**How to do judicial review**

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|  | **February 2024** |

**SESSION 5: SETTLEMENT AND COSTS**

**SETTLEMENT AND COSTS**

1. The paper covers settlement and securing inter parte costs and other costs orders (wasted costs, non­party costs and pro bono costs orders).

**SETTLEMENT AND INTER PARTES COSTS**

1. The need to consider settlement regularly arises in judicial review claims. In paragraph 3.21 of his final report in July 2009, Jackson LJ noted, “*PLP states that research shows that approximately 60 per cent of judicial review cases are now settled following the letter of claim...”.* That is because as a result of a claim or threatened claim defendants often change their decision, agree to reconsider it, or produce evidence that shows the decision was lawful.
2. Particular difficulties in a judicial review settlement include the following.
3. The defendant often takes only some of the action the claimant asks for, but not all of it. The question of whether LAA funding continues to be justified must then be considered.
4. The defendant may take this action very shortly before the hearing. It is regularly the case that crucial evidence is submitted a day or two before the substantive hearing. There are procedural rules about when the defendant’s evidence and grounds should be submitted. But those deadlines are regularly missed. Even if they are, the Administrative Court will normally accept fresh significant evidence from a defendant, and will expect the claimant to address

the updated position. The court may agree to adjourn the case if the claimant can show prejudice by the late service. Procedural breaches may, however, lead to costs being awarded against the defendant.

c. Costs are more difficult to obtain if the claimant has only received part of the relief sought.

**Facilitating settlement**

5. Judicial review claimants may wish to consider the use of offers made under CPR Part 36 in appropriate   
cases. These have traditionally been more familiar to civil litigators than judicial review practitioners. They are offers to settle that can be made at any time in the course of a case (or even before proceedings are issued). CPR 36.5 states:

“(1) A Part 36 offer must—

1. be in writing;
2. make clear that it is made pursuant to Part 36;
3. specify a period of not less than 21 days within which the defendant will be liable for the claimant’s costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
4. state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue;....”

6. The idea behind a Part 36 offer is to put pressure on the other party to settle because of the costs

consequences of refusing to settle and subsequently failing to beat the rejected Part 36 offer. Those costs consequences can be severe, and can include the payment of costs on an indemnity basis and interest on those costs at 10% above base. The making of offers is necessarily a fact-sensitive exercise, and needs to be carried out only on instructions and with the greatest care, and – if necessary – with the benefit of counsel’s advice.

**Settlement by agreement**

7. CPR r. 54.18 states:

*“The court may decide the claim for judicial review without a hearing where all the parties agree.”*

8. If the parties agree about the final order, the claimant must file at the court:

1. a consent order (with 2 copies) signed by all the parties setting out the terms of the proposed agreed order;
2. a short statement of the reasons relied on as justifying the proposed agreed order; and
3. copies of any authorities or statutory provisions relied on (PD54A, §17.1).
4. A statement of reasons is required because the Administrative Court is not bound by the agreed view of the parties. It can refuse to make the order. However, in practice the reasons do not need to be detailed because it is very rare that the Court will refuse to make an agreed order.
5. A precedent is attached to these notes. That order includes a direction that the claim is discontinued. It is not inevitable that the claim will be discontinued at the time of a consent order. For example, the consent order may relate to only one aspect of the claim, or the remedy given to the claimant may reveal further errors.

**Discontinuing without consent**

1. CPR Part 38 applies to judicial review claims and sets out the procedure and criteria for withdrawal. CPR 38.2(1) permits a claimant to discontinue all or part of a claim at any time. There are certain exceptions to that, including when the Court has granted an injunction, an undertaking has been given to the Court, or where there is more than one claimant. In those cases either the consent of another party or the consent of the Court is necessary.
2. A claimant who claims more than one remedy and subsequently abandons one or more (but not all) of them, is **not** treated as discontinuing part of the claim. She is treated as amending the claim and should follow the procedure for amending the statement of case, which is in CPR 17.
3. The procedure for discontinuance is set out in CPR 38.3, and includes the requirement that the claimant file and serve a notice of discontinuance.
4. The problem with withdrawing a claim without consent is that CPR 38.6 states:

*“(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.”*

1. As will be seen below, in the Administrative Court the court may order otherwise if the claimant has obtained the relief sought. But CPR 38.6(1) means it is preferable, if possible, to agree a consent order which deals with costs and discontinuance. Unfortunately, often defendants are unwilling to agree to pay a claimant’s costs, and prefer to agree that written submissions on costs will be made.

