

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. G195 OF 2019 (ASCJ)**

**BETWEEN SHIRLEY ELIZABETH ROULSTONE**

**PLAINTIFF**

**AND**

**(1) THE CABINET OF THE CAYMAN ISLANDS**

**(2) THE LEGISLATIVE ASSEMBLY OF THE CAYMAN ISLANDS**

**DEFENDANTS**

**AND**

**THE NATIONAL TRUST FOR THE CAYMAN ISLANDS**

**INTERVENING PARTY**

**REPRESENTATIONS:** Ms. Helen Mountfield Q.C. instructed by Ms. Kate McClymont of Broadhurst LLC for the Plaintiff.

Mr. Alan Maclean Q.C. instructed by Mr. Michael Smith of the Attorney General's Chambers for the Defendants.

John Harris – Legal Advisor to The National Trust of the Cayman Islands, being a position on the Governing Counsel and Executive Committee;

Anna Peccarino – Member of The National Trust of the Cayman Islands.

[The attorneys on the record for the Intervener in this proceeding, being The National Trust of the Cayman Islands, are Nelson & Co. They did not appear].

**HEARD ON 23 DECEMBER 2019**

**DECISION ANNOUNCED ON 6 JANUARY 2020**

**WRITTEN JUDGMENT DELIVERED (AS CORRECTED) ON 10 JANUARY 2020**



## JUDGMENT

*Protective costs order – principles governing grant of such orders – appropriate terms of such orders.*

1. This is an application by the Plaintiff for a Protective Costs Order (**PCO**). It is brought within her application for judicial review of the constitutionality and fairness of the terms of the decision, taken by the Cabinet on 31 October 2019, to hold a People-Initiated Referendum regarding the proposed Cruise Ship Berthing and Port Project (“**the Project**”).
2. Leave to bring her judicial review application was granted to the Plaintiff by Acting Justice Owen on 3 December 2019, with the learned judge then observing that “*this case plainly involves issues of great constitutional importance for the Cayman Islands – questions which have never been considered before because this is the first time that section 70 of the Constitution, which provides for a people-initiated referendum, has been triggered*”.
3. Owen J. granted leave on all four grounds of the application for judicial review, namely that:
  - *The Cabinet had pre-determined the referendum question and date before the referendum legislation was passed;*
  - *The Cabinet failed to take into account relevant considerations and, in particular, failed to have ‘due regard’ to the protection of the environment, as required by the Constitution;*
  - *The referendum question as determined by the Cabinet was not fair and neutral, as required by law; and*
  - *The failure to limit government spending and the decision not to provide any campaign finance or campaign finance limits frustrated the intention of the Constitution that a free and fair vote should be held.*
4. Owen J. also granted a stay, holding that the People-Initiated Referendum Regarding the Project shall not take place until after the handing down of judgment on the Plaintiff’s



application for judicial review or further order, and listed the case for an expedited hearing on 22–24 January 2020.

5. Having decided that another judge should try it<sup>1</sup>, Owen J. also, with my agreement, listed the Plaintiff’s application for a PCO to be heard before me on 23 December 2019. That hearing having taken place<sup>2</sup> and the substantive hearing of the judicial review application being fixed for 22–24 January, this is the judgment now delivered in time to settle the question of the PCO in advance of that fixture.

### **The rationale and jurisdiction for the making of PCOs.**

6. Notwithstanding that costs would normally follow the events of an action, a PCO is now a well-established means of limiting or extinguishing the liability of a party for costs in the event her claim is ultimately unsuccessful. This is because an overriding purpose of a PCO is to enable an applicant to present to the court, a case which is of general public importance, without being exposed to such serious financial risks as to be deterred from so doing.

7. The defining principles were established by the English Court of Appeal in *R (Corner House) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 (“*Corner House*”) as stated there at [74] by Lord Phillips MR in the following terms:

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<sup>1</sup> In brief, for the reason that counsel whose fees might be secured by the PCO sought by the Plaintiff, hails from the same set of London Chambers as the judge. While members of chambers often appear against each other and it is not uncommon in proceedings before the English courts and not unprecedented before this court that they serve as judges and find other members appearing before them, such arrangements could give rise to concerns about appearances of bias from parties who do not appreciate the unquestionable tradition of independence of barristers and judges. While no such concern was raised in this case, as the FCO application involves indirectly the question of counsel’s remuneration, it was regarded as best to avoid any such potential concern altogether.

<sup>2</sup> The CIG having asked to be heard rather than allowing the application to be taken administratively “on the papers”, as is the usual procedure, unless there is good reason for a contested hearing. This being the very first application for PCO in this jurisdiction, I acceded to the CIG’s request for a contested hearing.

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

- (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.
- (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.”



8. There is no law regulating the granting of PCOs in the Cayman Islands even while by contrast, in England and Wales, PCOs were put on a statutory footing by section 88 of the Criminal Justice and Courts Act 2015, which largely codifies the *Corner House* principles. There is however, no dispute that the principles may, and indeed should, be adopted and applied by this Court in the exercise of its inherent and/or statutory jurisdiction.
9. The statutory basis on which this might be done is to be found in section 18(2) of the Grand Court Law (2015 Revision) (“**the Law**”) and is a matter of settled principle<sup>3</sup> but

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<sup>3</sup> See, for instance, *In Re Sphinx* 2010 (2) CILR 1, where, in the absence of any local rules or practice, section 18(2) of the *Grand Court Law* was relied upon to invoke the English practice and procedure for the making of a representation order in insolvency proceedings. In this regard, section 18 (2) provides:

“In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case”.

