assistance in reaching that conclusion. The *Implementation Guide* says that:
>
> ‘The clear intention of the drafters …. was to craft a definition [of environmental information] that would be as broad in scope as possible, a fact that should be taken into account in its interpretation’.
>
> 11. In his Skeleton Argument the Secretary of State accepted that ‘environmental information’ is given a broad definition in Article 2.3, and further accepted that since administrative matters likely to affect ‘*the state of the land*’ are classed as ‘environmental’ under *Aarhus* the definition of ‘environmental’ in the Convention is arguably broad enough to catch most, if not all, planning matters. The Judge's conclusion that environmental matters are given a broad meaning in *Aarhus* (see paragraph 15 of the judgment) is supported by the decision of the CJEU in *Lesoochranárske VLK v Slovenskej Republiky* (Case C-240/09) [2012] QB 606 … ”

73. If the definition of ‘environmental’ in the Convention is a broad one, and planning appeals under section 288 are part of the “national law relating to the environment” for the purposes of article 9(3) of the convention, then in my judgment this claim under section 14 of the 1965 Act is equally so, because it concerns the uses to which open land and green spaces can be put, and the rights of the public to access them. I assume that it is for that reason that the second defendant says,

> “it is common ground that the claim concerns a decision which is within the scope of art 9 of the Aarhus Convention”.

74. However, whilst I agree with the unstated premise (that section 14 is “national law relating to the environment”), I am not so sure about the conclusion (that the decision is one within article 9). This is because article 9(3) requires that the decision be one taken by “by private persons [or] public authorities”. The City Council is plainly not a “private person”. The expression “public authority” is defined by article 2 of the Convention, to include (amongst others) “(a) Government at national, regional and other level”. On the face of

it, the City Council is within this paragraph (and probably others in article 2 as well). But article 2 ends with the words "This definition does not include bodies or institutions acting in a judicial … capacity". Yet, also on the face of it, that is the capacity in which the City Council as registration authority took the decision. It did not take it as a political body.

75. If so, then whether or not the City Council falls within any of the paragraphs of auricle 2, the final words take it out again. This matter appears not to have been raised in other cases, and it was not argued before me. So, I do not know how the parties would deal with it. For all I know, there is a simple answer. If it mattered, I would have asked the parties for further submissions. The reason is that it goes to jurisdiction: even if the parties *agreed* on the position, that could not confer on the court a jurisdiction which otherwise it did not possess. But in the event, I do not think that it matters.

76. I should add that I have not overlooked the comment of Underhill LJ in *NHS Property Services v Surrey County Council*, C1/2016/3267, in making a protective costs order on 16 December 2016. In giving reasons for his order, he stated that in his view a claim under section 15 of the Commons Act 2006 would not be "national law relating to the environment". But he gives no reasons for that view, and, as things stand, I regret to say that I do not understand it. In any event, I do not think that I am bound by an observation of a single Lord Justice given on the papers in dealing with an application for a cost capping order in a claim under a different statute.

Member of the public

77. What the second defendant *does* challenge are two other matters, both of which are necessary for the claim to fulfill the definition of "Aarhus Convention claim". The first is the claimant's assertion that it is a "member of the public". Rule 46.24(2)(b) now provides that "references to a member or members of the public are to be construed in accordance with the Aarhus Convention". The phrase "members of the public" appears in the text of the Convention. It is used to describe the persons who are to have rights protected in domestic law. Article 15 of the Convention provides for the establishment of "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention." This has resulted in the creation of the Aarhus Convention Compliance Committee. This is not a court of law, unlike (say) the Court of Justice of the European Communities established by the Treaty of Rome. As article 15 says, it is non-judicial.

