OUTER HOUSE, COURT OF SESSION

2020 CSOH 75

A76/20

OPINION OF LADY POOLE

In the cause

MARTIN JAMES KEATINGS

Pursuer

against

(FIRST) THE ADVOCATE GENERAL FOR SCOTLAND;

(SECOND) THE LORD ADVOCATE;

(THIRD) THE SCOTTISH MINISTERS

Defenders

Pursuer: O'Neill QC, Welsh; Balfour+Manson
First Defender: Webster QC, Pirie; Advocate General for Scotland
Second and Third Defenders: O'Neill; Scottish Government Legal Directorate

30 July 2020

Introduction

[1] In this ordinary action, the pursuer seeks declarator that the Scottish Parliament has power to legislate for the holding of a referendum on whether Scotland should be an independent country, without requiring the consent of the UK government or any further amendment of the Scotland Act 1998 (the "1998 Act"). The case came before me on the pursuer's motion for a protective expenses order ("PEO"). The pursuer argued that as a matter of effective remedy and access to a court, it was appropriate and necessary to grant a

PEO; and that all criteria for grant of a PEO were met. The motion was opposed by the first defender. The first defender argued that it was not fair and just to grant a PEO because the necessary criteria were not met. The motion was not resisted by the second and third defenders, although it was submitted that it remained open to the court to refuse the motion.

[2] The motion sought a PEO restricting the pursuer's liability in expenses in total to the defenders to the sum of £5,000, and capping the defenders' liability in expenses to the pursuer at £30,000 each (£90,000 in total as there were three defenders). The pursuer's estimate, discussed later, was that the judicial expenses for the action per party would be nearly £140,000. If granted, the PEO would protect the pursuer from being responsible for the full judicial expenses of each of the three defenders if any orders for expenses were made against him, for example if he lost the case. Instead he would pay a maximum total of £5,000. Grant of a PEO might therefore have the effect of the public purse bearing significant additional liabilities for legal expenses than if no PEO was made. In return, the suggested PEO restricted the amount of expenses the pursuer could claim from the defenders to a maximum of £90,000, if an award of expenses was made in his favour, for example if he won. The first defender argued that if the court was minded to grant a PEO, the first defender's maximum liability in expenses to the pursuer should also be restricted to £5,000, so both parties were on an equal footing. The second and third defenders submitted that, if an order was granted, there should be a cumulative cap of £30,000 covering both the second and third defenders, since they were not being separately represented.

[3] For reasons set out below, I refuse the motion for a PEO against any of the defenders. I do not consider that the criteria for grant of such an order are met.

Governing law

[4] The motion was brought at common law. It was not a PEO application governed by Chapter 58A of the Rules of Court, because it did not fall within the criteria in Rule 58A.1.

[5] In *Newton Mearns Residents Flood Prevention Group for Cheviot Drive* v *East Renfrewshire Council and another* [2013] CSIH 70 ("*Newton Mearns*"), the Inner House reviewed the jurisdiction in Scotland to grant PEOs at common law (paragraphs [24] to [31]). At paragraph [32] the court found that making of a PEO depends on the court determining that it is fair and just to do so. For a court to find it is fair and just to make an order:

> "Corner House identifies five matters on which the court must be satisfied, it having taken the view that the application for judicial review has prospects of success".

[6] The court was referring to the case of *R (Corner House Research) v Secretary of State for Trade and Industry* 2005 1 WLR 2600 ("*Corner House*"). At paragraph 73 of *Corner House*, the court found no order should be granted unless the judge considers the application has a real prospect of success and it is in the public interest to make the order. If the court is satisfied there is a real prospect of success, then it should go on to consider if criteria set out at paragraph 74 are satisfied. These *Corner House* criteria are:

(a) The issues raised are of general public importance

(b) The public interest requires that those issues should be resolved

(c) The applicant has no private interest in the outcome of the case

(d) Having regard to the financial resources of the applicant and the respondents and to the amount of costs that are likely to be involved, it is fair and just to make the order

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

[7] There is flexibility in the way in which some of the *Corner House* criteria are applied. *Newton Mearns* finds that the criteria of no private interest, and probability that the applicant will discontinue if the order is not made, are not essential preconditions to the grant of a PEO. Further, although the pursuer's legal advisors acting *pro bono* may be a positive factor in deciding whether to grant a PEO, the order may still be granted where they are remunerated for their work (*Newton Mearns* paras 32-33). The court in *Newton Mearns* did not suggest a PEO could be granted if the first two *Corner House* criteria were not met. In this context, it is worth noting the rationale for PEOs set out in *Corner House* at paragraph 76:

> "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 [PEO] must not expect the capping order that will accompany the [PEO] to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly".

