UKSC 2019/0174

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL

(CIVIL DIVISION)

Lord Justices David Richards, Hamblen and Coulson [2019] EWCA Civ 1230; [2020] 1 WLR 352

BETWEEN:

CAMPAIGN TO PROTECT RURAL ENGLAND – KENT BRANCH

Appellant

and

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Respondent

APPELLANT'S CASE

INTRODUCTION AND SUMMARY

1. This appeal relates to the initial stages of judicial review and planning statutory review challenges. The Appellant does not dispute that a defendant whose decision is under challenge should generally be entitled to its reasonable and proportionate costs of acknowledging service where it resists permission and permission is refused on the papers. The main issue in this appeal is whether, as a general rule, the costs of other parties who choose to acknowledge service and resist permission should also be awarded against an unsuccessful claimant at that stage. The Appellant submits that generally only one set of costs should be awarded. The Respondent submits that multiple sets of costs should generally be awarded.

2. A secondary, but related, issue is the appropriate quantum of such costs.

3. The decision this Court must reach is whether the general principle on multi-party costs in public law cases set out by Lord Lloyd of Berwick in Bolton MBC v Secretary of State for the Environment (Practice Note) [1995] 1 WLR 1176 at 1178A-B that *"where there is multiple representation, the losing party will not normally be required to pay more than one set of costs, unless the recovery of further costs is justified in the particular circumstances of the case"* applies at the permission stage, or whether to affirm the practice (albeit not consistently applied) that has arisen as a result of the Court of Appeal decision in R (Mount Cook Land Ltd) v Westminster CC [2003] EWCA Civ 1346; [2017] PTSR 1166, in reliance on which interested parties claim their costs of acknowledging service in addition to those claimed by the defendant.

4. The Appellant submits that the Bolton approach should be confirmed as applicable at the permission stage in judicial and planning statutory review cases.

5. In outline, the Appellant's submissions are as follows:

   a. There are good reasons for the courts to adopt a different approach to costs in public law litigation than for ordinary civil litigation between private parties.

   b. The Bolton propositions reflect a fair, reasonable and proportionate approach to the allocation of costs in public law litigation – albeit with particular reference to the planning context – consistent with the long-standing and general disinclination of the courts to award more than one set of costs against unsuccessful claimants in public law proceedings.

   c. The introduction of the Civil Procedure Rules ("CPR"), including provisions for judicial review claims to be made on notice to defendants and interested parties, and for acknowledgements of service from those parties, does not displace that general approach.

d. Moreover, the practice of making multiple awards of costs is not supported by the terms of the CPR and is contrary to the purpose of the permission stage under the CPR.

e. As a matter of certainty and consistency, the general position should be the same at both the substantive and permission stages: unsuccessful claimants in public law cases should generally only be liable for one set of costs. It is anomalous to award multiple sets of costs in claims that are found not to be arguable and are dismissed on the papers, where the same approach is consistently not taken for those that proceed to permission hearings[1] or substantive hearings.

f. In planning statutory review cases to which the permission stage now applies, there are, if anything, stronger reasons only to award one set of costs – as was recognised in part by the Court of Appeal in the judgment under appeal.[2]

g. Proportionality is relevant to costs awards, but the articulation of it by the Court of Appeal in this case fails adequately to respect the Bolton approach. To leave the matter to a case-by-case assessment promotes uncertainty, inconsistency and protracted arguments on costs.

h. The quantum of costs incurred by parties acknowledging service at the permission stage should generally be low, and there is no justification for parties incurring additional costs on account of a claim coming within the Aarhus Convention costs rules (cf. para.53 of the judgment under appeal).

6. Overall, it is submitted that the approach taken in Bolton, which is predicated on the Court being "*astute to ensure that unnecessary costs are not incurred*" is more aligned with the overriding objective of the CPR "*to deal with cases justly and at*

[1] Where permission has been refused on the papers, but granted at a hearing, any costs order made on paper will fall away. If permission is still refused, time will often be spent at the permission hearing arguing about quantum of the paper order.

[2] See para.33: *"I can see that, for some types of statutory review, there may be rather less of a legitimate role for interested parties than in judicial review proceedings under Part 54."*

proportionate cost" (CPR 1.1) than a practice which permits – as a matter of generality – costs to be "*inflated by the involvement of the other parties at the permission stage*" R (Ewing) v Office of the Deputy Prime Minister [2006] 1 WLR 1260; [2005] EWCA Civ 1583 at para.42.

7. The Appellant accepts that there will be cases where additional awards of costs should be made, as was recognised in Bolton. However, that should require a particular justification, such as a separate interest or separate issue that is not addressed by the primary defendant.[3] Merely being a developer who benefits from a planning decision will not suffice.

8. This Case sets out the Appellant's position (paras.9-11) and some background factual points (paras.12-17). It then addresses the submissions noted above in more detail (paras.18-106). It then summarises certain practical effects, on which submissions were requested by the Court (para.107) – see also Richard Buxton's witness statements dated 7 February 2020 (Appendix pp.198-201) and 20 November 2020 (Appendix pp.214-218). Finally, it explains how the submissions should apply to the case in hand (paras.108-112).

THE APPELLANT'S POSITION IN THIS CASE

9. The Appellant is the Kent branch of the Campaign to Protect Rural England ("CPRE"). It is a charity that works under the umbrella of, but independently from, the national organisation seeking to preserve the Kent countryside from inappropriate development. The Appellant pursues this appeal not because of the merits of the particular claim, or the particular award of costs (the quantum of which would not in themselves justify pursuing the appeal), but because of the

[3] An example of a case where an interested party did have a separate interest and addressed separate issues is the decision of Munby J (as he then was) in R (Smeaton) v Secretary of State for Health [2002] 2 FLR 146; [2002] EWHC 886 (Admin), a judicial review, in effect, of the sale of the morning after pill, that the Court said would be like *"Hamlet without the Prince"* absent the active participation of the supplier of the pill (para.39).

important issues of wider principle to which the lower courts' treatment of costs give rise. The appeal is therefore not limited to the facts of this particular case.[4]

10. It may be noted that CPRE has experience both of being a claimant in judicial or statutory review proceedings (such as this case) and of being an interested party advancing submissions to uphold the decision of a local authority or the Secretary of State.[5] The Appellant accepts that the clarification it seeks in this appeal will reduce the likelihood that *any* second or third defendant/interested party directly interested in an administrative law claim will be able to recover their costs where they choose to participate in public law litigation.

11. The Appellant seeks an order from this Court allowing the appeal and:

    a. Confirming that its position on multiple costs at the permission stage in judicial review and planning statutory review cases is correct.

    b. Quashing the costs orders granted by the High Court and affirmed by the Court of Appeal in favour of the Respondent and/or the interested party, Roxhill Developments Limited ("Roxhill").

    c. Reversing the costs award made in favour of the Respondent in respect of the proceedings in the Court of Appeal.

    d. Awarding its costs of the proceedings in the Supreme Court subject to the cap of £15,000.

FACTUAL BACKGROUND

12. The facts are set out in the agreed Statement of Facts and Issues, paras.3.1 to 3.12. The claim was brought under s.113 of the Planning and Compulsory Purchase Act 2004 against the decision of Maidstone Borough Council ("the Council") to adopt

[4] In this regard, the Court's consideration of this case is an example of its function *"not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's concern is broader, system-wide corrective action"*: President Barak, President of the Supreme Court of Israel, quoted by Carnwath LJ (as he then was) in Oxfordshire County Council v Oxford City Council [2005] EWCA Civ 175; [2006] Ch 43 at para.20.

[5] See e.g. Gladman Developments Ltd v SSCLG [2017] EWHC 2768 (Admin); [2018] PTSR 616.

Policy EMP1(4) of the Maidstone Borough Local Plan 2011-2031. While the context in which the claim arose is of limited relevance to the present appeal, a number of points bear emphasising.

13. First, three sets of costs were claimed in the present case – by the Council, the Respondent and Roxhill – notwithstanding the proposition expressed in Bolton that "*an award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests*" (at 1179A). The costs claimed by each of the defending parties were awarded (up to the Aarhus Convention cap of £10,000) in the first instance without any reasoning; an order that was upheld applying what HHJ Evans-Gordon considered to be a *"general rule"* that *"[multiple] Defendants and Interested Parties should normally have their costs of preparing acknowledgements of service"* (Appendix p.26).