78. However, the original version of the CPR, transposing obligations from the Convention into English domestic law (CPR rule 45.41), did not require that the claimant taking the benefit of the costs protection rules be a "member of the public". Following the decision of the Court of Appeal in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2015] PTSR 1025, that accordingly even local authorities could qualify for costs protection under rule 45.41, this was amended by SI 2017 No 95 as from 28 February 2017. For the future there was to be a requirement that the claimant be a member of the

public. This was continued when the relevant provisions of the CPR were moved from CPR Part 45 to Part 46.

79. The second defendant submits that the claimant is a public authority, and therefore cannot a be a member of the public. This submission is based on the *ex tempore* decision of Singh J (as he then was) in *R (Omotosho) v Harris Academy Crystal Palace* [2011] EWHC 3350, that the decision of an independent panel refusing an appeal against the decision not to award a place at the defendant academy school to the applicant's child should be quashed for inadequate reasoning. It is not of course a decision on the phrase "member of the public" for the purposes of the Aarhus Convention. In addition to being an *ex tempore* decision, it appears that there was no argument as to whether the decision was amenable to judicial review, and also that the decision went essentially by consent of the parties. So it is not as strong a decision as it might be. But I do accept that it is there.

80. At its highest, however, all that this decision shows is that an academy school may exercise some functions of a sufficiently public character as to attract the jurisdiction of judicial review *in relation to that exercise of those particular functions*. It does not mean that *every* decision an academy school makes is of that description. If an academy school decided to bring a claim for compensation against a motorist who negligently drove into the school minibus and caused damage, no-one could suggest that that decision could be subject to judicial review. So too it is here, where the claimant is bringing a claim to vindicate its proprietary rights under the lease of 2011 by seeking the cancellation of the registration of its school playing fields as a town or village green. This is not a public function, and, in making this decision, and prosecuting its claim, the claimant is not in my judgment acting as a public authority.

81. In any event, there appears to be only one relevant decision of the Aarhus Convention Compliance Committee, namely ACCC/C/2014/100. This found that a local authority, the London Borough of Hillingdon, was not a "member of the public" for the purposes of article 15 of the Convention. That is far removed from the facts of this case. A school with separate legal personality and charitable objects which is run neither by central nor local government can hardly be described as an "emanation of the state" (as I am afraid Mr Sharland KC referred to it during the argument). It is certainly not a local authority in the ordinary meaning of that phrase. It is independent of the state, even though funded by it, a point made at some length by the second defendant at paragraph 10 of her pre-action protocol reply letter dated 25 July 2023 in relation to the second judicial review proceedings. I adhere to the view that the claimant in seeking to protect its proprietary rights under the lease of the land is not acting as a public authority. I see no reason why in so acting it should not properly be described, as any other legal person which (in any event) is not an emanation of the state might be described, as a member of the public.

82. I am fortified in that view by the decision of John Howell QC, sitting as a deputy High Court judge, in *Crondall Parish Council v Secretary of State for Housing, Communities, and Local Government*, CO/3900/2018. That was a case where the deputy judge gave permission to apply for a planning statutory

review, and also held that the claim was an Aarhus Convention claim for the purposes of CPR rule 45.41. The claimant was a local authority. Unlike his decision on giving permission, where the deputy judge gave only short observations, he gave a full written judgment on whether the claim was an Aarhus Convention claim. He referred to the decision of the Aarhus Compliance Committee ACCC/C/2014/100, concerning the London Borough of Hillingdon. He pointed out that it was not a judicial decision or legally binding for the parties.

83. He then said this:

> "14. In considering the construction of the convention itself, it is significant in my judgment (i) that 'the public' is widely defined to include any natural or legal person, a definition that will inevitably include bodies falling within the wider definition of a 'public authority'; (ii) that there is no provision excluding anybody falling within that definition of a 'public authority' from being a member of 'the public'; (iii) that there is no apparent warrant within the convention itself inferring that the two categories are mutually exclusive in all circumstances; and (iv) that to exclude some public authorities, such as a parish council, by some inference from being a member of 'the public' in relation to access to environmental information held by other public authorities and from participation in the procedure leading to significant decisions for the environment taken by other authorities would undermine principles underlying the Aarhus Convention is recognised in its recitals."

