Neutral Citation Number: [2019] EWHC 1007 (Admin)

Case No: CO/4222/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before :

MRS JUSTICE FARBEY

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Between :

The Queen
on the application of

We Love Hackney Limited	**Claimant**
- and -	
London Borough of Hackney	**Defendant**

- -
- -

Philip Kolvin QC and Christopher Knight (instructed by **Leigh Day**) for the **Claimant**
David Matthias QC and Charles Streeten (instructed by **London Borough of Hackney**) for the **Defendant**

Hearing date: 27 March 2019

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Approved Judgment

Mrs Justice Farbey:

1. The claimant has permission to apply for judicial review of the decision of the defendant on 18 July 2018 to adopt a revised statement of licensing policy ("SLP"). The revised policy made changes to Special Policy Areas ("SPAs") within the London Borough of Hackney and changed the core hours policy for licensed premises within the Borough. Lavender J granted permission on consideration of the papers. At the same time, he dismissed the claimant's application for a costs capping order ("CCO") and directed that the defendant's application for security for costs be listed for hearing.

2. The claimant renewed its application for a CCO. On 14 February 2019, Lieven J directed that the renewed application be heard at the same time as the defendant's application for security. I heard both applications. Mr Philip Kolvin QC and Mr Christopher Knight appeared on behalf of the claimant. Mr David Matthias QC and Mr Charles Streeten appeared on behalf of the defendant.

3. Most of the time at the hearing concerned the CCO application. The court was provided with over 1,500 pages of documents. Given the nature of the issues, the volume of documents was disproportionate and undermined the court's expectation that such applications ought not to become a source of expensive satellite litigation in their own right: *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600, para 79.

Background to the judicial review claim

4. As the Council of a London borough, the defendant is the licensing authority for Hackney and is required, in carrying out its licensing functions, to have regard to its SLP (section 4(3) of the Licensing Act 2003). On 18 July 2018, at a meeting of the full Council, the defendant decided to adopt a revised SLP. In doing so, Council members took into consideration the report of Kim Wright who was the Group Director for Neighbourhoods and Housing, together with other documents and reports including an Equality Impact Assessment. The SLP was designed to promote the four licensing objectives under section 4(2) of the 2003 Act: the prevention of crime and disorder; public safety; the prevention of public nuisance; and the protection of children from harm.

5. The claimant objects to two particular aspects of the revised SLP. First, the defendant has changed its core hours policy so that alcohol can no longer generally be sold after midnight on Fridays and Saturdays. The policy states that later hours may be considered where the applicant for a licence has identified any risk that may undermine the promotion of the statutory licensing objectives and has put in place robust measures to mitigate those risks. The claimant maintains that this is an unworkable and unreasonable restraint on operators who seek to apply for late night opening which will discourage innovation.

6. The claimant also objects to the extension of the Shoreditch SPA and the retention of the Dalston SPA. In broad terms, the defendant has concluded that the high concentrations of licenced premises in Shoreditch and Dalston has given rise to cumulative negative impact on the licensing objectives (as set out in the defendant's Cumulative Impact Assessment of 2017). Applications for licences in those areas are therefore subject to a special policy, namely a rebuttable presumption that they will be refused unless the applicant can demonstrate that there will be no negative cumulative impact that is currently being experienced in those areas.

7. There has in some form been a Shoreditch SPA since 2005 and a Dalston SPA since 2013. The cumulative impacts specifically mentioned in the Hackney Licensing Policy Consultation document of 2017 were antisocial behaviour, public nuisance, crime, and noise intensified by a significant number of licensed premises concentrated in one area. The claimant's view is that the extension of the Shoreditch SPA lacks a firm evidential foundation; and the Dalston SPA will restrict new music and dance venues.

8. The claimant campaigned actively during the various consultative steps that the defendant took before introducing the SLP. In particular, when still an unincorporated body, the claimant submitted detailed representations entitled "Licensing Policy in a 24 Hour City: Proposal for Hackney's Future" (July 2016). The campaign was nevertheless not successful and so, following a number of pre-action letters, the claimant filed an application for judicial review on 17 October 2018.

