



Neutral Citation Number: [2019] EWCA Civ 1230

Case No: C1/2018/1259

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
PLANNING COURT
HHJ Evans-Gordon

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HAMBLÉN
and
LORD JUSTICE COULSON

Between:

CAMPAIGN TO PROTECT RURAL ENGLAND - KENT BRANCH **Appellant**

- and -

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **1st Respondent**

MAIDSTONE BOROUGH COUNCIL **2nd Respondent**

- and -

ROXHILL DEVELOPMENTS LIMITED **Interested Party**

Mr Ned Westaway (instructed by Richard Buxton Environmental and Public Law) for the **Appellant**

Ms Jacqueline Lean (instructed by the Government Legal Department) for the **1st Respondent**

The 2nd Respondent and the Interested Party did not appear and were not represented

Hearing Date: 27th June 2019

Approved Judgment

Lord Justice Coulson :

1 Introduction

1. This appeal arises out of an original decision by Lang J on the papers on 31 January 2018 when she refused the appellant’s application for statutory review in a planning case. The judge made costs orders in favour of both respondents and the interested party. Following a request for a review of the decision on costs, the order was affirmed by HHJ Evans-Gordon (sitting as a deputy High Court Judge) on 20 April 2018. Permission to appeal against that order was granted on 5 December 2018. Two potentially important issues arise on the appeal: first, the extent to which a court can make adverse costs orders in favour of more than one defendant or interested party in a planning case where permission to apply for statutory (or judicial) review is refused; secondly, the proper application of what I shall call the Aarhus cap¹ in a case which fails at the first hurdle (because permission is refused).

2 The Factual Background

2. On 25 October 2017, the second respondent (“the Council”) adopted the Maidstone Borough Local Plan (“the Plan”), following a finding by the inspector appointed by the first respondent (“SSCLG”) that, subject to modifications, the Plan was “sound” within the meaning of s.20 (5) of the *Planning & Compulsory Purchase Act 2004*. The Plan included a particular policy which allocated a large site at Woodcut Farm for mixed employment floor space. The promotor of the development at the Woodcut Farm site was the Interested Party (“Roxhill”).
3. On 4 December 2017, the appellant sought statutory review of the decision to adopt the Plan. The SSCLG was named as the first defendant, the Council as the second defendant, and Roxhill was named as the Interested Party. All three were served with the claim form, in which (amongst other things) the appellant requested that its cost liability be limited to £10,000 in accordance with CPR Part 45 (the Aarhus cap). The SSCLG, the Council and Roxhill each filed Acknowledgements of Service (“AoS”) with summary grounds setting out their reasons for disputing the claim for statutory review. There was some overlap in the points taken by each party, although there were some arguments which were specific to each. In addition, Roxhill referred to certain documents which had been excluded from the appellant’s original claim bundle.
4. As noted above, on 31 January 2018, Lang J refused the appellant permission to apply for statutory review. She accepted that the claim was subject to the Aarhus cap. She ordered the appellant to pay the SSCLG’s costs of the AoS and summary grounds of dispute, claimed and assessed at £2,879; the Council’s costs of the AoS and summary grounds, claimed and assessed at £5,245.50; and Roxhill’s costs of the AoS and summary grounds, claimed at £6,675 but assessed at £1,875.50. In this way, the total sum awarded by way of costs reached the full limit of the £10,000 Aarhus cap. In her short reasons Lang J accepted that the amount payable to Roxhill was capped at

¹ This is a reference to the Aarhus Convention of 1998 which provided, amongst many other things, that environmental litigation should not be “prohibitively expensive”. In the UK this eventually found its way into the CPR in 2017, and operates by way of a cap on the total costs liability of claimants to other parties. In the present case, the cap was £10,000.

£1,875.50 “because of the claimant’s costs limit of £10,000”. There is no complaint from Roxhill that the judge had been wrong to apply the Aarhus cap to their costs only.

5. The appellant, however, objected to the costs awarded by Lang J, and provided written submissions dated 14 February 2018 challenging that part of the order. These objections fell into two main areas. First, the appellant objected to the award of more than one set of costs. Secondly, there was an objection to the quantum of the costs ordered. Although there was also a suggestion that those costs were themselves excessive, the main argument on quantum was that it was wrong in principle for the costs at the permission stage to absorb the entirety of the Aarhus cap.
6. The respondents and the interested party served submissions in reply. The matter was considered on the papers by HHJ Evans-Gordon, who on 20 April 2018 affirmed the decision of Lang J.
7. The principal issues on appeal remain as they were in the written exchanges that were considered by HHJ Evans-Gordon. The first issue concerns the appellant’s liability for multiple costs orders when permission to seek judicial/statutory review is refused. There is a short tangential second issue as to who should be the lead defendant in a case of this sort. The third issue is concerned with quantum and the application of the Aarhus cap in circumstances where the claim for judicial/statutory review does not get beyond the permission stage. I shall address the issues in that order.

