**Public Law Project**

**Costs in Judicial Review Update**

**QOCS and costs budgeting**

1. On 7 Feb 2019 the government published the Post-Implementation Review of Part 2 of LASPO. This recognised calls to extend QOCS beyond personal injury to a range of other claims involving an “asymmetric relationship between the parties” and including: actions against the police and other public authorities, discrimination cases under the Equality Act 2010, human rights cases, housing disrepair, professional negligence claims, judicial reviews and private nuisance claims amongst others [para 102].
2. At [20] the government claimed that it would wish to be satisfied that certain risks (i.e. of shifting costs to defendants, an overall increase in costs and the potential for prolonging and not settling litigation) had been addressed before considering the case for extending costs protection further.
3. Just over a month later, in its consultation on fixed recoverable costs, the government made clear that it had no intention of extending QOCS or anything like it. At para 2.4 it stated:

“As both costs capping orders and legal aid are available for JRs (as well as the ‘Aarhus’ rules for environmental claims), we do not consider there to be an access to justice issue in respect of non-Aarhus JRs. Extending cost capping increases the risk of less meritorious JRs coming forward with increased costs to the government and other public-sector defendants. We therefore do not propose to extend costs capping in this way, and are not seeking views on this proposal”.

1. It supported Sir Rupert Jackson’s additional proposal for costs budgeting in what were described as “heavy” judicial reviews where the costs of a party are likely to exceed £100,000.
2. The consultation closed in Jun 2019 but there has been no response on this issue.
3. In *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin) Cavanagh J dismissed a claim for judicial review of the corresponding failure to introduce QOCS in discrimination claims [91]. In particular he:
	1. Rejected a claim that the failure was irrational “at this stage” given the need for further information and
		1. The complex balancing of interests involved in costs protection decisions.
		2. The possibility of increasing unmeritorious claims.
		3. Not all defendants have deep pockets.
		4. Existing protection through a combination of small claims, 100% CFAs and legal aid.
		5. The low value of such claims would mean that QOCS may not solve problems of access to the court.
		6. D might decide on other measures.
	2. Rejected a claim that that failure was a breach of the right of access to the courts under Art 6 or at common law. There was no perfect solution that could balance all interests and the question was under active consideration.

**Legal Aid**

***R (FF) v Director of Legal Aid Casework* [2020] EWHC 95 (Admin); [2020] 4 WLR 40**

1. By Para 19(3) of part 1 of Schedule 1 to LASPO proceedings for judicial review are excluded from the scope of legal aid if they do “not have the potential to produce a beneﬁt for the individual, a member of the individual’s family or the environment”.
2. C was a Bahraini citizen who had been granted asylum and sought judicial review of the SSHD’s consideration of her request that a Bahraini prince be excluded from the UK. She was refused legal aid on the basis that the challenge did have the potential to produce a benefit for her. Murray J quashed the decision. He held that the relevant principles are:
	1. “Whether proposed judicial review proceedings would have the potential to produce a beneﬁt for an individual or a member of his family is a mixed question of law and fact.
	2. As such, it is a maer for determination as a question of law after the relevant decisionmaker has found and then evaluated the relevant facts that are said to give rise to the potential to produce a beneﬁt.
	3. The starting point is that “beneﬁt” should be given its ordinary, broad meaning. It is not necessary to consider the degree or quality of the beneﬁt provided that there is some beneﬁt, but the beneﬁt must have some reality, some substance, that goes beyond the “suﬃcient interest” that Sedley J in the *Somerset County Council* case found any citizen to have to bring a maer before the court in certain cases that involve an apparent abuse of power. That is a maer of evaluation.
	4. The beneﬁt must be real. It is not necessary, therefore, for paragraph 19(3) to have used the words “real beneﬁt”. That the beneﬁt must be real goes without saying. Similarly, the standard would be no diﬀerent, in my view, had the words “material beneﬁt” been used, using “material” simply to mean having some substance. The beneﬁt does not, in my view, have to be ﬁnancial or otherwise result in an improvement in the material conditions of the life of the applicant or of a member of their family.
	5. Whether there is a beneﬁt to an applicant for civil legal aid for purposes of paragraph 19(3) is a hard-edged test. As a maer of law, there is a right answer. It is not a maer of discretion for the Director, and it is not simply a case of considering whether the Director’s judgment on the question is reasonable.
	6. A beneﬁt to an applicant that is “merely” psychological and/or involves the fulﬁlment of a moral obligation may, in an exceptional case, be a suﬃcient beneﬁt for purposes of paragraph 19(3), either alone (in a truly exceptional case) or, more likely, in combination with other factors. Clearly, however, any such psychological beneﬁt or beneﬁt involving the fulﬁlment of a moral obligation that proposed judicial review proceedings have the potential to produce for the applicant or a member of the applicant’s family must go beyond what would otherwise be involved in purely representative litigation. Otherwise the legislative purpose of paragraph 19(3) would be defeated. The decision to be made is fact-sensitive, a question of degree and a maer for evaluative judgment by the decision-maker”.
3. On the exceptional facts the proceedings were capable of producing a real benefit for FF and went beyond him simply having a sufficient interest for the purposes of brining a claim for judicial review. No one feature produced this result but the cumulative facts include that he remained active in campaigning against the regime and those close to him remained at risk such that he had a moral duty to victims of torture at the hands of the regime. He had provided a dossier of material in support of his request that the prince not be permitted to enter. His interest went beyond the significant personal interest in the outcome held by the peace campaigner in *R (Evans) v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1146 (Admin); [2012] 1 WLR 838

