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Counting the cost

Alison Pickup hopes the decision in *Scott* indicates a promising future

IN BRIEF

- *R (Scott) v LB Hackney* [2008] EWCA Civ 217: the Court of Appeal was invited to consider the guidance on costs in judicial review claims and the impact on publicly funded litigants of no order being made as to costs.

In *R (Scott) v LB Hackney* [2008] EWCA Civ 217 the appellant was a severely autistic 33-year-old man who issued a claim for judicial review in June 2006 challenging the failure of the respondent local authority to provide services to meet or properly assess his needs. After the claim was issued and permission granted, negotiation between the parties resulted in the claimant withdrawing his claim, but costs remained an outstanding issue.

After considering written submissions, Mr Kenneth Parker QC (sitting as a Deputy High Court Judge) decided to make no order as to costs in light of the fact that the respondent had had some reasonable points of defence, and the appellant had not pursued part of the original claim. The appellant appealed, arguing that the judge had applied the wrong test, had failed to take account of the respondent's conduct and had failed to take into account the effect on the system and publicly funded lawyers of not making an *inter partes* costs order.

The judgment

The court held that the deputy judge had not erred in his assessment of the issue of costs and that, having regard to the "generous ambit of his discretion", he had been fully entitled to conclude that it was not appropriate to make any order for costs in light of the history of the case.

The court did endorse the general principles set out by Mr Justice Scott Baker in *Boxall* as to the assessment of costs where judicial review claims settled, and emphasised that "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 fallback position of no order for costs".

Comment

The Public Law Project had obtained permission to intervene in *Scott* in order to bring to the court's attention the importance of *inter partes* costs orders being made in publicly funded cases. It was emphasised to the court that firms which undertake significant amounts of publicly funded work depend to a large degree on the substantially higher rates of

is normally irrelevant to the consideration of costs. That this is so is reinforced by the Access to Justice Act 1991, s 22, and by the Court of Appeal's earlier judgment in *R (Kuzeva) v Southwark LBC* [2002] EWCA Civ 781 (unreported, 30 May 2002, Schiemann, Sedley and Hale LJ). Moreover, in *Scott*, the court gave weight to the fact that local authorities and other public bodies defending judicial review claims may have equally limited resources on which to draw. As such, costs in such cases should be decided on normal principles. That the court was prepared to go no further than to warn judges against too readily falling back on the no order option will be disappointing for legal aid practitioners.

Scott is nonetheless a welcome reminder to both claimant and defendant lawyers—as well as to judges—that costs can and should in appropriate cases be awarded in favour of publicly funded claimants where claims are settled outside of court. This will particularly be the case where proper use of the pre-action protocol has produced little real response by the defendant public body, but the claim has been expressly

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pay available on an *inter partes* costs order than under a public funding certificate. It was suggested that the important role played by such lawyers in enabling vulnerable people to challenge decision-making by public bodies was being undermined by a reluctance on the part of judges to make costs orders in claims which settled before a hearing. That was something which the court ought properly to address.

Unfortunately for firms facing increasingly tight purse strings in legal aid work, these arguments did not win much favour with the court. The court stood by the principle identified in *Boxall* that the fact that one of the parties is legally aided

compromised post-issue or post-permission on the basis that the claimant's case was correct and properly brought. In a recent appeal against the refusal of costs in such a case in *R (Mendes) v Southwark LBC* [2009] All ER (D) 231 (Mar) the Court of Appeal held that the judge had been wrong to make no order as to costs where clearly the claimant had strong prospects of success and the decision to bring proceedings had been a reasonable one in the face of the defendant's refusal to withdraw its incorrect decision before proceedings were commenced. It is to be hoped that decisions of this kind will be more frequently seen in future. NLI

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