For these reasons, the deputy judge concluded that the claimant parish council was a member of the public for the purposes of the Aarhus Convention and the present claim.

84. In passing, I note, and respectfully agree with (but do not need to rely on), the decision on the papers at permission stage of Holgate J on 3 May 2017. This was that,

> "having considered the material submitted by the Claimant and the submissions on both sides, I conclude that the Claimant is to be treated as a 'member of the public'."

By that date the rules had been changed, so that the new "members of the public" requirement had been introduced into the CPR. The second defendant says that Holgate J applied the law that was applicable at the time that the challenge was made, rather than the law at the time of the decision. I do not agree. Because there was no such requirement before 6 April 2017, the judge cannot have been considering the legal position before that date. Otherwise the reference to "member of the public" would be pointless.

85. Accordingly, my conclusion on the first point is that, at least for the purpose of vindicating its proprietary rights under the lease in this claim, the claimant is a member of the public.

Review under statute

86. The second matter which the second defendant challenges is the claimant's assertion that the claim is one for "judicial review or review under statute". The claimant accepts that this is not judicial review. But it says that this claim is a "review under statute". I was referred to the decisions of Harman J in *Ministry of Defence v Wiltshire County Council* [1995[4 All ER 931 and of Cranston J in *St John's College Cambridge v Cambridgeshire County Council* [2017] EWHC 1753 (Admin). However, having read them I am afraid that I do not derive any great assistance from either on this question.

87. I was also shown *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951. That was an application for permission for judicial review of the Commons Commissioners that they had no jurisdiction to consider disputed applications for the registration of land as a town or village green pursuant to section 13 of the Commons Registration Act 1965. The court dismissed the appeal, but two of the judges did consider the various ways in which such a dispute might be resolved. One of these ("the third option") was an application to the High Court under section 14 of the 1965 Act. It is true that the judges used the word "review" in their judgments, but I do not think that they help the claimant here.

88. Arden LJ (at [39]) pointed out that (i) an application under section 14 would permit the court to consider the evidence afresh and reach its own conclusion on the facts, and (ii) there was no time limit provided for making it. These are not characteristics of judicial or other statutory reviews, which are usually restricted to looking at the materials before the original decision-maker, and within a limited time. She also expressed the view that the fact that the section referred to the phrase "rectify the register" did not mean that this was some kind of appeal or review of an existing decision. It was simply the consequence of the existence of the register. Waller LJ (at [47], [52] and [60]) made similar comments, including (in [60]) using the phrase "a review that is wider than would be the case on judicial review". Pumphrey J agreed with both judgments.

89. On the other hand, the second defendant says the claim is not a "review under statute". She relies on the statement of Lightman J in *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2007] 2 All ER 1000, which like this case was a claim under section 14:

> "14. … The language of the section affords no basis for any suggestion that the role of the court is the exercise of an appellate or supervisory jurisdiction or that the jurisdiction should only be exercisable if the registration authority in directing registration made an error on the evidence adduced before it or an error of law … The section requires only that it should appear to the court on the evidence before it that for any reason (factual or legal) no amendment or a different amendment should have been made and that it is just to rectify the error on the register."

90. On appeal, the Court of Appeal ([2009] 1 WLR 334) took the same view. Lloyd LJ (with whom Laws and Rix LJJ agreed) said:

> "19. The Appellant argues that the role of the court under section 14 is, in essence, to consider an appeal against the decision of the registration authority under section 13, and that although section 14 does not speak of an appeal, that is what the court would be hearing. Accordingly, it is argued, no evidence should be adduced before the High Court unless it can be justified as fresh evidence which could be admitted on an appeal within the court structure in accordance with *Ladd v Marshall* [1954] 1 WLR 1489. The Respondent on the other hand points out that the section is not drafted in terms of an appeal, and contends that it is open to any party to adduce whatever evidence it wishes, subject to the court's exercise of its case management powers, though the evidence which was before the inquiry should be put before the court and should be capable of being admitted as evidence subject to the court's directions. The judge accepted that submission, and so would I."

