



## **Judicial Review: A Procedural Update**

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### **INTRODUCTION**

1. There have been a number of recent decisions and legislative developments that touch upon the procedural aspects of judicial review, of which practitioners will wish to be aware. Whilst our review could not hope to be exhaustive, we will seek to review the most significant developments and outline the key features. We will cover broadly the following areas: starting claims; the permission stage; disclosure; the substantive hearing and costs.
2. We are not intending for the most part to cover the substantive points arising in each of the cases, but rather to concentrate on procedural points common to practice more widely in the Administrative Court. This means that the cases we have selected for discussion cover a wide range of substantive areas. We have tried to concentrate on the points of general relevance to all practitioners in the field of public law.

### **FUNDING AND JUDICIAL REVIEW**

#### ***Legal aid providers***

3. On 27 March 2015 new regulations<sup>1</sup> were introduced which make amendments to the provisions governing payment for providers' work on applications for judicial review. These changes follow the High Court's judgment in *R (Ben Hoare Bell & Ors) v the Lord Chancellor* [2015] EWHC 523 (Admin). The new regulations reflect the general policy as set out under the previous regulations<sup>2</sup> while additionally taking into account the findings of the High Court. The changes mean that payment for work on an application for judicial review is not allowed unless the:
  - court gives permission to bring judicial review proceedings
  - court neither gives nor refuses permission and the Legal Aid Agency (LAA) considers payment is reasonable in the circumstances<sup>3</sup> – see 'discretionary payments' below

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<sup>1</sup> Civil Legal Aid (Remuneration) (Amendment) Regulations 2015

<sup>2</sup> The Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014

<sup>3</sup> As before, providers may apply for a discretionary payment in situations where the court has neither given nor refused permission on an application for judicial review. For example, if a case is settled or withdrawn before the court has reached a decision on the application.



- defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court (a) refusing permission to bring judicial review proceedings, or (b) neither refusing nor giving permission
- court orders an oral hearing to consider whether to give permission to bring judicial review proceedings
- court orders a rolled-up hearing

### ***Residence test***

4. Following the entry into force of the civil legal aid reforms made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the MoJ decided to introduce a residence test for civil legal aid via secondary legislation<sup>4</sup>. If approved by Parliament, this would restrict civil legal aid to persons who are lawfully resident in the UK, the Channel Islands, Isle of Man or a British overseas territory for a continuous period of at least 12 months continuously with no absences in excess of 30 days at the time of the application for civil legal aid unless they were children under 12 months' old, a particular kind of asylum claimant or involved with the UK armed forces.
5. On 18 April 2016 the Supreme Court allowed the appeal of *R (The Public Law Project) v Lord Chancellor* (UKSC 2015/0255) midway through the hearing, overturning the Court of Appeal judgment in favour of the Home Office. The basis for the Supreme Court's decision was that the Lord Chancellor, Chris Grayling lacked the requisite *vires* via the enabling statute to introduce a residence test. A second issue was to be argued regarding whether the test was unjustifiably discriminatory and so in breach of common law and the Human Rights Act 1998 but the Court did not hear argument on that question. Full written reasons for the decision will follow in due course.

## **STARTING CLAIMS, PERMISSION AND DISCLOSURE**

### ***'No substantial difference' test***

6. A major recent legislative development in relation to judicial review has been implemented by Part IV (ss.84-90) of the Criminal Justice and Courts Act 2015 ("CJCA 2015"). Some commentators have described this as 'judicial review in an age of austerity'. Not all of the

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<sup>4</sup> Draft Legal Aid, Sentencing and Punishment of Offenders Act (Amendment of Schedule 1) Order 2014



provisions of Part IV are yet in force and will be discussed in further detail throughout the notes below.

7. Since 13 April 2015 all claims for judicial review issued in the High Court<sup>5</sup> are subject to a 'no substantial difference' test at the permission stage. By section 84 of the CJA 2015 (amending s.31 of the Senior Courts Act 1981), if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the “conduct complained of had not occurred”, the court must refuse to grant permission or interim relief. However, the court may still grant permission if it considers that it is “appropriate to do so for reasons of exceptional public interest” which the court must then certify. Similarly, the Court must refuse to grant final relief, including damages, if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different.
8. By CPR 54.8(4)(ia) if a defendant who wishes to contest an application for permission on the basis that the conduct complained of had not occurred then it is highly likely that there would have been no substantial difference to outcome then it must be expressly pleaded in the summary grounds. Where the defendant makes this request the Court must determine the point. Where no such request is made by the defendant the Court may still consider the point of its own motion.
9. This test is not confined to ‘trivial procedural failings’ but would encompass any finding that the outcome would have been substantially the same: see *R (Hawke) v Secretary of State for Justice* [2015] EWHC 3599 (Admin), where the operation of s 31(2A) of the Senior Courts Act 1981 applied to prohibit the granting of relief and to result in the dismissal of the claim for judicial review.
10. This change could be regarded as a complicated way of not achieving very much. The administrative court has long demonstrated an unwillingness to grant permission in cases that are of academic interest only. Furthermore, judicial review has always been a discretionary jurisdiction and relief has been refused where the outcome of a deficient decision-making process would have been the same, even if the correct, lawful process had been carried out<sup>6</sup>. In light of this, the ‘no substantial difference’ test is considered unlikely to alter the way in which most cases will be dealt with although it will need to be dealt with expressly and it remains to

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<sup>5</sup> Section 84 CJA 2015 will not come into force for judicial review proceedings considered by tribunals at this stage

<sup>6</sup> see e.g. *R v Chief Constable of Thames Valley, ex p Cotton* [1990] IRLR 344; *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWHC 1338 (Admin); 90 BMLR 139; [2006] All ER (D) 149 (Jun).



be seen what impact these changes will have on the overall length and cost of permission applications.

