UT Neutral citation number: **[2026] UKUT 00335 (TCC)**

UT (Tax & Chancery) Case Number: UT/2024/000135

Upper Tribunal
Tax and Chancery Chamber

Hearing venue: On paper

Judgment date: 28 August 2026

Protective costs order – Approach in Drummond v HM Revenue & Customs [2016] UKUT 221 (TCC) followed – application refused

Before

Judge Jonathan Cannan

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

JOHN DOUGLAS WARDLE

Respondent

Representation: The Appellants and the Respondent both made written submissions and the application for a protective costs order was dealt with on paper.

DECISION

Introduction

1. The Respondent ("Mr Wardle") has applied for a protective costs order ("PCO") in relation to this appeal in an application dated 7 July 2026. He is acting in person. The Appellants, HM Revenue and Customs ("HMRC") have objected to the application by way of written submissions sent to the Tribunal on 22 July 2026. Mr Wardle replied to that objection on 31 July 2026. I have dealt with the application on paper.

2. HMRC have permission to appeal a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 19 June 2024 ("the Decision"). The FTT allowed Mr Wardle's appeal against a closure notice which had denied his claim to entrepreneurs' relief on the disposal of his interest in Biomass UK No 1 LLP ("the LLP"). The principal issue in the appeal was the date on which the LPP had commenced its trade of selling electricity generated from wood waste and/or selling renewable obligation certificates.

3. The FTT granted HMRC permission to appeal on various grounds. The appeal was then stayed pending the appeal in *Putney Power Ltd v HM Revenue and Customs* [2026] UKUT 105 (TCC). The Upper Tribunal released its decision in *Putney Power* on 5 March 2026. The Upper Tribunal held that the FTT had applied an incorrect legal test derived from *Mansell v HM Revenue & Customs* [2006] STC (SCD) 605 in determining that the trade in that case had not commenced by the relevant date. The FTT ought to have simply undertaken a multi-factorial evaluation of the facts. The Upper Tribunal therefore set aside the FTT's decision and re-made the decision. In the event, the Upper Tribunal also found, adopting the right approach, that the trade had not commenced by the relevant date.

4. HMRC have since served an amended ground of appeal in this case. The sole ground of appeal is as follows:

> The FTT was wrong to conclude that the LLP had commenced its trade by the Relevant Date because it had completed each of the steps identified in *Mansell* at [93]. The FTT erred in considering that the test for when a trade commenced involved consideration of, only, the three 'steps' in the *Mansell* test rather than a multi-factorial evaluation of all the circumstances. As a result, the FTT took into account irrelevant factors and failed to take into account relevant factors. If it had taken the correct approach, the FTT would have been bound to find that the LLP had not commenced its trade by the Relevant Date in circumstances where, among other things, it had not completed the power plant and it was incapable of generating any income from its trade.

5. Mr Wardle initially applied for a PCO shortly after HMRC's appeal to the Upper Tribunal was lodged. He now renews that application by reference to the updated application mentioned above.

Jurisdiction to make a protective costs order

6. The jurisdiction of the Upper Tribunal to make a PCO has been considered in *Drummond v HM Revenue & Customs* [2016] UKUT 221 (TCC) and *HM Revenue & Customs v TGH (Commercial) Limited* [2016] UKUT 0519 (TCC). It is clear that the Upper Tribunal has jurisdiction to make the order sought by Mr Wardle. Judge Sinfield described the principles to be applied in *Drummond* at [27] – [31], drawing on principles applied by the courts in judicial review cases:

> 27. The CPR do not contain any rules in relation to PCO's. PCOs have been recognised in English public law since R v Lord Chancellor ex parte CPAG [1999] 1 WLR 347 where Dyson J set out some guidelines but refused to make a PCO on the facts of that case. The leading authority on the power to make PCOs

and the procedure to be adopted is Corner House. In that case, Lord Phillips of Worth Matravers MR, who gave the decision of the court, said at [72]:

> 72. … Dyson J said [in CPAG] the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances. We agree with this statement, but of itself it does not assist us in identifying those circumstances.

28. At [74], Lord Phillips set out the following guidance:

> 74. We would therefore restate the governing principles in these terms:
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> (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
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> (i) the issues raised are of general public importance;
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> (ii) the public interest requires that those issues should be resolved;
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> (iii) the applicant has no private interest in the outcome of the case;
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> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
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> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

29. Having set out some examples of types of PCOs, which included an order capping the unsuccessful claimants' liability for costs if they lost, Lord Phillips observed, at [76], that there is "room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise."