14. Second, as in Bolton, the claim arose in the planning context. This had the following implications:

    a. The time limit for issuing a claim is very short – six weeks – with no discretion for the Court to grant an extension of time.

    b. Planning claims are of their nature more likely to include multiple defending parties: as well as the defendant Secretary of State or local planning authority, there will often be a developer seeking to protect its commercial interests, an aggrieved authority/public body and other individuals or organisations with direct interests in the case.

    c. Where a grant of planning permission or publication of planning policy is the subject of challenge, the relevant planning authority and any interested parties will be very familiar with the background to, and documentation in, the claim.

15. Third, the arguments made in the summary grounds of defence submitted by the three responding parties did not materially differ from each other. While the pleadings were expressed in varying levels of detail, essentially the same points

were made by each party. There was no suggestion in either order of the High Court that there were special features (such as a separate interest or issue on the part of the interested parties) justifying the award of additional sets of costs in this case (see also para.108-109 below).

16. In practice, what approach will be taken on costs at the permission stage both as regards quantum and whether claimants will be ordered to pay one or more sets of costs is highly unpredictable. This is demonstrated by the different treatment of the Appellant's claim and that of Rebecca Driver, which was filed at the same time, under the same provisions, against the same local plan document. On that claim, Dove J accepted that only one set of costs should be paid, to the Council (Appendix pp.145-146).

17. Other recent examples demonstrating the variability in approaches adopted at first instance are referred to in Richard Buxton's first (Appendix pp.198-201) and second (Appendix pp.214-219) witness statements.

COSTS AND JUDICIAL REVIEW GENERALLY

18. The discretion to award costs of and incidental to proceedings under s.51 of the Senior Courts Act 1981 has always included the power to award costs against a claimant who is unsuccessful at the permission stage in judicial review (R (Camden London Borough Council) ex p Martin [1997] 1 WLR 359). In considering how that discretion should be exercised, there are several important distinctions between judicial review and ordinary civil litigation (that apply both pre- and post-CPR). As the Court of Appeal recognised in Mount Cook at para.71:

> *"… not only the statutory scheme, as supplemented by the practice direction and the pre-action protocol, but also the public law context, is different from that governing the generality of civil law proceedings, differences that suggest the need for, and intention to provide, a different costs regime in such cases."*[6]

19. First, judicial review is a special jurisdiction of constitutional significance, giving effect to the rule of law by holding public authorities to account and ensuring they

[6] See also R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192; [2005] 1 WLR 2600 at para.69.

do not act outside of the scope of their powers.[7] The development of administrative law in the second half of the 20th Century was described by Sir John Donaldson MR in R v Lancashire CC ex p Huddleston [1986] 2 All ER 941 as creating *"a new relationship between the courts and those who derive their authority from the public law, one of partnership based upon a common aim, namely the maintenance of the highest standards of public administration"* (at 945C). As Sedley J (as he then was) memorably said in R v Somerset CC ex p Dixon [1998] Env LR 111 *"[p]ublic law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power"* (at 121).

20. Public law challenges may only be brought against acts or decisions of public bodies. That is their necessary focus, even in the (relatively rare) cases where such bodies do not actively contest claims.[8]

21. Second, and connected to this, ordinary rules of disclosure do not apply in public law proceedings. The reason for that was explained recently by the Divisional Court in R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin); [2020] HRLR 17:

> *"there is a quite separate but very important duty which is imposed on public authorities which is not imposed on other litigants. This is the duty of candour and co-operation with the court, particularly after permission to bring a claim for judicial review has been granted"* (para.13).[9]

22. While certain interested parties may also be under a duty of candour[10] the primary duty is on public authority defendants, because they are *"not engaged in ordinary litigation, trying to defend their own private interests. Rather they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of*

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[7] See e.g. Fordham and Boyd, *Rethinking Costs in Judicial Review* (2009) 14 JR 306 at para.5.

[8] See in this regard the comments of Singh J (as he then was) in R (Midcounties Co-operative Ltd) v Forest of Dean District Council [2015] EWHC 1251 (Admin); [2015] BLGR 829 at paras.148-151.

[9] It is established that the duty of candour applies also at the permission stage: see R (Terra Services Ltd) v National Crime Agency [2019] EWHC 1933 (Admin) (Singh LJ and Carr J) at paras.9 and 14.

[10] See e.g. Belize Alliance of Non-Governmental Organisations v Department of the Environment [2004] UKPC 6; [2004] Env LR 38 per Lord Walker at para.87 – that case concerned an energy company with *"a very close identity of interest"* to the state.

law" (Hoareau at para.20). A classic exposition of the principle is that judicial review *"is a process which falls to be conducted with all the cards face upwards on the table, and the vast majority of the cards will start in the authority's hands"* (Huddleston at 945G). In reliance on this quote the *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (Treasury Solicitor's Department, January 2010)[11] explains that *"the duty of candour in judicial review applies from the outset and applies to **all** information relevant to the issues in the case, not just documents"* (emphasis in original).

23. Third, unlike ordinary civil litigation, judicial review involves a permission (formerly leave) stage before a claim can be brought. That is a long-standing[12] safeguard that finds statutory expression in s.31(3) of the Senior Courts Act 1981.[13] The test is whether or not the claim is arguable and the role of defendants at the permission stage is limited to identifying any "*knock-out point*" justifying the dismissal of the claim (R v Secretary of State for the Home Department ex p Doorga [1990] COD 109 at 110). That purpose is maintained in the requirement in the CPR for defendants to file *summary* grounds of resistance (see also below).

24. A recent summary of the relevance of the permission stage to the Court's exercise of its discretion on costs was provided by the Court of Appeal in R (Wilson) v Prime Minister [2019] EWCA Civ 304; [2019] 1 WLR 4174:

> *"… in exercising that broad discretion in relation to applications for permission to proceed, the court must take into account the nature of such applications. As Sedley J put it in* Ex p Martin *(at p 364G), the point of the requirement for permission in judicial review claims is "to afford [claimants] a simple and inexpensive way of finding out whether they [have] a worthwhile case". The whole purpose of requiring permission to be obtained would be defeated if the court were to go into the matter in depth at that stage, the proper place for full exploration of the evidence and argument ordinarily being at the substantive hearing of the claim*

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[11] Reproduced at [2010] 14 JR 177.

[12] Introduced originally following the Third Report of the Hanworth Committee on the Business of the Courts (1936) Cmd 5066.

[13] As observed by Lord Diplock in R v Inland Revenue Commissioners ex p National Federation for the Self-Employed [1982] AC 617 at 642H-643A the purpose of the requirement for permission requirement is "*to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived*".

which has been shown to be arguable at the permission stage. Thus, the part played by a Prime Minister to such a claim at that stage is restricted. The relevant public body may of course file an acknowledgement of service with short summary grounds of resistance; but, to do so, it should generally not be necessary for it to do much additional work. As this court has said, its proper course is to explain its decision and any further grounds of opposition in short form; and not take an active part in any oral hearing, but simply wait and see if permission is granted and, if it is, then and only then deploy a full defence: see R (Davey) v Aylesbury Vale District Council (Practice Note) *[2008] 1 WLR 878 , paras 12–13, per Sedley LJ …"* (per Hickinbottom LJ at para.68).

25. Other distinctions exist. Claims must be brought within much stricter time limits than other areas of civil law. There is generally an inequality of arms between claimant and defendant, both as respects financial resources and access to documents.[14]

26. The Appellant submits, contrary to the Court of Appeal's view at para.8 of the judgment under appeal, that the distinctions between public and private litigation do justify a different general approach to costs in judicial review and statutory review cases, and that those distinctions are supported, rather than displaced, by the CPR (see further below).

THE BOLTON APPROACH

Pre-Bolton

27. There is a long-standing and general disinclination in the courts to award more than one set of costs against an unsuccessful claimant in public law proceedings. As held by a three judge Divisional Court in R v Industrial Disputes Tribunal ex p American Express Co (Practice Note) [1954] 1 WLR 1118, *"the court does not like having to give two sets of costs in these cases"* and *"the opinion of the court is that, in future, in matters of this sort, we shall not grant more than one set of costs"*. It was not necessary for parties to appear simply because they had been served. In R v Registrar of Companies ex p Central Bank of India [1986] 1 QB 1114 Dillon LJ (with whom Slade and Lawton LJJ agreed) stated at 1162F-H:

[14] Cornford and Sunkin, *The Bowman Report, access and the recent reforms of the judicial review procedure* [2001] PL 11, 17-18.