91. The second defendant also relies on the statement by Barling J at first instance in *TW Logistics Ltd v Essex County Council* [2017] Ch 310. That was another case of a section 14 claim. The judge said:

> "31. … the court's jurisdiction to rectify the register under s.14 is neither appellate nor supervisory in nature. It is not confined to a review of the registration authority's decision, based only on the material which was before the authority when it made its decision. Subject to any directions the court may make, it can receive additional evidence (as it has in the present case), and should determine what (if any) amendment to the register ought to have been made and whether rectification would be 'just', having regard to all the information available to it (including, where appropriate, the evidence which was before the public inquiry and/or the findings of the inquiry).
>
> 32. In these circumstances, TWL was clearly correct in submitting that the focus in the present case should not be on whether and in what respects the Inspector's (and therefore Essex CC's) conclusions were flawed … but rather on whether having regard to the totality of the evidence ('old' and 'new') before me, the Land or any part of it ought not to have been registered as a TVG pursuant to subsection 15(3) of the 2006 Act. "

So far as I can see, neither the Court of Appeal nor the Supreme Court (which in turn dismissed appeals from Barling J's decision), made any comment on these *dicta*.

92. In my judgment the nature of a claim under section 14 is that of a freestanding claim, *de novo*, that the land the subject of the claim does not meet the statutory criteria for a town or village green, and that therefore the amendment of the register constituted by the registration of the land should be reversed. Although a decision under section 14 to reverse the earlier entry would mean that the earlier decision to register the land was wrong, and therefore made in "error" (a word used by section 14(b)), this claim is not a *review* of that decision. If it were, then for one thing the court could not receive evidence not before the original decision-maker (at all events unless there were circumstances corresponding to those in the well-known decision in *Ladd v*

Marshall [1954] 1 WLR 1489, CA). Indeed, the claimant has adduced such evidence in these proceedings, so the point is not an academic one. One would also expect to find a time limit for the application to be made. Yet there is none.

93. I conclude that this claim does not fall within the words "review under statute" in rule 46.24(1), and this is not therefore an Aarhus Convention claim. I emphasise that this is the result of a decision by the Civil Procedure Rules Committee to confine the definition of such claims in this way. So far as I can see, there is nothing in the terms of the Convention itself which requires this restriction. Indeed, rule 46.24(3) actually extends the scope of the phrase "review under statute" to include two specific kinds of statutory appeal, those brought under section 289(1) of the Town and Country Planning Act 1990 and section 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. The rule says that they "are for the purposes of this Section to be treated as reviews under statute". It could have said the same about a claim under section 14 of the 1965 Act. But it did not, and I must apply the rule as it is. I am a judge, and not a legislator. Accordingly, in my judgment there can be no Aarhus Convention costs protection in this case.

Protective costs order

Corner House

94. I therefore move on to consider the second aspect of costs protection. This is the "protective costs orders" jurisdiction, now found in the *Corner House* principles. In *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, CA, the court was concerned with the circumstances in which in judicial review cases such as that was) the court might grant a so-called "protective costs order". Lord Phillips MR, giving the judgment of the court (including also Brooke and Tuckey LJJ) described the context of the decision as follows:

> "28. The present appeal is concerned not with the incidence of costs in private law civil or family litigation or with statutory (or other) appeals, but with the incidence of costs in a judicial review application at first instance. Over the last 20 years there has been a growing feeling in some quarters, both in this country and in common law countries abroad which have adopted the "costs follow the event" regime, that access to justice is sometimes unjustly impeded if there is slavish adherence to the normal private law costs regime described by Buckley LJ in *Wallersteiner v Moir (No 2)* and by Hoffmann LJ in *McDonald v Horn*."