**Inter partes costs**

16. There have been recent significant changes to the Administrative Court’s approach to costs. The previous ‘*Boxall’* approach (after R(Boxall) v. Waltham Forest LBC [2001] 4 CCL Rep 258), 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, at paragraph 4.13, and from subsequent caselaw. PLP has played an important part in the changes.

17. A summary of the current position is that the claimant should normally obtain 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.

18. In R (Bahta) v Secretary of State for the Home Department [2011] EWCA Civ 895 [2011] CP Rep 43 Pill LJ, giving the leading judgment, said:

*“59. What is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant.”*

19. Similarly, in R (M) v Croydon LBC [2012] EWCA Civ 595 [2012] 1 WLR 2607 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”* (paragraph 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).

20. Lord Neuberger later decided that there are three types of case:

*“60. Thus in Administrative Court cases just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (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. While in every case the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.*

1. *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*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=6&crumb-action=replace&docguid=I4F356670B7DD11E09AEEE47F9692E867) *was decided on this basis.*
2. *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*](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=6&crumb-action=replace&docguid=I97F52A01E78B11DDA0F99F87CBDF8427) *. 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.*
3. *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.”*
4. The decision indicates that the contentions regularly made by defendants in judicial review (pragmatic solution not an acceptance we got it wrong; not clear the claimant would have won, etc) will not normally be sufficient to result in no order as to costs.
5. In R(Emezie) v. Secretary of State for the Home Department [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.”*
6. It is important that the three categories set out by Lord Neuberger are not applied mechanically. In R (Dempsey) v. Sutton LBC [2013] EWCA Civ 863 the claimant was awarded costs when it had been reasonable to issue judicial review proceedings and in substance she had achieved what she set out to achieve in the proceedings (paras. 22-24). Pill LJ cautioned against an *“over-technical view”* of costs being taken, focusing upon *“the hypothetical situation of what might have happened if events had taken a different course. One has to take an overall view of the situation and, applying good sense, decide on the reasonableness of the conduct of the parties including the conduct of the party seeking costs.”*
7. One other relevant consideration is whether the claim was brought in the wider public interest. In R (Public Interest Lawyers) v LSC [2010] EWHC 3227 the decision in question was not quashed but the LSC was ordered to change the way it acted with other applicants. The claimants were awarded 70% of their costs.



1. One of the main lessons from the recent caselaw is that it is important to carefully formulate the letter before claim, and in particular the relief sought. A failure to obtain the relief sought in the pre-action letter is the key factor in determining costs.
2. However, non-compliance by the claimant with the pre-action protocol does not inevitably mean he will not obtain costs. In R (KR) v Secretary of State for the Home Department [2012] EWCA Civ 1555 the claimant did not comply with the pre-action protocol in a challenge to the certification of an Article 8 claim in an immigration context. The claim was robustly defended, but the Secretary of State subsequently conceded that the claimant was entitled to an in-country appeal on her Article 8 claim. The failure to comply was causally insignificant, and the claimant was awarded her costs. Similarly, where there was a god reason to depart from the protocol in the first place (perhaps the claim was urgent) then the failure to adhere to it strictly should not count against an otherwise successful claimant. Even in urgent cases however, it is wise, if at all possible to send a letter setting out the information that would be contained in a formal pre action protocol letter, and a claimant who does so and then wins is far more likely to recover inter partes costs.