9. The grounds for judicial review are twofold. First, the claimant has submitted some post-decision evidence about those who have protected characteristics under equality law. In particular, it is said that the LGBTQ+ community will be prejudiced by the changes because, for this community, the bars and clubs of Hackney are important cultural spaces. The claimant contends that the defendant had no regard to the public sector equality duty ("PSED") laid down by section 149 of the Equality Act 2010. Secondly, it is submitted that Kim Wright's report to councillors did not fairly address competing views on the merits of the SLP and failed to draw the attention of councillors to material and relevant considerations. In response, the defendant filed summary grounds of resistance on 19 November 2018.

10. Lavender J regarded both grounds of challenge as arguable and granted permission on 25 January 2019. The application for a CCO before Lavender J was that:

    (i) Any liability of the claimant for the defendant's costs of the judicial review proceedings be capped at £35,000.
    (ii) Any liability of the defendant for the claimant's costs be capped to reasonable hours at the rates paid to counsel by the Government Legal Department and the rates for solicitors charged by GLD.

    The latter limb of the application recognised the need for reciprocity under section 89(2) of the Criminal Justice and Courts Act 2015. The reference to GLD rates reflects the courts' acceptance of those rates as a suitable "benchmark of modesty" (*R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2013] EWHC 3164 (Admin), para 67(1)).

11. In refusing the application, Lavender J concluded that the proceedings are not public interest proceedings. He considered that, even if they were, this would not be an appropriate case for a CCO because the claimant was formed by, among others, wealthy individuals who have a commercial interest in the litigation.

12. The claimant renews the application for an order in the same terms considered by Lavender J. Before I turn to the formation of the claimant company, I shall set out the essential legislative framework which governs the claimant's application for a CCO.

Legislative framework

13. Statutory provision for capping of costs in judicial review proceedings is made by sections 88 and 89 of the Criminal Justice and Courts Act 2015. Section 88(6) provides:

> "The court may make a costs capping order only if it is satisfied that—
> (a) the proceedings are public interest proceedings,
> (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and
> (c) it would be reasonable for the applicant for judicial review to do so".

14. Section 88(7) provides:

> "The proceedings are 'public interest proceedings' only if—
> (a) an issue that is the subject of the proceedings is of general public importance,
> (b) the public interest requires the issue to be resolved, and
> (c) the proceedings are likely to provide an appropriate means of resolving it".

15. By virtue of section 88(8), the matters to which the court must have regard when determining whether proceedings are public interest proceedings include:

> "(a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,
> (b) how significant the effect on those people is likely to be, and
> (c) whether the proceedings involved consideration of a point of law of general public importance".

16. The court must have the section 88 factors in mind but may take other factors into consideration (*R (Hawking) v Secretary of State for Health and Social Care* [2018] EWHC 989 (Admin), para 11). Although section 88(8)(a) mentions the number of people likely to be directly affected by the grant of relief, the court is not precluded from taking into account the interests of those who would be indirectly affected (*R (Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin), para 19).

17. Section 89 of the 2015 Act makes further provision as to the matters to which the court must have regard when considering whether to make a costs capping order and what the terms of such an order should be. Those matters 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 representatives for the applicant for the order are acting free of charge; and (e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

The nature of the claimant

18. The claimant's evidence is that, from 2015, We Love Hackney was an association of local residents and business owners who campaigned about Hackney's night-time economy and, in particular, the defendant's proposed changes to its SLP. In order to promote its objectives more effectively, and to advance the present application for judicial review, the group became a company on 22 August 2018.

19. The aims and objectives of the company are said to be: (1) campaigning on matters of local policy affecting the night-time economy; (2) conducting and commissioning research on licensing and related matters to inform policy-making; (3) advocating for the interests of those who value the night-time economy; and (4) seeking to provide support to those who wish to apply for licences to operate in Hackney. The claimant's business is described as "public relations and communications activities" in Companies House documentation.