95. After an exhaustive review of the case law (domestic and foreign) and consideration of other relevant materials, the court concluded:

> "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;

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.

75. A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted:

i) A case where the claimant's lawyers were acting *pro bono*, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (*Refugee Legal Centre);*

ii) A case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (*CND*);

iii) A case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*CPAG*);

iv) The present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).

76. There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is likely that a cost capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in *King* at paras 101-2 will always be applicable. We would rephrase that guidance in these terms in the present context:

> i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability;
>
> ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.
>
> iii) The overriding purpose of exercising this jurisdiction 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 of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly."

Venn

96. Obviously these principles were not intended to be treated or construed as if they were a statute, and subsequent decisions, glossing and refining the principles, have to be taken into account. In *Venn v Secretary of State for Communities and Local Government* [2015] 1 WLR 2328, which I have already referred to in a different context, the Court of Appeal considered how far it was possible for the court to apply the *Corner House* principles to a case which fell outside the protection of the Aarhus Convention rules in the CPR. Sullivan LJ said:

> "32. … Mr. Eadie fairly conceded that if, as I have concluded … the Claimant's section 288 application does fall within Article 9(3) of *Aarhus*, there will on the Judge's findings … as to the Claimant's means, be a breach of *Aarhus* if the discretion is not exercised so as to grant her a PCO. He also accepted that whether costs protection was available under CPR 45.41 for environmental challenges falling within Article 9(3) would, in many cases, depend solely upon the identify of the decision-taker. He recognised that there was no principled basis for that distinction if the object of the costs protection regime was to secure compliance with the UK's obligations under *Aarhus*.
>
> 33. Notwithstanding these implications of the Secretary of State's case, I have been persuaded that his appeal must be allowed. … Once it is accepted that the exclusion of statutory appeals and applications from CPR 45.41 was not an oversight, but was a deliberate expression of a legislative intent, it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to side-step the limitation (to

> applications for judicial review) that has been deliberately imposed by secondary legislation. It would be doubly inappropriate to exercise the discretion for the purpose of giving effect under domestic law to the requirements of an international Convention which, while it is an integral part of the legal order of the EU, is not directly effective … and which has not been incorporated into UK domestic law … ”

97. *Venn* concerned a statutory appeal under section 288 of the Town and Country Planning Act 1990. Having considered that decision, the Government promoted a change to the CPR which resulted in such statutory appeals being included in the CPR regime, along judicial review (see SI 2017 No 95). It *also* added appeals under section 289 of the 1990 Act and under section 65 of the Planning (Listed Buildings and Conservation Areas) Act 1990. But no amendment was made to include a claim under section 14 of the 1965 Act.

NHS Property Services

98. In *R (NHS Property Services) v Surrey County Council*, C1/2016/3267, permission to appeal had been given in a judicial review case. The appellant sought a protective costs order. Underhill LJ as the single judge dealt with the matter on the papers, without an oral hearing. In his reasons, dated 16 December 2016, he said that the parties' submissions on the question whether this was an Aarhus Convention claim were "not very full". Neither party had referred to the relevant rule, or supplied a copy of the relevant part of the Convention. On the materials he had, he decided that the claim was not an Aarhus Convention claim. So he treated the application as one for a protective costs order. He said that the only authority that he had been referred to was *Corner House* itself, and he simply applied the criteria in that case. He was certainly not referred to *Venn*. But *Venn* is a decision of the Court of Appeal, and I am bound by it.

Conclusion

99. The legislature has thus considered the matter on two occasions, made conscious by the decision in *Venn* of the limitations contained in the CPR implementing the Aarhus Convention in domestic law. Yet it has continued to exclude section 14 claims. I do not see how in those circumstances I can properly "side-step the limitation … that has been deliberately imposed by secondary legislation", as the Court of Appeal said in *Venn*. That would be for me, sitting at first instance, to take the step which the Court of Appeal (with regret) declined to do. In my judgment, only the legislature can take that step. In these circumstances it is unnecessary for me to consider the *Corner House* criteria set out above.