**Costs Capping Orders**

**Criminal Justice and Courts Act 2015 ss 88-90**

1. The Court may only make an order if satisfied that (s. 88(6)):

“(a) the proceedings are public interest proceedings,

(b)  in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and

(c)  it would be reasonable for the applicant for judicial review to do so.”

1. Public interest proceedings are only those where (s. 88(7)):
	1. an issue that is the subject of the proceedings is of general public importance,
	2. the public interest requires the issue to be resolved, and
	3. the proceedings are likely to provide an appropriate means of resolving it
2. The court must have regard to (s. 88(8):
	1. the number of people likely to be directly affected if relief is granted to the applicant for judicial review,
	2. how significant the effect on those people is likely to be, and
	3. whether the proceedings involve consideration of a point of law of general public importance.

***R (We Love Hackney Ltd) v LB Hackney*  [2019] Costs LR 463**

1. LBH introduced revised licensing rules restricting sales of alcohol after midnight on Friday and Saturday and maintaining a presumption against new licences in Shoreditch and Dalton because of the existing concentration in those areas.
2. WLH Ltd was an association of local residents and business owners that had recently incorporated with the aim of campaigning, researching and advocating with regard to the night-time economy and supporting those who wish to apply for licences in Hackney.
3. WLH was granted permission to challenge the decision on PSED grounds (based on the importance of cultural spaces for the LBGTQ+ community) and because the council report did not properly address material considerations.
4. WLH applied for a CCO. It had no assets but had raised £20,000 through crowdfunding mainly through small individual donations. One of its directors was a successful licensed premises entrepreneur with a significant commercial interest in the D’s policies. Another was a television presenter with (unspecified) means and other supporters had commercial interests.
5. Farbey J refused the application for a CCO holding:
6. The proceedings were not “public interest” proceedings because:
	1. They did not raise an issue of general public importance. They related only to Hackney’s own policy.
	2. They did not raise a point of law of general public importance since the principles applicable to the PSED were well established and not a matter of dispute and the fact that there was no authority on its application to licensing did not raise any general or important point [40-1].
	3. This was not a case where a substantial number of people were likely to be directly affected. WLH pointed to investors, workers and users and anybody seeking to operate a licence in the future but this was said to be an “amorphous and somewhat protean” group and so not “directly affected” for the purposes of s. 88(8)(a) of the CJCA. Those words are not: “apt to include anyone who works in licensed premises, or who goes for a late night drink, or who wishes at some stage in the future to invest in licensable activities in Hackney”. [45]
	4. In any case the effect was hard to measure but no section of the community speaks with a uniform voice and so this factor counted for less than other statutory factors.
7. Although the judge was satisfied that the claim would be withdrawn if a CCO were not made she did not consider this to be reasonable the company’s directors and backers could fund the litigation as they were “well-resourced”.

