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Landmark CHAMBERS

Funding Public Law Challenges
PLP Workshop 4 April 2012

Tim Buley, Landmark Chambers

Louise Whitfield, Pierce Glynn

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Part A:
Funding a Judicial Review

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Funding Options

- Traditional privately paying client
- Fundraising and third party funding
- Conditional Fee Agreements (Including *differential/hybrid or graduated* CFAs)
- Legal Aid

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Legal Aid – is it available?

- Scope: is JR available, alternative remedies, the pre-action protocol
- Costs Benefit Test – NB: reinforced standing test
- Merits test
- If costs-benefit or merits problematic, try the following (but beware specific wording and guidance):
  - Significant Human Rights issues
  - Overwhelming importance to the client
  - Significant Wider Public Interest (SWPI – use of devolved powers not available)

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Community Contributions, Standing, Alternative Funding & SWPI

- In some cases, LSC will ask (especially if you rely on Significant Wider Public Interest), have you considered alternative funding/community contributions?
- A useful extension to Legal Aid (or a potential pitfall)
- These issues often overlapping and arise together
- Special Controls Review Panel Guidance: library closures and other public interest challenges
- Practical problems for the lawyers in being collector of costs

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Summary of Changes impacting on Judicial Review following MOJ's Review of Legal Aid

- Scope – judicial review generally untouched
- Financial eligibility – end to passporting of capital assessment and increase in client contributions
- 10% cut in remuneration across the board
- Plans for public law matter starts, devolved powers and contracts remain unclear

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Legal Aid, Sentencing & Punishment of Offenders Bill

- Community care mandatory telephone gateway scrapped
- All discrimination claims to stay in scope: discrimination to become stand alone category within legal aid with mandatory telephone gateway, but still possible to bring discrimination challenge within existing area (e.g. housing)
- Some harsher proposals dropped after consultation but may be suggested again later (e.g. removal of devolved powers, increasing use of risk rates, no presumption of funding post-permission)

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Summary of Changes Following Jackson and the Review of Civil Litigation Funding – all medicine, no sugar

- Abolition of recoverability of CFA success fees from Defendant
- No Qualified One Way Costs-Shifting ("QuOCS")
- No revision of the Boxall Rules

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Part B
Adverse Costs & Costs Protection

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Adverse Costs: Introduction

- Costs in judicial review can be very high (albeit still much less than in heavy weight civil litigation). For non-institutional claimants and other parties, the prospect of bringing a claim and incurring such risks may be daunting indeed, even if some means can be found of funding the claim.

- Costs protection may be obtained via legal aid or protective costs orders. For legal aid, note risk of set-off (*R (Burkett) v Hammersmith and Fulham BC* [2004] EWCA Civ 1342).

- No costs risk pre-issue of claim. Claimants can test water with pre-action correspondence.

- For claimants, otherwise, general rule is that costs will follow event.

- Position more complicated when it comes to third parties, intervenors and interested parties / respondents.

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Claimant's Adverse Costs Risks: Permission stage

- Basic rules contained in *R (Mount Cook Land Ltd) v Westminster City Council* [2004] 1 PLR 29:
  - Defendants should be entitled to recover the costs of an Acknowledgement of Service, including the preparation of summary grounds, if permission is refused on the papers. Those costs do not include other pre-permission costs, such as responding to a pre-action letter, and are limited to the costs of the AoS and summary grounds only.
  - D's response at this stage should be truly "summary", and defendants should not incur "substantial expense" at this stage. In general, quantum here should be relatively low (see *R (Ewing) v Deputy Prime Minister* [2006] 1 WLR 1271).
  - Defendants are not generally entitled to the costs of attending an oral permission hearing.
  - They may be so entitled in certain "exceptional circumstances" (see *Mount Cook,* §76(v) and (vi).
- Proposals for reform in the Jackson report were not adopted by the SSJ.