"It is undoubtedly the general rule, and a salutary though not an inflexible rule, that, if several parties appear in the same interest on an application for judicial review, they will only be awarded one set of costs between them."

28. Similarly, while acknowledging that costs should generally follow the event in judicial review cases, the Court of Appeal in R v Intervention Board for Agricultural Produce ex p Fish Producers Organisation (No.2) [1993] 1 CLMR 707 added that *"it is not uncommon for the court to protect the applicant from having to pay costs to all of a number of respondents who have intervened and chosen not to leave it to one respondent to carry the argument"* (per Ralph Gibson LJ with whom Leggatt and Hoffmann LJJ agreed). In Birmingham City Council v H (A Minor) [1994] 2 AC 212, Lord Keith of Kinkel criticised the level of separate representation of the parties, where there was *"no significant difference between the arguments for those who supported the appeal or between the arguments for those who resisted it"* (at 217). The Birmingham City Council case was relied upon by Lord Lloyd in Bolton for the proposition that:

"Where there is multiple representation, the losing party will not normally be required to pay more than one set of costs, unless the recovery of further costs is justified in the circumstances of the particular case" (at 1178A-B).

29. The applicability of this general rule has also been recognised at the permission stage. For example in R v Secretary of State for Wales ex p Rozhon (1993) 91 LGR 667 the Court of Appeal held that because a person bringing an appeal against an enforcement notice[15] was required to apply for leave on notice and respondents were entitled to appear at the obligatory oral hearing, a respondent who was successful in resisting an application for leave should generally be awarded their costs. However Rose LJ went on to say:

"Different considerations may, of course, apply if there is more than one respondent. It may, for example, be inappropriate to order an unsuccessful applicant to bear more than one set of costs if, for example, the Secretary of State

[15] Under RSC Ord.94 rule 12.

and the local planning authority both appear on the oral hearing and advance duplicated arguments." [16]

Bolton

30. Bolton was a planning statutory review claim brought under then rule 1 of Order 94 of the Rules of the Supreme Court (RSC). Under those rules there was no requirement to acknowledge service, however a defendant or interested party who wished to contest the claim would have to attend the hearing and prepare a skeleton argument in advance of the hearing. They would not necessarily have knowledge of each other's arguments in advance.

31. The costs issue in Bolton concerned a practice that had arisen in planning cases where interested party developers were being granted their costs of successfully resisting challenges in addition to and/or in the stead of those awarded to the Secretary of State. This practice had been doubted by the Court of Appeal in Wychavon DC v Secretary of State for the Environment (No.2) (1995) 69 P & CR 394. There, Leggatt LJ (with whom Roch and Morritt LJJ agreed) criticised the costs submissions of the successful defending parties before the judge below on the basis that these had simply urged the application of what they submitted was *"the normal practice"* (awarding two sets of costs) rather than making principled arguments. Although the case concerned only whether the defendant Secretary of State should have been awarded his costs, Leggatt LJ expressed the *obiter* view that *"in circumstances such as these where the issues argued on behalf of two or more respondents are identical, the court should be disposed to make only one order for costs"* (at 397).

[16] For judicial review cases under RSC Ord.53 applications for leave were made *ex parte* and the general position was, even where hearings were held, neither the defendant nor interested parties would get their costs at that stage: see R v Honourable Society of the Middle Temple ex p Bullock [1996] ELR 349 where Brooke LJ said (at 359) that *"[i]n the normal course of events it takes unusual circumstances for this court to award costs to a respondent successfully opposing a grant of leave"*. That continues to be the position in Northern Ireland: see Re Coulters Hill Residents Ltd's Application for Leave to Apply for Judicial Review [2020] NIQB 1 per McCloskey LJ at paras.42 and 44.

32. The decision of the House of Lords in Bolton may therefore be understood as affirming a general approach to costs in public law cases in a specific planning context.

33. The main principles to be derived from Bolton are set out in the propositions articulated by Lord Lloyd at 1178G-1179A:

> *"(1) The Secretary of State, when successful in defending his decision, will normally be entitled to the whole of his costs. He should not be required to share his award of costs by apportionment, whether by agreement with other parties, or by further order of the court. In so far as the Court of Appeal in the* Wychavon District Council *case may have encouraged or sanctioned such a course, I would respectfully disagree.*
>
> *(2) The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.*
>
> *(3) A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords, by which time the issues should have crystallised, and the extent to which there are indeed separate interests should have been clarified.*
>
> *(4) An award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests."*

34. While Bolton was dealing with the costs of the parties to proceedings in the House of Lords, the propositions were intended to be of general application: it set out a principled basis for determining whether multiple sets of costs should be awarded against an unsuccessful claimant in response to the practice that had arisen in the lower courts (at 1178B-F).

35. In Bolton, the House of Lords held that there were special features which justified a second award of costs in favour of the first interested party, the developers: (i) the case raised difficult questions of principle arising out of the change of Government policy towards out of town shopping centres between the date of application and the final decision; (ii) the scale of development and the importance of the outcome for the developers were of exceptional size and weight; and (iii) the case was an

unusual one in the sense that the unsuccessful claimant was not the local planning authority but eight neighbouring authorities supported financially by a consortium of major commercial interests (1179B-E). However, there was no justification for ordering a third set of costs to the second interested party, the Trafford Park Development Corporation (at 1179F).

Post-Bolton

36. The Bolton approach is applied consistently at the conclusion of substantive public law proceedings.[17] While an interested party is entitled to be heard, and its submissions may be very helpful to the judge, unless they can demonstrate a separate issue not covered by the primary defendant or a separate interest requiring representation, the courts are generally not prepared to award them their costs.[18]

37. The effect of Bolton as generally applied at the conclusion of an unsuccessful challenge is to prevent interested parties from claiming any of their costs (including those of acknowledging service): for example in Council for National Parks v Pembrokeshire Coast National Park Authority [2005] EWHC 23 (Admin), the High Court held that *"the developers were entitled to file an acknowledgement of service and to take part, but it should be at their own expense"*.[19] [20]

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[17] For an example in the Court of Appeal see R (Friends of the Earth) v Secretary of State for Environment, Food and Rural Affairs [2001] EWCA Civ 1950 at para.2; for examples outside the planning context, see R (Smeaton) v Secretary of State for Health [2002] 2 FLR 146; [2002] EWHC 886 (Admin) and R (Lewin) v Financial Reporting Council Ltd [2018] EWHC 554 (Admin) at paras.12-17).

[18] See e.g. the decision of the Court of Appeal on costs following the disposal of the substantive appeal in Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [1998] 1 CMLR 945; Nourse LJ refused to award Fulham Football Club its costs in the Court of Appeal or the High Court. Similarly in R (Tewkesbury Borough Council) v Secretary of State for Communities and Local Government [2013] EWHC 449 (Admin) Males J recognised that submissions made on behalf of the developers were helpful and informative, and that the developments represented significant investments for the developers, but did not consider that they had demonstrated a separate interest sufficient to justify the award of an additional set of costs. Ouseley J adopted a similar approach in R (Bedford) v Islington Borough Council [2002] EWHC 2044 (Admin); [2003] Env LR 22, holding that the key to a second set of costs "*is a separate interest with separate arguments that have to be promoted*" and that neither the exceptional nature of the development in terms of scale and financial commitment nor the interested party's contribution to proceedings was sufficient justification (at paras.296-297).

[19] This decision was upheld on appeal to the Court of Appeal but there was no cross-appeal in relation to the interested party's costs.

38. Adopting a different approach at the permission stage – i.e. where the claim has been found to be unarguable – is on the face of it inconsistent and anomalous.[21] As Males J indicated in R (Tewkesbury Borough Council) v Secretary of State for Communities and Local Government [2013] EWHC 449 (Admin):

"… if the case was so weak that it was obviously bound to fail, it might be said that there was even less justification for the developers to incur substantial legal costs over and above the costs to be incurred by the Secretary of State" (para.10).