Public importance and public interest are prerequisites for a PEO which may have the effect that significant liabilities for legal expenses are borne by the public purse, when without the PEO they might not have been.

[8] At common law, the court has a discretion as to the form of any PEO it decides to grant (*Corner House* at paragraphs 75-76). The order is to be tailored to the circumstances of the case, depending on what is appropriate and fair. In some cases, it might be possible to address concerns arising about some of the *Corner House* criteria through the particular form of PEO selected. The court exercises a "very wide discretion in the knowledge of the likely costs of litigation"; *McGinty* v *Scottish Ministers* 2014 SC 81 at paragraph 62. One possible form is that sought in the motion before the court, which is similar to the standard order in

environmental cases proceeding under Chapter 58A of the Rules of Court. Other forms of PEOs might adjust the cap and cross cap upwards or downwards. A PEO may provide that there be no expenses to be due to or by either party (*The Scotch Whisky Association and Others* [2012] CSOH 156). Or there can be a cap on liability of the pursuer for the expenses of the defenders of £30,000, with a cross cap of liability of the defenders for expenses of the pursuer so they are limited to the expenses of a solicitor and one Senior Counsel acting without a junior (*Marco McGinty* v *Scottish Ministers* [2010] CSOH 5, upheld in *McGinty* v *Scottish Ministers* 2014 SC 81). There are many other variants. All depends on what is just and fair in the circumstances of a particular case.

[9] A number of environmental cases falling within the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention") were cited to me. This case is not an environmental case, and it has to be borne in mind that the genesis of the PEO test in Aarhus cases is not the same as the genesis of the common law PEO test. Since *McArthur* v *Lord Advocate* 2006 SLT 170, the criteria for grant of PEO in Scotland at common law are those in *Corner House* set out above. In contrast, the test which applies to PEOs in environmental cases derives from a test of whether proceedings would otherwise be prohibitively expensive, set out in legislative instruments. The "not prohibitively expensive" test appears in the Aarhus Convention (Article 9(4)), and became binding in domestic law as a result of incorporation in EU law (Article 10a of Council Directive 85/337/EEC and Article 15a of Council Directive 96/61/EC). The "not prohibitively expensive" test developed in a specific context of environmental protection, the rationale being that the environment needs public participation to protect it. There is extensive caselaw from the Court of Justice of the European Union, and courts in the UK, concerning the application of this test and the factors which must be taken into

account. In Scotland, the Rules of Court carefully define the cases to which Chapter 58A applies, so that Chapter 58A covers only environmental cases (Rule 58A.1), not common law PEO cases. The statutory provisions which replaced protective costs orders at common law in England and Wales similarly differentiate between environmental and other cases, so that the conditions for grant of an order are different (Criminal Justice and Courts Act 2015 Sections 88 to 90). I accept that aspects of the legal tests governing environmental PEOs may be instructive when considering the tests governing PEOs at common law. Both tests are aimed at deciding whether or not a party should benefit from expenses protection to enable access to the court. The common law is capable of development in appropriate cases. Nevertheless, the "not prohibitively expensive" test for environmental cases has not so far been adopted as replacing the common law tests in cases where only the common law applies. The tests are not identical. It is the common law tests, as interpreted in the *Newton Mearns* case, which I must apply.

Real prospects of success

[10] Both the *Newton Mearns* and *Corner House* cases make it clear that a condition for the grant of a PEO is that the application has a real prospect of success. The public interest rationale for PEOs is set out in paragraph [7] above. This rationale suggests that PEOs are in principle available in cases raising points of general public importance which the public interest requires to be resolved, where the relevant criteria are met, regardless of the form of the proceedings. PEOs are commonly brought in applications for judicial review, where prospects of success have been considered at permission stage. If a PEO application is made in a form of action (such as this ordinary action) where the test of real prospects of success

has not already been considered, the court must apply its mind to that test before considering the *Corner House* criteria.