Superior Courts of Record in other British Overseas Territories invoke the inherent jurisdiction for the adoption of English practice and procedure as developed in case law, to fill lacunae in local practice and procedure. See for instance, on the subject of PCOs, *The Bermuda Environmental Sustainability Taskforce and Minister of Home Affairs* [2014] SC (Bda) 56 Com (25 June 2014), per Kawaley CJ, at [3] to [5], (the *BEST* case) adopting and applying *Corner House*.

bears repetition here, as this is the first occasion on which this Court is called upon to grant a PCO.

10. Section 94 of the Cayman Islands Constitution Order 2009, declares the continuing existence of the Grand Court as a Superior Court of Record having such jurisdiction and powers as may be conferred on it by the Constitution itself and by any other law. Section 11 of the Law provides that the Grand Court shall possess the like jurisdiction within the Islands which is vested in the English High Court as constituted by the Senior Courts Act 1981 and, as noted at footnote 3, section 18(2) of the Law provides for the adoption of the practice and procedure of the English High Court in the absence of local rules.
11. Section 18(1) of the Law provides that the Grand Court shall exercise its jurisdiction in accordance with any rules made under the Law - currently, the Grand Court Rules 1995 (Revised Edition) ("*the GCR*"). However, while Order 62 of the GCR confers a general discretion for the making of costs orders, no express provision is made for PCOs.
12. It follows, in light of section 18(2) of the Law, that, to the extent local circumstances permit, this Court should follow the principles and practice applicable to PCOs as developed by the High Court in England pursuant to its jurisdiction under the Senior Courts Act 1981. Quite apart from the settled tradition by which this Court would regard the jurisprudence of the English High Courts as highly persuasive, this is a clear statutory basis for the adoption of the *Corner House* principles.
13. This does not mean however, that there should be an inflexible approach to the application of any adopted rules or practice in the setting of the terms of a PCO. Such inflexibility would be inconsonant both with the mandate to adjust to local circumstances and with the wide discretionary nature of the jurisdiction for the making of costs orders



generally, as vested by GCR Order 62. And as Lord Phillips MR himself made clear from the opening words of the passage quoted above from **Corner House** at [74], a PCO shall be made “*on such conditions as the Court thinks fit*” and there is no apparent reason for a more restrictive approach to PCOs than to other costs orders, once the criteria for a grant are met in keeping with the **Corner House** principles.

14. Moreover, as was also said by Lord Phillips MR in **Corner House** at [70]:

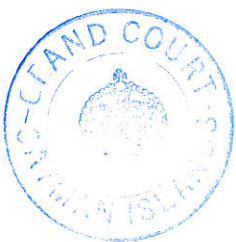
*“The important difference here is that there is a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties. One should not therefore necessarily expect identical principles to govern the incidence of costs in public law cases, much less the “arterial hardening” of guidance into rule which the majority of the High Court of Australia eschewed in the **Oshlack case** 193 CLR 72”.*

15. As to the appropriate form of a PCO, Lord Phillips MR stated [75] that:

*“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”* and at [76] that *“There is of course room for considerable variation, depending on what is appropriate and fair.”*

16. The need for flexibility in the making of orders has been re-emphasised in a number of cases in terms which helpfully inform the approach to be taken here:

- In **R (Compton) v Wiltshire Primary Care Trust (Practice Note)** [2009] 1 WLR 1436, Waller LJ stated that *“The paragraphs in the Corner House case [2005] 1 WLR 2600 are not, in my view, to be read as statutory provisions, nor to be read in an over-restrictive way”* and went on to indicate his approval of earlier dicta to the effect that the **Corner House** requirement of *“no private interest”* in particular, should not



be too restrictively applied<sup>4</sup>. This dictum is of direct relevance in this case where the Applicant has admitted to also having a private interest in the outcome, (as will be explained):

*“19. This requirement as formulated in [the **Corner House** case] has been diluted in the later case law. I have in mind particularly **Wilkinson v Kitzinger** [2006] 2 FLR 397, where Sir Mark Potter said, at para 54: ‘As to (1)(iii), I find the requirement that the applicant should have “no private interest in the outcome” a somewhat illusive concept to apply in any case in which the applicant, either in private or public law proceedings, is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case it is difficult to see why, if a PCO is otherwise appropriate, the existence of the applicant’s private or personal interest should disqualify him or her from the benefit of such an order. I consider that the nature and extent of the “private interest” and its weight or importance in the overall context should be treated as a flexible element in the court’s consideration of the question whether it is fair and just to make the order. Were I to be persuaded that the remaining criteria are satisfied, I would not regard the requirement (1) (iii) as fatal to this application. I note that passage was approved by the Court of Appeal in **R (England) v Tower Hamlets London Borough Council** [2006] EWCA Civ 1742 at [14]”.*

- Waller LJ went on at [24] to make the following observations which, along with the foregoing dictum, I regard as persuasive and applicable here:

*“24. Furthermore, I would agree with Holman J [the judge at first instance] that “exceptionality” was not seen in **Corner House** as some additional criterion to the principles set out in para 74 but a prediction as to the effect of applying the principles. Finally, I do not read the word “general” as meaning that it must be of interest to all the public nationally. On the other hand I would accept that a local group may be so small that issues in which they alone might be interested would not be issues of “general public importance”. It is a question which the **Corner House** case would expect judges to be able to resolve.”*



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<sup>4</sup>Citing Lloyd Jones J’s judgment in **Bullmore’s case** [2007] EWHC 1350 (Admin) at [19], with Lloyd Jones J himself relying on pronouncements from earlier cases. Other cases make the same point: In **Morgan v Hinton Organics (Wessex) Ltd** [2009] Env LR 629, Carnwath LJ stated that : “the **Corner House** statement of those principles must now be regarded as far as this court is concerned, but to be applied ‘flexibly’”. In **R (IS) v Director of Legal Aid Casework** [2014] EWCA Civ 886, Beatson LJ stated that: “While all the **Corner House** principles are overarching principles applying regardless of context, the extent of the flexibility may vary accordingly to context and the circumstances of a particular case”[31].