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Costs on Withdrawal

- Well established default rule where claim withdrawn before trial and no remedy granted or agreed, that withdrawing party pay costs: see *R v Liverpool CC, ex parte Newman* (1992) [1998] JR 178.

- Now formalised in CPR 38.6, and see *Walker Wingsail Systems Plc* [2006] 1 WLR 294. Generally, having chosen to put D to expense of defending claim, and then decided, for whatever reason, not to press to trial, expectation is that C should pay costs.

- In particular, not an answer to show that C might or would have won if claim not withdrawn: *Walker Wingsail.*

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Costs and Third Parties

- Types of third party in public law claims:
  - Interested party supporting the claim
  - Interested party resisting the claim
  - Intervenors
  - Other
- General rule in judicial review: "one set of costs". See *Bolton MBC v SSE (Practice Note)* [1995] 1 WLR 1176 (a planning case), and see e.g. *R (Smeaton) v SSH* [2002] EWHC 886 (Admin).
  - tends to limit costs exposure for third parties, provided at least that Defendant takes an active role, but
  - tends also to limit costs recovery for third parties.
- *Bolton* rule may not apply where there are two separately represented claimants with effectively equal standing: *R (A) v East Sussex CC* [2005] EWHC 585 (Admin).

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Third Party Costs Exposure

- *Bolton* rule will often limit exposure for third party, because in general C or D will be expected to meet successful party's costs.

- Exception where other main party drops out e.g. D agrees to quashing order, but interested party refuses to sign consent. E.g. *R (Holmes) v GMC* [2001] EWHC Admin 321.

- Partial exception also where third party raises new issues or puts winning party to additional or unnecessary expense: see e.g. *R (Munjaz) v* [2003] 3 WLR 1505, at [90]. Third party may be liable for additional expense so created.

- Intervenors in particular well advised to seek to resolve costs as part of terms of order permitting the intervention.

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Third Party Costs Orders

- Section 51 of the SCA 1981 provides power to make costs order against "non-party". Rules for exercise of power contained in CPR 48.2.

- CPR 48.2 requires that proposed payor be made party to proceedings and given opportunity to respond.

- Such orders are "exceptional", but in the sense that they are outside of the "ordinary run" of costs orders (Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807). He observed:
  - Such orders would not generally be made against "pure funders" with no personal stake in the proceedings, but
  - It would ordinarily be just to make such an order against third party with substantial control or benefit therefrom.

- See also *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055.

- Possible overlap with wasted costs jurisdiction

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Third Party Costs Recovery

- *Bolton* generally inhibits recovery.

- Exceptions in *Bolton* where third party has "interest requiring separate representation". Generally interpreted restrictively, limited to cases where it can be shown that third party brought something genuinely additional to the decision in the case (for example by filing evidence relevant or crucial to the outcome).

- Separate interest has been interpreted to mean "conflicting interest": *R (Bedford) v LB Islington* [2002] EWHC 2044 (Admin).

- Costs may in event be limited to partial award related to the costs of preparing the relevant additional arguments or evidence.

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Costs and Non-Appearing Tribunals

- General approach to make no order for costs against defendant court or tribunal which did not appear or take part, subject to exception for "flagrant ... Improper behaviour": *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2739.

- Particular important for *ad hoc* tribunals where order might otherwise take effect against judge personally.

- Discretion to depart from general approach, and relevant to consider financial position of successful claimant who is left without ability to recover costs, but also (suggest) institutional position of tribunal itself.

- Relevant to claimants and third parties both in relation to costs exposure (because defending third party may be put in frame for costs) and costs recovery (because claimant may be left without a party against who costs may be ordered).

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Protection Against Adverse Costs – Legal Aid

- General rule is that client is protected from adverse costs in an unsuccessful judicial review by dint of legal aid
- Section 11 of the Access to Justice Act 1999 (Community Legal Service (Costs Protection) Regulations 2000/824 as amended).
- Football Pools (Lottery?) Clause
- But consider effect of other proceedings, Statutory Charge etc.