**Submissions on costs**

1. Administrative Court judges may want to deal with costs very quickly. Recently, guidance was produced by the Administrative Court Office which indicated that costs submissions should normally be no longer than two pages. That guidance has subsequently been withdrawn, after submissions were made by various groups. A further draft was produced, and has been in force since 13 January 2014. A copy of the guidance is enclosed with this paper. Discussions are ongoing about whether that will be revised. Whether or not that happens, it is worth bearing in mind that judges may lose interest in longer submissions.
2. At the same time, the courts have recognized the importance of costs. In R (Scott) v Hackney LBC [2009] EWCA Civ 217 Lady Justice Hallett, giving the judgment of the Court of Appeal, stated:

*“I would... urge all judges to bear in mind that, when an application for costs is made, a reasonable and proportionate attempt must be made to analyse the situation and determine whether an order for costs is appropriate... A judge must not be tempted too readily to adopt the fall back position of no order for costs.” §51*

1. Similarly, in In re appeals by Governing Body of JFS [2009] UKSC 1, [2009] 1 WLR 2353 Lord Hope of Craighead DPSC, giving the judgment of the Supreme Court, said as follows:

*“24. ... the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This disadvantage is all the greater in a case such as this. It is a high costs case, for which lawyers representing publicly funded parties are required to enter a high costs case plan with the Legal Services Commission. It is a common feature of these plans that they limit the number of hours to an artificially low level and the rates at which solicitors and counsel are paid to rates that are markedly lower than those that are usual in the public sector...*

*25. It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice,*

*their businesses would very soon become financially unsustainable... the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded. Had such an order been asked for in this case we would have refused to make it.”*

30. In R (Bahta) v Secretary of State for the Home Department [2011] EWCA Civ 895 [2011] CP Rep 43

Pill LJ said *“Lord Hope’s statement that “the consequences for solicitors who do publicly funded work are a factor which must be taken into account” is intended to be of general application”* (para. 49).

**Consent order – settlement by agreement**

**IN THE HIGH COURT OF JUSTICE**

**QUEEN’S BENCH DIVISION   
ADMINISTRATIVE COURT   
Claim No:**

**IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW**

**THE QUEEN (on the application of XXX) –and- HM ASSISTANT DEPUTY CORONER FOR INNER SOUTH LONDON**

Before the Honourable Mr/Mrs Justice

The claimant and defendant do hereby consent to an order of the court being issued in the terms of the attached order

Dated this day of June 2012

..........................................

[*Please insert name*]

Signed on behalf of the claimant

...........................................

[*Please insert name*]

Signed on behalf of the defendant

**Statement of Reasons**

The defendant now accepts that further investigations should take place into the monitoring and care of the deceased before and up to her fall on 15 March 2011.

The reasons for this are those stated in paragraphs 18 to 45 of the claimant’s statement of facts and grounds relied on.

Dated the

**IN THE HIGH COURT OF JUSTICE**

**QUEEN’S BENCH DIVISION   
ADMINISTRATIVE COURT   
Claim No:**

**IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW**

**THE QUEEN (on the application of XXX) –and- HM ASSISTANT DEPUTY CORONER FOR INNER SOUTH LONDON**

Before the Honourable Mr/Mrs Justice .................

Upon reading the claim form and grounds in this matter

AND UPON READING the form of consent together with the statement of reasons signed by all parties to these proceedings

AND the Court being satisfied that the Consent Order set out here should be made

BY CONSENT

IT IS ORDERED that

1. The claimant be allowed to withdraw his claim for judicial review.
2. A fresh inquest shall take place before a different coroner to investigate the monitoring and care of the deceased before and up to her fall on 15 March 2011.
3. There be no order for costs save that the costs of the claimant be subject to a detailed Community

Legal Services funding assessment.

BY THE COURT.

**OTHER COSTS ORDERS**

31. Private law claims offer a salutary warning to public law litigants. In such claims, it is more frequent for

costs to be awarded against legal representatives, personally, and also for costs orders to be made against those who are not even parties to the litigation. It is therefore necessary for a judicial review claimant to be well-advised about the possible orders that can result from such a claim.