11. The no substantial difference test may invite a shift of focus away from the legality and more towards the outcome of decision-making<sup>7</sup>. It may be some time before it is clear what fruit these reforms will bring and a view may be taken as to what sort of fruit it is. Whether these changes may discourage claimants from bringing a case or the court from granting permission in circumstances where a decision maker who has failed to obey the law declares that obedience would have made no difference remains to be seen. There is certainly the possibility that it could increase the length, cost and complexity in cases at the permission stage and beyond (see e.g. *R (Logan) v Havering London Borough* [2015] EWHC 3193 (Admin) at [59]).

### ***Delay/Promptness***

12. As will be familiar to public law practitioners, CPR 54.5 stipulates that any claim for judicial review must be made promptly and in any event not later than 3 months after the grounds to make the claim first arose. Time limits for challenges to decisions under the planning acts are even shorter, promptly and no later than 6 weeks. Challenges to procurement decisions governed by Reg. 92 of Public Contracts Regulations 2015 (currently between 10-30 days depending on the circumstances in which the decision is taken).
13. A recent approach to excusable delay was considered in *R (on the application of Jenkins) v Hammersmith Magistrates' Court and Crown Prosecution Service* (2015), (unreported) where there had been substantial delay in making a judicial review application. The court identified that it was important to bear in mind the observations in *Balogun v DPP* [2010] EWHC 799 (Admin) that challenges to adjournments had to be pursued as a matter of extreme urgency, within days rather than weeks, so as not to affect the continued progress of cases. However, in the light of various factors, particularly the fact that the Administrative Court Office had wrongly advised the claimant that he could not file his claim without his legal advisor's note of the hearing, and the fact that the delay had not caused any disruption to the Crown, the delay was excusable in the circumstances.
14. In a recent planning judicial review: *Mulvenna and Smith v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2015] EWHC 3494 (Admin), the court determined that anyone objecting to a public authority's decision by way of

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<sup>7</sup> See: *Reforms to Judicial Review in the Criminal Justice and Courts Act 2015* [2015] Public Law 583



judicial review had to take the initiative and challenge it promptly since the time limits in planning judicial reviews were especially tight. The public law system could not work on the basis of persons holding back from legal challenges until another claimant in a similar position had succeeded in court. The court considered that if an extension of time were granted, there would be a detriment to good administration since, at the very least, public resources had gone into the preparation of decision letters.

### ***Compliance with the CPR***

15. The importance placed by the court upon complying with the rules has found its clearest modern expression in the cases of *Mitchell* and *Denton*. They underpin the principles that govern the court's approach to applications for extensions of time generally. In *R (Kigen & Anor) v SSHD* [2015] EWCA Civ 1286 the Court of Appeal confirmed that the approach to be taken in public law proceedings should not be substantially different from that which the court would ordinarily take in private law civil cases. It is widely recognised that judicial review proceedings should be started promptly and pursued with diligence and there is no reason why the court should take a more relaxed approach to compliance with the rules than it would in private law proceedings; if anything, there are grounds for adopting an even stricter approach.
16. In *Kigen* the court held that lodging a request for reconsideration of an application for permission to apply for judicial review is analogous to filing a notice of appeal, since in both cases a failure to do so will result in the termination of the proceedings. Accordingly, similar principles apply to applications for any necessary extension of time and in dealing with such the court can be expected to adopt the three-stage approach set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, applying the guidance given in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 – was the delay or default serious and significant/whether there is any good reason for the failure or default/ all the circumstances of the case. Delay in obtaining legal aid cannot be regarded as a complete answer to a failure to comply with procedural requirements.

### ***Duty of candour***

17. In *Mohammad Shahzad Khan v SSHD* [2016] EWCA 416, the Court of Appeal (Beatson LJ giving the leading judgment) re-emphasized the importance of the claimant in judicial review proceedings ensuring that that judge dealing with the application for judicial review has the full picture in order to make the relevant decision (see §§36 ff). Although a highly significant piece of information had been put before the court when an application for judicial review was made,



the respondent had failed to pick up on its significance in its acknowledgement of service, and its import was only appreciated much later down the line when counsel was instructed. Permission was refused on the papers and at the renewal hearing in the Upper Tribunal, and the claimant proceeded to obtain permission to appeal from the Court of Appeal. However, highly unusually, the Court of Appeal set aside the permission to appeal (although they said that they would have dismissed the appeal in any event).

18. Of particular interest will be the Court of Appeal's consideration of the duty of candour and in particular how that duty affects claimants and their advisers.
19. Initially, the CA re-stated and endorsed a number of well-known propositions as to the duty of candour:
  - (1) The provision for a respondent to judicial review proceedings to file an acknowledgement of service and summary grounds does not justify a claimant taking a more relaxed view of the duty of candour;
  - (2) If a material document is not disclosed by the claimant at the outset, the fact that the claimant did not know it contained material facts is no excuse if the claimant would have known had he or she made appropriate inquiries before applying for permission, applying *R v Kensington General Commissioners, ex p Polignac* [1917] 1 KB 486.
  - (3) The duty of candour on public authority respondents, not least central government, to judicial review proceedings is of course "*a very high duty ... to assist the court will full and accurate explanations of all the facts relevant to the issue the court must decide.*" (per Laws LJ in *R (Quark) v SSFCA* [2002] EWCA Civ 1409 at §50).
20. The key question that the CA had to consider was whether that "very high duty" on respondents extended similarly to claimants, to assist the court with "full and accurate explanations of all the facts relevant to the issue" (§39). Case law had not treated the position of the claimant and the respondent in the same way. The CA considered the similar contexts of without notice applications for injunctions and applications in the Commercial Court or the Chancery Division for freezing injunctions or permission to serve out of the jurisdiction, but found them ultimately unhelpful, as in those (often without notice) contexts what is sought is an immediate coercive order of the court, and not simply permission, and applications in those cases are generally made on an urgent basis (although of course we note that an application for judicial review can be made on an urgent basis too). As with an application for permission to appeal before the CA



itself, a respondent to an application for permission to apply for judicial review will be aware of the same, and respondents are encouraged to file an Acknowledgement of Service and participate in the judicial review proceedings.