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Adverse costs for Unfunded clients

- Bankruptcy
- Security for costs
- Third Party Funders
- Legal Expenses Insurance
- Protective Costs Orders
- Companies as vehicles for litigation

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Protective Costs Orders – availability generally

The Corner House Guidance/Rules:

- The issues are of general public importance.
- The public interest requires that those issues should be resolved.
- The Claimant has no private interest in the outcome of the case.
- 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.
- If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in so doing.

– If those acting for the Claimant are doing so *pro bono* this will be likely to enhance the merits of the PCO application.
– 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 [74].

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Protective Costs Orders – availability - Environmental cases

- The Aarhus Convention – "not prohibitively expensive" test
- EU Law issues – *GARNER & ORS (Appellant) v ELMBRIDGE BOROUGH COUNCIL & ORS (Respondent) [2011] EWCA Civ 891*
- Other environmental cases – *DULLINGHAM PARISH COUNCIL v EAST CAMBRIDGESHIRE DISTRICT COUNCIL [2010] EWHC 1307 (Admin)*

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Protective Costs Orders in Practice

- Evidence of means
- Costs risks on application
- *King* "reciprocal" cap on recoverability of claimant's own costs

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Companies as Vehicles for litigation

- Potentially attractive way for group of privately funded claimants to limit costs liability. See §§56-8 of the Sullivan Report.

- Potential downsides (see generally *R (Coedbach Action Team Ltd) v SSECC* [2010] EWHC 2312 (Admin), [2011] 1 Costs LR 70):
  - A company is not a "member of the public" for the purposes of the Aarhus Convention, and cannot, in environmental cases, benefit from otherwise more generous approach to PCOs and costs generally (see *Coedbach,* §§ 33).
  - In that case, this in turn undermined the application on a wider basis.
  - Very fact that formation of limited company carries its own form of costs protection, may mean that it is required to give security for costs (see both the Sullivan report, §57, and *Coedbach,* §40).
  - May impact upon the question of whether the Claimant company has sufficient standing to bring the proceedings (*Coedbach,* §35, but correctness of this not clear (see Carnwath LJ, refusing permission to appeal at [2011] EWCA Civ 1494, §23, expressing doubt on this point).

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Costs Risks – Where we are?

- still the single greatest bar to access to justice in judicial review – "chilling effect"
- The optimism of recent years has been dealt several major blows:
  - Restrictive interpretations of Corner House Guidance;
  - Court's refusal to interpret PCO guidance in manner compatible with Aarhus Convention (save where EU law is in play);
  - The (mis-)interpretation of the Corner House guidance on *King* reciprocal costs caps
  - The abolition of the recoverability of success fees on CFA's in judicial review
  - The failure to adopt QuOCS in judicial review
- Despite the squeeze on legal aid, this remains the most attractive means to lawyers of funding a case and the overwhelming majority of middle-income citizens are effectively debarred from accessing the Courts in judicial review

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Part C
Maximising Costs Recovery

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Claimant's Costs Recovery: B*oxall*, B*ahta* and all that (intro)

Long-standing "default" rule in *R (Boxall) v Waltham Forest LBC* (2001) 4 CCL Rep 258, reconsidered, and recast, in *R (Bahta) v SSHD* [2011] EWCA Civ 895.

- Pre-*Bahta, Boxall* often understood, at least in some areas of public law, as meaning that, where a Defendant agreed to the compromise of a claim for judicial review on the basis that it would grant some or all of the relief sought in the claim, a "successful" Claimant would nevertheless be expected to accept no order for costs unless he could show that he was bound to win (a "plain and obvious" case).

- Doubtful extension of *Boxall* to other public law contexts (e.g. statutory appeals: *Sengoz v SSHD* [2001] EWCA Civ 1135), but not consistently applied: compare *KR (Nepal) v SSHD* [2010] EWCA Civ 1619, and planning cases. Also very doubtful that *Boxall* was intended to cover situation where court itself grants relief.