20. By 3 October 2018 the company had 4,341 registered supporters. Mr Kolvin told me that supporters register by indicating their support on social media. They do not pay a membership subscription and the company has no constitution or other document setting out the duties and benefits of registration.

21. Mr Jonathan Downey, in a witness statement on behalf of the claimant, says that the company will "ultimately" be owned by local residents in Hackney. Mr Matthew Sanders (who was the claimant's founding director) says that ten Hackney residents now have shares in the company although no further details or supporting documents have been provided.

Litigation funding

22. At the core of both the claimant's application for a CCO and the defendant's application for security for costs is the claimant's impecuniosity. On incorporation, the company's share capital amounted to £10 and it has not increased. I was not told about any other assets. Mr Sanders accepts that the claimant has very limited resources. He claims that it is not in a position to risk the costs exposure associated with judicial review proceedings.

23. The claimant proposes to fund its judicial review claim by contributions from members of the public through the crowdfunding site CrowdJustice. The initial crowdfunding target was £20,000. That target has been met. The company continues to raise further money in order to reach its "stretch target" of £53,000. The evidence which I have seen suggests that multiple donors have each made comparatively small donations.

24. The generosity of members of the public has been at the forefront of my mind and has weighed heavily with me. I am nonetheless obliged to consider the evidence as a whole and to apply the legislation that governs CCOs.

25. Mr Matthias took me in detail to the evidence which the defendant has collated in relation to the professional and financial standing of the key players in the company. I need not set out the details at length because (as Mr Matthias pointed out) they have not been challenged.

26. Records from Companies House show that Mr Sanders has been a director of the claimant company since 22 August 2018. The documents before me contain little other information about him. His witness statements do not make clear (i) whether he is a Hackney resident; (ii) how long he was involved with We Love Hackney before he became a director of the company; and (iii) whether or not he owns or has any interest in a business located in Hackney. Evidence served by the defendant suggests that he has since September 2017 been Director of Property, Campaigns and Communities in one of Jonathan Downey's enterprises.

27. Jonathan Downey (a Hackney resident) became a director of the claimant on 23 November 2018. He is recorded on the Companies House website as being the director of six other companies. The registered address for the claimant is the same address as five of those other companies including Street Feast Limited. Street Feast consists of food markets and bars which operate after 10pm. The Street Feast concept launched outdoors in Dalston Yard (which has 12 bars). It has since then extended to a total of five markets including the well-known Dinerama in Shoreditch (which has six bars). Mr Downey claims that the defendant's core hours policy has caused him to change his mind about opening a further large outdoor market which (it seems) would have sold alcohol beyond midnight. It is plain that he has a significant commercial interest in the defendant's licensing policies.

28. Mr Matthias took me to press clippings which emphasise both Mr Downey's entrepreneurial success and also his general opposition to the current system of licensing law. He is (for example) reported in the industry press as saying that licensing law is "anti-business" and "anti-alcohol". Even without the press reports, it is plain that Mr Downey is a successful entrepreneur with access to resources. The claimant does not seriously challenge the proposition that he has adequate financial resources to fund the judicial review proceedings. It is also plain that Mr Downey has a commercial interest in the outcome of the litigation.

29. The third director is Ms Griselda Erskine. She is a successful chef, cookery writer and television presenter. She too became a director of the claimant on 23 November 2018. She has in the past operated Mare Street Market in Hackney and has some other commercial interests in the borough. There is little evidence about her motivation in becoming one of the claimant's directors. The claimant has not sought to rebut the defendant's submission that she is in a financial position to help to fund the judicial review proceedings.

30. Other than the directors, Dan Beaumont appears to have been one of those who formed We Love Hackney. He is currently the operator of three licensed premises in Hackney, two of which have 3am licences. The evidence suggests that all three venues are located within the Hackney SPAs. On the evidence before me, he plainly has a commercial interest in the outcome of the litigation.

31. The defendant produced some evidence about Henry Dimbleby's involvement. He is a successful entrepreneur in the food industry and a supporter of the claimant. He is a non-executive director of one of Mr Downey's companies.