21. But whilst the duty on claimants did not equate exactly with that on respondents, the CA accepted that the obligation of a claimant was greater than simply to furnish the material document (without drawing its significance to the attention of the court). Beatson LJ said:

*“If, as Collins J stated in R (I) v Secretary of State for the Home Department [2007] EWHC 3103 (Admin), claimants in judicial review proceedings must ensure that the judge dealing with the application has the full picture: in some circumstances to ensure this they will have to do more than just furnish the document. The position should be the same for those applying for permission to appeal from the first instance decisions in such proceedings. [...]*

*... providing a partial explanation in the statements of grounds and facts which is misleading will be a breach of the duty of candour in an application for judicial review even where it is not linked with a without notice application for an injunction. Beyond that, in particular, I do not consider that it suffices to provide a pile of undigested documents, particularly in a document heavy case, or where the claimant has knowledge which enables him or her to explain the full significance of a document. I also consider that in considering the effect of a failure to explain material in a disclosed document that is adverse to the claim, it is relevant to consider whether the failure to explain the material was innocent in the sense that the relevance of the material was not perceived.” (emphasis added).*

22. On the facts of the case, the specific history and documents should have been reviewed carefully by legal advisers, and had this been done, the need for an explanation in a witness statement, or at least in the statement of facts and grounds with the application for judicial review, would have been manifest.
23. Beatson LJ also re-emphasized that the duty of candour is a continuing one, including a duty to reassess the viability and propriety of a challenge in the light of the respondent’s acknowledgement of service and summary grounds.
24. As to the setting aside of permission to appeal to the CA, Beatson LJ found, and the other members of the Court agreed, that the claimant’s failure to provide an explanation for not highlighting the issue after the mistake had been identified by the SSHD meant it was more than a simple oversight, and indeed it amounted to “a compelling reason” to set aside permission to appeal within the meaning of CPR 52.9(2). The court inferred that the claimant had put forward his application for judicial review and permission to appeal to the CA on a fundamentally false factual basis and did so knowingly.



25. The importance and effect of this case is perhaps summarised by Ryder LJ in his judgment: “*The change in behaviour that is anticipated is a more careful attention to the duty of candour that already exists.*” The practical ways in which a claimant may avoid falling foul of the reasoning in *Khan* may include:
- (1) Providing clear signposting through the paperwork that is included with an application for judicial review;
  - (2) Making sure that the Statement of Facts includes identification of points against the claimant as well as in his/her favour;
  - (3) Including a witness statement highlighting any important points against the claim when issuing the application for judicial review.
26. Another interesting case on the duty of candour / disclosure related problems, where things went badly wrong, is *R (oao Babbage) v SSHD* [2016] EWHC 148. This was an unlawful detention immigration challenge. At a pre-action stage, the claimant sought all detention decision making documents but received no response. Collins J then made an order that all relevant documents not already disclosed should be disclosed together with the acknowledgement of service. This was not done in full. After permission had been granted, a further order requiring full disclosure was made but (a) this was not done entirely; and (b) the disclosure was provided in partly redacted form, with the redacted material being relevant to the claim for judicial review. Garnham J said that he was “extremely concerned” about the attitude of the SSHD, or alternatively her advisers, towards the supply of documents. The deficiency in the SSHD’s response overall, where she was in breach of the duty of candour, was compounded by the fact that she served no evidence whatsoever in support of her resistance of the claim.
27. The Court ordered a senior Home Office official to explain what had happened, and his evidence was that all relevant material had been provided to the Government Legal Department. The Government Legal Department solicitor said that she had decided some of the material was not relevant, which was why she had not disclosed it. This was in breach of the orders of the court, as was the redaction of the material that had been redacted. Garnham J was critical of this conduct in the strongest possible terms, and proceeded in the substantive decision to draw inferences of fact in the Claimant’s favour where the evidence was unclear.
28. The Head of Division at the Government Legal Department apologised in writing to the Court which may have gone some way to repairing the damage. However, it is clear that, whether





acting for the claimant or defendant in judicial review proceedings, the importance of the duty of candour has never been greater. For practitioners, best practice must surely be - if in doubt, to disclose.

29. The 'Hogg Guidance' which is the central government guidance to the duty of candour for central government departments can be found at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/285368/Tso\\_l\\_discharging\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tso_l_discharging_1_.pdf)
30. Note also that the Lord Chief Justice is currently running a consultation in relation to the Defendant's duty of candour, effectively suggesting codification of Practice Direction 54A to reflect the obligation on the Defendant. The proposed wording for paragraph 12 of the Practice Direction is: ""12.2. A defendant should, in its detailed grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted" which it is suggested would clarify the position. The consultation is open until 21 July 2016 and more information can be found at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/04/consultation-duty-of-candour-april-2016.pdf>