39. In Ewing Carnwath LJ also appeared to be applying a Bolton approach to the costs of acknowledging service, noting that there was nothing in relation to the position of two of the interested parties to indicate why separate representation was necessary thereby justifying a separate award of costs (at para.45). In other cases where permission has been refused after a hearing the court has declined to award the interested party its costs of filing an acknowledgment of service.[22] Leach, Mount Cook and the authorities referred to at paras.18-19 of the judgment under appeal are addressed below.

40. The House of Lords costs officers in deciding costs issues in Berkeley v Secretary of State for the Environment ("Berkeley No.2") (22.1.2003, HL) applied Bolton principles in the context of a written permission decision. The costs officers considered that Bolton should apply where costs were sought on an unsuccessful application for permission without a hearing, accepting an argument made on behalf of the Appellant that to do otherwise would be anomalous given the acceptance that the Bolton approach applies where there is a hearing (at paras.14-17 and 20-21). While Berkeley (No.2) concerned leave to appeal to the House of Lords, the practice whereby respondents were required to file notices of objection (if they wished to object) bears some analogy with the process for permission in

[20] The refusal of additional sets of costs for acknowledgments of service following hearings is widespread: see e.g. R (Woolverstone Parish Council) v Babergh District Council [2016] EWHC 2574 (Admin) at paras.104-127 and the authorities cited at fns.17 and 18 above.

[21] See also the view expressed in a number of legal commentaries: Supperstone, Goudie and Walker *Judicial Review* (6th edition, first supplement (2019)) para.19.88; Halsbury's Laws of England, Judicial Review (Vol 61A (2018)) 4 Practice and Procedure (5) Costs para.86 fn.10; Maurici, *Rethinking Costs in Judicial Review – A Response* (2009) 14 JR 388 para.17.

[22] R (Merricks) v Secretary of State for Trade and Industry [2006] EWHC 2968 (Admin) at paras.131-136; R (Recycling with Skips) v Secretary of State for Rural Affairs [2017] EWHC 458 (Admin); [2017] Env LR 27 paras.40-49.

judicial review or statutory appeal cases in the High Court. Coulson LJ did not refer to this ruling in his judgment in these proceedings.

CPR PART 54

Introduction

41. CPR Part 54 was introduced on 2 October 2000 following the *Review of the Crown Office List* by Sir Jeffery Bowman published earlier that year.[23] The most significant material changes were: (i) the introduction of a pre-action protocol for judicial review,[24] compliance with which the Court may take into account in any subsequent proceedings,[25] (ii) greater detail about what must be included in a claim,[26] (iii) a requirement to serve the claim on defendants and, unless the Court directs otherwise, interested parties[27] within seven days of issue,[28] (iv) a requirement for acknowledgments of service and (where applicable) summary grounds for contesting the claim within 21 days of service[29] and (v) where permission is granted (either on paper or following a hearing) provision for the filing and service of detailed grounds and any written evidence within 35 days[30] in addition to skeleton arguments ahead of the hearing.[31]

42. The CPR did not (and does not) attempt to cover all elements of the procedure. Notably, it says nothing about the general test for permission;[32] that is left to judicial discretion. In relation to costs, the only relevant guidance in CPR Part 54 is at para.8.6 of Practice Direction 54A, that *"[w]here the defendant or any party does attend a hearing, the court will not generally make an order for costs against the claimant"*.

[23] The Bowman review itself drew on the Law Commission's 1994 report *Administrative Law: Judicial Review and Statutory Appeals* and Lord Woolf's 1996 *Access to Justice – Final Report*.
[24] See the Pre-Action Protocol for Judicial Review that came into force in December 2001. The current pre-action protocol was adopted with effect from 6 April 2015.
[25] See esp. CPR 3.1(4)-(5) and 44.2(5).
[26] CPR 54.6 and Practice Direction 54A paras.5.1-5.10.
[27] Interested party is defined at CPR 54.1(1)(f) as *"any person (other than the claimant and defendant) who is directly affected by the claim"*.
[28] CPR 54.7.
[29] CPR 54.8.
[30] CPR 54.14(1).
[31] Practice Direction 54A paras.15.1-15.3.
[32] CPR 54.7A(7) does set out an enhanced test for permission for judicial review of Upper Tribunal decisions.

43. Moreover there are a number of matters in relation to costs which the CPR does not deal with, and which are left to judicial discretion, particularly in the context of judicial review.[33]

44. This appeal concerns another matter not explicitly addressed in the CPR: the application of the general rule in CPR 44.2(a) where there is more than one successful party in public law proceedings.

Leach and Mount Cook

45. Remarkably, neither of the authorities that are routinely relied upon in support of the award of multiple sets of costs at the permission stage involved multiple sets of costs.

46. In re Leach [2001] EWHC Admin 455 was an *ex tempore* judgment of Collins J on the application of the defendant for its costs in judicial review proceedings that had been dismissed on the papers. The Judge awarded the defendant its costs, referring to the *"positive requirement"* to acknowledge service in CPR 54.8(2) and the consequences of not complying in r.54.9. Collins J set out the rhetorical questions put forward by the defendant:

> *"… why should the successful party, in this case the defendant, have to bear the costs of putting forward his objections to the claim if those objections then serve to defeat the claim? Why should he be required by the rules to incur costs which he can never recover, even if he is successful as a result of what he has done? That, submits Mr Corner, is manifestly unfair, and I agree with him."*

47. However, while the Judge recognised that *"there may be quite a number of … interested parties in the context of any given case"* (para.4), Leach did not concern an award of multiple costs. Nor did it consider the position of interested parties where it is *a defendant's* arguments that serve to defeat a claim.

[33] *Civil Procedure (White Book) 2020* vol.1 p 1407, para.44.2.30. For example, the principle that the High Court will not make an order for costs for or against an inferior tribunal or court which plays no active part in a judicial review of one of its decisions is derived from and governed by case law (See R (Davies) v Birmingham Deputy Coroner [2004] EWCA Civ 207; [2004] 1 WLR 2739). Similarly, until 2015, the practice of granting protective costs orders in cases involving matters of significant public interest was governed by case law (see R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192; [2005] 1 WLR 2600).

48. The main relevant issue in Mount Cook was the circumstances in which a court on an oral application for permission in judicial review may award costs to a defendant who has attended and successfully resisted the application (see para.18(4)). It is accepted that the discussion in Auld LJ's judgment is more general, and that he noted that *"[t]he issue affects not only claimants and defendants, but also interested parties and the court itself …"* (para.47). However there were, again, no interested party costs in play. There was therefore no reason for the Court of Appeal to address multiple awards of costs and Bolton was not referred to in the judgment or argument.[34]

49. The Court of Appeal was not considering the costs of a defendant *and* another party.[35]

50. To the extent that Mount Cook provides any justification for the award of multiple sets of costs at permission stage this appears to be based on a *"positive obligation"* to acknowledge service (para.51) and the considerations of fairness referred to by Collins J in Leach (para.74). As explained below, neither of these justifications offers a principled basis for the award of multiple sets of costs at the permission stage.

51. Mount Cook has been relied upon in a number of subsequent cases as authority for the award of costs to additional parties notwithstanding Bolton. However, those cases treat Mount Cook as establishing the proposition; they do not provide any additional reasoning as to the principles that should be applied.[36]

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[34] A different, earlier, case – Bolton Metropolitan Borough Council v Secretary of State for the Environment (1991) 61 P & CR 343 – was relied upon in the dismissal of the substantive appeal. It is of no relevance.

[35] Indeed, it has been argued that para.76(1) of Mount Cook can be read consistently with Bolton if the word *"or"* is interpreted as having disjunctive effect: an interested party may recover its costs of acknowledging service where the defendant has not sought to defend the claim, leaving it to the interested party to do so – see Mills, *Costs, Permission and Interested Parties* (2014) 19 JR 173 at para.22.