32. This paper addresses three costs orders that, although infrequently made, can have a major impact on

judicial review claims:

1. Wasted costs orders against legal representatives;
2. Non-party costs orders; and
3. Pro-bono costs orders.

**A. Wasted Costs Orders**

33. The power to award wasted costs against legal representatives personally is contained in section 51 of

the Senior Courts Act 1981, which provides, so far as is relevant:

*“51 Costs in civil division of Court of Appeal, High Court and county courts.*

*(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and*

*incidental to all proceedings in—*

1. *the civil division of the Court of Appeal;*
2. *the High Court; and*
3. *any county court,*

*shall be in the discretion of the court.   
...*

1. ***In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.***
2. ***In subsection (6), “wasted costs” means any costs incurred by a party—***

***(a) as a result of any improper, unreasonable or negligent act or omission on the part of   
any legal or other representative or any employee of such a representative; or***

***(b) which, in the light of any such act or omission occurring after they were incurred,***

***the court considers it is unreasonable to expect that party to pay.****” (emphasis added)*

34. The procedure by which wasted costs orders are made is contained in the relevant rules of court: CPR

r. 46.8 provides:

*“(1) This rule applies where the court is considering whether to make an order under section 51(6) of the Senior Courts Act 19813 (court’s power to disallow or (as the case may be) order a legal representative to meet, ‘wasted costs’).*

*(2) The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.*

*(3) When the court makes a wasted costs order, it will –*

1. *specify the amount to be disallowed or paid; or*
2. *direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.*

*(4) The court may direct that notice must be given to the legal representative’s client, in such manner as the court may direct –*

1. *of any proceedings under this rule; or*
2. *of any order made under it against his legal representative”.*

35. The provisions of CPR r.46.8 seek to give effect to the previous common law position, as set out in the

decision of the Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205. In that case, the Court of Appeal suggested that a three-stage test is to be applied:

(iv) Has the legal representative of whom complaint is made acted improperly, unreasonably or

negligently?

1. If so has such conduct caused the applicant to incur unnecessary costs?
2. If so, is it just, in all the circumstances, to order the legal representative to compensate the applicant for the whole or part of the relevant costs?
3. Although Ridehalgh suggests a relatively high threshold, the Administrative Court has shown an increasing enthusiasm for these orders. Some comfort may be drawn from the fact that the cases in which such orders have been made have arisen in extreme factual circumstances.
4. In R (Gassama) v Secretary of State for the Home Department [2012] EWHC 3049 (Admin), Haddon-Cave J made a wasted costs order on the indemnity basis. The claimant’s solicitors had disregarded case management directions, failed to respond to correspondence, and permitted a substantive judicial review hearing to proceed without responding to the defendant’s detailed grounds or filing a skeleton argument. On the morning of the hearing, they wrote to the Court to suggest that they were withdrawing from acting on behalf of the claimant: “*Should this position change we will notify you*,” their letter concluded. Haddon-Cave J. concluded that, this was “*a paradigm case”* for a costs order: “*It is difficult to think of a more disgraceful dereliction of duty to the court than in the present case*” (at [27]).
5. In R (Grimshaw) v Southwark LBC (unreported, 17th July 2013) Leggatt J made a wasted costs order on the indemnity basis against solicitors who had failed to inform the court until two days before a substantive hearing that its client had obtained the relief sought in judicial review proceedings (a dispute over the provision of temporary accommodation), and had persisted with a “*manifestly spurious*” claim for damages despite its legal aid duties in respect of public funds. Leggatt J. Was concerned at what he saw as a breach of “*the duty to keep the court informed of any relevant changes to the circumstances”*. It was no excuse for the firm to suggest that it was “*simply following instructions”*. Because the claimant’s firm had caused costs to be incurred, their arguments that “*some items on the local authority’s bill of costs were not proportionate or reasonable”* carried little weight.
6. The approach in Grimshaw is of concern. It suggests that, in the event that the Court concludes that a claim is “*manifestly spurious”*, it may award wasted costs against the legal representative. This test is not dissimilar from the new “*totally without merit”* test that can apply at the permission stage (CPR, r. 54.12(7)). There is a lack of guidance as to how that test will be applied and recent experience suggests that the Court has not always applied that test in a consistent fashion. This gives rise to a concern, particularly for publicly funded claimant lawyers, that pursuing a claim that is subsequently classed as “*totally without merit”* may leave them personally liable to a wasted costs order. Claimant’s advisers will therefore want to make sure that whatever the Court makes of the *merits* of the case advanced, they cannot be criticized for being *improper, unreasonable, or negligent* conduct. (In Grimshaw the solicitors reason for the failure to discontinue was really nothing more than that their client had told them that she wanted to pursue what was a fairly hopeless damages claim.)
7. Some support for claimant solicitors in these situations may however be sought in the older authority of Orchard v South Eastern Electricity Board [1987] Q.B. 565, in which the Court of Appeal suggested that courts should be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the relevant regulations and that “i*n a legal aid case there would have to be a finding*