#### ***'Totally without merit'***

31. What is the proper approach to be taken in considering whether to certify an application for permission to apply for judicial review as "totally without merit"? This question was addressed (again) by the Court of Appeal (judgment of the court delivered by Underhill LJ) in *Samia Wasif v SSHD* [2016] EWCA Civ 82.
32. CPR 54.12(7) means that any claim which is certified as being "totally without merit" at the stage of refusal of permission on the papers cannot proceed to a renewal hearing. The effect of such certification is that, even if a judge considers that an oral hearing would be desirable, (s)he is precluded from directing an oral hearing (per *GR (Albania) v SSHD* [2013] EWCA Civ 1286). In *R (Grace) v SSHD* [2014] EWCA Civ 1191, the Court of Appeal held that "totally without merit" means no more and no less than "bound to fail".
33. It is generally accepted that the touchstone for the grant of permission in judicial review is whether the application is "arguable" or has "a realistic prospect of success".<sup>8</sup> In *Samia Wasif*,

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<sup>8</sup> The CA in *Samia Wasif* regarded the *locus classicus* for this as the judgment of Lord Bingham and Lord Walker in *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780, at para.14(4) (p787E)



the Court wrestled with the difficulty arising when permission is refused. If it is not arguable, such that permission is refused, does it not therefore follow that it is bound to fail and should be certified as “totally without merit”? The Court of Appeal said this:

*“In our view the key to the conundrum is to recognise that the conventional criterion for the grant of permission does not always in practice set quite as low a threshold as the language of “arguability” or “realistic prospect of success” might suggest. There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the cases referred to in Grace as “bound to fail” (or “hopeless”). In such cases permission is of course refused. But there are also cases in which the claimant or applicant (we will henceforth say “claimant” for short) has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be “arguable” in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be “realistic”, if the judge feels able confidently to reject the claimant’s arguments. The distinction between such cases and those which are “bound to fail” is not black-and-white, but we believe that it is nevertheless real; and it avoids the apparent anomaly identified at para. 13 above.” (§15).*

34. The Court of Appeal found that this reasoning provides a sensible basis for distinguishing between the two types of case as regards the right to an oral renewal hearing. It does leave the matter, however, to the assessment of the judge in each case, and with this in mind, the Court of Appeal made the following observations:

- (1) Judges should certainly not certify applications as “totally without merit” as the automatic consequence of refusing permission.
- (2) No judge should certify an application as “totally without merit unless he is confident after careful consideration that the case is truly bound to fail.
- (3) The potential value of an oral permission hearing is not confined to the power of oral advocacy; it is also an opportunity for the claimant to address weakness in the claim which have led to the refusal on the papers. The judge should only certify the application as “totally without merit” if satisfied that in the particular circumstances a hearing could not serve such a purpose. The claimant should get the benefit of any real doubt.
- (4) Although it will generally be the case that any renewal hearing will be before a different judge than the one who refused permission on the papers, the rules do not require that that be the case. “The point of a renewal hearing is not that the claimant is entitled to another dip in the bran-tub of Administrative Court or Upper Tribunal judges in the hope of finding someone more sympathetic. Having said that, we do not deny that some judges may find it a useful thought-experiment to ask whether they can conceive of a judicial colleague taking a different view about whether permission should be granted.”



- (5) Judges who encounter cases where the materials are too confused or inadequate to justify the grant of permission (particularly where the claimant is unrepresented) but which the judge suspects if properly presented may disclose an arguable basis of claim. This should not be certified as “totally without merit” but permission should be refused, with some indication of the problem given to the claimant that could be addressed at an oral renewal hearing.
- (6) Judges should not certify a claim as “totally without merit” on the basis of points raised in the summary grounds of defence to which the claimant might have had an answer if given the opportunity.
- (7) Where the application is certified as “totally without merit” peculiar care must be taken to ensure that all the arguments raised in the grounds are properly addressed although reasons for refusing permission need not always be lengthy. It is important in principle that the judge gives reasons for the “totally without merit” certification separately from the reasons for refusing permission, although this may be shortly stated (e.g. “I consider the application is totally without merit” my reasons are those already given above”) but will remind the judge that the exercises are distinct.

***Can a judicial review claim be started as a Part 7 claim?***

35. The short answer to this is no. The point was decided unambiguously by Coulson J in *Newlyn PLC v Waltham Forest LBC* [2016] EWHC 771 TTC. This case concerned a public procurement claim brought pursuant to the Public Contracts Regulations 2015 by an unsuccessful tenderer. It was brought as a Part 7 claim, but in fact the Regulations did not apply to it. The claim was struck out as there was no power to permit the action, brought under CPR Part 7 to continue as an application for judicial review. On the facts of the case, even if it had been brought as a judicial review the claimant had no arguable case.
36. Coulson J reviewed *R (Townsend) v Secretary of State for Work and Pensions* [2011] EWHC 3434 (Admin), where Silber J had reviewed the well-known case of *O’Reilly v Mackman* [1983] 2 AC 237. There, Lord Diplock said that a private law claim could not be turned into a claim by way of judicial review and said:

*“it would...as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.”*



37. Coulson J found that CPR 54.4, which provides that, “*The court’s permission to proceed is required in a claim for judicial review whether started under this Section or transferred to the Administrative Court*” was of no relevance as it is dealing with the permission stage and envisages the possibility of the transfer of an existing judicial review claim, which was not the situation before him. Coulson J accepted the general principle that a claim started under Part 7 cannot be turned into a judicial review claim part way through the proceedings.