Costs capping orders

CPR rule 3.19

100. Lastly, there is the jurisdiction under CPR rule 3.19, in Section III of Part 3 of the CPR (cross-headed "COSTS CAPPING"). This relevantly provides as follows:

"(1) For the purposes of this Section—

> (a) 'costs capping order' means an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made; and
>
> (b) 'future costs' means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.

(2) This Section does not apply to judicial review costs capping orders under Part 4 of the Criminal Justice and Courts Act 2015 or to protective costs orders.

[…]

(4) A costs capping order may be in respect of –

> (a) the whole litigation; or
>
> (b) any issues which are ordered to be tried separately.

(5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –

> (a) it is in the interests of justice to do so;
>
> (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
>
> (c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –
>
> > (i) case management directions or orders made under this Part; and
> >
> > (ii) detailed assessment of costs.

(6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –

> (a) whether there is a substantial imbalance between the financial position of the parties;
>
> (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
>
> (c) the stage which the proceedings have reached; and
>
> (d) the costs which have been incurred to date and the future costs.

[…]"

101. There are also certain procedural requirements set out in rule 3.20:

> "(1) An application for a costs capping order must be made on notice in accordance with Part 23.
>
> (2) The application notice must –
>
> (a) set out –
>
> (i) whether the costs capping order is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately; and
>
> (ii) why a costs capping order should be made; and
>
> (b) be accompanied by a budget setting out –
>
> (i) the costs (and disbursements) incurred by the applicant to date; and
>
> (ii) the costs (and disbursements) which the applicant is likely to incur in the future conduct of the proceedings.
>
> (3) The court may give directions for the determination of the application and such directions may –
>
> (a) direct any party to the proceedings –
>
> (i) to file a schedule of costs in the form set out in paragraph 3 of Practice Direction 3E – Costs capping;
>
> (ii) to file written submissions on all or any part of the issues arising;
>
> (b) fix the date and time estimate of the hearing of the application;
>
> (c) indicate whether the judge hearing the application will sit with an assessor at the hearing of the application; and
>
> (d) include any further directions as the court sees fit."

102. Practice Direction 3E, para 1.1, additionally provides that

> "The court will make a costs capping order only in exceptional circumstances."

Discussion

103. For present purposes I focus on the pre-conditions set out in rule 3.19(5). They are that (a) it is in the interests of justice to make the order, (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and (c) the court is not satisfied that the risk at (b) can be adequately controlled by costs management orders or detailed assessment. At the time that

this rule was introduced, in 2013, there was no experience of costs budgeting by costs management orders (which were also introduced in 2013).

104. In *Black v Arriva North East Ltd* [2014] EWCA Civ 1115, a case which predated the introduction of the requirement for costs budgeting, an appeal was being brought to the Court of Appeal from a decision at first instance in a discrimination case. The appeal raised questions of some importance to disabled people and to public transport providers. The appellant sought a costs-capping order in the sum of £50,000 under CPR rule 3.19. Christopher Clarke LJ, sitting as the single judge of the Court of Appeal, declined to make the order sought. He pointed out that

> "3. … A costs capping order can only relate to future costs. Since the Respondents have already expended something like some £52,000 plus VAT in costs the effect of the draft order sought would be that the court would be making a costs capping order in respect of future costs of zero …"

He also said (amongst other things):

> "11. … it does not seem to me to be the function of costs capping orders to remedy the problems of access to finance for litigation.

