

Case Name: *R (Badger Trust and Wild Justice) v Natural England* [2025] EWHC 2761 (Admin)

Full case: [Read Here](#)

Commentary: This case concerned two issues in relation to a judicial review about badgers, namely the redaction of documents and Aarhus Costs Caps.

First, Fordham J considered whether to make an order that permits the filing of confidential, unredacted documents subject to notice being provided when non-parties to this case apply for permission to access those confidential documents, and a hearing where submissions from the Parties will be heard in order to determine whether permission should be granted. The Court ultimately made that order, but noted that where redacted documents are already amongst the court documents and then proceedings begin, the redacting party ought to reconsider that redaction in light of the principle of open justice, and assist the court in dealing with that principle.

Second, Fordham J considered an application by the Defendant, Natural England, to vary both of the Claimants' maximum costs liabilities upwards, pursuant to CPR 46.27 ("**Rule 27 Variation**"), to £20,000 for Wild Justice, and to £30,000 for Badger Trust. This departs from the cap of £10,000 per claimant under CPR 46.26 ("**Rule 26 Costs Caps**").

Articles 9(4) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("**Aarhus Convention**") requires that the procedures in Articles 9(1)-(3) are not "prohibitively expensive". These procedures include judicial review challenges which concern decisions which putatively contravene national legislation which relates to the environment, following *HM Treasury & Anor v Global Feedback Limited* [2025] EWCA Civ 624.

There are two limbs to the test in CPR 46.27(3) which determines whether upwards variation would be "prohibitively expensive", namely: Limb (a): the real-world unaffordability for the Claimant, and Limb (b): the objective unreasonableness of varying Rule 26 Costs Caps upwards.

Taking into account the public interest imperative of access to justice in environmental matters, the importance of the role of the courts in protecting against a chilling effect on environmental judicial review claims, and the Claimants' ability to continue to function as repeat players in bringing these challenges, Fordham J held that it would be "objectively unreasonable" to vary upwards from the Rule 26 Costs Caps. He therefore refused the application for a Rule 27 Variation upwards.

Discussion

Order as to the Disclosure of the Confidential Redacted Documents

Fordham J dealt briefly with the first issue as to whether the Court should make an order that would enable the filing of unredacted documents and an unredacted bundle subject to a restriction. That restriction requires that at the point which any member of the press or public applies to access those confidential documents, a notice will be triggered alerting the Parties and the Court will be required to consider whether or not to grant permission for that access, having heard submissions from the Parties.

Fordham J remembered that the Court is "... at its most vigilant" when the parties are agreed in keeping information from the public, as was so in this case, following ***Manchester City FC Ltd v FA Premier League Ltd*** [2021] EWCA Civ 1110 [2021] 1 WLR 5513. Before proceedings begun, Natural England filed documents which redacted the names and contact details of officials involved in the decision-making process, citing safety concerns as the reason for that redaction. Fordham J ultimately concluded that the order sought was "fully justified" and its protections were "measured, precautionary and proportionate". [14] Accordingly, the Court made that order.

Rule 27 Application to Vary Rule 26 Costs Caps

The Relevance of Rule 26

On review of the Rule 26 Costs Caps, Fordham J determined that they constitute the "initial answer in every Aarhus Case", which can be expected:

"... at least in a paradigm environmental protection context, where a claimant seeks access to environmental justice, with undiluted public interest motivations."
[26]

That means that in such a paradigm case, the starting point is not a "clean-sheet, as if the Rule 26 Caps did not exist or their levels were unknown." [27] Instead, the "normal" or "general" cap on costs per claimant should be £10,000.

Fordham J concluded that this case should be seen as a paradigm environmental protection case, undiluted by individual economic interests, mixed purposes, or other private/public interest. [53] Fordham J also distinguished ***R (CPRE Surrey) v Waverley Borough Council*** [2018] EWHC (Admin) where the caps were varied in the case of a single-issue interest group, which challenged a specific development, and which was able to raise substantial funds from local resident property owners.