[11] The requirement that there be real prospects of success mirrors one of the criteria for grant of an environmental PEO under the Rules of Court (Rule 58A.1(5)). This requirement was considered in the Outer House in *Carroll v Scottish Borders Council* 2014 SLT 659 at paragraph [14]. The court found that the requirement is not to result in a stringent and detailed examination of the applicant's case, and the question should not be looked at too closely. If the court decides there is a real prospect of success, it is unnecessary and undesirable to say much by way of explanation. The merits will be considered at a full hearing in which the test is different from the test of real prospects of success. The court in *Carroll* also suggested that real prospects of success meant there should be an arguable case, or something that has more than a remote prospect of success. This sits uneasily with subsequent dicta about the test of real prospects of success in the context of applications for permission for judicial review. In *Wightman* v *Advocate General for Scotland* 2018 SC 388, the Inner House found arguability or statability, which may be seen as interchangeable terms, is not enough for there to be a real prospect of success. What is required is less than probable success, but the prospect must be real; it must have substance (paragraph 9). *Wightman* recognises that the test is intended to sift out unmeritorious applications, and it is not to be interpreted as creating an insurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course. Other cases in a permission context have indicated that the hurdle of real prospects of success, as a minimum requirement, is not intended to be a high one (*MIAB* v *Secretary of State for the Health Department* 2016 SC 871 at 66).

[12] The first defender did not argue before me that there was no real prospect of success, but concentrated on whether the *Corner House* criteria are satisfied. In the circumstances, having regard to the dicta that I should not look at this matter too closely and that the hurdle (even in a permission context where arguability is not enough) is not intended to be a high one, I find that the case has real prospects of success. As stated in *Carroll*, it is unnecessary and undesirable to say much by way of explanation.

Are the issues raised of general public importance?

[13] Turning next to the *Corner House* criteria, although disputed by the first defender, I am satisfied the issue of whether or not the Scottish Parliament has power to legislate for the holding of a referendum on whether Scotland should be an independent country, without requiring the consent of the UK government or any further amendment of the Scotland Act 1998, raises an issue of general public importance. The first criterion is therefore met.

Does the public interest require that those issues should be resolved?

[14] I accept the submission of the first defender that the second of the *Corner House* criteria requires the court to consider whether the public interest requires the issues of general public importance to be resolved in these particular proceedings. The PEO is being sought in respect of specific proceedings, and it is those proceedings which must be considered. In other words, the second *Corner House* criterion should be given effect as if it included the words "in these proceedings" at the end. I note that this was the formulation of this criterion applied by the Court of Appeal in *R (Roszkowski)* v *Secretary of State for the Health Department* [2017] EWCA Civ 412 para 29; and that the statutory provisions which replace the common law test in England and Wales have made explicit a requirement that

the proceedings are likely to provide an appropriate means of resolving the issue (Criminal Justice and Courts Act 2015 Section 88(7)(c)). Construing in this way may also have utility where multiple cases have been brought on the same issue of general public importance, although that is not the situation in this case.

[15] In relation to this second *Corner House* criterion, the pursuer argued that there was no publicly agreed position between the UK and Scottish governments whether the Scottish Parliament already has power under the 1998 Act to hold a referendum. The pursuer's position that there was such a power was set out in the pleadings, and there was a contradictor in the form of the UK government. The issue of legislative competence needed to be clarified now in order to preserve the primacy of the rule of law within a democratic polity. The first defender argued that there was no such need in the absence of any Referendum Bill, or intention of the Scottish Government to introduce one during the lifetime of this Scottish Parliament. Further, Sections 31-33 of the 1998 Act set out the appropriate procedure for pre-enactment scrutiny of the legislative competence of any Referendum Bill that might be introduced. After enactment, there were many examples of judicial review challenging legislative competence, all involving situations in which there was a legislative instrument the court could consider.

[16] I am not satisfied that the second criterion is met, because the public interest does not require the issue of general public importance to be resolved in these proceedings. There are other ways to resolve the issues raised. Separately, having regard to the legal tests which must be applied to determine issues of legislative competence, these proceedings are not the appropriate forum to determine the issue of general public importance.