Analysis and conclusions

32. The parties addressed me in detail on the various elements of the relevant legislation. I need not deal with all the submissions that were made to me. I shall deal only with the key questions on which my decision has turned.

33. In my judgment, the central question is whether these proceedings are "public interest proceedings" within the meaning of section 88(6)(a) of the 2015 Act which I have set out above. Section 88(7) sets out the meaning of public interest proceedings, to which I now turn.

Is there an issue of general public importance?

34. In order to be public interest proceedings, the case must raise at least one issue that is of "general public importance" (section 88(7)(a)). Mr Kolvin submitted orally and in writing that the claim raises important questions of law relating to the application of the PSED to licensing law. The questions have general and indeed national consequences.

35. I reject that submission. In considering whether the proceedings raise an issue of general public importance, it is convenient to start with a consideration of the issues raised in the parties' respective statements of case (*R (Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin), para 9). As I have indicated, the essential challenge set out in the grounds for judicial review is that the defendant had no regard to the PSED in formulating its SLP. That contention concerns what the defendant did or did not do in reaching the decision under challenge. In my judgment, it does not gain traction beyond the way in which the defendant came to formulate its own specific policy.

36. The claimant's skeleton argument submits that "there is no indication in the SLP or the EIA that the Council has enquired into, or had any regard to, how the core hours policy will affect the equality of opportunities between those of different races (including ethnic and national origin) concerning how and when they are able to socialise". The claimant is thereby complaining about how the defendant failed to formulate its own SLP lawfully. The alleged failures under equality law on which Lavender J granted permission cannot found a more general complaint about local authorities as a whole. The grounds for judicial review do not frame or raise any general challenge.

37. Mr Kolvin sought to persuade me that the case raised a general challenge by reference to the defendant's evidence. He drew my attention to certain comments in the report of Dr Philip Hadfield who is the director of a research consultancy working in the field of alcohol licensing. In his report for these proceedings, Dr Hadfield happens to express the opinion that the claim for judicial review has wide relevance and covers new ground. His opinion is legally irrelevant: it is the court's function alone to determine the issues of law that arise.

38. The grounds for judicial review contend that the defendant failed to take account of relevant considerations because the report from Kim Wright lacked balance and (it is said) failed to draw the attention of councillors to a number of factors which would undermine the defendant's policy decisions. This part of the claim is specific to the defendant's decision and in my judgment has no general importance.

39. Local issues framed by reference to local government policy may in principle raise issues of general importance. However, I would echo Nicol J's observation in *Garner v Elmbridge Borough Council* [2010] EWHC 567 (Admin), para 24: "As with any court judgment, it may involve considerations of matters of wider generality, but in essence the argument is… specific to the facts of the present case". The test in section 88(7)(a) is not met.

Do the proceedings involve a point of law of general public importance?

40. As to the legal issues, I need to consider as a separate question whether the case involves consideration of a point of law of general public importance (section 88(8)(c)). The claimant avers (at paragraph 35 of its Statement of Facts and Grounds) that the legal principles applicable to section 149 of the Equality Act are well established. The claimant's grounds refer to the collation of relevant legal principles by the Court of Appeal in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345,

[2014] EqLR 60, paras 25-26 as approved by the Supreme Court in *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811, para 73. The defendant accepts that *Bracking* and *Hotak* set out the applicable principles and, indeed, sets out those principles in its summary grounds of resistance. On their written statements of case, it is difficult to discern any general principle of law on which the parties disagree.

41. Mr Kolvin submitted that the application of equality law to licensing decisions is a novel area upon which there is no direct legal authority. I was told that this is the first case in the High Court to raise what Mr Kolvin called the intersection of licensing law and the PSED. I was nonetheless left unclear at the end of Mr Kolvin's submissions as to what general or important point of law would fall to be determined by the judge hearing the present claim.

42. The defendant accepts that it is bound to apply relevant statutory guidance which requires public authorities to have due regard to the PSED and to publish information at least annually in order to demonstrate compliance with the PSED (Home Office, Revised Guidance under section 182 of the Licensing Act 2003; April 2018; paras 14.66 - 14.67). The claimant has raised no general point of law for the court's decision under the guidance.

