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SWALA Spring breakfast seminar series

Costs in Judicial Review proceedings

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Judicial review – introduction

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- The starting points are always:
  - CPR Part 54
  - Pre-action protocol for judicial review
  - The Administrative Court Guide
- In relation to costs, while there are some departures for JR, for the most part the underlying principles of CPR Parts 44-48 (and the PD's) apply.
- As a consequence:
  - You still need to serve a costs schedule at least 24 hours prior to a hearing.
  - Subject to the detail in this talk, the Court retains its normal discretion to award (or not) costs as it sees fit.
  - The Court can summarily assess costs, or order detailed assessment.

JR Costs – general principles

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- The general rule is that costs will follow the event, so the unsuccessful party will pay the successful party's costs – CPR 44.2(2)(a)
- In deciding whether to depart from the general rule, the Court will consider:
  - The conduct of the parties, including:
    - Whether they complied with the Pre-Action Protocol;
    - Whether it was reasonable to raise, pursue, or defend a particular allegation;
    - The manner in which the party conducted the claim; and
    - Whether a claimant who was successful exaggerated a claim.
- Where a party has failed to comply with any orders, the Rules or the PD the Court can decide whether to :
  - reduce a successful party's costs; or
  - Increase the amount an unsuccessful party should pay.

JR Costs – M v London Borough of Croydon [2012] EWCA Civ 595

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- M was an immigration case, dependent on whether M was aged 12, or 14. The authority eventually conceded that M was 12 and submitted to the relief. M was refused costs (no order as to costs) at first instance, on the basis that the Judge decided that the outcome was not clear from the outset.
- The appeal was allowed on the basis that M was successful and costs should follow the event.
- The CA however agreed that at the outset, the facts (and M's age) were unclear. On that basis the CA:
    - Allowed M 50% of M's costs until the grant of permission; and
    - Allowed 100% of M's costs after permission, on the basis that Croydon should have reassessed the position and the merits of continuing to oppose the claim.

M v Croydon (cont.)

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- In addition, the CA set out three criteria which Courts should consider when assessing the question of costs:
    - Where C has been wholly successful, i.e. they have obtained the relief sought, either at a contested hearing, or by consent. Unless there is a good reason (see above), C will generally be allowed their costs.
    - Where C has only been partially successful, the Court should consider:
        - How reasonable was it for C to pursue the unsuccessful claims;
        - How important / significant were the unsuccessful parts of the claim; and
        - What effect did the unsuccessful part of the claim have on costs.
    - Where there has been a compromise and C has achieved a result which is outside the scope of the relief sought. This can be a positive outcome, in the sense that it might achieve something valuable. The Court should however consider whether that is a) success by other means, and / or b) whether C would have succeeded had the claim been decided at a hearing.

Other departures from the general rule

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The Court may also depart from the general rule in other circumstances:

- Cases with a public interest element – for example *R (Davey) v Aylesbury Vale District Council [2007] EWCA Civ 1166*. Amongst other points, there were two core principles:
    - First, if a claim was brought which was wholly in the public interest, and not for commercial or proprietory reasons, then only some costs may be ordered against an unsuccessful C, or even "no order as to costs"; and
    - Second and conversely, if a public body defended a claim in the public interest, it might recover the costs of an oral permission hearing, or costs prior to filing an AoS.
- Unlawfullness / illegality. In *Hunt v North Somerset Council [2015] UKSC 51* C sought to quash D's budget, for cutting youth services and failing to comply with the Equality Act. C lost at first instance, but succeeded on appeal.

Other departures from the general rule (cont.)

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- *Hunt (continued)* – however, by the date of the appeal, the financial year was almost at an end and the CA decided that:
  - it was too late to quash the budget, notwithstanding the unlawfulness;
  - the appeal was of no practical value to C;
  - D had therefore effectively "won"; and
  - C should pay 50% of the Council's costs
- Hunt won at SC – the SC deciding:
  - Where a mandatory, quashing, or prohibitory order was not appropriate by the hearing, particularly where there was unlawfulness, the Court should normally make a declaration of unlawfulness.
  - However, H was represented and did not seek a declaration. Had also failed on a number of his claims at first instance.
  - However, H had won in substance, should not pay D's costs and should recover two thirds of his costs at each stage of the proceedings.

Costs at the permission stage

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- Ordinarily, if C obtains permission, costs are “in the case” and will follow the outcome of the substantive hearing.
- If C fails to obtain permission, they may be ordered to pay D’s costs.
- D, plus any interested parties must apply for / seek costs in their AoS to be entitled to costs.
- D’s / interested parties will normally only be entitled to costs of the AoS, not of attending a permission hearing
- The Court should only depart from these rules in “exceptional” cases, normally including a) the hopelessness of the claim, b) C persisting after being told it was hopeless, c) abuse of process, d) C with substantial resources pursuing an unreasonable claim, or e) a rolled up hearing or in effect an early substantive hearing where denying costs would prejudice D.

Costs at the substantive hearing

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- Unlike at the permission stage, if permission has been granted, at the substantive hearing, ordinarily if C is unsuccessful, they will only be expected to pay one set of costs.
- The Court can depart from that general rule if:
    - Any of the points above relating to conduct apply;
    - D and any interested parties (or where there is more than one Defendant) have different interests and it was reasonable to be separately represented;
    - C was acting in the public interest, not for personal gain (this might be a reason not to make an adverse award, or to limit the costs, or parties entitled to them).

Costs where a claim has been settled

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- Where a claim has been settled, the parties must attempt to agree the liability for costs, mindful of the overriding objective and the amount of costs at stake.
- Only if the parties cannot agree, should they ask the Court to determine liability for costs.
- The parties must consider / follow the ACO April 2016 Guidance - ac013-eng.pdf (publishing.service.gov.uk)
- The Court will apply the principles set out in *Croydon* and *R (Tesfay) v Secretary of State for the Home Department [2016] EWCA Civ 415*.
- Note – *Croydon*, although earlier than *Tesfay* is a substantially less factually complicated case (hence it's adoption in the Guidance).

Other factors

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- Legal aid: costs can be made against a legally aided party, but will be subject to the costs protection provided by s26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- Environmental claims: JR claims that fall under the *Aarhus Convention* are subject to certain costs protections – see CPR Part 46.24 – 46.28.
- *Aarhus* applies if C is a member of the public and the claim relates to environmental issues relating to decision making and compliance with environmental obligations.
- If it applies, C can seek a costs capping order, limiting their liability to costs. C must raise the point in the Claim Form, and provide information on their resources, proving entitlement to the protection.

Conclusion

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Remember – costs follow the event; except where they don't!

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Thank you