105. In *PGI Group Ltd v Thomas* [2022] EWCA Civ 233, a harassment, assault and discrimination claim, Cavanagh J had refused a cost-capping order sought by the defendant against the claimants under rule 3.19, and the defendant sought to appeal. The judge also fixed the budget of the defendant at £848,140 (it had asked for £1.5 million), but the defendant sought to cap the claimants' costs at £150,000. The judge also said ([2021] EWHC 2776 (QB)) that

> "63. The fact that not a single CCO has been made for more than eight years is not, of itself, a reason to decline to make a CCO in the present case. CPR 3.19 has not been withdrawn, even though it now sits alongside the rules providing for costs budgeting. But it serves to emphasise their exceptional nature.
>
> 64. It is easy to see why CCOs have fallen out of use following the introduction of costs budgeting. Both CCOs and costs budgeting provide parties with a relative degree of certainty, well in advance of trial, about their likely exposure to the other party's costs if they were to lose. But, in comparison to costs budgeting, a CCO is, as [the defendant's counsel] puts it, a 'blunt instrument.' Costs budgets have advantages in that, inter alia, they break down the work by phases (this facilitates settlement of costs in the event of settlement of the damages claim). Further, good reason has to be established to reduce a budgeted sum for each phase downwards if that phase has been completed. It is hard to see how, in a normal case, a CCO would be preferable to costs budgeting. One of the pre-conditions for a CCO is that the court must not be satisfied that the protection against disproportionate costs cannot be effected by costs budgeting. It is difficult to envisage circumstances in which a CCO can

provide protection against disproportionate costs which cannot better be provided by costs budgeting.

106. On appeal, Coulson LJ, sitting as the single judge, refusing the defendant permission to appeal, said:

> "6. CCOs are very rare. CPR PD 3F at 1.1 makes plain that they will only be made 'in exceptional circumstances'. The costs budgeting regime, introduced after costs capping as part of the Jackson reforms, is widely regarded as a more scientific way of achieving the same goal. However it is not right to say that the CCO regime is moribund. It was retained in the CPR, following the introduction of costs budgeting, at the express request of certain regular litigants, including Pension and Trust Funds, who said in their response to the CPRC that they liked the certainty that CCOs can bring, saying that they proved a useful tool in cases with a finite amount of money. The available evidence appears to demonstrate that, despite that, CCOs are rarely sought or made (and that is certainly my experience) but the available statistics are not entirely reliable. Consistent with this, the response to the CPRC concerning Pension and Trust Funds explained that the majority of cases were agreed without the need for a cost capping order, but with the knowledge that the court had the power to make one."

107. Coulson LJ also said:

> "20. … It is impossible to over-state the interests of justice in the present case, given the nature, scope and extent of the respondents' allegations and what the judge said about them at [79]. If a CCO in the sum of £150,000 would have the effect of stifling these valid claims, then that might be regarded as a very powerful factor against making such a CCO. Moreover, as to the third pre-condition, costs budgeting has always been regarded as a scientific way of keeping future costs to proportionate levels, whilst [the defendant's counsel] accepted that a CCO was – or certainly could be – 'a blunt instrument'."

108. For present purposes, I can leave on one side the first precondition (in the interests of justice), which must always be fact sensitive, and depend on the context. It seems to me that, in a case where there will be costs management, and cost budgets will be approved, it is very difficult to see how there could be "a substantial risk that without such an order costs will be disproportionately incurred". Indeed, CPR rule 3.15(2) requires that, "where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and proportionate cost in accordance with the overriding objective without such an order being made". Again, it is difficult to see how the third precondition (that the court is not satisfied that the risk mentioned can be adequately controlled by costs management orders or detailed assessment) can be satisfied in a case where there is costs budgeting and management, if only because costs management orders are far more sophisticated tools, costs capping order.

109. I have said "in a case where there is costs budgeting and management". Yet it is to be noted that the present claim is one under CPR Part 8, and therefore the

costs management provisions of CPR Part 3 do not apply automatically (see the opening words of rule 3.12(1)). However, the court has the power, under rule 3.12(1A) and 3.13(1) and (3) to order the parties to file costs budgets in a case where the costs management rules do not automatically apply. That means that the court may do so in this case. If the court does so order, then in my judgment, on the material before me, the second and third preconditions for the exercise of the jurisdiction of rule 3.19 will not be fulfilled.