*Security for Costs*

1. Since it was accepted that the company would not be able to pay the costs if it lost the conditions for an Order for security were met (CPR 25.13(1)(b)).
2. WLH argued that security should not be ordered because the effect would be to stifle a valid claim. Farbey J accepted that it was for WLH to show that there did not exist third parties who could reasonably be expected to put up security for the defendant’s cost. Since there were substantial backers it could not do so.
3. The judge ordered security in the sum of £60,000. LBH sought £106,279.00 and had incurred £55,000 to date. The amount ordered appears to assume that £5,000 was sufficient to cover skeleton arguments (the summary grounds standing as detailed grounds), some further witness evidence and the full hearing.

**Non-disclosure setting aside a PCO**

***R (Harvey) v Leighton Linslade Town Council* [2019] EWHC 760 (Admin)**

1. H challenged a decision regarding market trader fees. She was a concerned resident who felt that the changes might cause traders to leave. She was granted a CCO with a cap of £4,000. At the time she was in receipt of income related ESA. Her father died five months previously and she was a co-executor but did not disclose in her application that she might inherit a substantial sum. The evidence was unclear but the judge worked on the basis that it would be between £50,000 and £100,000.
2. The power to set aside or revoke an Order was said to lie in CPR 3.17. The ACO Guide 2018 stated (24.3.7) that: “the court should not set aside a JRCCO unless there is an exceptional reason for doing so”. However, the Court noted that there was no authority for that proposition and HHJ Dight considered that:

“if relevant material comes to light, as in this case, that had been available at the time of the application, but which was not brought to the attention of the judge making the decision, that is a failure to give full and frank disclosure and a failure to comply with the obligations of the Act and founds the jurisdiction for the Court to review the decision that it has made” [112].

1. The duty in CPR 46.17.1(b) to give a summary of the applicants financial resources included “resources which may not be immediately available at the time of the application and may not be immediately in the applicant's hands”. This covered the inheritance which ought to have been disclosed at the time of the application.
2. This was a significant failure because the information could have had an impact on the decision to grant a CCO at all or its terms. However, it was not appropriate to set aside the order for non-disclosure because the C, who acted person, had made a mistake in good faith [117-8].
3. However, the judge would have made a different order had the facts been known so it was appropriate to set aside the COO and re-make it “putting myself back in the position that I would have been in if I had that knowledge at the date of the application”.
4. It would be reasonable for C to withdraw if she felt the whole of her inheritance would be at risk and there should be a CCO but with C’s costs capped at £20,000.
5. Significantly the judge rejected the suggestion that there was a general power to revisit a CC at the end of the trial:

“I disagree with the submission that the Court would at the end of the judicial review process have the opportunity generally of reviewing a cost capping order, as it would do in a case (principally involving commercial litigation) where an interim order to preserve the status quo is granted pending trial but that order is revisited at the conclusion of the trial in the light of the findings of the trial judge. A cost capping order is a quite different interim order. The whole purpose of a cost capping order is to ensure that the issue is litigated for the benefit of the public through to the end. It is irrelevant, ultimately, whether the applicant for judicial review succeeds or losses. The issue will have been determined for the parties and, by necessary inference, for the benefit of the public and that purpose is served by the existence of a cost capping order. It is very different, therefore, from an interim injunction and, in my judgment, unlike in an interim injunction, the Court does not have a general power to revisit the decision about whether it would have granted the order in the light of the knowledge it has at the conclusion of the trial” [128].

**The effect of a CCO**

*R (Elan Cane) v SSHD Human Rights Watch Intervener* [2018] EWCA Civ 363

1. C lost their claim for judicial review but since they succeeded on one issue they were only ordered to pay 2/3 of D’s costs. There was a CCO with a mutual cap of £3,000 for each side. The judge had been entitled to apply the 2/3 Order to the capped costs and not the uncapped costs so that the SSHD recovered £2,000 only.
2. See also CPRE (Kent Branch) below.

