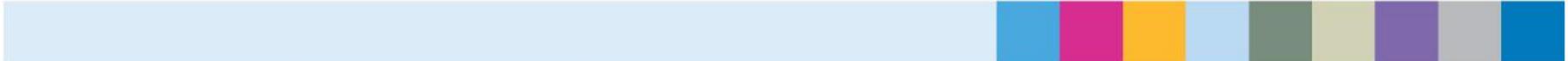


# COSTS UPDATE

Kirsten Sjøvoll



- New guidance from the Administrative Court Office as to how the court will approach an application for costs following settlement of claims for judicial review
- Applies where the parties to judicial review have agreed to settle a claim but have submitted the issue of costs for determination by the court
- Applies to all consent orders submitted for approval by the court after 20 November 2013.

*'Mind numbing, byzantine costs submissions will stop'. Ouseley, J*

- Despite line of Court of Appeal authority designed to simplify costs issues, the Admin Court found itself with a huge backlog of cases and increasingly complex submissions on costs;
- *Inter partes* costs awards especially important against a background of funding cuts and yet more proposed financial obstacles for claimants in judicial review proceedings;
- Also important for increasing number of CFA cases, dependent on award of *inter partes* costs orders.

- The principles on the award of inter partes costs were set out by the Court of Appeal in *M v Croydon Borough of London* [2012] EWCA Civ 595, [2012] 3 All ER 1237;
- Determined that the principles on costs in the context of judicial reviews should be no different than principles in general civil litigation;
- Default position should not be that there is no order as to costs;
- Distinguished *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258 as that was a case where the Claimant had only succeeded on a small part of the claim.

- Since *M*, the position has been further clarified by the Court of Appeal;
- ***R (Dempsey) v. Sutton LBC* [2013] EWCA Civ 863**, per Pill LJ at paras. 22 – 24: appellant entitled to full costs as “the initial commencement of proceedings was justified”; she achieved her central aim, i.e. an offer of accommodation from the local authority; she was justified in going to court to ensure her position was protected). Cautioned against an “over-technical” approach to costs;
- ***Emezie v. Secretary of State for the Home Department* [2013] EWCA Civ 733 [4]**: “the starting point now is whether the claimant has achieved what he sought in his claim.” This includes obtaining interim relief, as in that case, which does not require any consideration of the merits of the underlying claim.

# The New Admin Court Guidance



- Claims to apply the principles set out in *M*;
- Paragraph 6 states that: *“unless it is clear that the Claimant seeking costs has succeeded on all of the substantive parts of the claim it is much more likely that there will be no order as to costs.”*
- Parties are to “assist the court” by trying to reach agreement on costs without the need for judicial intervention;
- Agreement should always be sought before any submissions made to the court;
- Any party wishing to claim costs must file and serve submissions on costs within 14 days of the approval by the Court of the consent order settling the claim.

# Content of submissions



- Submissions should -
  - confirm that the parties have used reasonable endeavours to negotiate a costs settlement;
  - identify what issues or reasons prevented the parties agreeing costs liability;
  - state the approximate amount of costs likely to be involved in the case;
  - clearly identify the extent to which the parties complied with the pre-action protocol;
  - state the relief the claimant (i) sought in the claim form and (ii) obtained;
  - address specifically how the claim and the basis of its settlement fit the principles in *M v Croydon*, including the significance and effect of any action or offer by the defendant in relation to the claim.

# Submissions [2]



- Not to exceed 2 standard A4 pages without good reason (to be explained to the court);
- They should be accompanied by the pre-action protocol correspondence (where this has not previously been included as part of the documents supporting the claim), the correspondence in which the costs claim is made and defended, along with any other correspondence necessary to demonstrate why the claim was brought in the light of the pre-action protocol correspondence or why the step which led to settlement was not taken until after the claim was issued;
- No right to a reply.

- Questions raised over Guidance by practitioners;
- Letters from Doughty Street, ALBA and ILPA to Ouseley J, asking that Guidance suspended because:
  - Test misstates the authorities and the guidance is not in conformity with current authority on costs and ignores more recent post- *M* Court of Appeal authority;
  - Too restrictive: negotiation not always possible in judicial review post settlement;
  - JR settlements different from civil litigation, where both parties agree. JRs may settle because, for example, they become academic;
  - Defendants often ask for submissions on Claimant costs without explaining their position. Under new Guidance, Claimant will struggle to explain this to the Court within the shorter, two-page submission limit and no right to reply;
  - Requirement that Claimants “confirm the costs involved in the case” practically extremely difficult;

# “New” new guidance



- Guidance suspended and amended in December 2013 in response to concerns;
- Ouseley J letter does not accept correctness of concerns but states that Guidance will be amended to remove “contentious” wording;
- Reiterated reasons for Guidance as:
  - Low quality cost submissions on both sides, resulting in more work for the court;
  - Frequency with which the parties have failed to reasonably consider why they differ on costs;
  - Disproportionate use of judicial resources to the value of the claim;
  - Need to find faster ways of resolving disputes;
  - Impact upon limited judicial resources

# “New” new guidance



- “New” new Guidance does not contain any substantive changes/additions but does omit some of the more contentious language, for example the test previously set out at paragraph 6 (which Ouseley J did not think was inconsistent with the authorities);
- Pending further discussion, consent orders will only be approved in accordance with the current Guidance;
- The Guidance is up for discussion at the next Admin Court User Group meeting in late January 2014.

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