110. I also note the filed statement of costs of the second defendant dated 19 January 2024. This states that she has already incurred more than £45,500 in legal costs, plus VAT of £9,100, making a total of £54,600. Since a costs capping order can relate only to future costs, it can have no impact on any claim that the second defendant might hereafter make in respect of these past costs. The claimant has filed a costs budget dated 22 January 2024, in the total sum (excluding VAT) of £99,993.09. It also filed a statement costs solely for the hearing on 24 January 2024, in the sum of £23,474.98, which is one quarter of the total budget. The schedule filed for the second defendant (consisting of counsel's costs only) was £25,000 plus £5,000 VAT. In her witness statement dated 20 November 2023, Alison Crossland, the claimant's Director of Finance and Resources, sets out information on the claimant's resources and says:

> "16. Taking into account the above, the claimant cannot afford to allocate more than £70,000 towards the litigation to cover its own legal costs and the risk of adverse costs."

111. It seems to me that, if there is any risk, let alone a substantial risk, that disproportionate costs would be incurred in this case, the better instrument for preventing that undesirable event is effective costs management orders, rather than the "blunt instrument" of a costs capping order. In the circumstances, I propose to order pursuant to rule 3.15(1) and (3)(a) that, although this is a Part 8 claim, and although the second defendant is a litigant in person (albeit employing counsel on a direct access basis), all parties must file and exchange costs budgets not later than 21 days before the first case management conference. Having so ordered, the preconditions for a cost capping order under rule 3.19 are not satisfied, and I decline to make such an order.

CONCLUSIONS

112. I am sorry for the length of this judgment, probably the result of the speed with which I have thought right to produce it. The result is that:

(1) I will order that the two acknowledgments of service filed by the City Council be withdrawn, to be replaced by *one* such acknowledgment setting out its position in relation to the claim, and the City Council will be a single defendant;

(2) the claimant is not entitled to protection by virtue of the Aarhus Convention and CPR Part 46;

(3) the court has no power to make a protective costs order;

(4) the court declines to make a costs capping order;

(5) I will order that all parties must file and exchange costs budgets not later than 21 days before the first case management conference.

113. There are two further matters to deal with. The first is that there may be consequential matters arising from this judgment which cannot be agreed between the parties and which will require a hearing. I was prepared to deal with this remotely, rather than require counsel to come to Bristol for this purpose. In fact, the parties have now agreed a draft order which provides for written submissions in the coming days. The second is that the costs and case management conference will need to be held sooner rather than later. I ask all parties to supply my clerk as soon as possible with the dates of nonavailability for March and April, and in any event by 4 pm on 1 February 2024. At present I am thinking of a one-day hearing, but I am happy to consider the parties' submissions on this point.

Postscript

114. After I had circulated my draft judgment in this case, I received written submissions from Mr Sharland KC on behalf of the second defendant. This asked me (i) to make clear that certain comments I have made in this judgment were limited to private law issues, (ii) to delete what is now paragraphs 59-62 of the draft judgment, and (iii) to delete a sentence in a subsequent paragraph.

115. I have not received any submissions in answer, though Mr Wilmshurst for the City Council very properly reminded me that he is in a trial at present and had not had time to think about the submission or to take instructions. He suggested that if I were going to reconsider these matters I might give him time to do both these things. But that would mean in effect postponing the hand-down which in the circumstances I am reluctant to do unless it is really necessary.

116. I have nevertheless considered the matters raised by Mr Sharland KC, and have made such amendments by way of clarification as I think appropriate. I was happy to make the changes suggested in (i) and (iii). That in (i) reflected the position and changed nothing. As to (iii), I considered that the sentence referred to added nothing of value. But I have not deleted the present paragraphs 59-62, though I have amended them to make them (as I hope) clearer.