[17] I leave to one side the political mechanisms which were used successfully to resolve a similar issue prior to the Independence Referendum held in 2014, resulting in enactment of

an Order under Section 30 of the 1998 Act. But it is relevant to notice the mechanisms contained in Sections 31-33 of the 1998 Act. These provide for pre-enactment scrutiny of Bills in the Scottish Parliament, including references to a court (the Judicial Committee), to ensure that they are within legislative competence. If and when a Bill for an Independence Referendum is introduced, those statutory processes are available to resolve the issue of general public importance raised in this case. Parliament has thereby provided a pre-enactment means of resolution. Judicial review is available to resolve issues of legislative competence after enactment.

[18] Further, these particular proceedings are not an appropriate way to resolve the underlying issue. The court is being asked in this action to construe the limits of the legislative power of the Scottish Parliament. This is a matter governed principally by the 1998 Act. The limits of legislative competence of the Scottish Parliament are primarily set out in Sections 29 and Schedule 4 of the 1998 Act, together with reservations in Schedule 5. Section 29 of the 1998 Act provides (bold added):

> "(1) An Act of the Scottish Parliament is not law **so far as any provision of the Act** is outside the legislative competence of the Parliament.
> (2) **A provision** is outside that competence so far as any of the following paragraphs apply….
> (b) it relates to reserved matters
> (c) it is in breach of the restrictions in Schedule 4
> (d) it is incompatible with any of the Convention rights or with EU law...
> (3) For the purposes of this section, the question whether **a provision** of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the **purpose of the provision**, having regard (among other things) to its effect in all the circumstances.
> (4) A **provision** which
> (a) would otherwise not relate to reserved matters, but
> (b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters, is to be treated as relating to reserved matters unless the purpose of **the provision** is to make the law in question apply consistently to reserved matters and otherwise".

Schedule 4 contains further paragraphs preventing modification of various other instruments and the law on reserved matters. On its wording it prohibits an "Act of the Scottish Parliament" from modifying specified things. The legal questions for courts about the extent of the legislative competence of the Scottish Parliament are therefore to be determined by reference to a "provision" or an "Act of the Scottish Parliament". The difficulty for the pursuer is that there is no such Act, nor is one imminently proposed. Currently there is no existing provision or Act to which the court can meaningfully apply the legal tests which define the limits of the legislative competence of the Scottish Parliament. Nor is one imminent. On 18 March 2020 the Scottish Government announced that because of the Covid-19 crisis it had paused work towards an independence referendum at this time. It indicated that a referendum would not be held this year. Elections to the Scottish Parliament are due to be held next on 6 May 2021. It remains uncertain when and whether in the future there will be any vote on any such legislation. Currently, there is no inevitable vote, in contrast to the position in *Wightman* v *Secretary of State for Exiting the European Union* 2018 SC 111 (paragraph 27). Nor has there been any exercise of power similar to that in *Cherry* v *Advocate General* [2019] UKSC 41 (paragraph 39) for the court to adjudicate upon. It is not possible to receive a certain answer whether a particular referendum is within competence when the instrument enabling it is not available to the court to construe. The court does not exist to determine questions in the abstract, including hypothetical questions about the competence of possible forms of future legislation. The rule of law does not require the court to find that it is in the public interest to grant a PEO merely because there is a case raising a matter of law in which there is a contradictor, or because the Scottish and UK governments have no publicly agreed answer

on a question of law. In my opinion the public interest does not require the issue of general public importance to be resolved in these proceedings.

[19] I recognise that in so finding I have touched on substantive issues raised in the pleadings, which ultimately remain for determination by the court hearing this case. It is inevitable that a court determining a PEO application will have to carry out a preliminary assessment of some of the matters raised in the pleadings, because the test for a PEO requires it to consider real prospects of success and the *Corner House* criteria. The finding I have made does not prevent the pursuer carrying on with these proceedings if he chooses. All matters raised in the pleadings remain at large for the court hearing the case to determine. The finding I have made means only that the second *Corner House* criterion for grant of a PEO is not met.

Does the pursuer have a private interest in the outcome of the case?

[20] The pursuer clearly has a private interest in the outcome of this case in a personal sense; he is described in the pleadings as campaigning "specifically and consistently" on the matter of Scottish Independence, and the action is brought as part of that campaign. However, previous PEO cases tend to focus on private interest in the form of financial interest, rather than private interest in a wider sense, and that is the approach I also take in this case.