*of serious dereliction of duty or serious misconduct in allowing the case to proceed before a wasted costs order would be made”* (at 580).3

Also note that the Upper Tribunal also has the power to make wasted costs orders in judicial review cases. See R(Okondu) v Secretary of State for the Home Department [2014] UKUT 377 (IAC)

Under section 51 of the Senior Courts Act 1981 (as amended by section 67 of the CJCA 2015 and brought into force on 13 April 2015) when a wasted costs order is made the Court must inform as it considers appropriate the relevant regulatory body (e.g. the SRA or BSB) and the Director of Legal Aid Casework (if appropriate).

**B. Non-Party Costs Orders**

41. The Court has discretion to make a non-party costs order, pursuant to s.51 Senior Courts Act 1981.

42. In Symphony Group Plc v Hodgson [1994] QB 179, at 191G-192E, Balcombe LJ considered this discretion and set out the following categories of non-party costs orders:

(iv) *Where a person has some management of the action, e.g. a director of an insolvent company who causes the company improperly to prosecute or defend proceedings ... It is of interest to note that, while it was not suggested in any of these cases that it would never be a proper exercise of the jurisdiction to order the director to pay the costs, in none of them was it the ultimate result that the director was so ordered.*

1. *Where a person has maintained or financed the action ...*
2. *... the power of the court to order a solicitor to pay costs ...*
3. *Where the person has caused the action ...*
4. *Where the person is a party to a closely related action which has been heard at the same time but not consolidated ...*
5. *Group litigation where one or two actions are selected as test actions ...*

43. These categories were described as being “*neither rigid nor closed”*, but represented the sorts of connections which had led the courts to consider making a non-party costs order.

44. Balcombe LJ gave the following guidance, at 192H-194D:

(iv) *An order for the payment of costs by a non-party will always be exceptional ... The judge should treat any application for such an order with considerable caution.*

1. *It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to e.g. the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make [a Part 36 offer]; and the knowledge of what the issues are before giving evidence.*
2. *Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action ...*

[these principles were described as “*an obvious application of the basic principles of natural justice*”]

1. *An application for payment of costs by a non-party should normally be determined by the trial judge ...*
2. *The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias. Bias is the antithesis of the proper exercise of a judicial function ...*
3. *The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger ... Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge’s findings of fact may be admissible .... This departure from basic principles can only be justified if the connection of the non-party with the*

*original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.*

1. *Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly4 ... In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle.*
2. *The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company ...*
3. *The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim against the [Legal Aid Agency] ... is very limited. Nevertheless the [relevant regulations] lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations ... and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred.*

45. The Privy Council has given similar guidance, in Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807 Lord Brown summarised the relevant principles governing the exercise of this discretion at [25]:

*“Although costs orders against non-parties are to be regarded as “exceptional”, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and for their own expense. The ultimate question in any such “exceptional” case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against;*

4 This aspect of Balcombe LJ’s reasoning should now be read subject to the subsequent disapproval of class-based immunities in, for example, Jones v Kaney [2011] 2 A.C. 398 (in respect of expert witnesses).