[36] Holgate J relied upon Mount Cook in R (Luton Borough Council) v Central Bedfordshire Borough Council [2014] EWHC 4325 (Admin) (at para.221) and his decision was upheld by the Court of Appeal [2015] EWCA Civ 537 (paras.80-81). In D2M Solutions Ltd v Secretary of State for Communities and Local Government [2018] PTSR 1125; [2017] EWHC 3409 (Admin) Holgate J relied upon Luton. It may be noted that the circumstances in Luton and D2M were both a little unusual and did not in fact relate to *multiple* awards of costs: in Luton the claimant and defendant local authorities had agreed not to seek costs against each other, so only one set of cost was in play; D2M was not dealing with an application for costs in that case but rather the interpretation of

Terms of CPR Part 54

52. As noted above, CPR Part 54 makes no explicit provision for costs at the permission stage other than those occasioned by an oral renewal hearing (PD 54A paras.8.5 and 8.6). In Mount Cook Auld LJ recognised that these provisions admit of two interpretations (para.52): (i) either they are silent as to whether claimants must pay the costs of defendants and interested parties at the permission stage, or (ii) they indicate that there should be no distinction between the position at an oral hearing (no order in favour of *any* parties resisting permission) and that which applies to acknowledgments of service. In adopting the first interpretation and setting out the principles by which defendants should be entitled to their costs of acknowledging service, Auld LJ implicitly recognised that this was a matter on which the CPR itself did not give a clear answer.[37]

53. The practice which has arisen is based on the view (repeated by Coulson LJ at para.21 of the judgment under appeal) that an interested party is under an *obligation* to file an acknowledgement of service.

54. However, while CPR 54.8 provides that "*any person who wishes to take part in the judicial review must file an acknowledgment of service*" that must be read together with CPR 54.9. The consequences of a failure to serve an acknowledgment of service is only the inability to participate as of right (permission may be given to do so) *at an oral permission hearing* (CPR 54.9(1)(a)) and the *possibility* of some penalty at the subsequent substantive hearing (CPR 54.9(2)).

55. These are carefully calibrated provisions that should not be read to have the effect of displacing the pre-CPR approach to multiple party costs.

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an *ex gratia* scheme relating to payments for errors made by the Planning Inspectorate and its application to litigation costs.

[37] It has been argued with some force that the proper interpretation of the CPR is that no costs should be awarded against unsuccessful claimants at the permission stage: see McCracken and Jones, *Leach and Permission Costs* [2002] JR 4 at para.7; see also fn.16 above. The position in Canada as recorded by Lord Justice Jackson in his *Review of Civil Litigation Costs: Preliminary Report* (May 2009) is that costs are generally not awarded against defendants or interested parties even at the substantive stage (Ch.35 paras.3.8-3.9). The Appellant's submission in this case is more modest.

56. As far as participation is concerned, by CPR 54.9(1)(b), as long as a defendant or interested party complies with the rules regarding filing and service of detailed grounds for contesting the claim (and written evidence) within 35 days of permission being granted, they are expressly entitled to participate in the substantive hearing. In this regard, defendants and interested parties in judicial review are given preferential treatment in comparison to parties to ordinary civil litigation under CPR Part 8, where failure to file an acknowledgment of service may bar a defending party from participating in the litigation at all. This difference indicates in part why Coulson LJ was wrong to hold in the judgment under appeal that "*different rules do not apply*" to judicial or statutory review cases as opposed to the ordinary situation in which a claim is struck out or refused at an early stage.

57. As is recognised in the *Administrative Court Judicial Review Guide 2020* (July 2020) filing an acknowledgement of service is *"wise"* for any party that intends to resist a claim, but *"it is not mandatory (unless ordered by the Court)"* (para.7.1.3).[38] The provisions for acknowledgements of service do not, in the Appellant's submission, justify a general approach where multiple costs are awarded at the permission stage. In practice, interested parties can and sometimes do preserve their position as to participation by merely lodging an acknowledgement of service stating that they will rely on the defendant's summary grounds for resisting permission.

58. As far as a possible costs penalty is concerned, this is potentially relevant to the position of a defendant that would ordinarily be expected to pay the costs of a successful claim and to receive its costs of resisting an unsuccessful claim. However – save in unusual circumstances – an additional party that resists a claim that is also resisted by a defendant will neither be liable for costs to, nor able to claim costs from, a claimant at the conclusion of a substantive hearing. Therefore, in ordinary cases, the hypothetical costs sanction in CPR 54.9(2) is of no consequence for interested parties.

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[38] See Woolf et al, *De Smith's Judicial Review* (8th edition 2nd supplement, 2019) para.16-98: "*a defendant is entitled (but not obliged) to respond to a claim for judicial review at the permission stage by filing an acknowledgment of service **summarising** the grounds on which the claim is contested*" (emphasis in original).

Purpose of permission stage under the CPR

59. Nor does the purpose of the permission stage, as set out in the CPR, support the general award of multiple sets of costs.

60. The purpose of encouraging acknowledgments of service at the outset of judicial review proceedings is discussed in the Bowman report and a number of authorities. Primarily, it is to ensure that the judge's attention is drawn to matters not apparent from the application that indicate that the claim should not proceed (Leach para.8). This enables the judge *"to identify at that early stage the strengths and weaknesses of the proposed claim"* (Mount Cook para.51; see also Bowman report Ch.7, para.19).

61. Acknowledgments of service and (where applicable) summary grounds therefore assist the Court. They also assist claimants by enabling a speedy and relatively inexpensive determination of the arguability of claims, and assist defendants by filtering out hopeless claims, encouraging settlement of meritorious claims and prompting early consideration of an authority's public duties (Mount Cook para.71; Bowman report Ch.7, paras.12 and 19).

62. The focus on *summary* grounds reflects the pre-CPR focus on identifying *"knock-out points"* (see above). The purpose of the filter would be undermined were defendants required to file lengthy defences at this early stage. As is noted at para.24 of Ch.7 to the Bowman review *"[w]e do not expect the defendant to incur substantial expense at this stage"*. The position was summarised by Carnwath LJ (as he then was) in Ewing at para.43:

> *"The purpose of the "summary of grounds" is not to provide the basis for full argument of the substantive merits, but rather (as explained at p 71, para 24 of the Bowman Report: see para 15 above) to assist the judge in deciding whether to grant permission, and if so on what terms. If a party's position is sufficiently apparent from the protocol response, it may be appropriate simply to refer to that letter in the acknowledgement of service. In other cases it will be helpful to draw attention to any "knock-out points" or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition). As the Bowman Report advised, it should be possible to do what is required without incurring "substantial expense at this stage".*

63. Additional acknowledgments of service and summary grounds filed on behalf of interested parties are not required to promote any of those purposes; in fact they may tend to undermine the intended summary nature of the stage. The position may be considered from the perspective of the Court, the claimant, the defendant and interested parties.

The Court

64. As far as the Court is concerned, summary grounds from the defendant will generally serve to identify the basic strengths and weaknesses of a proposed claim. The threshold for passing the permission stage is relatively low. If there is an obvious *"knock-out point"*, that is something that will be obvious from the claim, and, if not, a defendant will generally be capable of identifying it.

65. In the vast majority of claims, the defendant will be best placed to respond to claims. It is in the position to understand its own decision-making process and will have access to the documents on which it relied in making the decision under challenge. It is also under a duty of candour. Where a defendant engages in an appropriately frank way with an application for permission, there will generally be nothing more that is required at the permission stage.

66. Dealing with additional submissions raised on behalf of one or more additional parties might be of assistance to the Court, but it extends the process (and takes up more judicial time) and is unlikely to be truly necessary given the stage of the proceedings.

The claimant

67. A claimant is already under a duty to make full and frank disclosure, which is *"to ensure that the judge has a full picture when dealing with an application for permission. That may include not merely furnishing copies of documents, but drawing attention to, and explaining, documents which are adverse to the claim."*[39] Whether or not a claim is arguable will therefore often be apparent on the face of

[39] *Civil Procedure (White Book) 2020* vol.1 p.1937, para.54.6.2.

the claim itself. That is a claimant's burden. It unfairly exacerbates that burden if a claimant is also liable for the costs of a proliferation of (sometimes lengthy) submissions from opponents at the permission stage, to which a claimant has no right of reply.[40]

68. Moreover, liability (or potential liability) for additional sets of costs prejudices access to justice, by deterring claimants from bringing what may turn out to be valid claims. That risk was noted by the Court of Appeal in Ewing (para.41) where Carnwath LJ (as he then was) commented:

> *"In the ordinary case, however, the court must be particularly careful to ensure that the costs falling on the judicial review claimant are not disproportionately inflated by the involvement of other parties at the permission stage"* (para.42).

69. A concern that potential claimants should not be deterred by costs in judicial review proceedings is a recognised and legitimate objective of the law.[41]

The defendant

70. A defendant is protected, as it will generally receive its reasonable and proportionate costs of acknowledging service where it resists permission and permission is refused. Early consideration of the merits of the claim will also facilitate early consent to judgment and/or alternative dispute resolution in appropriate cases.