**Private litigation**

*Maugham v Uber London Ltd* [2019] Costs LR 521; William Trower QC

1. M of the Good law Project brought proceedings in the Chancery Division seeking a declaration as to the responsibility of Uber to deliver a VAT invoice for a journey undertaken by him (£6.34 on which VAT would be £1.06). The Deputy Judge held that [*Eweida v British Airways plc [2009] EWCA Civ* 1025](https://uk.westlaw.com/Document/I4A3E3250BA0011DEB402E469A09D9605/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&comp=wluk&navId=1CA995144C24462DE67CC12103AD177F) was binding to the effect that a PCO was not available in private litigation [38], [41]. He accepted that the position may be different in environmental cases where the Aarhus Convention applies.
2. The proceedings were private litigation in this sense since “the only cause of action that Mr Maugham asserts is a private law entitlement to the provision of a VAT invoice, a claim that he says he can pursue against a private person”. No claim was made against a public body [49].
3. The application was dismissed on the merits in the alternative.
4. In *Swift v Carpenter* [2020] EWCA Civ 165 the CA also followed *Eweida* in holding that while there was jurisdiction to make a PCO in an appeal against a PI damages award “case law establishes that, as a matter of judicial policy and practice, we should not do so in the present case” [30].
5. It is unclear how far this limitation is based on a distinction between public and private law or the nature of the private interest in litigation. The proposition is qualified at [50] where the court suggested that the *Corner House Principles* are “about how the wide discretion of the court as to costs should be exercised. They are not decisions on law but on policy and practice. Like any other policy or practice, they may be subject to adjustment in the light of circumstances that did not exist or were not anticipated at the time they were set”.
6. It may be therefore, that in a case of “public interest” litigation there may still be room for a PCO or something like it even if the claim is not a JR. In *Eweida*, *Wilkinson v Kitzinger* was explained in that way. But it is then difficult to understand the court’s endorsement of *Maugham*.

**Costs following Settlement**

*Parveen v Redbridge BC*[2020] EWCA Civ ; [2020] 4 WLR 53

1. P started judicial review proceedings to challenge failure to provide suitable accommodation for a family temporarily housed in a hostel. A month before the hearing the LA offered self-contained accommodation after having been provided with a medical report which confirmed that this was necessary. P applied for costs but the judge made no Order as it was not possible to determine, without conducting a full trial of the claim, what, if any causal connection there was between the claim for judicial review and the oﬀer.
2. The Court of Appeal upheld this reasoning despite the fact P had received the relief she sought and so was, on the face of it, the successful party within the first class in *M v Croydon LBC* [2012] 1 WLR 2607.
3. However, “the fact that the claimant has obtained the relief which he or she was seeking in the proceedings does not necessarily mean that the existence of the proceedings has caused or contributed to that result. It may be that it would have happened anyway. The cases show that causation is a relevant and sometimes decisive factor in the exercise of the court’s discretion concerning costs” [31].
4. Where causation is not made out then the C will still be entitled to costs if the court can say with “sufficient confidence” that they would have succeeded [35].
5. Both issues must be addressed proportionately and it may not be possible for the court to resolve them unless the case is “reasonably plain” [38-41]
6. The judge was entitled to conclude:
	1. that causation was not clear on the evidence before him [50-1].
	2. it would not have been practicable without going into the matter in more detail than would have been appropriate to say who would have been the successful party if the matter had been fought out [52].
7. The Court also made clear that: “where a claim is withdrawn leaving costs to be determined by the court, there is no rule, even as a starting point or default position, that the claimant should pay the defendant’s costs”. The relevant principles are those derived from *M v Croydon* [45].

*R (Medway Soft Drinks Ltd) v HMRC* [2019] EWCA Civ 1041

1. CC challenged decisions by HMRC to refuse them interim approval to run a wholesale alcohol business so that they could continue trading pending a substantive challenge to a refusal to grant approval. Both were granted interim relief. After proceedings started HMRC reversed the substantive refusals and so the claims became academic. The claims were settled on terms that recited that approval had been granted. Both CC were granted their costs on the papers on the basis that they had succeeded.
2. HMRC appealed. They argued that there was no casual link because the grant of approval followed separate HMRC investigations and developments in the facts and was not the result of the claim (in each case there was an outstanding VAT assessment and that caused the refusal). They relied on *RL v Croydon* [2018] EWCA Civ 726 where housing was provided as the result of a review being completed and not because of the claim.
3. The Court of Appeal (Sir Timothy Lloyd, Newey and Gross LJJ agreeing) dismissed the appeal, mainly because CC had had to bring proceedings to obtain interim relief. This was particularly against a background where this was a new regulatory scheme, where there was no provision for interim protection and so applications to the court would have been forseen. It was also to be expected that the underlying issue would be resolved before the judicial review claim could come to a full hearing.
4. In these unusual circumstances, the claims fell within the first category in *M v Croydon*

“I say so because the claimants had to start the judicial review proceedings in order to have any chance of obtaining interim protection, and they did secure that protection, by virtue of having brought the claims, for as long as they needed it, namely until the problem that had led to approval being refused had been resolved”.

