HM Courts &
Tribunals Service

# Guidance as to how the parties should assist the Court when applications for costs are made following settlement of claims for judicial review – April 2016

## When this guidance applies

1. This guidance is applicable where the parties to judicial review have agreed to settle the claim but are unable to agree liability for costs and have submitted that issue for determination by the Court.

2. It applies to all consent orders submitted for approval by the court after 18 April 2016.

3. Previous guidance is withdrawn.

## The problem

4. The Court faces a significant number of cases, poorly considered and prepared by the parties, which can consume judicial time far beyond what is proportionate to deciding a costs issue after the parties have settled the case. The judicial and other Court resources applied to these cases must be proportionate to what is at stake. That requires efficiency and co-operation from the parties. At the same time, parties want to have the costs orders resolved fairly and quickly.

## How the parties should assist the court before sending in submissions on costs

5. The onus lies on the parties to reach agreement on costs wherever possible, and in advance of asking the Court to resolve the issues, in order to support the overriding objective and ensure that efficient use is made of judicial time. See *M v Croydon* [2012] EWCA Civ 595, paragraphs 75-77.

6. The parties should not make submissions to the Court on costs following a compromise of the proceedings without first seeking to agree the allocation of costs through reasoned negotiation, mindful of the overriding objective to the CPR, the amount of costs actually at stake and the principles set out in M v Croydon, paragraphs 59-63. This should give them a clear understanding of the basis upon which they have failed to reach agreement, so as to focus their submissions to the court on the points in dispute.

7. Liability for costs between the parties will depend on the specific facts in each case but the principles are set out in M v Croydon, paragraphs 59-63 (annexed at the end of this guidance) and Tesfay (2016) EWCA Civ 415.

8. The fair and efficient operation of this Guidance and the Timetable detailed below assume that in the 28 day period between the date of the Court's order and the Defendant's submissions, the parties will have ascertained by communication between themselves who is seeking what costs order and why as well as the basis of

any disagreement between them, so that all submissions are then as focused and succinct as possible to assist the Court in speedier decision-making.

9. The procedure timetabled below starts with the Defendant because it is so often said that the Claimant does not know why a costs order in its favour is resisted. However it is to be hoped that only one set of submissions per side will be necessary. The cost correspondence between the parties can be annexed to the submissions. Submissions are expected not to exceed 2 sides of A4 at reasonable font size, in the absence of very good reason.

**The terms of consent orders**

10. Following a settlement the terms of consent orders require the approval of the court. Unless there are specific contrary reasons given with the proposed consent order, the court is very unlikely to approve the draft without varying its terms so as to expressly incorporate the provisions of this Guidance.

**Timetable**

11. Within 28 days of the service of the order upon the parties, the Defendant may file with the Court, and serve on all other parties, submissions as to what the appropriate order for costs should be.

12. Where the Defendant does not file submissions in accordance with 11 above the Defendant will be ordered to pay the Claimant's costs of the claim on the standard basis and for these to be the subject of detailed assessment if not agreed. However, if the Court considers that such an order would be wrong or unfair in all the circumstances, it shall make such other costs order as it sees fit, or it may require submissions from any party in the case within a specified time, or extend time for the service of the Defendant's submissions.

13. Where submissions are filed and served by the Defendant, the Claimant or any other party may file and serve submissions in reply within 14 days of the service of those submissions.

14. Where no submissions are filed by the Claimant or by any other party in accordance with the above, the Court will make the Order sought by the Defendant. However, if the Court considers that such an order would be wrong or unfair in all the circumstances, it shall make such other costs orders as it sees fit, or it may require submissions from any party in the case within a specified time, or extend time for the service of the Claimant's or other party's submissions.

15. Where submissions are filed by the Claimant or by any other party, the Defendant shall have 7 days in which to file and serve a reply. If the Court thinks it necessary in the interests of justice, it may seek any further submissions from any party. A party may also apply for permission within 14 days of the service of previous submissions to lodge further submissions provided it explains what new point has arisen in those previous submissions to which it needs to reply. A short timetable can be expected for any such submissions.

**Content of submissions**

16. 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,* and *Tesfay* including the relationship of any step taken by the defendant to the claim.

**Documents**

17. Submissions should be of a normal print size and should not normally exceed two A4 pages in length unless there is compelling reason to exceed this which is properly explained in the submissions.

18. Submissions 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.

19. Unless advised otherwise, the parties should assume that the Court has the claim form and grounds, the acknowledgment of service and evidence lodged by the parties. Further copies of these should not be provided unless requested by the Court.

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT**
**THE HON MR JUSTICE LINDBLOM**
**Case CO/1468/2009**

Royal Courts of Justice
Strand, London, WC2A 2LL
8th May 2012

B e f o r e :

**THE MASTER OF THE ROLLS**
**LADY JUSTICE HALLETT DBE**
**(VICE-PRESIDENT OF THE QUEEN'S BENCH DIVISION)**
**and**
**LORD JUSTICE STANLEY BURNTON**

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**Between:**

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|---|---|
| **M** | **Appellant** |
| **- and -** | |
| **MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CROYDON** | **Respondents** |

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**(Transcript of the Handed Down Judgment of**
**WordWave International Limited**
**A Merrill Communications Company**
**165 Fleet Street, London EC4A 2DY**
**Tel No: 020 7404 1400, Fax No: 020 7404 1424**
**Official Shorthand Writers to the Court)**

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**Robert Latham (instructed by Hansen Palomares) for the Appellant, M**
**Catherine Rowlands (instructed by Policy & Corporate Services Department of Croydon LBC ) for the Respondent, Croydon LBC**
**Hearing date: 14 March 2012**

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**The Master of the Rolls:**

59. In my view, however, on closer analysis, there is no inconsistency in either case, essentially for reasons already discussed. Where, as happened in *Bahta*, a claimant obtains all the relief which he seeks, whether by consent or after a contested hearing, he is undoubtedly the successful party, who is entitled to all his costs, unless there is a good reason to the contrary. However, where the claimant obtains only some of the relief which he is seeking (either by consent or after a contested trial), as in *Boxall* and *Scott*, the position on costs is obviously more nuanced. Thus, as in those two cases, there may be an argument as to which

party was more 'successful' (in the light of the relief which was sought and not obtained), or, even if the claimant is accepted to be the successful party, there may be an argument as to whether the importance of the issue, or costs relating to the issue, on which he failed.

60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that *Bahta* was decided on this basis.

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in *Scott*. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. *Boxall* appears to have been such case.

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.