### **Challenging decisions on appeals under section 106BC of the Town and Country Planning Act 1990**

38. In *Medway Council v Secretary of State for Communities and Local Government* [2016] EWHC 644 (Admin), Gilbart J considered the requirements relating to affordable housing in sections 106BA-C of the Town and Country Planning Act 1990; this was the first occasion that the Courts had considered these provisions. Gilbart J pointed to the complexity of the legislation and some potential lacunae in the statutory code, but for present purposes, emphasized that the only remedy for challenging decisions on appeals under s.106BC was by way of judicial review rather than by the specialised route for statutory appeals in section 288. Gilbart J said at §6:

*“[The route under section 288] contains more rigorous time limits for the making of applications for leave to make the application under s 288(4A) (the strict 6 week window), in contrast to the position in a judicial review challenge, where, while a 6 week time limit is specified in CPR 54.5, time can be extended. It is not clear whether the absence of s 106BC appeals from the list in s 284 (2) and (3) is a matter of choice by the legislature, or simply an omission. In reality in the vast majority of cases there will be little difference between the legal principles applying to the consideration of a decision letter in a Judicial Review context as opposed to a statutory review, save only for the different principles relating to the time for making applications. Even then, this Court would require much persuasion that a challenge to a decision letter could be made after a period of 6 weeks has elapsed.”*

### **Multiple claimants**

39. In *R (oao Majit) v SSHD* [2016] EWHC 741 (Admin), a Bulgarian claimant who personally already had permission to apply for judicial review sought injunctive relief on behalf of persons unknown: he was seeking to prevent all Dublin III returns to Bulgaria. He relied upon a permission decision of Christopher Clarke LJ in *HN (Afghanistan) v SSHD* [2015] EWCA Civ 1043<sup>9</sup> where Christopher Clarke LJ had allowed injunctive relief to the appellant and all other persons on a particular flight intended for Afghanistan. On the facts of that case, Christopher Clarke LJ had found that, “in a public law case when a consideration which affects one group of applicants affects others who are not or not yet parties to the proceedings in that or a very similar way, it

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<sup>9</sup> Permission granted but appeal later rejected in *R (oao HN and SA) (Afghanistan) (Lead cases associated Non-Lead Cases) v SSHD* [2016] EWCA Civ 123



seems to me proper for the recent stay ordered by the Court to extend to those in the latter as well as the former category. At any rate, that seems to be appropriate on the facts of the present case.”

40. In *Majit*, Gilbart J found that such an approach was not appropriate. He observed that the relief which was being sought was on behalf of persons unknown (unlike HN, where the identity of those on a specific flight was identifiable.) Whilst there are some circumstances where litigation might be carried out on behalf of individuals without their consent (the Attorney General taking proceedings in the public interest, e.g. section 222 of the Local Government Act 1972; NGOs acting on behalf of persons who are not immediately identifiable; and section 47B of the Competition Act 1998 enabling opt-out collection actions to be launched), the claimant was seeking to piggy-back this type of application onto a case that had hitherto been to advance his private interest. Gilbart J identified a statutory bar to relief (applying the “no substantial difference” test) and also found that it would not be an appropriate exercise of his discretion to grant the relief sought.
41. Whilst there are circumstances when an application for judicial review could be properly made on behalf of a group of multiple, unidentified claimants, it would seem they likely to succeed only rarely.

## **SUBSTANTIVE HEARING**

### ***Oral evidence in Judicial Review claims***

42. The traditional approach is that judicial review applications are ordinarily heard on paper and factual disputes will generally be resolved at trial in the Defendant’s favour<sup>10</sup>. This does not apply where the evidence is manifestly wrong such as the where it is inconsistent with undisputed objective evidence (see *S v Airedale NHS Trust* [2002] All ER (D) 79, Stanley Burnton J) or the documents show that the Defendant’s evidence “cannot be correct” (Silber J in *R (Westech College) v SSHD* [2011] EWHC 1484 (Admin) at [22]-[27]).
43. However, following the decision *R (Al Sweady & Others) v Secretary of State for Defence* [2009] EWHC 1687 (Admin) at [27]-[28] the courts should not be reluctant to make such orders in suitable cases. Parties and the court should always consider carefully if there is any critical factual issue that requires orders for cross-examination or disclosure. They must consider at an

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<sup>10</sup> *R v Board of Visitors of Hull Prison Ex p St Germain (No.2)* [1979] 1 WLR 1401



early stage whether cross examination may be necessary and seek appropriate directions. It may also be necessary to make orders for disclosure so that cross examination can be effective (*Al Sweady* at [64]).

44. Examples of cases where applications to cross examine may be allowed are:
- (a) The court has to reach a conclusion on disputed issues of fact:
    - (i) a question of collateral fact or where there is a dispute as to the procedure that was actually followed<sup>11</sup>. Even in this case the court retains a discretion and may resolve the issues on the papers<sup>12</sup>;
    - (ii) Where there is disputed allegation of a human rights breach raising a hard edged question of fact (see *Al Sweady* (above) at para [19]);
  - (b) Where fundamental human rights are at stake and the court has to review the merits of the decision – for example questions as to the compulsory treatment of a detained patient<sup>13</sup>;
  - (c) Recent cases have suggested that a more relaxed approach to ordering cross examination is not confined to cases concerning fundamental human rights. In *R (MH) v SSHD* [2009] EWHC 2506 (Admin) Sales J held: *“The fact that a claim (such as a claim in tort) happens to be brought using the procedure in Part 54 does not mean that ordinary procedures employed by the courts for resolving substantial disputes of fact (including cross-examination) are not to be applied”*. This was a claim for false imprisonment but the remarks were general. In the event there was no live evidence and the Claimant’s statements were treated with a *“measure of generosity”* because they had not been challenged;
  - (d) *R (Mc Vey) v Secretary of State for Health* [2010] CP Rep 38 – a case involving whether the Defendant had acted to amend a VCJD scheme when so advised by trustees. No application for cross examination was made but Silber J stated as a general rule: *“The proper course for a Claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies”*.

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<sup>11</sup> see e.g. *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2012] EWHC 2115 (Admin).