1. This had to get round *RL v Croydon* [2018] where an interim injunction was granted but costs successfully resisted on the basis that C was rehoused because of the ordinary assessment process and so there was no causal link. The explanation was said to be:

“there is a material distinction between *RL* and the present cases, in that, so the claimants argue, if they had not been able to obtain interim protection which they did through the judicial review proceedings, they would not have been able to carry on their business and the successful outcome might well have come too late to save them from having to close down and even from insolvency. An interim injunction was granted in *RL v Croydon* but, while I would not wish to underestimate the value of that interim protection for the family in question, it was arguably less critical than a situation in which the claimant companies, in these cases, might have been forced out of business and perhaps of existence by having to stop trading altogether”.

1. *RL* was a case where a family was ineligible for assistance and the object of the claim was to bring forward an assessment and where they had been evicted or 2 weeks before they started proceedings. They obtained an order but withdrew the claim when the assessment was completed. They were refused costs because the court was not satisfied that the claim did expedite the assessment or that they would have succeeded.

*R (Archer) v HMRC* [2019] 1 WLR 6355

1. A was served with an accelerated payment notice. He had a statutory right to make representations (s. 222 representations) but issued JR proceedings protectively before doing so. He then made representations as a result of which HMRC withdrew the notice.
2. The CA (Henderson LJ) upheld the Master’s decision to make no Order. The proceedings were premature because s. 222 representations had not been exhausted. The court would adopt a flexible approach to time limits where such representations had been made in good faith to avoid the need for proceedings [92]. This course should be taken in preference to issuing proceedings and seeking a stay because that course would involve additional costs [93].

*R (Patel, Gandhi) v SSHD* [2020] EWCA Civ 74

1. The CC challenged a decision to remove them on the ground that they had used deception in a TOEIC test. The grounds sought a determination that they had not used deception and also sought an in country right of appeal in the alternative but this ground was not developed. Their appeals were settled on terms that gave an in country right of appeal.
2. Hickinbottom LJ summarised the relevant principles at paras 21-2:
	1. Who is the successful party is “not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense” [21].
	2. Where compromise does not reflect the claims made then there is a stronger case for no Order.
	3. Where there are a number of strands of claim involved, for a costs order in his favour, a claimant has to show that his claim has been vindicated such that he should be regarded as a successful party
3. Here CC had, at most, achieved partial success because they wanted a decision that they had not used deception and not just a forum in which that issue would be addressed. The correct Order was therefore no Order for costs of the judicial review. The SSHD would pay the costs of the compromised appeal.

*Discretion to award costs*

*R (Johnson) v SSWP* [2019] EWHC 3631 (Admin)

1. CC succeeded in a challenge to a decision about benefits although not on grounds that precisely matched the pleaded points of law. One of 4 claimants failed on a PSED ground. SSWP argued that the costs should be reduced by 50%.
2. The court rejected the submission and awarded CC their full costs. As a matter of principle a successful party will not be deprived of their costs only because they fail on one or more points. In a pithy remark, with which we would respectfully agree, "It is a fortunate litigant who wins on every point." [26]. 2 factors were important here:
	1. The point was not unreasonably pursued permission having been granted to run it.
	2. Most, if not all of the evidence would have been before the court in any event.

*R (Osman) v SSHD* [2020] EWHC 47 (Admin)

1. O challenged D’s refusal to grant him a residence card. Clive Sheldon QC considered that if that claim had been litigated it was “tolerably clear” [26] that C would have succeeded. However, he considered that both parties had acted unreasonably.
2. C got married to an EEA national while the proceedings were ongoing but did not inform the D for 4 ½ months even though this made his claim academic and might have affected the way that the SSHD responded. There was no explanation for the delay.
3. C also acted unreasonably in his approach to offers by seeking to impose a condition on an offer made by SSHD.
4. However, D also acted unreasonably with respect to offers because she refused to pay any of his costs.
5. C was awarded all of his costs up to the date of his marriage and 60% thereafter to reflect a 20% reduction for failure to notify the D of his marriage and a further 20% reduction because of his conduct in relation to offers.