[21] I consider that the pursuer has an indirect financial interest in the outcome of this case were I to grant the PEO in the form sought. This arises because of the crowdfunding currently being utilised to fund legal expenses of the action. The pursuer sought a cap on the expenses that could be paid to him by the defenders in the event of success, of £30,000 each or £90,000 in total. If an order was granted in those terms, the pursuer was successful,

he received an award of expenses in his favour, and his judicial expenses amounted to that sum, he would stand to receive £90,000. However, it appeared from documents lodged before the court that money from crowdfunding was being used to pay the pursuer's legal expenses. There had been one crowdfunding round through Crowd Justice with a target of £40,000. It ran over the Christmas period between 18 December 2019 and 15 January 2020. When it was closed after less than a month, that target had been exceeded by £3,658. A post dated 29 December 2019 on a website headed "The Scottish People vs the UK Government on Indyref 2" apparently operated by the pursuer explained that Crowd Justice did not take donations at the point of pledge but at the point the target was met. After the pursuer's initial target had been reached, a further post, dated 24 January 2020, stated "Crowd Justice have now formally transferred the funds from this crowdfund to the Law Firm". The crowdfunding had proceeded on the basis that there would be a phased approach to funding, so more funds would be raised as and when required. Tweets sent by the pursuer mention that there are "many out there" who have said they will donate again, and many who want to donate for the first time in the second wave of crowdfunding. A tweet of 21 June 2020 stated "please wait for 2nd funding announcement in a few weeks". The position is therefore that the pursuer's legal expenses are being covered by donors, and more money is expected to be raised if requested. When asked about what was proposed to be done with the money if the pursuer was to receive £90,000 of expenses in the event of success, Senior Counsel for the pursuer submitted that if money crowdfunded was not necessary it was not taken. But that did not appear to be correct as a matter of fact, because of the posts of 29 December 2019 and 24 January 2020 mentioned above. Money crowdfunded was ingathered and transferred to the pursuer's legal team. It appeared that would also be the outcome if further waves of fundraising met their targets. I was not

informed of any mechanism to return funding to the crowdfunders. In these circumstances, if a PEO was granted in the terms of the order sought, there might ultimately be a sum of £90,000 accruing to the pursuer in the event of success, which he could choose what to do with. This gave him an indirect financial interest in the outcome.

[22] This finding would not of itself have prevented me from granting a PEO. The private interest criterion is to be applied flexibly, and the form of the PEO could have been modified to avoid this indirect financial interest, for example providing there was no potential expenses recovery from the defenders. Nevertheless, of the five *Corner House* criteria to be considered, this criterion does not support the pursuer's application for a PEO in the form in which it is made.

Having regard to the financial resources of the applicant and the respondents and to the amount of costs that are likely to be involved, is it fair and just to make the order?

[23] The fourth *Corner House* criterion to be considered was whether, having regard to the financial resources of the applicant and the respondents and to the amount of costs that are likely to be involved, it is fair and just to make the order. It is first necessary to ascertain the financial resources of the parties, then the amount of costs likely to be involved, and then consider what is fair and reasonable.

[24] The personal financial resources of the applicant were set out in an affidavit. They are modest. His income derives from various social security benefits including income support. His outgoings take up most of this income. He has no savings and owns no property of his own. However, as noted above, grant of a PEO may have the effect that large liabilities in expenses are borne by the public purse. The test is what is fair and just. In that context, in my opinion it is wrong to ignore the significant crowdfunding income in

practice available to the pursuer to bring this action. Fundraising to support actions has been taken into account in other applications for PEOs, such as *Marco McGinty* v *Scottish Ministers* [2010] CSOH 5. The pursuer states in tweets of 22 May 2020 it does not sit well with him that the court summons lists his name only, because it omits the names of the people funding the action. He says this has been done primarily to protect everyone from potential financial repercussions from the action, but also that it is not possible to list 1900 pursuers (being the people who had donated in the first phase) and to do so would be inappropriate. The pursuer does not come to the court submitting that he has raised all that he can. Rather, so far he has substantial support in excess of £43,000. Those funds were raised in a closed period of less than a month, over six months ago, and with a declared intention on the website that "if more funding does become necessary later on, we will approach the movement with the new figure". The practical reality appears to be that the pursuer has access to significant funding to support this action. Turning to the defenders, representing the UK and Scottish governments, it was not disputed that the resources available to them are extensive. Those resources are significantly in excess of those available to the pursuer.