30. The governing principles set out in Corner House have been considered and refined by the Court of Appeal in subsequent cases. It is now clear that the principles in Corner House are guidelines which are not to be read as statutory provisions but are to be interpreted and applied flexibly (see R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749, [2009] 1 WLR 1436 ('Compton') at [23] and Morgan & Anor v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107 ('Hinton Organics') at [40]). Exceptionality is not an additional criterion to be satisfied but a prediction as to the effect of applying the principles set out in [74] of Corner House (see Compton at [24] and [83]). The general public importance and public interest requirements are a matter of evaluation for the judge but a case that will clarify the true construction of a statutory provision which applies to and potentially affects the whole population raises issues of general public importance (see Compton at [75] – [77]). Although private interest is a factor to be taken into consideration, it is not a bar to a PCO (see Hinton Organics at [37] - [39]). I understood HMRC to agree with the following approach to the issue of private interest, derived from Ames. It is inevitable that all tax appeals will have an element of private interest but it is the extent of the general public importance of the issue which must be taken into account, alongside other factors relevant to the fairness and justice of making such an order in appeal proceedings.

> 31. I can see no reason, as a matter of principle or policy, why the governing principles set out in Corner House should not be applied in the case of applications for PCOs in appeals to the UT. It seems to me to be obvious that consistency and good administration require the UT, when considering whether to make a PCO, to apply the Corner House principles, as modified by subsequent cases and bearing in mind the overriding objective in rule 2 of the UT Rules which is not the same as the overriding objective in the CPR.

7. In the event, Judge Sinfield refused the application in *Drummond*, but of course each case must be determined on its own facts. In *HM Revenue & Customs v TGH (Commercial) Limited* [2016] UKUT 0519 (TCC), Judge Sinfield rejected a submission by HMRC that the existence of a private interest in the outcome of an appeal means that no PCO can be made. He concluded at [30]:

> 30. … although private interest is a factor to be taken into consideration, it is not a bar to a PCO and a flexible approach should be applied to all aspects of the Corner House guidelines.

8. Both parties accept that I should apply the principles described by Judge Sinfield in *Drummond*. As I pointed out in *The executors of the estate of Peter John Linington v HM Revenue & Customs* [2024] UKUT 70 (TCC), the Upper Tribunal also has jurisdiction to make a costs capping order ("CCO") or an appeal costs order ("ACO"). That jurisdiction is analogous to the jurisdiction in the civil procedure rules ("CPR"), under CPR 3.19 and 52.19 respectively. A CCO is not appropriate in this case because there is no suggestion that HMRC will disproportionately incur costs without a CCO.

9. CPR 52.19 (previously CPR 52.9A) provides as follows in relation to ACOs:

> (1) Subject to rule 52.19A, in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.
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> (2) In making such an order the court will have regard to—
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> > (a) the means of both parties;
> >
> > (b) all the circumstances of the case; and
> >
> > (c) the need to facilitate access to justice.
>
> (3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).
>
> (4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.

10. Judge Sinfield considered the jurisdiction in relation to ACOs in *Drummond*. He cited *Manchester College v Hazel* [2013] EWCA Civ 281 where Jackson LJ described the introduction of ACOs:

> 29. In <u>*R (Corner House Research) v Secretary of State for Trade & Industry*</u> [2005] EWCA Civ 192, [2005] 1 WLR 2600 and a subsequent line of cases the Court of Appeal developed rules for protective costs orders in the context of judicial review. Such orders were made both at first instance and on appeal. In <u>*Eweida v British Airways PLC*</u> [2009] EWCA Civ 1025, the claimant, who was appealing from the EAT to the Court of Appeal, applied for costs protection on the basis that she was moving from a "no costs" jurisdiction to a costs shifting jurisdiction. The Court of Appeal dismissed her application, on the grounds that it did not have power to make a protective costs order or a costs capping order.

> 30. The outcome of *Eweida*, although correct on the law as it stood, was unsatisfactory for a number of reasons. Many individuals of modest means who litigate in "no costs" jurisdictions are often without legal representation. Indeed, the claimants in this case litigated before the Ashford Employment Tribunal without representation. It is usually unjust to subject such litigants to a risk of adverse costs when they proceed to a higher level. This is particularly so if they win at first instance and are dragged unwillingly into an appeal. It may also be unjust to impose a costs risk if the litigant loses at first instance, but has proper grounds for bringing an appeal. This was the case with Mrs Eweida.
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> 31. Of course it is not always desirable to suspend costs shifting rules when a case comes up from a "no costs" jurisdiction. A classic example is an appeal from the EAT where one party is a well resourced employer and the other party is an employee or a group of employees backed by their union. Such a case may well involve issues of principle or practice on which substantial sums turn. Obviously, in cases like that, there is no reason to disapply the normal costs shifting rules.
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> 32. It is against this background that the Rule Committee has recently promulgated the new rule 52.9A. This rule will come into force on 1 April 2013. It provides as follows…
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> …
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> 33. This new rule is intended to address the mischief which has emerged in cases such as *Eweida*. Where justice so requires, the court can exclude or limit costs recovery when a case passes from a "no costs" or "low costs" jurisdiction to a court with full costs shifting powers. The new rule will not only apply to appeals from the EAT to the Court of Appeal. The enactment of this rule constitutes implementation of recommendation 71 in the *Review of Civil Litigation Costs Final Report* (published in January 2010).