*Sanneh v SSHD* [2019] EWCA Civ 1319

1. S challenged his immigration detention starting in Aug 2016. He was still detained when the claim started in Aug 2017. He was released in Feb 2018. His claim failed for the whole period apart from the last 4 weeks. The SHHD conceded at trial that this period was unlawful. The trial judge awarded S 75% of his costs. SSHD appealed arguing that S ought to pay 80% of the SSHDs costs because he had failed on most of his claim.
2. Peter Jackson LJ held that S “was not the only successful party” and SSHD had succeeded in respect of 20 months [11]. However WS had had to pursue the claim to trial and his detention might have been longer otherwise have been detained for longer. In view of this the SSHD claim for 80% of the costs was “extremely ambitious”
3. Each side was ordered to bear its own costs of the proceedings below.
4. The result cannot be over-generalised. The court clearly thought the claim to be “overblown” [12] and in some respects unreasonable [11]. The SSHD made various complaints about unreasonable conduct although these are not reflected in the judgements.

*R (Commissioner of Police for the Metropolis) v PMAB; Neil Brown Interested Party* [202] EWHC 345 (Admin)

1. C was awarded 75% of her costs where she succeeded in quashing a decision of the Police Medical Appeal Board. She failed on the 2 grounds on which she had originally been granted permission and succeeded on 2 grounds for which permission was only granted at the hearing. However, one of those had become necessary because of the IPs change of position and the judge was satisfied that the IP would have opposed the proceedings in any event.

*No relief because of the “any difference” rule*

*Raqeeb v Barts Health NHS Trust* [2019] EWHC 3320 (Admin)

1. These were complex proceedings concerning the failure of the Trust to consent to T receiving medical treatment in Italy. T brought a claim for judicial review of the Trust for its failure to honour her right to receive services in a member state. The argument succeeded but no relief was granted because it was highly likely that the decision would have been no different. There were also proceedings under the Children Act 1989, initiated by the Trust but where the court made no order preventing travel to Italy for treatment.
2. On the judicial review claim Macdonald J held, applying R (Hunt) v North Somerset Council [2015] UKSC 51, that the fact that a remedy had been refused was not “a proper reason for depriving Tafida of a costs order in her favour, particularly in circumstances where the court did not mark the illegality on the part of the Trust by way of a declaration”
3. “I am of the view establishing the public law ground contended for is a more reliable indicator of success in the context of the question of costs than is the nature and extent of any discretionary relief subsequently granted for that default. In addition, I have taken account of the fact that the application resulted in lessons of general application beyond this case for NHS Trusts regarding their treatment of the directly effective EU rights of children in the context with which this case was concerned” [46]
4. Costs were reduced by 20% to reflect T’s failure on a point about whether T was being deprived of her liberty.

**Multiple parties**

*Campaign to Protect Rural England (Kent Branch) v Secretary of State for Communities and Local Government & anor* [2020] 1 WLR 352

1. C brought a claim for statutory review of a borough local plan. The secretary of state and local authority were D1 and D2 and a developer was interested party. Each filed an AOS. The proceedings were Aarhus proceedings. The claim was refused permission on the papers and each D and the IP were awarded their costs up to a total being the Aarhus cap.
2. The CA (Coulson LJ) held that:
3. As to multiple DD the same rules applied as in judicial review.

“There is no general rule in planning cases which limits the number of parties who can recover their reasonable and proportionate costs of preparing an AoS and summary grounds, if the application is refused at the permission stage” [20].

1. any party served with the claim form is prima facie entitled to its reasonable and proportionate costs of their preparation if, having considered that documentation, the judge refuses permission to allow the claim to go further [22].
2. However, costs must be reasonable and proportionate. Thus the principles in *Bolton* [1995] 1 WLR 1176 (where one set of costs will ordinarily be awarded) remain relevant but in relation to proportionality.