[25] The next matter to be considered is the likely expenses of the action. The pursuer did not initially submit expenses estimates for the action, and the first defender submitted that meant the pursuer had not met the requirements for grant of a PEO. There is considerable force in this argument. It is clear from *Corner House* at paragraph 78 that applications should be supported by requisite evidence including a schedule of expenses (and in environmental PEOs it is expressly provided in Rule of Court 58A.3(d) that there should be a schedule of expenses). Any person seeking a PEO should be candid with the court, so that the estimated level of expense the public purse or other parties might have to bear if a PEO is granted is

clear. That should be done at the time the motion is made, to give defenders time to consider what is being suggested as the cost of the litigation and be in a position to respond. After I asked why expenses estimates had not been provided, estimates were provided orally at the bar on the basis of information read out to me (which I was told had been provided by instructing solicitors). The estimate at that time for judicial expenses for the whole action was £110,000 inclusive of VAT for each of the four parties (totalling £440,000, or £330,000 if the second and third defenders continued to be represented together). It was submitted that if the pursuer was paying his own representatives on an agent client basis expenses would be £125,000 rather than £110,000. With some hesitation, I decided to allow a written schedule to be lodged after the hearing, but in the interests of fairness to allow the defenders time to comment upon it. A schedule prepared by Law Accountants, dated the day after the motion, was subsequently lodged. In that, the pursuer's estimate of judicial expenses had increased to a total of £139,532.71 inclusive of VAT per party. The second and third defenders elected not to comment on the schedule. The first defender lodged a written submission. It was argued that if I were minded to take account of the schedule when lodged late, then I should consider legal aid rates. Public law litigation is often funded by the state in the provision of legal aid, and on legal aid rates the total expense for representing the pursuer would be £25,446.62. A breakdown was provided. It was submitted the pursuer's estimate was in any event grossly excessive. Detailed criticisms of excessive elements were set out, including adjustments purportedly costing £11,000 plus VAT in counsel's fees, £5,000 plus VAT for counsel's fees for what would be a By Order (Adjustment) Roll hearing, expenses for a motion for sist being included at £5,750 plus VAT for counsel although the pursuer had already been awarded the expenses of that motion, court fees of over £8,000 being included even though the pursuer had said he was exempt

from them on the basis of his financial situation, an unexplained contingency, excessive fees for solicitors given that the action concerned a legal and not factual dispute, and various other matters.

[26] The task for me in applying the fourth *Corner House* criterion was to consider the likely expenses of the proceedings on the basis of fair and reasonable charging rates. Given the legal nature of the dispute, the case was likely to be decided fully after a debate on legal issues, without the need for evidential hearings. A substantial part of argument could be presented in written notes of argument. In that context, I consider the schedule provided by the pursuer to be overstated. Although prepared by Law Accountants apparently on the basis of judicial rates, it does not appear to proceed on the "modest representation" basis suggested in *Corner House* and *McGinty* for litigation in which a PEO is granted. The overall figures had increased markedly from what the pursuer had submitted in court. Many of the first defender's detailed criticisms about the pursuer's schedule appeared to be well founded. Given the degree of difference between the parties, and the stage of the action, the court can only take a broad view of what the likely expenses are on the basis of fair and reasonable charging rates. Since the effect of the PEO would potentially be to require the public purse to take on additional liabilities, it is appropriate to have regard to what the public purse will ordinarily pay for representation on legal aid rates, although bearing in mind that if a legally aided party receives an award of expenses, judicial expense rates will apply. Taking a very broad brush approach, in my opinion £65,000 inclusive of VAT for each party is the appropriate figure to take for the likely expenses of the action on the basis of fair and reasonable charging rates, for the purposes of assessing whether a PEO should be granted. The second and third defenders are being represented together. The interests of the first, and second and third defenders, are not identical, and in the event the pursuer is

not successful a court may well find him liable for two sets of expenses. The likely maximum liability for expenses on fair and reasonable charging rates should therefore be based on three sets of expenses (the pursuer's own expenses and two sets of defenders' expenses). The total is £195,000 inclusive of VAT. As a check, I noted that in *Gibson* v *Scottish Ministers* 2016 SLT 454, a three party case, the total cost estimates for all parties in a public law action judicially reviewing consents for Dersalloch Windfarm were about £170,000.