- *Boxall* seemed at first to survive introduction of Pre-Action Protocol in judicial review, and general criticism over the years (see e.g. *R (Scott) v LB Hackney* [2009] EWCA Civ 217).

- Publication of Jackson Report on costs may have set scene for change.

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Boxall, B*ahta* and all that: B*ahta*

All change with CA's judgment in *Bahta.*

- Default rule is now that Claimant is entitled to costs on concession of claim:

  65. *When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol. I regard that approach as consistent with the recommendation in paragraph 4.13 of the Jackson Report.*

- Follows basic rule that costs follow the event, but places particular emphasis on compliance with PAP ("heavy burden").

- Expresses great scepticism about idea of "pragmatic concessions":

  63. I have serious misgivings about UKBA's claim to avoid costs when a claim is settled for 'purely pragmatic reasons'…There may be cases in which relief may be granted for reasons entirely unconnected with the claim made. Given the Secretary of State's duty to act fairly as between applicants, and the duty to apply rules and discretions fairly, a clearly expressed reason would be required in such cases. The expression 'purely pragmatic' covers a multitude of possibilities. A clear explanation is required, and can expect to be analysed, so that the expression is not used as a device for avoiding an order for costs that ought to be made.

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Boxall, *Bahta* and all that: distinguishing *Bahta?*

Various ways of distinguishing *Bahta* have been suggested or may be argued in future:

- Compliance with pre-action protocol by D
  - May *arguably* reduce strength of presumption in favour of C (see *Bahta,* §59, §§64-5), but does not remove it.
- Non-compliance with pre-action protocol by C
  - Where C's non-compliance met with early concession, good argument for no order as to costs.
  - Much less clear where D contests claim for considerable period before concession. C's non-compliance not causally relevant to costs being incurred.
  - Also much more doubtful in context of urgent claims where full compliance with protocol not required.
- Not applicable to statutory appeals / outside of judicial review
  - NoPAP stage., but not a sufficient basis to distinguish *Bahta,* and arguably *Bahta* not needed. See now *Harripaul v Lewisham LBC* [2012] EWCA Civ 266. (compare *Sengoz* and *KR (Nepal)*. Test case on this issue in CA 19 April 2012
- Should not apply to local authority defendants. Highly dubious!

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Costs Recovery and the Ombudsman

- Ombudsman has power, when making a finding of maladministration by a public body coming within his jurisdiction, to "recommend" that the public body pay the applicant legal costs associated with his complaint. General policy appears to be to exercise this in complex cases where recourse to legal assistance was necessary to formulate the complaint.

- In past, has treated legal aid as irrelevant. See e.g. LGO complaint 03/A/15819, striking prescient of *Bahta*.

- But following *R (Adams) v LGO* [2011] EWHC 2972, fact of legal aid for LGO complaint would seem to make a costs recommendation by the Ombudsman impossible.

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Maximising Costs Recovery – General tips

- Get your retainer in place at the earliest opportunity and before you carry out substantive work on potential litigation
- Even if the precise type of funding is undecided see if your potential client is prepared to enter a retainer which provides for liability on private-client basis with an understanding that this will only be enforced if the case is successful
- Ensure that your initial costs estimates are realistic and, if anything, err of the side of caution (ie: are at the upper limit of what you expect costs to be)
- Review your costs estimates regularly and at least every six months
- Fully risk assess your CFA

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Maximising Costs Recovery – General tips (cont/…)

- Where client has some but limited resources, consider carefully how these can best be applied. For example: is it better for the client to exhaust these funds paying own legal fees and then move onto a CFA? or better to enter a differential CFA? Or better to offer these resources up in support of a PCO application? Etc.

- Comply with the Pre-action Protocol for judicial review

- Focus your claim – beware split-costs orders.

THE END

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Tim Buley, Landmark Chambers

Louise Whitfield, Pierce Glynn