17. Given the conclusions of Owen J in granting leave, as to the public importance of the issues raised by the Plaintiff's application and the fact that the necessary number of signatories to the petition were obtained for the triggering of the People-Initiated Referendum, the CIG concedes that the "general public importance" criterion for the making of a PCO is satisfied. The CIG's objections center around other arguments which will be examined below, after a fuller examination of the Plaintiff's arguments in support of the PCO.

*The Plaintiff's arguments*

18. It is uncontroverted that the Plaintiff is a private individual of modest means. In her first affidavit she describes herself as a tour bus operator, usually earning between \$16,000-\$20,000 per year and avers that her only significant asset is her tour bus, which she values at around \$19,000.
19. While a member of the non-profit organization known as CPR Cayman who have promoted the Petition which triggered the People-Initiated Referendum, the Plaintiff avers that she has been engaged in the efforts of CPR Cayman against the Project because she is interested as a citizen and believes that the Project will cause substantial and irreversible damage to the marine environment of the Cayman Islands. Further, that if it goes ahead, the Project will likely have a negative economic impact on people working in the tourism industry. Her involvement in the action she avers is therefore that of a concerned citizen having no private interest in the outcome of the judicial review application which seeks only to ensure that the referendum is conducted in accordance with law.



20. For the purposes of the PCO application, those averments are obviously relevant as they confirm her standing to bring the application and, on the basis of *R (Compton)* (above) posit that, her private or personal interest should be regarded as merely coincidental. The Applicant emphasises that, as also explained in *R (Compton)* (above), the *Corner House* requirement that there should not be a private interest has been described as “*diluted in the later case law*” in keeping with the need for flexibility in the application of the principles. See also in this regard: *IS v Director of Legal Aid Casework* (above) at [14].
21. Of immediate relevance to the merits of her application for a PCO, the Plaintiff also avers that she does not have the financial means to pay the costs of the Judicial Review application. She avers that CPR Cayman<sup>5</sup> has paid her legal fees and associated costs to date; and further that CPR Cayman has been funding her legal fees from donations it has received from the general public. While it is the current intention of CPR Cayman to continue to use some of its donations to pay her legal fees, there is however she avers, no formal agreement with CPR Cayman, nor with any other person or entity, that would require them to do so. In addition, that neither CPR Cayman nor any other person or entity has agreed to pay any adverse costs order that might be made against her in favour of the CIG, if she is not successful in her judicial review application.
22. Given that her best fundraising efforts (as described above) afford her no certainty that she can take the risk of an adverse cost order without facing personal bankruptcy, the Plaintiff ultimately avers that if the PCO is not granted, absent any unforeseen change of circumstances, she will be forced to withdraw her application for judicial review.



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<sup>5</sup> With a donation from the Guy Harvey Foundation which is described as a charity established for the conservation of the marine environment.

23. This is, therefore, the conclusive factual averment upon which she rests her application for a PCO. It goes fundamentally to the basis upon which, as discussed above, a PCO might be made by the Court because without it, an otherwise important claim which it is in the public interest to resolve, will not be heard.
24. This is an averment by the Plaintiff which also, in my view, brings into focus the right of access to the Courts for a fair hearing which is guaranteed by section 7 (1) of the Constitution. Section 7 (1) requires that the State, which has an obligation to ensure access to the Courts, should not seek to deter an interested citizen from the bringing of a proper and important public interest application by insisting upon the recovery of its costs of opposing such an application. It seems to me therefore, that as to costs implications, not only the Courts but also the Executive arm of the State, should have regard to the strength of the public interest in the resolution of a proper application.
25. The Applicant's inability and unwillingness to proceed in the absence of a PCO, was earlier accepted by me as the reasonable basis for the grant of an interim PCO on 26 November 2019 to protect her position, pending the hearing of her application on the present *inter partes* basis. In effect therefore, what she now seeks is the continuation of that order as a complete bar to recovery of costs by the CIG. The argument is put on her behalf by counsel as follows:

*“The bottom line is that, unless the current form of PCO is continued (ie: a complete bar on recovery of costs by CIG), the claim will not go ahead, even though there is an overwhelming public interest in it doing so. In short, the grant of leave and a stay will prove academic unless Ms Roulstone succeeds on her application for a PCO.”*