[27] Having ascertained the resources of the parties and the amount of costs that were likely to be involved, the question for the court in respect of the fourth *Corner House* criterion was whether it was fair and just to make the order. The pursuer invited me to approach the question of 'fair and just' considering the matter both subjectively and objectively, having regard to *Gibson v Scottish Ministers* 2016 SC 454. The subjective test is essentially whether it has been proved as a matter of fact that the pursuer could not afford the proceedings without a PEO, having regard to the resources available to him; and the objective test is whether it is reasonable, in all the circumstances, that the pursuer should be required to meet judicial expenses of the defenders in the event that he does not succeed. *Gibson* was an application for an environmental PEO under Chapter 58A of the Rules of Court, and not a common law PEO. As already noted, there are differences between the applicable tests. However, given the court's wide discretion as to expenses, the first defender accepted that there was nothing at common law preventing me from considering the fourth *Corner House* criterion both subjectively and objectively. The ultimate test is what is fair and just, and in my view that gives scope to apply both subjective and objective tests.

[28] The pursuer did not satisfy me that subjectively he is unable to meet the costs of the proceedings. I accept that the pursuer's own income and capital would be insufficient to

meet the costs of the proceedings. The exemption from court fees for persons in receipt of income support does not extend to exemption from legal expenses. However, the pursuer has access to significant amounts of funding through crowdfunding, as set out above. I have regard to the apparent ease with which significant funding was initially raised, in the knowledge that further funding would be sought when necessary, and the pursuer having stated in tweets that he knows there are many out there who will donate. I also have regard to the pursuer not so far having attempted to raise any further funds, after a period of less than one month ending in January 2020. It is not possible to predict with certainty what the maximum figure he will be able to raise will be, but given the history so far I estimate that it is likely to be in the hundreds of thousands of pounds. The pursuer failed to satisfy me of any cap on what was potentially available to him, or that any such cap was lower than the full reasonable costs of the proceedings if he were to be found liable in expenses.

[29] Considering the matter objectively, the question is whether it is reasonable, in all the circumstances, that the pursuer should be required to meet full judicial expenses of the defenders in the event that he did not succeed. Various factors may be relevant. The pursuer relied primarily on: the disparity in financial resources between the parties; the importance of what is at stake to the general public in terms of the constitutional makeup of Scotland and the UK; and the complexity of the relevant law and procedure. The first defender argued that it was objectively reasonable to expect the pursuer to be subject to the normal expenses consequences of litigating, because: it was the choice of the pursuer to bring the action; the arguments being advanced were weak in the absence of any actual Bill or Act of the Scottish Parliament; only expenses reasonably incurred in the conduct of the litigation could be recovered by the defenders even in the event of success and so disparity of resources was of limited relevance; and there is crowdfunding available to the pursuer for

a case of this nature. I accept the underlying issue is an important one and the applicable law is complex. But I also consider that although the low hurdle of real prospects of success has been surmounted, the case is not strong in the absence of any Bill or Act of the Scottish Parliament containing specific provisions to which the 1998 Act can be applied. I do not consider the overall disparity in financial resources to be a weighty consideration, because the cost of litigation should not fall on a party just because they have deeper pockets, including in public law cases. I also bear in mind that the pursuer tweeted on 22 May 2020 that the action is in his name only primarily to protect everyone from the financial repercussions of the action. The likely availability of further funding through crowdfunding means that the ability to pay reasonable legal expenses of this action is not as disparate between the parties as the pursuer sought to present it. The overall test is what is fair and just, and in that context the pursuer is to be expected to access what funds he reasonably can. It is objectively reasonable in all the circumstances to expect the pursuer to meet his own expenses and a significant part of the defenders' judicial expenses occasioned in the action if not successful; and had I found that a PEO fell to be granted, this would have resulted in the cap on the potential expenses for which the pursuer was liable to the defenders being significantly higher than sought in the pursuer's motion.

[30] However, I have regard to my assessment that on fair and reasonable charging rates the maximum expenses the pursuer might be liable for if he lost (including his own) was in the region of £195,000 inclusive of VAT. This is a high figure, even with access to money from crowdfunding. I do not consider that it is objectively reasonable for the pursuer potentially to be liable for a sum quite as high as that in legal expenses. Accordingly, I find that the fourth *Corner House* criterion is met by the pursuer, albeit on a limited basis.