<sup>12</sup> See *R v CC Thames Valley ex p Cotton* [1989] COD 318)

<sup>13</sup> See *R (Wilkinson) v RMO Broadmoor Hospital* [2002] 1 WLR 419



- (e) *R (Shoesmith) v OFSTED and others* [2010] EWHC 852 (Admin). The question whether the Claimant had had an adequate opportunity to address concerns may be an issue for cross examination;

***Age assessment claims – the defendant’s right to defend itself***

45. The Administrative Court or, more typically, the Upper Tribunal (Immigration and Asylum Chamber) routinely hears oral evidence in age assessment judicial reviews. In *R (A) v London Borough of Croydon* [2009] UKSC 8 the Supreme Court held that in cases involving the exercise of a local authority’s statutory obligations in respect of children, a child’s age was a matter subject to determination by the court as a precedent fact. As a consequence of this decision, case law has developed so that it is now well-established that neither the applicant nor the respondent bear a burden of proof but it is for the Court/Tribunal to enquire and on the basis of the evidence produced to make a decision on a balance of probabilities.
46. In *London Borough of Croydon v Y* [2016] EWCA Civ 398 the Court of Appeal confirmed that the defendant’s right to defend itself as it and its advisers think fit applies equally to judicial review proceedings as well as private proceedings. This includes identifying any assessments it requires to prepare its defence. It directly concerns age assessment cases, but the principles apply to all litigation, private and public.
47. Y was an asylum seeker who was subject to an age assessment by Croydon and assessed as being over 18. He brought a judicial review age assessment challenge. The Upper Tribunal gave directions listing the case for a 4 day hearing. Three months before the final hearing Croydon applied to the UT for an order that the claim should be struck out or stayed unless Y consented to and co-operated fully with: (1) a dental examination (including a dental X-ray); (2) a psychiatric examination; and (3) an age assessment by two Croydon social workers. Y’s representatives refused to cooperate.
48. In bringing the application, Croydon relied on the decision of *Starr v National Coal Board* [1977] 1 WLR 63, a personal injury claim. In *Starr* the Claimant had accepted that in preparing its defence, the NCB needed to be advised by a consultant neurologist who had had the opportunity of examining him. He objected to examination by the particular doctor chosen by the NCB without explaining why. The claimant said that he was willing to be examined by any other consultant neurologist of similar qualification and experience. The NCB applied for a stay of all further proceedings until the claimant submitted to an examination by its chosen doctor. The Court of Appeal upheld the stay that had been granted by the judge.



49. In *Croydon v Y*, the UT judge refused Croydon’s application, saying that it was “most unfortunate” that Y’s representatives would not co-operate, but that it would be “too draconian” to stay or strike out the proceedings. The judge said that *Starr* did not apply for two reasons: (i) unlike Mr Starr Y had not conceded that Croydon’s assessments were necessary; and (ii) this was public rather than private law litigation.
50. The Court of Appeal overturned the UT judge’s decision. Lord Dyson MR held at [16] that it didn’t matter whether there was a concession by the Claimant or not: the question was whether the assessments were in fact “*reasonably necessary for the proper conduct of Croydon’s defence*”. The UT judge himself had already decided that they were. On the second point, Lord Dyson said at [17] that, “*there is no basis in principle for confining the Starr principles to private law litigation... The fundamental common law right of a defendant to defend itself in litigation to which Scarman LJ referred [in Starr] applies in any litigation*”.
51. The lesson to be drawn from *Croydon v Y* is that the *Starr* principle is of general application, whether in courts or tribunals. For example, one consequence of this is that a First-tier Tribunal should apply similar principles in special educational needs cases where a young person’s needs are in question and the authority or school wants to assess them.

## **COSTS**

### ***Protective Costs Orders – a quick recap***

52. A Protective Costs Order (“PCO”) limits or extinguishes the amount of costs that a claimant will have to pay if they lose in public law proceedings. PCOs are an exception to the rule that costs follow the event and are not available in a private law action. The principles of when a PCO may be granted have been most famously enunciated in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.
53. In *Corner House* the Court of Appeal set down the following guidance on the grant of PCOs:
  - (a) A PCO may be made at any stage of the proceedings on such conditions as the court thinks fit, provided that the court is satisfied that:
    - (i) The issues are of general public importance.
    - (ii) The public interest requires that those issues should be resolved.
    - (iii) The Claimant has no private interest in the outcome of the case.





- (iv) Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order.
  - (v) If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in doing so.
- (b) If those acting for the Claimant are doing so pro bono this will be likely to enhance the merits of the PCO application.
- (c) It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of the above considerations.
54. PCOs can take three forms:
- (a) Protection from adverse costs but permission for the claimant to recover costs if successful. This was the order made in *Corner House*. The amount that the Claimant can recover will almost always be capped (see further below).
  - (b) No order as to costs whatever the outcome of the case (e.g. *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1296).
  - (c) An order limiting the Claimant's costs liability in the event that it loses the case (e.g. *Campaign for Nuclear Disarmament v Prime Minister and Others* [2002] EWHC Civ 2777 Admin, where CND obtained an order capping its cost liability at £25,000 if it lost the case).
55. The guidance in *Corner House* should be interpreted flexibly, with the aim of doing justice between the parties. No one factor is decisive in itself<sup>14</sup>.
56. In *Howard & Bennett v Wigan Council* [2015] EWHC 3643 (Admin) the court varied a PCO in order to allow the Defendant to recover part of its costs of defending a ground of JR that had been brought without foundation.

### ***Cost capping and the CJCA 2015***

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<sup>14</sup> See *R (Compton) v Wiltshire PCT* [2009] 1 WLR 1436 per Waller LJ at [23] and Smith LJ at [25]; *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209; *Morgan v Hinton Organics* [2009] EWCA Civ 107 at [40]).