26. Thus, the Plaintiff seeks continuation of the existing PCO on the basis that: (1) she shall not be liable for any of the CIG's costs of the proceedings in any event; and (2) her recoverable costs as against the CIG if she succeeds shall be capped at C\$100,000.
27. She emphasizes that the issue as to ensuring she is not liable for the CIG's costs is especially critical to the viability of her action. The CGI she avers, has proved unamenable to any discussions on the possibility of a reciprocal fees cap at any level, that it has simply refused to discuss the matter. She cannot afford to bear any significant costs risks. Accordingly, if the PCO is not continued on at least the basis described above, her action will not proceed.
28. As to the appropriate reciprocal cap on her recoverable fees, the Plaintiff proposes a cap of C\$100,000 for a number of reasons.
29. First, as explained in her second affidavit, her anticipated costs are high – approximately C\$200,000. This she avers reflects the substantive and procedural complexity of the proposed litigation, the state of the Caymanian legal market and incorporates a significant discount on market rates offered by her Caymanian attorney and English counsel. These rates she avers reflect the fact that there are far fewer specialist public law practitioners in the Cayman Islands than in England and Wales and so, far less (if any), opportunity for representation on conditional or reduced fee arrangements. Her estimated costs she avers are a product of local conditions and are in step, not necessarily with costs allowed in England and Wales but more appropriately with the costs of the litigation in the *Best* case in the comparable context of Bermuda<sup>6</sup>, albeit that case was substantially less complex.
30. Second, that the CIG's decision of 31 October 2019 to hold the referendum on 19 December 2019 left very little time for fundraising. This has resulted in the limited funds

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<sup>6</sup> Above, and in which a reciprocal cap on the fees which *BEST* could recover was set at BD\$75,000.

she has so far raised through CPR Cayman (as explained above) but she considers that she will be able to raise the rest of the fees.

31. Third, a cap of CI\$100,000 would represent 50% recovery of her costs as Applicant, the same proportion awarded in the *Best* case.
32. Fourth, a relatively high reciprocal cap is justified because this claim is at the very strongest end of the spectrum of public interest cases identified by Smith LJ in *R (Compton) v Wiltshire Primary Care Trust*<sup>7</sup>.

### The arguments of the CIG

33. While acknowledging that there is a public interest to be served in the timely resolution of the Applicant's judicial review application, the CIG opposes the grant of the PCO for the following reasons as submitted by their counsel. They challenge whether, in certain respects, the Applicant meets the *Corner House* criteria and if so, on what terms a PCO should be granted to her.



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<sup>7</sup> Above, at [86] where she described a spectrum of cases: "At one end of the scale, the judge may make a PCO which imposes on a defendant the burden of bearing its own costs even though it wins on the merits and does not relieve it of the prospective burden of paying the applicant's costs in the event that the applicant succeeds. However the *Corner House* case [above] makes it plain that it will be usual to limit the successful claimant to recovery of modest costs, comprising the fees of the solicitor and one junior counsel. That is the "strongest" form of order which will usually be made. It puts the defendant at a major disadvantage; on costs it is in a "heads you win tails I lose" position. At the other end of the scale, the court can make a much more modest order, whereby the claimant's liability to pay the defendant's costs is capped not at nil but at a specified level and where the defendant is given a guarantee that it will not be required to pay any of the claimant's costs."

And at [87]: "It seems to me as a matter of common sense, justice and proportionality that when exercising his discretion as to whether to make an order, and if so what order, the judge should take account of the fullness of the extent to which the applicant has satisfied the five *Corner House* requirements. Where the issues to be raised are of the first rank of general public importance and there are compelling public interest reasons for them to be resolved, it may well be appropriate for the judge to make the strongest of orders, if the financial circumstances of the parties warrant it. But where the issues are of a lower order of general public importance and/or the public interest in resolution is less than compelling, a more modest order may still be open to the judge and a proportionate response to the circumstances."

34. The terms of the order originally sought by the Plaintiff in her application for judicial review were that (a) total costs payable by the Plaintiff to the Defendants should be capped at CI \$5,000 and (b) total costs payable by each Defendant to the Plaintiff should be capped at CI \$35,000.<sup>8</sup> However, she now seeks a rather more ambitious order, protecting her from any liability for the Defendants' costs if she loses, and capping her own recoverable costs at the much higher sum of CI\$100,000.
35. The CIG accepts that the applicable principles are those set out in *Corner House*. But these, the CIG submits, include the requirements not met by the Plaintiff here, viz: (i) that the Plaintiff has no private interest in the outcome of the case, (ii) that, having regard to the financial resources of the Plaintiff and the Defendant and to the amount of costs that are likely to be involved, it is fair and just to make the order, and (iii) that if no PCO is made the applicant will probably discontinue the proceedings<sup>9</sup>.
36. It is however, accepted that overall, the Court must be satisfied that it is fair and just to make a PCO.
37. The CIG acknowledges that *Corner House* itself does not deal with the financial position, and private interest in the case, of third party funders or potential funders as a relevant consideration. However, the CIG submits, those matters are plainly relevant to the questions whether the litigation is likely to proceed absent protection, and whether it is fair and just to make an order. Indeed, the Court of Appeal recognised their relevance in *R (Compton) v Wiltshire Primary Care Trust* (above), at paragraph 27, where Waller LJ stated in terms adopted also by the other members of the Court of Appeal, that:



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<sup>8</sup> These figures were based on the costs regime in respect of Aarhus Convention claims under the CPR in England and Wales. That Convention has not been extended to Cayman.

<sup>9</sup> See e.g. *Lewis "Judicial Remedies in Public Law"* (5<sup>th</sup> ed.) at 9-045 (DB/11).