43. I have therefore reached the conclusion that these proceedings do not involve consideration of a point of law of general public importance. As the claimant's challenge is focused on an individual SLP, the public interest does not require any issue of public importance to be resolved (section 88(7)(b)).

44. I must also consider the number of people likely to be directly affected by any relief which the court may grant (section 88(8)(a)). Mr Kolvin submitted that investors, workers and users of Hackney venues would be affected, as would persons with protected characteristics and anyone seeking a licence to serve or sell alcohol in the future.

45. Mr Kolvin no doubt described a large number of people. However, the group or groups to which he referred are amorphous and somewhat protean. I do not think that the statutory words "likely to be directly affected" are apt to include anyone who works in licensed premises, or who goes for a late night drink, or who wishes at some stage in the future to invest in licensable activities in Hackney.

46. In relation to those who are directly affected, I must consider how significant the effect on those people is likely to be (section 88(8)(b)). The effect is in this case hard to measure. It is possible that, if relief were granted, some more people would be able to socialise by the consumption of alcohol late at night and some further operators would contribute to the night-time economy; but I am not persuaded on the evidence before me that any section of the community – whether residing, investing, working or socialising in Hackney – speaks with a uniform voice about the effects of the SLP. I am not bound to give this factor decisive weight and, in my judgment, the difficulties in delineating and measuring the direct effect means that it should count for less than other statutory factors.

47. To the extent that these various groups of people may be better described as indirectly affected, I am not bound to give any particular weight to indirect effect. In my judgment, the difficulties (which Mr Kolvin accepted) in measuring and assessing even the indirect effect mean that I should be slow to give this factor any decisive weight.

48. In short, these proceedings challenge specific aspects of the defendant's decision-making process. They are not public interest proceedings. It follows that the necessary condition for a CCO is not met.

The effect of not making a CCO

49. Further, under section 88(6)(b), the court may only make a CCO if it is satisfied that, in the absence of the order, the applicant would withdraw the application for judicial review or cease to participate in the proceedings. The press coverage and other documents that have been submitted to the court show that We Love Hackney has mounted a sustained campaign over the last few years. It is not in dispute (nor could it be) that civic society benefits from the expression of public views to those who make decisions on the public's behalf. Those views may legitimately be expressed in hard-fought campaigns. However, We Love Hackney's representations in 2016, which I have mentioned above, refer to the defendant's failure to minimise the regulatory burden on businesses. I have some sympathy for Mr Matthias's submission that this is an industry-driven campaign with the resources to resurrect some form of challenge against the defendant if the present case does not proceed.

50. On the other hand, Mr Kolvin assured the court that the present claim would not proceed if the claimant does not obtain a CCO; and this court cannot immunise the defendant against what may happen in the future. For present purposes, and on the basis of what I was told by Mr Kolvin in court, I accept that the claim will be withdrawn.

51. However, I must also consider whether it would be reasonable for the claimant to withdraw the claim (section 88(6)(c)). In this regard, it is relevant to note that the claimant's directors and significant supporters are individuals who have a commercial interest in the proceedings. I do not accept that either they as individuals, or their businesses if commercial advantage warranted it, would individually or together be unable to fund litigation which they say is of great significance to them.

52. A number of well-resourced individuals have chosen to litigate the claim via an impecunious company which has taken possession of funds donated by members of the public. Given their individual and cumulative financial resources, I infer that the directors and other backers do not want to fund the litigation beyond the level of third party support, rather than that they are incapable of doing so. I do not accept on the evidence before me that the claimant would be forced to withdraw the claim through impecuniosity. In my judgment, absent any compulsion to withdraw through impecuniosity, it would not be reasonable for the claimant to withdraw its application for judicial review. This part of the statutory test for a CCO is not met and, for this reason too, the application for a CCO does not succeed.

Section 89 factors

53. I have had regard to the factors stipulated by section 89 (set out above). As I have concluded that these proceedings are not public interest proceedings, the additional section 89 factors cannot and do not give rise to grounds for making a CCO.

