

## SCOTTISH COURT BROADENS SCOPE OF COSTS PROTECTION IN ENVIRONMENTAL PROCEEDINGS

On 10 February 2021, the Outer House of the Court of Session in Edinburgh granted a protective expenses order to Scottish environmental charity Trees for Life ("TfL"), in judicial review proceedings against the Scottish Government and NatureScot. This marks a positive development for charitable organisations seeking to protect the environment, and demonstrates that crowdfunding can be compatible with robust costs protection in judicial review challenges.

### BACKGROUND

TfL alleges that NatureScot, the organisation responsible for the protection of beavers in Scotland, has failed to apply the correct legal tests in its approach to licensing the killing of Scottish beavers.

As a result of the order granted, TfL's liability to NatureScot, the Scottish Ministers, and other interested parties is limited to a cumulative total of £5,000. The other parties' liability to TfL was limited to £30,000. The Lord Ordinary also waived all court fees relating to the petition, which could have totalled £20,000. This is believed to be the first instance of such a waiver in a protective expenses order.

### AARHUS CONVENTION CLAIMS

In argument before the Court, TfL contended that its claim was an Aarhus Convention claim, and thus attracted protection against costs that were prohibitively expensive, under the Rules of the Court of Session ("**RCS**").

Peculiarly, RCS and the English Civil Procedure Rules differ in their incorporation of Aarhus Convention protections for environmental claims. RCS 58A.1(1) makes costs protection available for environmental law claims generally, but for claims relating to the specific environmental activities prescribed by Article 6 of the Convention, an applicant must also demonstrate their sufficient interest in proceedings. However, in England, equivalent rules in CPR r.45.43 – 44 apply to any acts or omissions which contravene environmental law – the test set out in Article 9 of the Convention.

On their face, the English rules are less prescriptive - and more generous - in their definition of 'Aarhus Convention claims', than their Scottish counterparts. TfL had argued that the whole of Chapter 58A RCS had to be read in an

#### Key take-aways

- Scottish charity Trees for Life has been granted a protective expenses order in its challenge to NatureScot's approach to the licensing of beaver killing in Scotland
- The case clarifies the scope of costs protection for environmental claims that fall within the Aarhus Convention
- The case facts also provide guidance to those seeking to crowdfund environmental litigation

Aarhus-compliant fashion, and so environmental law claims (regardless of whether they fell strictly under Article 6) should attract Aarhus Convention costs protection. The Lord Ordinary found that TfL's petition was an Aarhus Convention claim as it concerned environmental law, and granted costs protection accordingly.

The case signals that while there are separate regimes dealing with costs protection in environmental litigation, the protection deriving from the Aarhus Convention is broad and can apply even-handedly - regardless of jurisdiction. This is positive news for NGOs seeking to hold governments to account for environmental decisions, in particular where these decisions are devolved in the UK's domestic jurisdictions

## **CROWDFUNDING**

TfL raised over £60,000 through crowdfunding, as against estimated adverse costs of £200,000. TfL submitted a detailed statement, which gave the Court a full analysis of its financial position. This allowed the court to conclude that notwithstanding its successful crowdfunding, exposure to the Respondents' costs would be objectively unreasonable, and prohibitively expensive.

Restrictions on the use of funds, and analysis of internal fund allocation should be borne in mind by NGOs and charities who might seek to crowdfund legal challenges. Claimants should involve lawyers at an early stage to assess the funding routes available, and how adverse cost risks might be mitigated when fundraising.

*Clifford Chance is pleased to be supporting The Lifescape Project in its assistance of Scottish charity Trees for Life, who have brought judicial review proceedings challenging the lawfulness of the Scottish Government's beaver management policy. Trees for Life are advised by Burness Paull LLP. The Clifford Chance team is composed of Roger Leese (Partner), Oliver Carroll (Associate), Saskia Mondon-Ballantyne (Associate), and Rahul Dev (Trainee), all acting pro bono.*

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