57. Sections 88 and 89 of the CJCA 2015 seek to codify the PCO regime introduced by the Courts. They formalise the *Corner House* criteria for a PCO into a statutory formulation (with some additional criteria), including a definition of the meaning of “the public interest”. They are not yet in force.
58. There remain serious concerns about the provisions. In particular, the procedural requirement that a PCO is not able to be provided until permission to bring JR has been granted will cause real practical problems for litigants in need of a costs cap because they will still be liable for the costs of the Defendant’s AOS if permission is refused.
59. A further innovation contained within section 89 of the CJCA 2015 is the requirement that where there is an order capping the Defendant’s costs, a reciprocal costs cap on the Claimant’s costs must also be imposed – although it does not appear that the Court must order the same level of cap.
60. It is also of note that for the first time the meaning of “the public interest” is being codified, with further provision for the Lord Chancellor to amend what constitutes public interest proceedings. It would obviously be of very real concern if the Lord Chancellor sought to exclude particular types of proceedings or classes of litigant from the definition of the public interest. In addition, under s.89(1)(e) CJCA 2015 the Lord Chancellor is empowered to define the type of claimant who is eligible to receive a cost capping order.

#### ***Capping of costs in environmental cases***

61. It should be noted that as a result of the Aarhus Convention, section 90 CJCA 2015 expressly disapplies sections 88 and 89 in environmental JRs.
62. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) provides environmental litigants with enhanced rights of information, participation and access to justice.
63. Article 9 of the Aarhus Convention modifies the rules on costs (including those in *Corner House*) in environmental Aarhus Convention cases. An environmental protective costs order is still possible.



64. In *R (Garner) v Elmbridge BC and others* [2010] EWCA Civ 1006, the Court of Appeal considered whether article 10 of the Environmental Impact Assessment (EIA) Directive<sup>15</sup>, requiring that members of the public with sufficient interest in maintaining the impairment of a right have access to a review procedure before a court of law, means that proceedings should not be prohibitively expensive.
65. The Court modified the *Corner House* conditions to secure compliance with the EIA Directive, which has direct effect, concluding that the procedure for resolving whether a claimant has sufficient interest must be compliant with article 10 of the EIA Directive and must not be prohibitively expensive. The judge was not entitled to reject the appellant's application for a PCO on the basis that the issues raised were not of general public importance which the public interest required to be resolved. In determining whether the costs are prohibitively expensive, regard should be had to whether the potential costs are prohibitively expensive for an 'ordinary member of the public concerned'. It is the ordinary member of the public with 'ordinary' means that is the test. A PCO was made which imposed a limit of £5,000 on the costs that the claimants would have to pay and a £35,000 limit for the respondent's liability if the claimants were successful.

### ***Interveners' liability for costs***

66. There are a variety of ways in which third parties (e.g. charities, NGOs, single/specific issue bodies, such as the Equality and Human Rights Commission) can intervene or participate in proceedings, including through filing evidence or making representations at a hearing. Historically the question of who should bear any costs that follow from such interventions has been left to the discretion of the court. The court has frequently benefitted from hearing from third parties and so orders requiring them to bear costs other than their own have been rare.
67. By section 87 of the CJCA 2015 any proceedings issued on or after 13 April 2015 an organisation that intervenes as a third party in proceedings will bear their own costs and may be required to pay the costs parties incur as a result of their involvement in the proceedings. This will only happen if certain conditions identified at s.87(6) CJCA 2015 are met:
- (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

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<sup>15</sup> Directive 83/337/EEC



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.

68. It may be that as a result of these changes, that less interveners will be willing to take part in proceedings given the level of financial risk. If they do decide to become involved they will need to ensure that their arguments are framed in a way that avoids a finding by the court that they have been of no assistance (or one of the other grounds which imposes a cost liability).

69. Some commentators consider that the changes introduced by the CJA will result in a fairer division of the costs involved with judicial review. So that those who are privately funding an unsuccessful applicant, who may have had the benefit of a PCO, will have to pay some of the defendants costs. It remains to be seen whether the changes introduced impact on the number of claims pursued and whether less public funds are involved in financing or defending claims in the future.

#### ***Information about financial resources***

70. Section 85 of the CJA 2015 will amend s.31 of the Senior Courts Act 1981 to require applicants for judicial review to provide specified financial information on their application to enable the court to consider making an award of costs against a person identified in the information at the appropriate point(s) in the proceedings. This provision is not yet in force.

71. The government's intention is to achieve greater transparency about how judicial review claims are funded and to limit the perceived scope for third parties to avoid liability for costs when their contribution exceeds a certain threshold. Further consideration will need to be given as to when and in what circumstances this information will be made available to defendants. It is not intended that the information will be used to determine any other issue in a claim other than third party liability for costs.

#### ***Settlement and Costs***

##### *ACO Costs Guidance*



72. In December 2013 the Court published guidance setting out the approach parties are expected to take in respect of applications for costs following settlement of claims for judicial review<sup>16</sup>. In summary, any party wishing to claim costs must file and serve submissions on costs within 14 days of delivering a consent order to the court to settle the claim. Any party wishing to contest a claim for costs must file and serve submissions in reply within 14 days of the applicant's submissions. Submissions, if any, in response to matters raised in those replies must be filed and served within 7 days of the service of the reply.
73. Submissions must:
- (a) confirm that the parties have used reasonable endeavours to negotiate a costs settlement;
  - (b) identify what issues or reasons prevented the parties agreeing costs liability;
  - (c) clearly identify the extent to which the parties complied with the pre-action protocol;
  - (d) state the approximate amount of costs likely to be involved in the case;
  - (e) state the relief the claimant (i) sought in the claim form and (ii) obtained;
  - (f) address specifically how the claim and the basis of its settlement fit the principles in *M v Croydon*, including the significance and effect of any that are in dispute.
74. Submissions should be of a normal print size and should not normally exceed two A4 pages in length unless there is good reason to exceed this, which is properly explained in the submissions.