71. It is acknowledged that where an unsuccessful claim is brought against a public body, it imposes costs on that body that may require funds to be diverted from its primary public functions. That provides a potential justification for compensating such authorities by an award of costs.[42]

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[40] Indeed, as Lang J recently noted in R (Wingfield) v Canterbury City Council [2019] EWHC 1975 (Admin); [2020] JPL 154 *"[u]nder CPR Pt 54, there is no provision for the claimant to file a Reply, or any other response, to the Summary Grounds of Defence filed in a judicial review claim"* (para.80).

[41] See e.g. R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192; [2005] 1 WLR 2600 at paras.28 and 64-79.

[42] See e.g. R v Lord Chancellor ex p Child Poverty Action Group [1999] 1 WLR 347 at 356C; see also Maurici, *Rethinking Costs in Judicial Review – A Response* (2009) 14 JR 388 at para.13.

The interested party

72. However, the same justification has no force when it comes to interested parties, who are able to rely on the defendant public body to defend the claim.

73. An interested party or additional defendant is seldom liable for costs if the claim is successful and is not normally able to recover its costs if the defendant succeeds at the substantive stage. Its participation at the permission stage is not required for it to resist a claim that is subsequently granted permission. Even in cases where a defendant intends to concede a claim on a ground and an interested party disagrees (something likely to justify the grant of permission in any event), a consent order will not be made without all interested parties' agreement and signature (or in any event having made enquiries as to their interest in participation).

74. The justifications underlying the rule that costs follow the event – that a successful party should be entitled to the costs of defending their position (McDonald v Horn [1995] ICR 685, 694D-E) and *"promoting discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim"* (Child Poverty Action Group at 355H-356B) – do not support multiple awards of costs where an interested party does not have a separate interest to that of the defendant and has effectively ridden on the defendant's coat tails.

Pre-Action Protocol

75. Where there has been pre-action correspondence, the position is if anything even clearer.

76. A prospective claimant is required to identify interested parties (persons directly affected by the claim) and to send a copy of a pre-action letter of claim to them (para.17 of the Protocol). There is no obligation on interested parties to respond, but a prospective defendant must respond and send a copy of its response to all interested parties so identified and any other parties it considers should have been identified (para.24). Where the Protocol is followed, it will generally reduce the

effort required by defendants at the acknowledgment of service stage and remove any reason for an interested party to incur expense reiterating points that it knows are being made by the defendant.[43]

PLANNING STATUTORY REVIEW

77. Practice Direction 8C was introduced in October 2015, and came into force at the same time as the requirement for permission in certain planning challenges was introduced by statute.[44]

78. Adding a permission filter to these claims was done to enable the Court to remove unmeritorious cases and focus resources on those that are clearly arguable. PD 8C is closely modelled on Part 54 and includes analogous provisions on acknowledging service and summary and detailed grounds (paras.5.2-5.5, 6.1-6.2 and 12.1-12.2).

79. The position is therefore now largely the same as judicial review. Just as with Part 54, PD 8C is silent on costs at the permission stage, except in relation to hearings (para.8.2). Nor does there appear to have been any discussion of the costs consequences of the provisions for acknowledging service in the consultations and background material to the 2015 changes.

80. In principle, there is therefore no reason why a different approach should apply to planning statutory challenges as to judicial review.

81. There are, however, two practical differences which make it (even) less appropriate for successive sets of costs to be awarded in planning statutory review cases.

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[43] See e.g. Ewing at para.43: *"[i]f a party's position is sufficiently apparent from the protocol response, it may be appropriate simply to refer to that letter in the acknowledgement of service"*.

[44] See s.91 and Sch.16 to the Criminal Justice and Courts Act 2015. The five types of challenge to which these provisions applied were (i) challenges to development plans, schemes or orders under s.287 of the Town and Country Planning Act 1990 (Sch.16, para.3(2) inserting s.287(2A)-(2B)), (ii) challenges to other orders, decisions or directions under s.288 of the Town and Country Planning Act 1990 (para.4(5) inserting s.288(4A)-(4B)), (iii) challenges to the validity of orders, decisions or directions under s.63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (para.6(5) inserting/substituting s.63(3)-(3A)), (iv) challenges to the validity of decisions on applications under s.22 of the Planning (Hazardous Substances) Act 1990 (para.7(3) inserting s.22(2A)-(2B)) and (v) challenges to the validity of strategies, plans or documents under s.113 of the Planning and Compulsory Purchase Act 2004 (para.8(2) inserting s.113(3A)-(3B)).

82. First, statutory review cases will always follow a prior process of independent examination or inquiry for which a primary defendant is responsible. Claims must be brought by parties *"aggrieved"*[45] which will normally require participation in the planning process which led to the decision sought to be challenged.[46] The parties will therefore be aware of each other's positions. Moreover, there will not generally be any documentation relevant to the process that is not available to the primary defendant.

83. Second, the rules of service differ: see the table at PD 8C para.4.1. All claims must be served on *"the appropriate Minister or government department"*. In addition, challenges to local plans or similar documents must be served on the authority who prepared the document, and challenges to decisions must be served on the authority directly concerned with the decision. Thus, there are always two defendants. Only where the claimant is the authority itself must claims also be served on others (*"every person who would, if he were aggrieved … be entitled to [make the application for statutory review]"*). Otherwise, whether or not to serve claims on other parties is left to the claimant's choice. The Court has a discretion to permit parties other than the authority responsible for the decision under challenge to appear either as additional defendants, interested parties or interveners. However, there is no *requirement* that they be involved from the outset.

84. A final difference between planning statutory review and judicial review is that the former does not have a formal pre-action process, although often claimants will nonetheless write pre-action letters, and such a course of action is encouraged by the courts.[47]

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[45] Town and Country Planning Act 1990 ss.287(2), 288(1); Planning (Listed Buildings and Conservation Areas) Act 1990 s.63(1); Planning (Hazardous Substances) Act 1990 s.22(1) and Planning and Compulsory Purchase Act 2004 s.113(3).

[46] See Ashton v Secretary of State for Communities and Local Government [2010] EWCA Civ 600; [2011] 1 P & CR 5 per Pill LJ at para.53(2).

[47] See R v Horsham District Council ex p Wenman [1995] 1 WLR 680 per Brooke J at 709E-G; referred to favourably in the Woolf report in the context of the *"growing practice of writing a letter before commencing proceedings"* (Ch.18 para.7).

PROPORTIONALITY

85. As above, the Appellant's case is that Bolton is of direct relevance to judicial review proceedings and should apply at the permission stage.

86. A feature of the judgment under appeal is that it did not entirely reject this argument. In fact Coulson LJ accepted that Bolton principles remain relevant *"[b]ecause a successful defendant or interested party will only recover its costs of preparing and filing an AoS where those costs are reasonable* and proportionate" (para.24). Para.25 continues:

> *"Thus, in a typical judicial review planning case, if there is more than one successful defendant or interested party who has been served with the claim form, it will not necessarily follow that the costs of each defendant or interested party will be proportionate and thus recoverable. The purpose of the* Bolton *principles was to ensure that, if one defendant to a planning claim merely replicated the argument of another, the claimant would not necessarily be obliged to pay two sets of costs. Those same considerations continue to be relevant, only now by reference to the proportionality of the costs being assessed. Thus, 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."*

87. At para.37(c), Coulson LJ reiterated the requirement of proportionality, stating that *"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"*. However, this was said to be a *"case-specific"* assessment *"not susceptible to more general rules"*.

88. There are a number of difficulties with this reasoning, both in principle and practice.

89. First, it does not make clear the extent to which Bolton continues to be relevant as against the extent to which it has been *"overtaken by events"* (para.23). If a lack of a separate interest is a signpost for costs being duplicative and/or disproportionate,

it is not clear why the Court of Appeal could not have simply confirmed the applicability of the Bolton approach. As matters stand, the risk is that the Court of Appeal's decision, if affirmed, will (and indeed does) lead to extended argument about whether in a given case there has been duplication and whether, even if there has been, that necessarily means that costs are disproportionate.

90. Moreover it mischaracterises the second proposition from Bolton as being that a claimant would *"not necessarily"* be obliged to pay two sets of costs where one party's grounds replicate another's. The proposition is much clearer than that: it is that a developer *"will not normally be entitled to his costs"* (emphasis added).

