CHAPTER 58A

PROTECTIVE EXPENSES ORDERS IN ENVIRONMENTAL APPEALS AND JUDICIAL REVIEWS

Application and interpretation of this Chapter

58A.1.-(1) This Chapter applies to-

(a) applications to the supervisory jurisdiction of the court;
(b) appeals under statute,

which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the public participation provisions of –

(c) Directive 2011/92/EU of 13th December 2011 on the assessment of the effects of certain public and private projects on the environment, or
(d) Directive 2008/1/EC of the European Parliament and of the Council of 15th January 2008 (concerning integrated pollution prevention and control).

(2) In this Chapter, references to applicants who are individuals do not include persons who are acting as a representative of an unincorporated body or in a special capacity such as trustee.

(3) In this Chapter, references to a respondent's liability in expenses to the applicant or, as the case may be, an applicant's liability to the respondent means that of all the respondents in the proceedings.

(4) Nothing in this Chapter shall affect any powers of the court to make an order corresponding or similar to an order which may be made under this Chapter in any proceedings falling outwith this Chapter.

Availability of protective expenses orders

58A.2 – (1) Subject to paragraph (2), a petitioner in an application or, as the case may be, an appellant in an appeal to which this Chapter applies may apply for a protective expenses order.

(2) The applicant must be –

(a) an individual; or
(b) a non-governmental organisation promoting environmental protection.

(3) A protective expenses order is an order which regulates the liability for expenses in the proceedings (including as to the future) of all or any of the parties to them, with the overall aim of ensuring that proceedings are not prohibitively expensive for the applicant.

(4) Subject to paragraph (6), where the court is satisfied that the proceedings are prohibitively expensive for the applicant; it must make a protective expenses order.

(5) For the purposes of this rule, proceedings are prohibitively expensive for an applicant if the applicant could not reasonably proceed with them in the absence of a protective expenses order.

(6) The court may refuse to make a protective expenses order if it considers that-

> (a) the applicant has failed to demonstrate a sufficient interest in the subject matter of the proceedings; or
> (b) the proceedings have no real prospect of success.

Applications for protective expenses orders

58A.3-(1) An application for a protective expenses order shall be made by motion.

(2) Subject to paragraph (3), except on cause shown, an application must be made no later than when it is reasonably practicable to do so after the applicant becomes aware that the proceedings are to be defended.

(3) An application for a protective expenses order may be made in relation to a reclaiming motion at any stage of the proceeding whether or not an application for such an order was made, or an order granted, at first instance.

(4) A motion mentioned in paragraph (1) shall –

> (a) set out why the applicant is seeking the order;
> (b) be accompanied by any supporting evidence, which the applicant intends to refer to in making the application.
> (c) set out the terms on which the applicant is represented;
> (d) be accompanied by a schedule estimating –
>
>> (i) the expenses of the applicant in relation to the proceedings in respect of which the order is sought; and
>> (ii) the expenses of each other party for which the applicant may be liable in relation to the proceedings in respect of which the order is sought;
>
> (e) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.4, set out the grounds on which that lower or higher figure is applied for.

Terms of protective expenses orders

58A.4- (1) Subject to paragraph (2), a protective expenses order must contain provision limiting the applicant's liability in expenses to the respondent to the sum of £5,000.

(2) The court may, on cause shown by the applicant, lower the sum mentioned in paragraph (1).

(3) Subject to paragraph (4), a protective expenses order must also contain provision limiting the respondent's liability in expenses to the applicant to the sum of £30,000.

(4) The court may, on cause shown by the applicant, raise the sum mentioned in paragraph (3).

(5) A protective expenses order may –

> (a) exclude any party's liability in expenses to any other party;
> (b) limit any party's liability in expenses to any other party;
> (c) provide that no party will be liable for the expenses of any other party;
> (d) include provision –
>
> > (i) as to a party's liability in expenses if the applicant is successful in the proceedings;
> > (ii) as to a party's liability in expenses if the applicant is unsuccessful in the proceedings; or
> > (iii) as to a party's liability in expenses regardless of the outcome of the proceedings.

Determination of terms of a protective expenses orders

58A.5-(1) In deciding the terms of a protective expenses order, the court shall (subject to rule 58A.3(1) take into account all the circumstances, including-

> (a) the need to ensure that it is not prohibitively expensive for the applicant to continue with the proceedings;
> (b) the extent to which the applicant would benefit (whether financially or otherwise) if successful in the proceedings to which the order would apply;
> (c) the terms on which the applicant is represented;
> (d) whether and to what extent the applicant is acting on behalf of another person which would have been able to bring the proceedings himself, herself or itself; and
> (e) whether and to what extent the applicant is willing to limit the expenses which he or she would be able to recover from another party if successful in the proceedings to which the order would apply.

(2) The court shall not make a protective expenses order until it has given all of the parties an opportunity to be heard.