*Generally speaking the discretion will not be exercised against “pure funders” i.e. those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course. In their case the court’s usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights;*

*Where the non-party not merely funds the proceedings but substantially controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is “the real party”, or “a real party” to the litigation;*

*A non-party costs order should not be made when the relevant costs would have been incurred anyway without the involvement of the non-party.*

*It follows that a non-party costs order is more likely where (a) the party to the litigation is unable to pay costs, (b) the non-party has played an active part in the conduct of the litigation, (c) the non-party has an interest in the subject of the litigation (see Flatman v Germany [2013] 1 W.L.R. 2676, at [26], applying the decision of the High Court of Australia in Knight v FP Special Assets Ltd [1992] 174 CLR 178, at 192).*

*A solicitor who not merely funds the proceedings but substantially also controls or at any rate is to benefit from them falls within these categories (Myatt v National Coal Board (No 2) [2007] 1 WLR 1559, per Dyson LJ, as he then was, at [8]). However, a solicitor who funds disbursements as the case proceeds, on a conditional basis, will not, without more, be be the real party to the litigation and so potentially liable to a third party costs order under s.51 Senior Courts Act 1981 (Flatman, at [47]).”*

**Criminal Justice and Courts Act 2015**

*Interveners*

46. As we will see in session 6, section 87 of the CJCA 2015 provides that if certain conditions are met the   
Court must make an adverse costs order against an intervener for costs that a party has incurred as a result of the intervener’s involvement in the proceedings, unless there are exceptional circumstances. Also the Court must not order a party to pay the interveners costs unless there are exceptional circumstances.

*Third parties*

1. As already noted, when sections 85-86 of the CJCA 2015 come into force, unless claimants provide information about how the claim is being financed then permission will not be granted, and the court must have regard to that financial information when determining by whom and to what extent costs are to be paid. Section 86 will place a duty on the court to consider whether to order costs to be paid by a third party who is identified from that information as someone who is providing financial support for the purposes of the proceedings or likely or able to do so5.

**C. Pro Bono Costs Orders**

1. The law on costs is not all bad news for claimant legal representatives. Where a claimant pursues a judicial review claim on a *pro bono* basis and succeeds, the claimant is still entitled to an order for costs in their favour. The costs, in such a case, are payable to the prescribed charity, the Access to Justice Foundation. The Foundation then distributes the money to agencies and projects that give free legal help to those in need.
2. The power of the Court to make such an order arises under s.194 Legal Services Act 2007, which provides, so far as is relevant for this session:

* An order can only be made where a party was represented by a legal representative and the representation was provided free of charge, whether in whole or in part (s.194(1));
* The fact that the party was also represented by a legal representative who was not acting free of charge does not mean that an order cannot be made (s.194(2));
* The order is payable to the “*prescribed charity”* in respect of the representation that was provided for free, or, if only part of the representation was provided for free, in respect of that part (s.194(3));
* The “*prescribed charity”* is the Access to Justice Foundation: Legal Services Act 2007 (Prescribed Charity) Order 2008, Article 2.

1. In considering whether to make such an order and the terms of such an order, the Court must have regard to: (a) whether, had the party’s representation not been provided free of charge, the Court would have ordered the person to make a payment to the party in respect of the costs payable in respect of that representation, and (b) if it would, what the terms of the order would have been (s.194(4)).
2. Such orders can be made by the High Court (s.194(10)).
3. The Administrative Court has demonstrated some reluctance to make pro bono costs orders in favour of claimants, so it is particularly important that applications for such costs are made where possible (in R (Bewry) v Norfolk CC [2010] EWHC 2545 (Admin), when an application was made, Holman J commented, “*I have never ever had this animal before”* and refused to make such an order, although the claimant’s representative did not provide the Court with a copy of s.194 and made the application at the end of a long court day).

5 S.86(3) Criminal Justice & Courts Act 2015

53. The Access to Justice Foundation has produced guidance as to how to make applications for pro bono costs orders.The guidance recommends that, where an order is sought, the claimant’s representatives should:

1. Seek such an order when a claim succeeds, whether following a hearing or following settlement;
2. File and serve a statement of costs using court form N260. This shows what free work the claimant’s representatives did, and what it would have cost a paying client at your normal rates;
3. Seek an order in the following terms:

*“The Defendant must pay costs for pro bono representation on or before [date] to The Access to Justice Foundation (PO Box 64162, London WC1A 9AN), [summarily assessed*

*at £ ] [or] [to be assessed on the standard / indemnity basis if not agreed].”*

1. Tell the Access to Justice Foundation when an order has been obtained (by way of email to [costs@ATJF.org.uk)](mailto:costs@ATJF.org.uk).

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