Landmark CHAMBERS

JR NUTS AND BOLTS: COSTS

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Costs: general principles

- General rule is that the unsuccessful party must meet the successful party's costs;
- However, ordinarily an unsuccessful claimant will not be ordered to pay two sets of defendant costs;
- Costs of a successful interested party will not ordinarily be recoverable against the claimant unless the defendant and interested party have separate interests properly requiring separate representation or where those parties dealt with separate issues in the claim;
- Interested Party's costs recovered in *R (Smeaton on behalf of SPUC) v Secretary of State for Health [2002]* EWHC 886 (Admin), where:

  "The simple reality is that this case without the active participation of Schering would have been a 'Hamlet without the Prince'… Schering had no practical option but to seek to intervene… in proceedings raised by a party… which chose to make very serious allegations of criminality against a well-known pharmaceutical company, and which must have been well aware of the possible costs consequences of an unsuccessful application for judicial review."

Costs at the permission stage

- Where a claim is refused permission, the Defendant is ordinarily entitled to the costs of preparing the AoS and summary grounds;
- Where is refused permission on the papers and renews to an oral hearing, PD 54 paragraphs 8.5-8.6 provide that:
  - **8.5** Neither the defendant nor any other interested party need attend a hearing on the question of permission unless the court directs otherwise.
  - **8.6** Where the defendant or any party does attend a hearing, the court will not generally make an order for costs against the claimant.
- Cost situation may be different in cases of non-compliance with the pre-action protocol.

Costs: special situations

- From 13 April 2015 (subject to transitional provisions) the position for interveners has been altered by s89 of the Criminal Justice and Courts Act 2015;
- s89(3) and (4) provide that intervening parties may not, save in exceptional circumstances, recover their costs from the parties to those proceedings;
- s89(5) and (6) provide for circumstances where the intervening party will be required to pay the costs of a claimant/defendant. Court must order intervener to pay the costs *"incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings"* where:

(a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;

(b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;

(c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings;

(d) the intervener has behaved unreasonably.

Costs: legally aided claimants

- Special rules apply for cost orders against and legally aided claimants;
- Currently contained within s26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LAPSO")
- Principle is that cost orders against legally aided individuals must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances;
- Further provision as to the assessment of costs and the amount it is reasonable for a legally aided claimant to pay is made in regulations 15 and 16 of the Civil Legal Aid (Costs) Regulations 2013;
- Example wording is provided in the pack of materials.

Settlement

- Claims can be settled by consent between the parties at any time prior to the substantive hearing;
- If a consent order is agreed, the claimant should file the agreed order, signed by all the parties, at court together with copies;
- Note that there is a fee to be paid (currently £50);
- Applications for fee remissions can be made using Form EX 160.

Consent orders: terms

- If a mandatory order of the court is required to give effect to the agreed settlement terms (other than costs), the draft order should be accompanied by a short statement of reasons justifying the terms of proposed order;
- Not necessary where the consent order simply provides for the withdrawal of the claim and the payment/assessment of costs;
- If the court is not satisfied with the terms of the order, the court will give directions and may direct that a hearing date be set for the matter to be cosidered further.

Consent orders: costs

- Common situation where parties can agree over the disposal of the claim (for example that a new decision should be made), but not about costs;
- Situation dealt with in Administrative Court Guidance of December 2013 (see pack of materials);
- In summary:
  - Sets out a procedure where the consent order should provide for any party seeking its costs to file and serve written submissions (of no more than 2 sides of A4) within 14 days of the court approving the consent order;
  - Submissions must confirm that the parties have sought to negotiate an agreed position on costs;
  - Set out the compliance (or otherwise) with the pre-action protocol;
  - Identify the areas of dispute;
  - Set out the party's position by reference to the principles in *M v Croydon*;
  - The other party then has 14 days to file and serve submissions in reply;
  - Party seeking its costs then has 7 days to file and serve any reply.

Who won? The principles in *M v Croydon*

- Court of Appeal considered the various classes of settled cases and the costs orders which should follow:

- Case (i): where a claimant obtains all the relief which he seeks he is *"undoubtedly the successful party, who is entitled to all his costs, unless there is a good reason to the contrary";*
- 'Good reasons' might include the claimant having failed to comply with the pre-action protocol (thereby denying the defendant the opportunity to concede pre-issue);

M v Croydon (cont.)

- Case (ii): where the claimant obtains only some of the relief which he is seeking the position on costs is more nuanced and there may be an argument as to which party was more 'successful';
- Determining who was successful requires court to consider:
  - how reasonable the claimant was in pursuing the unsuccessful claim;
  - how important it was compared with the successful claim;
  - how much the costs were increased as a result of the claimant pursuing the unsuccessful claim.
  - *"where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs."*
  - However, *"much would depend on the particular facts."*

M v Croydon (cont.)

- Case (iii): where there has been some compromise which does not actually reflect the claimant's claims.
- In such cases:
  - *"the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs."*
  - *"However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."*