91. Next, the guidance provided by the Court of Appeal is uncertain in its application. Whether the Court derives *"utility"* or assistance from a set of summary grounds is a hugely subjective question. Very few grounds will be *"entirely duplicatory"*, but even in that case the guidance is only that the costs of such grounds *"may … not be recoverable"*. The position again should be capable of much clearer expression: where (i) there is an obvious lead defendant that resists a claim (as will be the case in the majority of public law proceedings) and (ii) an additional party also resists the claim but on points that the lead defendant could be anticipated to raise, it is hard to see why a claimant should in principle be liable for two sets of costs.

92. Therefore, if proportionality is a guide, it is one that requires a more principled articulation. Otherwise, it is of limited value to judges faced with the task of summarily assessing costs at the permission stage, and it provides no certainty to litigants.

93. On one view, proportionality is a poor guide to the question of principle that arises in this appeal as it is primarily about the quantum of costs. The parts of the CPR referred to by Coulson LJ at para.24 – rr.44.3 and 44.4 – relate to the *"[b]asis of assessment"* and *"[f]actors to be taken into account in deciding the amount of costs"*. That is a multi-factorial assessment of whether items of costs were (i) proportionately and reasonably incurred and (ii) proportionate and reasonable in

amount (CPR 44.4(1) and (3)). The issue in this appeal is, at least arguably, an anterior one: whether or not the costs are capable of being recovered at all.

94. Moreover, the matters that Coulson LJ regarded as going to *"proportionality"* – (i) the existence of a *"principal"* or *"lead"* defendant and (ii) duplicatory grounds – are principled reasons against making multiple awards of costs in the ordinary case.

95. The CPR included a requirement that costs should be proportionate prior to the reforms following Lord Justice Jackson's costs review.[48] However, it did not prove effective in controlling costs.[49] Chapter 3 of the Jackson report drew a distinction between compensation and proportionality (paras.5.1-5.3). Para.5.4 explained:

> *"… The principle of compensation requires that a party whose claim or defence is vindicated should be made whole. In other words, that party's costs should be paid by the other side. However, the principle of proportionality requires that the costs burden cast upon the other party should not be greater than the subject matter of the litigation warrants. The focus of this chapter is upon the extent to which the second principle limits the operation of the first principle."*

96. At para.5.17, the report noted the policy of a cost benefit analysis: *"[i]f parties wish to pursue claims or defences at disproportionate costs, they must do so, at least in part, at their own expense"*.[50]

97. The Appellant submits that additional pleadings filed on behalf of third parties in public law proceedings will generally go beyond what is required or warranted by the subject matter of the litigation, which is an argument about the lawfulness of a public body's actions. To the extent necessary, therefore, this Court should

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[48] *Review of Civil Litigation Costs: Preliminary Report* (May 2009); *Review of Civil Litigation Costs: Final Report* (December 2009).
[49] See the analysis in Willis v Nicolson [2007] EWCA Civ 199; [2007] CP Rep 24 per Buxton LJ at paras.18-20.
[50] In relation to judicial review, the Jackson report recommended *"qualified one way costs shifting"* whereby the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful (subject to qualification in two respects: where unreasonable behaviour and/or the financial resources available to the parties justify two way costs shifting in particular cases) (Ch.35, para.4.1). That recommendation recognised that *"[t]he permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims."* While the recommendation has not been taken up, it is relevant context in that (i) it underscores the justification for the courts considering costs in judicial review distinctly from general litigation and (ii) it concluded that legal policy supported claimants not generally being liable for *any* adverse costs. The problem that arises in the context of the present appeal is not against two way costs shifting, but a three (or more) way costs shifting where multiple sets of costs fall to be borne by a claimant.

indicate that such costs will be disproportionate and will not be recoverable – in other words that a Bolton approach accords with and is supported by proportionality.

QUANTUM

98. Costs incurred at the summary stage of judicial review or planning statutory review proceedings should be strictly limited. Functionally, all that should be required is the identification of potential *"knock-out points"* (see above at paras.23 and 62). The background and facts will be set out in the claim. Procedurally, that respects the two-stage process. Parties may choose to submit elaborate and/or lengthy submissions, but summary grounds are distinct from detailed grounds. Too often, in practice, they are indistinguishable. That is disproportionate to the permission stage and is an undue use of costs and resources. The permission stage ought to be inexpensive. As above, this is a point that favours generally only allowing one set of costs.

99. Moreover, quantum arises as a separate issue in this case on account of the Court of Appeal's rejection of the argument that the cap for Aarhus Convention claims is relevant to the reasonableness of costs at the permission stage. At para.53 of the judgment under appeal, Coulson LJ noted that the application of the Aarhus Convention cap has *"a knock-on effect for the defendants and interested parties in an environmental claim"* and reasoned as follows:

> *"[Defendants and interested parties] will know that, if permission is granted, they face the prospect of expensive litigation with very little costs protection, so that it is no good keeping any particular points up their sleeve for a later date. They need to deploy all their arguments, at the outset, in the hope of avoiding permission being granted. It is therefore unsurprising that defendants and interested parties may incur relatively high costs at the outset. That is a logical consequence of the importance to the permission process of the AoS and the summary grounds of dispute, and thus an inevitable result of the Aarhus cap."*

100. The Appellant does not pursue its argument that *in this case* the courts below were required to reduce the quantum of costs awarded because an Aarhus Convention

claim cap[51] applied. However, it does submit that the presence of a cap is at least a relevant factor to a judge's exercise of discretion both on whether multiple costs should be awarded and the quantum of those costs. In that regard, the suggestion at para.53 that *"relatively high costs"* are justified *on account* of the case being an Aarhus Convention claim is wrong in principle.

101. Most importantly, it wrongly overlooks the nature of the permission stage, which is a summary process to determine a low threshold question. If defendants and/or interested parties need to "*deploy all their arguments … in the hope of avoiding permission being granted*" this suggests that there is no obvious *"knock out point"*, that the claim is arguable and that permission should be granted. Lengthy pleadings and evidence at the permission stage do not assist the Court and are likely to prejudice a claimant (who has no right of reply[52]).

102. There is no warrant for treating environmental cases differently on account of the costs protection afforded to claimants. In fact, adopting such an approach risks undermining the purpose of the cap in the first place, which is to provide certainty to litigants that their *total* possible adverse liability for pursuing a claim will not make the litigation prohibitively expensive. Claimants are entitled to budget on that basis. If the entire cap is routinely exhausted at the arguability stage, it may dissuade claimants from bringing claims due to the significance of the immediate costs liability.

103. Para.53 of the judgment under appeal therefore runs counter to wide access to justice in environmental matters that the Aarhus Convention is intended to secure. It is noteworthy in this specific context that the Report of the Working Group on Access to Environmental Justice chaired by Sullivan J (as he then was)[53] emphasised the need for costs at the permission stage to be proportionate and *"generally … set at a very modest level"* (paras.11 and 55). Para.24(2) of the Report refers to the risk of exposure to third party costs at the permission stage, noting that they *"may*

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[51] i.e. £5,000 or £10,000 depending upon whether the claimant is an individual or an organisation, subject to variation: CPR 45.43(2) and CPR 45.44.
[52] See fn.40 above.
[53] *Ensuring access to environmental justice in England and Wales* (May 2008).

be a significant deterrent even to the commencement of a challenge".[54] The Aarhus costs rules have improved the position, but the Court of Appeal's approach risks undermining its proper operation.

104. Moreover, substantial costs should never be incurred by respondents at the permission stage in any public law litigation.

105. In Ewing Carnwath LJ (as he then was) referred to the defendant authority's response as *"a model of what is required by way of a "summary", making all the necessary points in 2½ pages"* (para.44; see also per Brooke LJ at para.51). In Davey v Aylesbury Vale DC [2007] EWCA Civ 1166; [2008] 1 WLR 878, Sedley LJ said:

> *"… it ought not ordinarily be necessary for a public body on which a claim for judicial review is served to do much additional work before completing its acknowledgement of service. In the nature of things it should already know what it has done and why. If on inspection it realises that it has slipped up, it may well not oppose the application. For the rest, its proper course is to explain the decision and offer any further grounds of opposition in short form and wait to see if, with or without a contested court hearing, permission is granted to challenge it"* (para.13; see also Wilson v Prime Minister cited above at para.24).