Would the applicant discontinue the proceedings if the order is not made, and if so would he be acting reasonably doing so?

[31] The pursuer provided a carefully worded affidavit. It stated

> "I confirm that I am not in a position to be a party to these proceedings if I am personally exposed to the risk of having to pay the defenders' expenses or a significant part of them, particularly in circumstances where there is no indication of how large those expenses might be. I do not have the resources to make that commitment or to participate in these proceedings on that basis".

[32] This statement has to be considered against the background of productions lodged by the first defender, which include extracts from the website referred to above, and the pursuer's tweets. The pursuer regards the action as being an action not only by himself but by others too. The action is being funded by a number of people through crowdfunding, and further funds are anticipated if the pursuer asks for them. The pleadings explain the pursuer's long history of campaigning for Scottish Independence, and this action is part of that activity.

[33] In these circumstances I am not satisfied that if the application for a PEO is refused the pursuer would as a matter of fact discontinue the action. I note that the pursuer does not say that in his affidavit in terms. What appears likely to happen is that there would be further phases of crowdfunding, through which funds would be raised. This further crowdfunding would enable the action to go ahead. The pursuer would continue in that knowledge, because the crowdfunding would prevent him from exposure to liability for expenses he could not afford from his personal resources. The fifth *Corner House* criterion is not met.

Decision

[34] For reasons set out above, the case crosses the low hurdle required to show real prospects of success. Of the five *Corner House* criteria considered in applications for a PEO at common law, only the first and fourth criteria are met. The majority of the criteria, being the second, third and fifth, are not met. In the light of these findings, I am not satisfied that it is fair and just to grant the pursuer's motion for a PEO. The issues raised in relation to the third and fifth criteria, and the limited extent to which the fourth criterion is met, could have been met by the form of the PEO ordered. For example, in the absence of any mechanism to return expenses to crowdfunders, a PEO could have included provision that the pursuer would bear his own expenses in the event of success, which would have resolved the concerns about indirect financial interest; and the liability of the pursuer for the defenders if an award of expenses was made against him might have been limited, but to a much higher sum than sought in the motion to reflect fairly the ability to crowdfund. That would be a form of PEO less generous to the pursuer than requested, but in my opinion would have been within the very wide discretion as to the form of PEO allowed at common law and would have given some certainty to the pursuer as to his maximum exposure. However, *Newton Mearns*, which is binding on me, does not suggest a PEO can be granted in the absence of the court being satisfied of the second *Corner House* criterion, that the public interest requires that the issues should be resolved. The wording used at paragraph 32 of *Newton Mearns* is "must be satisfied", and no relaxation of that requirement in relation to the second criterion is suggested, despite express mention of other criteria which are more flexible. That is presumably because the second criterion (together with the first) goes to the heart of the rationale for the favourable expenses regime resulting from the grant of a PEO, set out in paragraph 7 above and *Corner House*. If very significant responsibility for legal

expense of a particular action is potentially to be transferred to the public purse and other parties, the public interest must require the issue of general importance raised to be resolved in that action.

[35] I therefore refuse the pursuer's motion for a PEO against all defenders, because the criteria for grant are not met.

Court fees

[36] The pursuer sought exemption from court fees as part of the PEO, relying on cases such as *R(UNISON)* v *Lord Chancellor* [2017] UKSC 51 [2017] ICR 1037 and *R* v *Lord Chancellor ex p Witham* 1998 QB 575 at 586-587. So far, PEOs in Scotland appear only to have regulated legal expenses, and have not extended to an exemption from court fees. However, even if I had decided to grant a PEO at common law, it would not have been necessary to decide in this case whether or not a court can competently include exemption from court fees in a PEO. The payment of court fees has a statutory basis in Section 107 of the Courts Reform (Scotland) Act 2014. This enables subordinate legislation which, among other things, may contain exemptions from the requirement to pay fees. The Court of Session etc Fees Order 2018/83 contains various exemptions. Regulation 5(a) has the effect that a fee specified by the Order is not payable by a person if the person or the person's partner is in receipt of income support under the Social Security Contributions and Benefits Act 1992. The pursuer's sworn affidavit states that he is in receipt of income support.