Access to justice

54. Mr Kolvin submitted that the claimant would in the absence of a CCO be denied access to justice in a claim worthy of the grant of permission to apply for judicial review. I am not

sure that reliance on the grant of permission advances his application in a statutory scheme that applies only to cases in which leave to apply for judicial review has been granted (section 88(3)). In any event, the submission fails to recognise that Parliament has in the legislation struck the balance between (on the one hand) access to justice in public interest cases and (on the other hand) the risk to the public purse should unsuccessful claimants be unable to pay the costs of successful defendants. The suggestion that those well-resourced individuals who drive the litigation will, in the absence of a CCO, be denied access to justice is not realistic.

55. For these reasons, I agree with Lavender J and the renewed application for a CCO is dismissed.

Security for costs

56. The defendant sought security for its costs in the sum of £106,279.00. That sum was intended to cover costs up to but not including the substantive hearing (i.e. including preparation for the hearing but not the costs of appearing at court). The claimant's position is that, in the absence of a CCO, an application for security does not arise because the claimant will have no choice but to withdraw the claim. However, the claim has not yet been withdrawn and the defendant's application is before me for decision. While my consideration of the issues may become academic, it is not yet so.

57. I accept that the claimant company would be unable to pay the defendant's costs if ordered to do so – because I have been told as much by counsel for the claimant. Therefore, the conditions for an order for security are met (CPR 25.13(1)(b) and 13(2)(c)).

58. The key point of dispute was whether, having regard to all the circumstances of the case, it would be just to make such an order (CPR 25.13(1)(a)). Mr Kolvin submitted that orders for security are unusual in judicial review proceedings. However, the court has the power to award security and Mr Kolvin did not contend that any special or particular principles apply.

59. Mr Kolvin's primary submission was that it would not be just to make an order because the claim (which has been granted permission to proceed and is therefore arguable) could not then be pursued and would be stifled. In circumstances where an arguable claim would be stifled, an order for security should not be made (see the principles set out in *Keary Developments v Tarmac Construction* [1995] 3 All ER 534, 539H-542G and, more recently, *Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ* [2017] UKSC 57, [2017] 1 WLR 3014, para 12).

60. Mr Matthias submitted that, in order to demonstrate that the claim would be stifled, the burden rested on the claimant to show that there did not exist third parties who could reasonably be expected to put up security for the defendant's costs (*Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB), para 32; upheld on appeal in [2006] EWCA Civ 1123, [2007] 1 Costs LR 57; see also *Keary Developments*, above, at 540J-541B).

61. I accept Mr Matthias's submissions. For similar reasons as above, I have concluded that the claim would not be stifled: it has successful and resourceful backers who have the funds to provide security and to enable the claim to continue. The further contention that

the defendant has deliberately acted to frontload its costs to stifle an arguable claim lacks any foundation.

62. On the other side of the scales, the defendant may incur substantial costs in these proceedings with no realistic prospect of recovery in the event that the claim for judicial review were to be successfully resisted. There is therefore a risk of injustice if no order is made. In the circumstances, it is just to make an order.

63. As to the amount, both parties agreed that this fell to be fixed as a matter of my discretion. Mr Kolvin submitted that the defendant has incurred excessive costs to date. I agree that the case has been prepared by the defendant with the volume of documentation appropriate for a final hearing. Notably, the lengthy summary grounds of resistance could readily stand as detailed grounds. As canvassed with counsel, I would not anticipate that either party would need to incur further significant pre-hearing costs beyond the preparation of skeleton arguments (which need not be lengthy) and, possibly, some limited further witness evidence. For that reason, I do not propose to order the full security which the defendant seeks.

64. In all the circumstances, it would be reasonable to order security in the sum of £60,000 representing the defendant's costs to date (about £55,000 not including the costs of the present applications) together with a modest uplift to represent the limited further costs that may be reasonably incurred to prepare for the substantive hearing.

Conclusion

65. The claimant's application for a CCO is dismissed. The defendant's application for security for costs is allowed to the extent set out above.