106. As above, the Appellant submits that the nature of the permission stage points against the multiple award of costs. However, on any view, it is incompatible with the higher costs liability envisaged by the Court of Appeal in this case for environmental claims.

PRACTICAL EFFECTS

107. The Court is referred to Richard Buxton's witness statements for examples and observations. The practical effects of the current position on the award of costs against unsuccessful claimants at the permission stage are fourfold: (a) inconsistency and uncertainty, (b) deterrence, (c) use of resources and (d) impact on the operation of the Aarhus Convention costs rules. These are elaborated upon below.

[54] A footnote refers to a then recent claim by a developer for £31,000 for acknowledging service.

a. Inconsistency/uncertainty: as explained above and in Richard Buxton's witness statements, the lack of a clear and principled basis on which costs awards are made at the permission stage in public law proceedings leads to significant inconsistency in decision-making and, uncertainty for all litigants as to what the position will be. Coulson LJ's proportionality approach does not resolve that uncertainty, as it invites argument regarding whether there has been duplication and whether as a whole costs are disproportionate.

b. Deterrence: the uncertainty over and risk of multiple sets of costs at the permission stage has a deterrent effect for claimants, and in practice makes it harder to budget for cases. Even in Aarhus Convention claims, the difference between a risk at the permission stage of, say, £2,000-3,000 and £5,000 or £10,000 may well be sufficient to dissuade an ordinary member of the public or a group of neighbours concerned with a decision affecting their local environment from pursuing what may be very valid and meritorious litigation. Furthermore, it must be remembered that Aarhus Convention cases are only a small proportion of all judicial review claims.[55] In other cases, costs capping orders are only available once permission has been granted.[56] The deterrent effect of multiple awards of costs if a claimant is unsuccessful at the permission stage is therefore even more significant. Where the interested party is a private commercial operator, these costs are likely to be higher than those of the public authority whose decision is under challenge – an extreme example is Merricks (see footnote 22 above) where the interested party claimed £85,000 for successfully defending the refusal of permission where the Secretary of State already sought £7,227.

[55] Jackson, *Review of Civil Litigation Costs: Supplemental Report* (July 2017) Ch.10 para.1.8 a figure of 1% of judicial review cases is suggested.
[56] Criminal Justice and Courts Act 2015, s.88(3).

c. Use of resources: the uncertainty also leads to protracted written and oral submissions on costs, increasing the time burden and expense for the Court and parties.

d. Aarhus Convention costs rules: a particular issue arises in relation to Aarhus Convention claims. Where a claim relates to environmental law and falls within the scope of the Aarhus Convention it benefits from an initial cap on a claimant's liability of £5,000 or £10,000. The potential for interested parties to claim substantial costs at the permission stage can lead to arguments, even where the point is not raised by a defendant, that (i) a claim does not fall within the scope of the Aarhus Convention, so the caps should not apply[57] and/or (ii) that the caps should be varied upwards, to accommodate the multiple award of costs.[58]

APPLICATION TO THIS CASE

108. The underlying claim was unremarkable in substance. A pre-action letter was sent to the Council, as the local authority responsible for the local plan document under challenge (Appendix pp.33-39), copied to Roxhill. The Council responded, but not substantively given the short time limits (pp.40-41). The claim was filed on 4 December 2017 naming the Respondent as first defendant on the advice of the Administrative Court Office. In their respective summary grounds of resistance, all three respondent parties listed the Council as the defendant, and the Respondent and Roxhill as interested parties. The Council argued that *"[t]he Council is the public body which has adopted the Maidstone Borough Local Plan 2017 … and it is that decision which is challenged … The Council is therefore the sole Defendant in these proceedings"* (para.2 Appendix p.85). The Respondent agreed (para.7 Appendix p.67; see also para.6 ibid. and para.34 p.73).

109. Applying a Bolton approach, the appropriate order should have been a single proportionate award of costs in favour of the Council as the primary defendant.

[57] See Forbes – Richard Buxton's first witness statement, para.7 (Appendix pp.199-200) and second witness statement, para.7.

[58] See Finch and Bertoncini – Richard Buxton's first witness statement, para.8 (Appendix p.200) and second witness statement, paras.4-6.

The Respondent and Roxhill ought not to have been awarded costs unless they could demonstrate a separate issue or interest from the Council. Neither sought to do so in their acknowledgments of service. With one caveat, neither Lang J nor HHJ Evans-Gordon suggested any such justification in their orders (Appendix pp.26-27 and 28-30). The caveat is the point about the Respondent being *named* as first defendant, so that it *"should have its costs in the normal course of things"* (para.4 of HHJ Evans-Gordon's order). The Appellant's final position on that unfortunate mix-up is at para.7 of its costs reply:

"C has no concerns which D should get costs, but that two sets of costs should not be awarded" (Appendix p.143).

110. The Appellant submits that this Court should allow the appeal in accordance with the correct position, which is that the Council was the appropriate primary defendant. A second set of costs in favour of the Respondent was therefore not justified and a third set of costs (or a contribution to a third set of costs within the scope of the Aarhus cap) in favour of Roxhill even less so. As Lord Lloyd said, *"[a]n award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests"* (Bolton at 1179A).

111. Moreover, while the Claimant does not take specific points on quantum at this level, it is to be observed that each of the respondent parties' summary grounds of resistance was actually detailed: the Respondent's eight pages/35 paragraphs (Appendix pp.66-73), the Council's 19 pages/54 paragraphs (pp.84-103) and Roxhill's 18 pages/71 paragraphs (pp.108-125). Coulson LJ observed that *"[t]here was some overlap in the points taken by each party, although there were some arguments which were specific to each"* (para.3 of the judgment under appeal). However, while the arguments may have differed in their articulation, the essential points raised were the same, each focussed on references in the Planning Inspector's report that informed the adoption of the Local Plan. The only difference in the substantive positions taken by the parties was on the costs cap: the Respondent queried whether the claim was an Aarhus Convention claim but made no other submissions (para.34 Appendix p.73), the Council sought to vary the

cap from £10,000 to £35,000 (para.54 p.103) and Roxhill argued that the caps should be lifted entirely (para.69 p.125).

112. As submitted below, the Appellant did not anticipate multiple sets of costs, despite the fact that it served the claim on three parties (see para.12 Appendix p.197). There were no special features that justified a different approach. The appropriate and proportionate award was a single payment of costs in favour of the Council.

SUMMARY AND CONCLUSION

113. As set out at para.5 above, the Appellant submits:

a. There are good reasons for the courts to adopt a different approach to costs in public law litigation than for ordinary civil litigation between private parties.

b. The Bolton propositions reflect a fair, reasonable and proportionate approach to the allocation of costs in public law litigation – albeit with particular reference to the planning context – consistent with the long-standing and general disinclination of the courts to award more than one set of costs against unsuccessful claimants in public law proceedings.

c. The introduction of the CPR, including provisions for judicial review claims to be made on notice to defendants and interested parties, and for acknowledgements of service from those parties, does not displace that general approach.

d. Moreover, the practice of making multiple awards of costs is not supported by the terms of the CPR and is contrary to the purpose of the permission stage under the CPR.

e. As a matter of certainty and consistency, the general position should be the same at both the substantive and permission stages: unsuccessful claimants in public law cases should generally only be liable for one set of costs. It is anomalous to award multiple sets of costs in claims that are

found not to be arguable and are dismissed on the papers, where the same approach is consistently not taken for those that proceed to permission hearings or substantive hearings.

f. In planning statutory review cases to which the permission stage now applies, there are, if anything, stronger reasons only to award one set of costs.

g. Proportionality is relevant to costs awards, but the articulation of it by the Court of Appeal in this case fails adequately to respect the Bolton approach. To leave the matter to a case-by-case assessment promotes uncertainty, inconsistency and protracted arguments on costs.

h. The quantum of costs incurred by parties acknowledging service at the permission stage should generally be low, and there is no justification for parties incurring additional costs on account of a claim coming within the Aarhus Convention costs rules.

114. The Appellant accordingly asks this Court to grant the relief identified in para.11 above.

NED WESTAWAY

ESTHER DRABKIN-REITER

FRANCIS TAYLOR BUILDING
INNER TEMPLE
LONDON EC4Y 7BY