*“In my view, if a party seeks to represent others, the court is entitled to take into account whether the others have the means to support the action. The jurisdiction to grant a PCO is concerned to hold the balance so far as it can between the parties. It may often be right to expose a claimant and those the claimant represents to some risk as to costs capped so that all can see what the risk is.”*

38. Reflecting this principle submits CIG, the statutory provisions which have taken the place of the *Corner House* principles in the UK now identify, as mandatory relevant considerations for a court considering whether to make a judicial review costs capping order, the resources of “any person who provides, or may provide, financial support to the parties”, as well as “the extent to which [any such person] is likely to benefit if relief is granted” (see s. 89(1)(a) and (c) of the Criminal Justice and Courts Act 2015<sup>10</sup>).
39. In *Maugham v Uber London Limited* [2019] EWHC 391, the High Court rightly noted that it would be curious if such considerations were of mandatory relevance under the statute, and yet irrelevant on the application of the *Corner House* principles, at [84].
40. Also, applying the statutory principles in *R (Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin), Ouseley J. undertook detailed consideration of the possible untapped sources of funding from which the impecunious claimants could expect to draw further financial support (at [29] ff.). In calculating the appropriate level of the cap (which



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<sup>10</sup>Section 89(1) provides : “The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include—

- (a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;
- (b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
- (c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;
- (d) whether legal representation for the applicant for the order are acting free of charge;
- (e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.”

he set at £25,000 for recoverable costs against the Claimant, and £65,000 for recoverable costs against the Defendant) he took into account the fact that many members of the claimants' representative body had not yet contributed and could be expected to do so (they were midwives, with very modest incomes) (see Ouseley J. at [34]-[35] and [41]).

41. The CIG also reminds that in *Corner House*, the Court of Appeal noted that the merits of an application would be enhanced if those acting for the applicant were doing so pro bono ([74]). That, says CIG, is emphatically not the case in the present application where the Plaintiff has three attorneys on record, each expecting to be paid at going commercial rates. This is indeed, an issue to be further addressed below.

42. The CIG further submits that in *Corner House*, the Court of Appeal stated, moreover, that the beneficiary of a PCO must not expect the reciprocal capping order which applies to the applicant's own costs recovery "*to permit anything other than modest representation*", and that the applicant must "*arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly*" (at [76]). That, says CIG, does not appear to apply to the present application where the Applicant is represented by three lawyers – a local instructing attorney and a senior junior and leading counsel from London.

43. Against that background, and for the following reasons, the CIG submits that this Court cannot be satisfied that the *Corner House* criteria are met in the present case.

#### A. The role and resources of CPR Cayman

44. Ms Roulstone may herself be of limited means, but it is clear, says CIG, that she acts in these proceedings as a proxy for CPR Cayman, of which she is a member – that CPR Cayman has effective conduct of this litigation; the pre-action correspondence was in



CPR Cayman's name<sup>11</sup>; CPR Cayman commissioned the legal advice that forms the basis for Ms Roulstone's grounds of review; and CPR Cayman was, up until the issue of proceedings, identified as the intended Plaintiff.

45. Ms Roulstone acknowledges that CPR Cayman is paying her legal fees. It is to be inferred, says the CIG, that the only reason that Ms Roulstone, rather than CPR Cayman, is named as the Plaintiff is as a mechanism to seek to improve the prospects of obtaining a PCO.
46. The only information the Court has before it as to CPR Cayman's present resources is appended to Ms Roulstone's second affidavit. This shows that, as at 3 December 2019, \$20,000 of CPR's funds had been set to assist Ms Roulstone with her legal expenses. However, Ms Roulstone's own evidence at that stage was that she had been told by CPR Cayman volunteers that "*they expect to be able to raise more funding for my legal fees provided leave to apply for judicial review is granted and the Court grants a stay*". She suggested that people were reticent to donate in circumstances where the referendum might take place before judicial review proceedings were concluded (2<sup>nd</sup> Roulstone Affidavit at [7]). From this the CIG asserts that since the Court has now granted both leave and interim relief, the effect of Ms Roulstone's own evidence is that CPR Cayman can be expected to raise further funds to support her.
47. Moreover submits CIG, the Court has no evidence before it as to the *source(s)* of CPR Cayman's funding, and, in particular, as to what extent this derives from well-resourced private parties who have a commercial interest in disrupting the planned cruise port development, and may reasonably be expected to contribute to Ms Roulstone's litigation

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<sup>11</sup>See e.g. the letter of 12 November 2019 from CPR Cayman and the Attorney-General's reply of 19 November 2019 (DB/3).

expenses, either via CPR Cayman or directly. Press reports (exhibited by the CIG at DB/21) suggest that anti-Port Project campaign groups may have received significant donations from persons with a commercial interest in delaying or preventing the development (such as those who operate the “tender boats” that currently carry cruise ship passengers ashore to Grand Cayman). Further, that CIG has specifically requested details of CPR Cayman’s funding (see CIG’s 19 November 2019 response to CPR Cayman’s letter before claim of 12 November 2019, paragraph 8.7 (DB/3) and email correspondence at DB/4 and further correspondence (disclosed at the hearing), but no such details have been forthcoming. Without information as to how CPR Cayman is funded, the Court may not be satisfied that those responsible for funding this litigation have no private interest in its outcome<sup>12</sup>.

B. Other potential sources of support

48. The size of CPR Cayman’s membership, and the number of members who have so far donated, is said to be unknown to CIG. The issues raised in Ms Roulstone’s claim must however, says the CIG, be important to those members, and such of them as have not already contributed may reasonably be expected to do so (cf. *Beety*, above at [34]). Whatever difficulties Ms Roulstone may otherwise have in raising funds (she cites the absence of a large population to support a “crowd-funding” webpage) would not prevent her from asking CPR Cayman’s members for donations.
49. Moreover submits the CIG, CPR Cayman is not the only anti-Port campaign group, and a contribution to legal expenses could reasonably be sought from others. Alternatively,

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<sup>12</sup> In response to this argument, on 20 December 2019, the Applicant filed her third affidavit by which she disclosed further information relating to CPR Cayman’s financial position, including the disclosure of CPR Cayman’s bank statement which appears to confirm her evidence as to the amount raised by CPR Cayman to date.

such support could be sought from individuals with a commercial interest in disrupting the Project. For instance, the press has reported that Mr Adrian Briggs, a tender operator, has committed up to \$100,000 from his personal funds to groups opposing the Project, including CPR Cayman. (The Court was shown extracts at DB/21). There is no evidence that Ms Roulstone has approached him, or similarly placed individuals, for assistance with her legal expenses.