Applying Rule 27

The question of “prohibitively expensive”, pursuant to the requirement Article 9(4) of the Aarhus Convention, is determined by the test in CPR 46.27(3)(a)-(b) which has two limbs.

Limb (a) concerns the subjective, real-world unaffordability of bringing the case for the actual claimant when taking into account the funds which the claimant can access. Limb (b) concerns whether the costs are objectively unreasonable when having regard to six mandatory factors which rule 27(3)(b) defines. Those mandatory factors are:

- (i) the situation of the parties;
- (ii) whether the claimant has a reasonable prospect of success;
- (iii) the importance of what is at stake for the claimant;
- (iv) the importance of what is at stake for the environment;
- (v) the complexity of the relevant law and procedure; and
- (vi) whether the claim is frivolous.

Limb (a): Real-World Unaffordability

Limb (a) was thought to be subjective only insofar as it concerns the specific circumstances of the claimant, rather than its genuine view of its own capacity to bring a challenge.

Inter alia, Natural England submitted that to vary the costs caps upwards using a Rule 27 Variation would strike a fairer balance by imposing an overall cap of £50,000 on the Claimants, taking into account that the cost burdens on Natural England will produce real-world deficits; the Claimants have been able to budget for substantial costs contributions for lawyers, the Defendant, and court fees; the Claimants pitched for crowdfunding and exceeded their target of £52,486, and stopped efforts after securing £57,180 when they could have sought to secure more; and the Claimant’s had substantial funds in their respective bank accounts.

However, Fordham J considered that the Defendant focused “too much” on real-world affordability and did not engage sufficiently with objective unreasonableness, which exists as a test in its own right and could preclude a Rule 27 Variation. [59]

Limb (b): Objective Unreasonableness

Fordham J considered the judgment of the CJEU in ***R (Edwards) v Environment Agency (No.2)*** [2013] UKSC 78 [2014] 1 WLR 55 (Case C-260/11 [2013] 1 WLR 2914 at 23), in particular, to determine the underpinning of Limb (b); he determined:

“It is a standard – after real-world affordability has already been ensured – intended to facilitate responsible and viable claims which invoke access to environmental justice, because of the accompanying public interest imperative. Especially in paradigm environmental protection cases.” [40]

Fordham J thought that whilst there is the option to consider real-world affordability as a feature under Limb (b), specifically under the situation of the parties (CPR 27(3)(b)(i)), he ultimately concluded that Limb (b) is “not a re-run of Limb (a)” and that therefore it could not drive a conclusion of objective unreasonableness. [43]

Fordham J proceeded to consider the mandatory factors under rule 27(3)(b). He took into account the following factors which pointed to objective unreasonableness:

1. both of the Claimants were funded by donations;
2. their limited individual financial capacity and the “heavy cost” of a higher cap; [48]
3. the public interest imperative of access to environmental justice that an upward variation of the costs would undermine;
4. the present claim was a viable one, and not “frivolous”; [50]
5. as there are two claimants, there is already a “double cap” in place;
6. the Claimant’s crowdfunding endeavours were perfectly reasonable;
7. the Claimant’s should retain their ability to be “repeat players” in securing access to justice; and
8. the purpose of environmental costs caps is to prevent a chilling effect on environmental judicial review claims which are important to preserve the environment “which we share with each other, and with others, and for which we are responsible.” [57]

In addition, Fordham J accepted that Natural England’s exposure to costs were real, and that it would incur a deficit even in the event that it succeeded, but noted that:

“Sometimes public authorities have to accept the practical implications of legal audits and irrecoverable costs.” [54]

Accordingly, Fordham J held that any increase from the Rule 26 Costs Caps would be objectively unreasonable and he refused the application for a Rule 27 Variation upwards.

Case summary prepared by Adam Choudhury