11. Judge Sinfield then described the jurisdiction of the Upper Tribunal as follows:

> 37. I agree that an ACO is simply a species of PCO. As such, I consider that the UT has the power to make such an order under the TCEA 2007 and the UT Rules for the same reasons as I have stated at [18] – [23] above… [T]he UT has the benefit of the guidance provided by CPR 52.9A when deciding how to exercise its power to make orders in relation to costs. Like the ET and EAT, the FTT is a no costs jurisdiction except in a case that has been categorised under rule 23 of the FTT Rules as a Complex case and the appellant has not asked for it to be excluded from potential liability for costs under rule 10. The injustice identified by Jackson LJ in *Manchester College* at [30] has the same potential to arise in the UT as in the High Court and Court of Appeal. In my view, the UT would not be giving effect to the overriding objective in the UT Rules if, having the power to make a costs order to mitigate the potential injustice, it refused to do so where such an order would be appropriate under CPR 52.9A.

12. When Judge Sinfield came to apply these provisions in *Drummond v HM Revenue & Customs* [2016] UKUT 0369 (TCC), he considered the criteria in *Corner House*. He did not separately consider the specific requirements of CPR 52.19. Clearly there is an overlap between the *Corner House* criteria for a PCO and the requirements of CPR 52.19 for an ACO. In refusing any form of order, Judge Sinfield placed particular weight on the fact that Mr Drummond would be able to finance HMRC's reasonable costs of an appeal if required to do so. He concluded:

> 15. Taking all the criteria together and bearing in mind the overriding objective, as set out in rule 2(1) of the UT Rules, of dealing with cases fairly and justly, I consider that Mr Drummond's application for a PCO or similar order should be refused. Mr Drummond has chosen to appeal to the UT and such an appeal carries with it the risk of an order that the unsuccessful party pays the successful party's costs. Such a costs shifting regime is not inconsistent with the overriding objective which requires fairness and justice for both parties. There is nothing unfair or unjust in this case about refusing to protect Mr Drummond from being exposed to the risk of costs when, as I have found, he is able to pay them.

13. Against this background, and with the principles stated above in mind, I shall consider the Appellants' application for a PCO.

Discussion

14. I start by considering the relevant factors identified in *Corner House*.

(i) General public importance

15. The approach to determining when a trade commences has been considered by the Upper Tribunal in *Putney Power* and neither party contends for any different approach. HMRC acknowledge that the multi-factorial approach that falls to be applied on the particular facts of a case is a matter of general public importance. HMRC say that the FTT in this case took the wrong approach as a matter of law in light of *Putney Power*. They contend that on the facts of this case the FTT would have been bound to find that the LLP had not commenced trade by the relevant date.

16. I would have been inclined to regard the approach to be taken on the particular facts of a case to be more of an iterative process for the FTT to work through as cases come before the FTT. If HMRC were to establish a material error of law in the FTT's approach, the question for the Upper Tribunal would be whether to remake the decision on the facts found by the FTT or to remit the appeal to the FTT to reconsider its decision. I have some reservations that the appeal does involve a matter of general public importance. However, I shall proceed on the basis of HMRC's concession that it does.

(ii) Public interest

17. HMRC do submit that the public interest does not require the Upper Tribunal to determine when a trade commences on the facts of this appeal. I accept that submission. The Upper Tribunal has given authoritative guidance to the FTT as to how it should approach the question of when a trade commences. That guidance was given in *Putney Power* in the context of the enterprise investment scheme, but it is equally applicable in the present context. In my view, there is no real public interest in requiring the Upper Tribunal to determine when the trade commenced on the particular facts of this case.

18. Mr Wardle argues that there are conflicting answers in the present FTT Decision and in the Upper Tribunal decision in *Putney Power* and that HMRC's guidance in this area is inconsistent with *Putney Power*. He suggests that the law as to when a trade commences remains in urgent need of rationalisation.

19. I do not accept those submissions. The correct approach as a matter of law has been set out in *Putney Power*. HMRC's guidance does not appear to have been updated to reflect the decision in *Putney Power*. That is surprising, almost 6 months later, but in any event such guidance has no authoritative status. If there was no authoritative decision on the correct approach then I would accept that there would have been a public interest in the Upper Tribunal considering the correct approach on this appeal. However, this appeal was stayed so that the correct approach could be determined in *Putney Power*. Now that has been done, I do not consider that there is any real public interest that requires the present appeal to determine the question of when the trade commenced on the facts of this case.