50. A further potential source of funding support is the National Trust, says CIG. As an intervener in Ms Roulstone’s claim, its own legal costs can be expected to be less than originally anticipated. There is no evidence that Ms Roulstone has sought its financial assistance.

C. The proceedings will not be abandoned if no PCO is made

51. Having regard to the extent of the potential untapped sources of funding referred to above, the CIG further submits that this Court can be satisfied that the proceedings will not run aground if no PCO is granted. That is for instance, because as the National Trust made clear, at the leave hearing before Owen J. on 3 December 2019, that if Ms Roulstone were to abandon her claim because her PCO application was refused, then the National Trust would seek to step into her shoes. Its position in this regard was reported in the Cayman press<sup>13</sup>.

D. The Plaintiff’s representation is not “modest”

52. In relation to the size of the reciprocal cap that Ms Roulstone suggests would be appropriate (CI \$100,000), it is relevant says the CIG, that CPR Cayman has chosen to instruct UK leading and junior counsel, at rates which on any view cannot sensibly be

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<sup>13</sup> <https://www.caymancompass.com/2019/12/03/port-referendum-delayed/> (copy supplied to the Court).

described as “modest” (Cf. the rates that were permitted in *Beety* (above) at [37], namely £200/hour for leading counsel). While the rates of the parties’ junior counsel are the same, Ms Mountfield QC’s hourly rate in this matter (£ 600)<sup>14</sup> exceeds that of CIG’s UK Leading Counsel, by £200/hr. Ms McClymont’s time is being billed at CI\$360/hour<sup>15</sup>, as compared with the £150/hour at partner level in *Beety* ([37]). Ms Roulstone has not apparently asked whether any of her lawyers would be prepared to work pro bono or under a conditional fee arrangement, or tried to find lawyers that would.

53. Ms Roulstone’s estimated costs of the leave, PCO and stay applications are more than CI\$65,000, and her total estimated costs of the Judicial Review are approximately CI\$200,000. It seems improbable, says CIG, that the case could not in principle be run at lower cost than this, given its nature and profile, the degree of support for the Plaintiff’s position, the circumscribed nature of the issues and the relative brevity of the documents.
54. For those reasons submits CIG, the Court is invited to refuse the application.
55. If the application is granted, the CIG submits in the alternative, that the Court should order reciprocal caps of CI\$100,000 each way, to reflect, on one hand, the Plaintiff’s potential untapped sources of financial support as set out above, and, on the other, a level of costs recovery that would permit modest representation.

### Discussion and conclusions

56. In assessing the competing arguments, I consider that the first and most important consideration is that the public interest in this case may be considered, in terms of the *Corner House* criteria as explained in *R (Compton)* (above), to be at the strongest end of the spectrum:

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<sup>14</sup> See 2<sup>nd</sup> Affidavit of Laura Stone of Broadhurst LLC at [5.3].

<sup>15</sup> 2<sup>nd</sup> Affidavit Laura Stone at [5.2].



- In his grant of leave and a stay, Owen J has properly recognized that the claim here concerns the fundamental democratic right guaranteed by section 70 of the Constitution: the right of every Caymanian voter to participate in a fair and effective people-initiated referendum. Irrespective of the importance of the issue which the referendum will decide, there is a very clear and strong public interest in ensuring that the referendum is conducted in keeping with law.
- On the Applicant's case, the CIG is impeding that democratic right: it is alleged to have fixed the timing of the referendum so as to prevent newly registered voters from voting, to have suppressed voter turnout and to have deprived voters of an environmental impact assessment and business case on the proposal on which they are called to vote; that it has slanted the wording of the referendum question to promote its own cause; and that it has spent large sums of public money on an entirely one-sided information campaign. It does appear therefore, that there is an overwhelming public interest in resolving these claims.
- The underlying issue which the referendum will decide is (by definition, under section 70 of the Constitution) of national importance. It concerns the appropriate balance to be struck between the perceived economic opportunities of mass short-stay tourism and the destruction of internationally renowned coral reefs.
- As explained in *R (Compton)* (above)<sup>16</sup>, the Court should be more inclined to grant a PCO where the public interest is very strong.

57. Next, it must be accepted that while the Applicant has a personal interest (by dint of her tour bus business) in the outcome, this in no sense diminishes the significance of her

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<sup>16</sup> At [86] to [87], per Smith LJ.

standing as a member of the public, seeking to protect the public interest in the lawful and proper conduct of the referendum. That interest is the same as that of every other Caymanian voter. Any private (i.e.: pecuniary) interest an applicant might have in the outcome of the case is not the overarching consideration – some private interest in the proceedings does not automatically disqualify an applicant from obtaining a PCO: see *Corner House* at [74] and *R (Compton)* at [23], (both above).

58. Nor is her standing one which the Applicant is obliged to relinquish to the National Trust, even if the Trust were inclined or authorized to represent her interest. As already noted, it is accepted that the Applicant has standing to bring these claims and so the CIG can have no right to insist that she must relinquish that standing to another party in order to lessen the CIG's exposure to costs, as it seeks to argue here.