#### *M v Croydon*

75. There have been recent significant changes to the Administrative Court's approach to costs. The previous '*Boxall*' approach<sup>17</sup>, which often led to no order for costs being made upon settlement, has been departed from. These changes resulted, in part, from the introduction of the pre-action protocol for judicial review, from recommendations in Jackson LJ's final report on civil litigation costs<sup>18</sup> and from subsequent case law.

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<sup>16</sup> See the Administrative Court's website at: [www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/).

<sup>17</sup> *R (Boxall) v Waltham Forest LBC* [2001] 4 CCL Rep 258

<sup>18</sup> Para 4.131 of the *Review of Civil Litigation Costs: Final Report (December 2009)* states: "...in any judicial review case where the claimant has complied with the protocol, if the defendant settles the claim after (rather than before) issue by conceding any material part of the relief sought, then the normal order should be that the defendant pays the claimant's costs."



76. The current position is that where judicial review proceedings are compromised and an application for costs is made the court should exercise its discretion in accordance with the guidance given by the Court of Appeal in *R (M) v Croydon LBC* [2012] EWCA Civ 595. There has been a move away from a no order for costs default position so that the successful public law claimant should be just as much entitled to costs as the private law claimant – consistent with *R (Bahta & Others) v SSHD* [2011] EWCA Civ 895 – although it is recognised that there may be instances where defendants who concede claims in public law ought to be less at risk on costs as those who concede in ordinary civil actions.
77. In *M v Croydon LBC* the then Master of the Rolls, Lord Neuberger, concluded that, “*the position should be no different for litigation in the Administrative Court from what it is in general civil litigation*” (para [58]). In general civil litigation, the ordinary rule is that costs follow the event. The claimant should receive costs if he or she gets in settlement “*all, or substantively all, the relief which he has claimed*” (para [49]). If the Claimant succeeds only in part, there will be no order for costs unless the court is able “*to form a tolerably clear view without much effort*” about who has won (paras [50]-[51]).
78. Lord Neuberger considered that there were essentially three types of case: (i) a case where a claimant has been wholly successful, whether following a contested hearing or pursuant to a settlement; (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement; and (iii) a case where there has been some compromise which does not actually reflect the claimant’s claims. In considering the differences between the types of cases, he held at [61]-[63]:

*61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and as the successful party that he should recover his costs. In the latter case the defendants can no doubt say that they were realistic in settling and should not be penalised in costs, but the answer to that point is that the defendants should on that basis have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately it seems to me that the Bahta case [2011] 5 Costs LR 857 was decided on this basis.*

*62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases the court will be able to form a view as to the appropriate costs order based on such issues; in other cases it will*



*be much more difficult. I would accept the argument that, 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. That I think was the approach adopted in the Scott case [2009] EWCA Civ 217. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases it may help to consider who would have won if the matter had proceeded to trial as, if it is tolerably clear, it may for instance support or undermine the contention that one of the two claims was stronger than the other. The Boxall case 4 CCLR 258 appears to have been such case.*

*63. In case (iii), 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."*

79. Post *M v Croydon* a claimant should normally expect to be awarded costs if: (1) he or she has complied with the pre-action protocol; and (2) obtains the relief sought, or substantially similar relief, through settlement or judgment. However, if the claimant is only partly successful, the court will often decide to make no order for costs, unless it can form a tolerably clear view without much effort about who has won.
80. The general position confirmed in *M v Croydon* has been further developed and modified by subsequent case law. For example:
- (a) In *R (Emezie) v SSHD* [2013] EWCA 733 [2013] 5 Costs LR 685, at para 4 the Court of Appeal said: "*the starting point now is whether the claimant has achieved what he sought in his claim*";
  - (b) In *R (Tesfay) v SSHD & Others* [2016] EWCA Civ 415 the Court of Appeal held that success in public law proceedings had to be assessed, not only by reference to what had been sought and the basis on which it had been sought and on which it had been opposed, but also by reference to what had been achievable. In public law litigation, securing reconsideration of a decision which was challenged was usually considered a success for costs purposes. The fact that, following reconsideration, a decision might be taken which was against the interests of the applicant was not a reason for refusing costs on the judicial review (see [57], [67], [115], [116] of the judgment);
  - (c) In *R (Baxter) v Lincolnshire County Council* [2015] EWCA Civ 1290 the Court of Appeal found that the claimant had failed to establish that the link between his claim and the



agreed relief was so clear that he could properly be treated as the successful party for the purposes of the award of costs and the much fuller investigation of the case on the present appeal had not shown that the judge's conclusion fell outside the range of decisions that were open on a summary assessment of costs that is designed to assist the parties and to limit the incurring of further costs;

- (d) In *R (TH (Iran)) v East Sussex County Council* [2013] EWCA Civ 1027 the Court of Appeal held that the Upper Tribunal (Immigration and Asylum Chamber) had been entitled to find that, by refusing to accept an offer by the defendant local authority to carry out a fresh age assessment until accepting the offer six months later, the claimant had acted unreasonably with the effect that the normal order that he recover all his costs had not applied. The tribunal had been entitled to find that the claimant was only entitled to his costs up to the date when he had reasonably refused the authority's offer.
- (e) In *R (Naureen and anor) v Salford City Council* [2012] EWCA Civ 1795 the Court of Appeal held at [40]-44] that the favourable intervention by a third party not involved in the litigation could not be a reason to order the Defendant to pay the Claimants' cost. The fact that the Claimants obtained interim relief does not mean that they were successful in the action. It is not a reason for awarding to the claimants the costs of the action.

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RHYS HADDEN

19 May 2016