“where a judge has two sets of summary grounds of dispute, he or she will consider the utility of each and the extent to which one defendant should have anticipated the points raised by another, so as to make proportionate costs orders. The costs of an entirely duplicatory set of summary grounds produced by what is clearly not the principal defendant may not be proportionate and may therefore not be recoverable” [25].

1. Although said to repeat the effect of *Bolton* this in fact goes further because it makes the test lack of duplication or utility to the court rather than the need to show a separate interest as in *Bolton*.
2. As summarised at para 37:
	1. “When permission to seek review is refused, a claimant may be liable to more than one defendant and/or interested party for their costs of preparing and filing their AoS and summary grounds.
	2. It is not necessary for the additional defendant(s) and/or interested party to show “exceptional” or “special” circumstances in order, in principle, to recover those costs.
	3. However, to be recoverable, those costs must be reasonable and proportionate. So, for example, if there is an obvious lead defendant and the court was not assisted by the AoS or summary grounds of an additional defendant(s) and/or interested party, then the costs of that additional defendant(s) and/or interested party may not be proportionate and so will not be recoverable. That is an assessment which is case-specific and not susceptible to more general rules”.
3. As to the effect of the cap with multiple parties and at the permission stage:
	1. The cap limits the liability if the C. It applies to all of the costs payable to DD and to IPs.
	2. Provided their costs are reasonable and proportionate and the total is below the cap then they can be recovered in full.
	3. There is no reason to adjust the cap downwards where a claim fails at the permission stage. The cap (£10,000 in that case) was not intended to cover the cost of a notional trial.
4. The same issue could not now arise in a CCO claim because a cap can only be applied where permission has been granted. It is not clear that the same reasoning would apply if the claim ends at an earlier stage because any cap might be fixed by reference to the costs of trial (albeit discounted) and so it might be appropriate to reduce the amount payable.

Other parties

*R (D, P, K) v Lord Chancellor* [2020] EWHC 736 (Admin) David Pittaway QC

1. After 2 directors of Duncan Lewis were appointed as fee paid judges in Birmingham the FtT President issued a protocol that cases represented by that firm should not be listed in Birmingham. CC had their cases listed at Hatton Cross and brought JR proceedings challenging the policy which was withdrawn after several interim applications had been made. CC sought to withdraw their claims on terms that D paid the costs. The judge accepted that this was a M v Croydon class 1 case and that the protocol would not have been withdrawn had proceedings not been issued.
2. The Deputy Judge accepted that the decision to issue the protocol was part of the ordinary judicial process and that it therefore engaged the principle that where a judicial body does no more than provide assistance and information to the court rather than to contest the proceedings, itshould not generally be liable for the claimant's costs ( *R [Davies] v HM Deputy Coroner for Birmingham (Costs) 2004 1WLR 2739* at para 47 (iii)); *R (Gourlay) v Parole Board [2017] 1 WLR 4107* – where permission has been granted to appeal to the Supreme Court.
3. However, in this case the D had gone further and had actively stepped into the ring despite the fact that their AOS said they were adopting a neutral position. At about the same time D filed claiming that the CC lacked standing, that the relevant case management decision was not amenable to judicial review, and that the CC had overstated the legal position.
4. The Deputy Judge also rejected an argument that the CC had not complied with the pre-action protocol process, holding that the C’s stance was clear from the correspondence so that there was ample opportunity to withdraw the protocol.

*R (Kent) v Teeside Magistrates* [2020] Costs LR 195

1. In judicial review proceedings the D ticked a box saying that this was not an Aarhus case. However, they thereafter took no part in that issue. The IP actively opposed the issue. The C succeeded. Freedman J held that the court had power to award costs against the IP of this issue (CPR 45.45(3) only refers in terms to the D normally paying the costs). Costs were awarded against them.
2. As a practice point on quantum costs were awarded for legal research, distinguishing *R v Legal Aid Board, ex parte Bruce* [1991] 1 WLR 1231

*Western Sahara Campaign UK v HMRC* [2019] EWHC 684

1. C brought judicial review proceedings against D which they eventually won following a reference to the ECJ. HMRC took no part in the reference opposed costs of the reference for this reason. Mostyn J awarded costs on the basis that the C had incurred costs in achieving success. “Non-participation in proceedings is rarely, if ever, any defence to a claim for costs” [17].

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