59. In any event, as Mr Harris explained<sup>17</sup> on behalf of the National Trust, its position has always been that it seeks to challenge the CIG on one ground only, being that set out in its Statement of Grounds filed in these proceedings. This is that in broad terms, the CIG was under an obligation properly to inform and consult with the public in respect of environmental issues and concerns raised by the Project. It failed in that duty and engaged in a one-sided, partisan and misleading campaign of misinformation in respect of the Project. The National Trust's intervention is so it can present its own purely environmental concerns. The National Trust has limited the basis of its intervention in these proceedings, to that within its statutory mandate as set out in section 4 of the National Trust Law – being the protection of Cayman's natural and maritime environment and native flora and fauna.



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<sup>17</sup> Supported evidentially by the second affidavit of Nadia Hardie, the Executive Director of the National Trust.

60. That being the National Trust's position, the CIG's argument against the Applicant's right to separate representation is clearly untenable.
61. Furthermore, in light of her uncontroverted evidence as to her own financial circumstances (as set out above and as verified on affidavit), I am obliged to accept that the Applicant cannot afford to bear any significant risk of costs and is reasonable in her determination to discontinue the claim unless the PCO is continued.
62. Notwithstanding the CIG's scepticisms in this regard, I am obliged, on the state of the evidence, to accept that the funds available to her are those pledged by CPR Cayman. The CIG cites *Maugham v Uber* (above) and the UK statutory requirements<sup>18</sup> and refers to speculation in the media that there are others – it suggests tender boat operators such as Mr Briggs – whom it may be assumed might have a private interest in ensuring that the referendum is conducted lawfully and so be expected to contribute to the Applicant's costs.
63. While I accept in principle<sup>19</sup>, that it would be curious if such considerations (as those identified by the UK statute) were of mandatory relevance under the statute and yet irrelevant on the application of the *Corner House* principles, the media reports<sup>20</sup> are to the effect that Mr Briggs, a co-owner of tender operator Caribbean Marine Services has



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<sup>18</sup> Section 89(1)(a) of the **Criminal Justice and Courts Act 2015** (above) which as mentioned above, in taking the place of the *Corner House* principles, now identify, as mandatory relevant considerations for a court when making a judicial review capping order, the resources of "any person who provides, or may provide, financial support to the parties", as well as "the extent to which [any such person] is likely to benefit if relief is granted".

<sup>19</sup> In agreement with Deputy High Court Judge William Trower QC, in *Maugham v Uber* (above) at [84]

<sup>20</sup> "Port Rivals battle for hearts, minds and votes: Two very different PR campaigns seek to shape port vote", *Caymanian Compass*, November 6, 2019. A subsequent article of November 13, 2019, reports an interview with Mr Briggs and his business partner Mr Atlee Bodden under the heading "We will be out of business- tender operators spell out consequences of port project" and in which the partners are quoted as indeed stating that they and their 50 employees would be out of business and jobs if the Project goes ahead.

pledged up to \$100,000 from personal funds to groups opposing the Project, including CPR Cayman. In a subsequent interview about this pledge, Mr Briggs asserted that his support is not for the sake merely of his own economic interests but for the sake of the environment.<sup>21</sup>

64. Natural scepticism or speculation aside, there simply is no basis for concluding that the Applicant should or would be entitled to call upon Mr Briggs or any other interested party to fund her legal costs, let alone to meet any liability she might incur to repay the CIG's legal costs. Her unrefuted evidence is that she brings these proceedings "*myself, not as a representative of CPR Cayman or any other entity.*" Nor is there evidence to rebut her averment that no-one has assumed an enforceable obligation to meet the costs of these proceedings.
65. On the other hand, there is the unrefuted evidence of the limited resources available to CPR Cayman and of its limited ability to fund the Applicant's costs. In light of that evidence, there is no basis for concluding that the Applicant is merely a "proxy" for CPR Cayman. While CPR Cayman is apparently concerned and galvanized only for the purpose of resisting the development of the Project, it is itself an unincorporated movement and can assert no legal standing as a litigant. As a member of this unincorporated movement, it is entirely understandable that this Applicant would wish, in her own right, to champion its cause.
66. Moreover, in light of CPR Cayman's limited ability to fund the Applicant's costs, there is no basis for concluding that the Applicant's stated unwillingness to proceed if placed at risk of paying the CIG's costs, is either unreasonable or untrue.



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<sup>21</sup> "Briggs: I donated to save reefs, not the tender business" 13 November 2019

67. The Applicant is however, obliged to accept that a PCO will reflect only an entitlement to “modest” costs, in keeping with *Corner House*, not to sums which would afford her abundant or exorbitant representation. And while the English Court of Appeal recognized in *R (Bug Life) v Thurrock Thames Gateway Dev. Corp.*[2009]1 Costs L.R. 80 (above), at [25], that “there can be no absolute rule limiting costs to those of junior counsel”, it does not follow that even in a case where senior counsel must be instructed<sup>22</sup>, a PCO should allow for the costs of senior counsel at whatever his or her going commercial rates may be<sup>23</sup>. An objectively reasonable rate should be identified by the Court having regard to the complexity of the case and the rates which the public might reasonably expect to pay for representation in the type of case.

68. This leads to the question whether an applicant for a PCO is obliged to call upon her counsel to act *pro bono*. I do not accept that this is a settled requirement for the grant of a PCO.