(iii) Private interest

20. Mr Wardle clearly has a private interest in the outcome of this appeal. There is tax at stake of some £87,000 which Mr Wardle has paid and is seeking to recover. The existence of that private interest is not a bar to a PCO, but it is a factor to take into account in exercising my discretion as to whether to make a PCO. I also take into account that Mr Wardle's interest arises as a result of his

position as a taxpayer seeking to comply with his obligations under the UK tax code. There is a public interest in taxpayers paying the right amount of tax and in HMRC collecting the right amount of tax. To that extent, the appeal does not concern a purely private interest.

(iv) Financial resources

21. Mr Wardle is acting in person and his costs of defending the appeal as a litigant in person will be relatively small. HMRC are well-resourced. They are represented by their Solicitor's Office, and by leading and junior counsel. They have estimated that their costs of the appeal are likely to be some £42,000.

22. Mr Wardle has chosen not to rely on evidence as to his financial position. He simply says that his resources are limited to his personal savings. He points to the decision of Bean J (as he then was) in *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250 (Admin). In that case, it was held that *Corner House* did not require the applicant's resources to be such that a failure in the litigation would be "financially fatal" before a PCO would be made. A PCO was made with a cap of £40,000 despite the applicant having significant reserves. It appears that it could have afforded to pay £150,000 in costs without having to close.

23. In the absence of any evidence as to means, I must infer that Mr Wardle would be able to meet a liability for costs if HMRC's appeal is successful. Indeed, Mr Wardle states in his Reply that he has never suggested that he lacks the resources to satisfy an adverse costs order. His position is that in the circumstances of this case, where he has been successful before the FTT and is responding to an appeal by HMRC, it is disproportionate and unfair for him to be at risk of an adverse costs order. It seems to me that questions of proportionality and fairness fall to be considered as part of the overall balancing exercise.

(v) Discontinuance of the proceedings

24. I must consider whether Mr Wardle will probably discontinue the proceedings in the absence of a PCO and whether he would be acting reasonably in so doing. Mr Wardle has previously stated that if he did not obtain a PCO then he would withdraw his appeal because he was unwilling to shoulder the costs. However, in light of the decision in *Putney Power* his position was that whether or not he would withdraw depends on HMRC's response to his application for a PCO.

25. Mr Wardle has now had sight of HMRC's response. In his Reply dated 31 July 2026 he states that it would not be prudent for him to continue defending the appeal in the absence of a PCO. Otherwise, he would face the risk of an uncapped adverse costs order. Therefore, he would have little practical alternative but to cease defending the appeal. In practice, HMRC's appeal would be conceded.

26. Mr Wardle's indication as to what would happen if there is no PCO falls short of a clear indication that he would withdraw the appeal. Given that Mr Wardle does not seek to suggest that he lacks the resources to satisfy an adverse costs order, I am not satisfied that in the absence of a PCO it is likely that he would withdraw his case on the appeal.

Conclusion

27. I must consider whether it is fair and just to make a PCO taking all these factors into account, including the circumstances generally.

28. Mr Wardle's submissions as to why I should make some form of PCO have been moderate, cogent and well-argued. I acknowledge that HMRC are the appellants and that Mr Wardle is moving from a non-costs jurisdiction in the FTT where he was successful to a costs-shifting jurisdiction in the Upper

Tribunal. He has been put in the position of having to defend an appeal against a reasoned decision of the FTT. As such, he is being required to bear the risk of an adverse costs order.

29. Having weighed all the circumstances, I have come to the firm conclusion that it is not appropriate to make a PCO in this appeal. The absence of any real public interest in determining when the trade commenced on the facts of this particular case, and the fact that Mr Wardle would be able to meet a liability for costs weigh most heavily in the balance.

30. I should also consider whether it is appropriate to make an ACO, possibly capping the recoverable costs by reference to HMRC's estimate of £42,000.

31. I have not had any submissions specifically directed to how the jurisdiction pursuant to CPR 52.19 might apply by analogy in the circumstances of this application. I take into account that HMRC has substantial means, but I have no evidence as to Mr Wardle's means. I am not satisfied that it is necessary to make an ACO in order to facilitate Mr Wardle's access to justice. Overall, I am not satisfied that it is appropriate to make any form of ACO.

Determination

32. For all the reasons given above I refuse the application for a protective costs order.

33. Mr Wardle should confirm to the Upper Tribunal and HMRC whether he intends to pursue his defence of the appeal or to withdraw his case on the appeal within 28 days from the date of this decision.

JONATHAN CANNAN
UPPER TRIBUNAL JUDGE

Release date: 28 August 2026