69. Apart from anything else, as the Applicant asserts, specialist public and constitutional lawyers who could take the case on a *pro bono* basis or cross-subsidized from other sources and in order to benefit their reputation, as often happens in the United Kingdom – see *Beety* (above), at [38] – are not available in Cayman.

70. There is moreover, no basis in my view, for an approach which invariably requires that cases involving matters of important public interest should impose an obligation on applicants to get their lawyers to act *pro bono*. Lord Phillips MR’s dictum from *Corner*



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<sup>22</sup> As it is recognized is the case here where the CIG has itself instructed a specialist Queen’s Counsel.

<sup>23</sup> There is evidence set out above of the differing rates of fees for the engagement of counsel for the Applicant and the CIG in these proceedings. I see no need to make odious comparisons as between those for counsel for the CIG and counsel for the Applicant in order to arrive at rates which may be regarded as objectively reasonable in the Cayman Islands for public law proceedings of the type and complexity of the present proceedings.

*House (above) at [74.2]*, should , in my view, be regarded as an exhortation to lawyers to be accessible and of service in such cases, rather than as a pre-requisite to the grant of a PCO for an applicant whose claims otherwise satisfy the requirements. In this regard, I agree with Ouseley J’s sentiment expressed in *Beety (above) at [37] and [38]* that: “*I do not consider it realistic to conclude that a [PCO] should not be made unless the lawyers act for nothing.*”

71. There is, however, also an issue about the number of counsel to be allowed and their fees. Here the CIG objects to the fact that the Applicant instructs not only an eminent Queen’s Counsel and a local junior counsel but a London based senior/junior counsel as well. I consider this objection to be reasonable as, despite their novelty and the need for specialist counsel, the issues in this case are neither very extensive nor very complex.
72. I am advised, however, that at the hearing on 3 December 2019 Owen J was persuaded that the case justified the engagement of three counsel and granted limited admission to Mr Chris Buttler, the London based senior junior. While the learned judge no doubt had good reason for that decision, I do not consider that I am bound by it for the purposes of the PCO. My reason is that while a party may wish to have abundant representation and the Court might allow this for the purposes of the grant exceptionally of limited admission, that does not mean that an unsuccessful opposing party should be required to pay all the attendant costs. The terms of the PCO must reflect the entitlement to competent but ‘modest’ representation. In this case I am satisfied that this means that the Applicant is entitled to representation only by Cayman junior instructing counsel and Queen’s Counsel, both at reasonable Cayman rather than London rates.



73. While Owen J must have been satisfied about the test, it is worth noting here that it is well established as a matter of Cayman law and practice, that lawyers from overseas (other than Queen’s Counsel) will not be granted limited admission to appear, in effect as instructing counsel, barring unusual or exceptional circumstances. Where Queen’s Counsel from overseas are needed, it is to be assumed that there will be competent local juniors to instruct them. See: *In Re Limited Admissions* 2015 (2) CILR 338.
74. While the Applicant asserts that the reciprocal cap of CI\$100,000 which she seeks itself represents a very significant discount from her expected costs of approximately CI\$200,000, this is still on the premise that she is entitled to instruct three counsel, two of them at London rates, albeit said to be discounted. This is her proposition which I do not accept, for the reasons given above. And so, rather than providing for 50% recovery of the estimated costs as was allowed in the *BEST* case (above), the recovery will be more limited. I assume that the discount of 50% reflects the fact that the CPR Cayman funding comes from donations free and clear of any obligation to repay, but also the principle that in the event the Applicant succeeds, she should be entitled to recover a significant amount of the costs for the account of CPR Cayman<sup>24</sup>. While I accept this proposition, it too involves the implications of the Applicant engaging three rather than only two counsel. For that reason I consider that there should be a further reduction by one-third.
75. It must nonetheless be recognized that a PCO in these terms allowing significant recovery of hers while protecting entirely against the CIG’s, is still of the “strongest of such orders”, as categorized by Smith LJ in *R (Compton)* (above). This is because from the CIG’s perspective, the outcome may be seen as “heads you win tails we lose”. But such



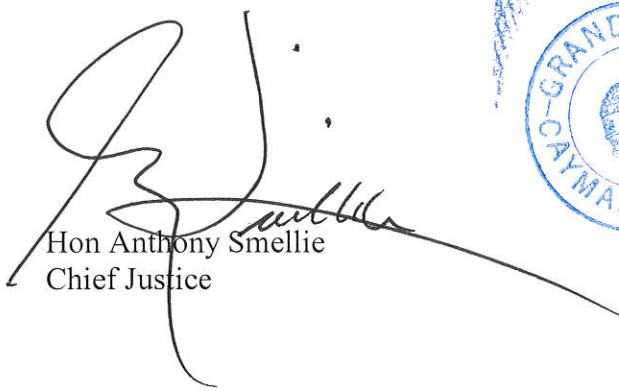
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<sup>24</sup> The evidence reveals that CPR Cayman is concerned to be able to fund its own advertisement campaign to counter that of the CIG.

an order is, in my view, objectively reasonable because as a matter of “commonsense, justice and proportionality” (per Smith LJ), where, as here, the issues raised are of the first rank of public importance and there are compelling reasons for them to be resolved, it is appropriate to make an order in strong terms, as justified also by the respective financial circumstances of the parties.

76. Accordingly, the PCO will be continued and will provide that:

- (i) The Applicant will bear no liability in any event, for any of the CIG’s costs of the proceedings.
- (ii) There will be a reciprocal costs cap, namely that the Applicant, if successful, may recover no more than C\$66,600 from the CIG in any event.

  
Hon Anthony Smellie  
Chief Justice