3 Issue 1: A Claimant’s Liability For Multiple Costs

3.1 Overview

8. Ordinarily, a claimant who issues and serves proceedings on other parties, and whose claim is then struck out or refused at an early stage, will *prima facie* be liable for those other parties’ reasonable and proportionate costs. The issue that arises is whether different rules apply to claimants in judicial or statutory review cases (particularly planning cases), or whether they are *prima facie* liable for the reasonable and proportionate costs of defendants and interested parties of preparing and filing an AoS and summary grounds, if permission is then refused. For the reasons set out below, and subject to the particular point I emphasise about the proportionality of the costs claimed, I consider that different rules do not apply and that such claimants may be liable for more than one set of reasonable and proportionate costs.

3.2 The Principal Authorities

9. Mr Westaway relied heavily on *Bolton Metropolitan District Council and others v the Secretary of State for the Environment* [1995] 1 WLR 1176. That was a planning case where there were a number of different parties which went to trial and all the way to the House of Lords. Lord Lloyd said:

“ The House will be astute to ensure that unnecessary costs are not incurred. Where there is multiple representation, the leading 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...

What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule. But the following propositions may be supported.

(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. On the facts of the present case the Secretary of State is clearly entitled to the whole of his costs. The only question is whether the Manchester Ship Canal Co. should also receive their costs. In my opinion they should. I accept that the issues were all capable of being covered by counsel for the Secretary of State. But the case has a number of special features. First, 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. The Secretary of State was concerned not only to support his decision, but also to explain and defend his wider policy. If the appeal had gone the other way, the case would in all likelihood have gone back to him for re-determination *de novo*.²

10. Mr Westaway cited another older authority, *Berkeley v the Secretary of State for the Environment* (12 February 1998) (QBCOF 97/0679 CMS4) which did not seem to me to support any additional point of principle. That was a decision in which another

² In the course of his speech in *Bolton*, Lord Lloyd referred to *Wychavon District Council v Secretary of State for the Environment* (1994) 69 P&CR 394 in which the judge at first instance had awarded the developer the whole of his costs, whilst the Secretary of State had recovered nothing. Although the Court of Appeal plainly considered that to have been the wrong way round, there was little they could do because the developer was not a party to the appeal.

party's claim for costs was refused, again after a substantive hearing, because, on the facts, Nourse LJ found they had been unable to demonstrate a separate issue on which they were entitled to be heard (page 7 E-F).

11. Both *Bolton* and *Berkeley* were concerned with costs after a substantive hearing, not (as here) the limited costs of preparing and filing an AoS and summary grounds. They were also decided by reference to the old RSC 94 which imposed no obligation on a party responding to a motion for judicial review to serve any formal document at all. That position was changed by the introduction of the CPR in 1999. Part 54 of the CPR deals with judicial and statutory review. The relevant rules for present purposes are as follows:

“Acknowledgment of service

54.8

(1) Any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice form in accordance with the following provisions of this rule.

(2) Any acknowledgment of service must be –

(a) filed not more than 21 days after service of the claim form; and

(b) served on –

(i) the claimant; and

(ii) subject to any direction under rule 54.7(b), any other person named in the claim form,

as soon as practicable and, in any event, not later than 7 days after it is filed.

(3) The time limits under this rule may not be extended by agreement between the parties.

(4) The acknowledgment of service –

(a) must –

(i) where the person filing it intends to contest the claim, set out a summary of his grounds for doing so; and

(ia) where the person filing it intends to contest the application for permission on the basis that it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred, set out a summary of the grounds for doing so; and

(ii) state the name and address of any person the person filing it considers to be an interested party; and

(b) may include or be accompanied by an application for directions.

(5) Rule 10.3(2) does not apply...

Failure to file acknowledgment of service

54.9

(1) Where a person served with the claim form has failed to file an acknowledgment of service in accordance with rule 54.8, he –

(a) may not take part in a hearing to decide whether permission should be given unless the court allows him to do so; but

(b) provided he complies with rule 54.14 or any other direction of the court regarding the filing and service of –

(i) detailed grounds for contesting the claim or supporting it on additional grounds; and

(ii) any written evidence,

may take part in the hearing of the judicial review.

(2) Where that person takes part in the hearing of the judicial review, the court may take his failure to file an acknowledgment of service into account when deciding what order to make about costs.

(3) Rule 8.4 does not apply...”

12. These rules were considered shortly after they were introduced by Collins J in *Leach* [2001] EWHC Admin 455 in the context of a defendant’s application for costs. As to the requirement for an AoS, the judge noted that r.54.8 required the filing of an AoS where previously there had been no such obligation. He said at paragraph 7:

“Accordingly, there is now, by the new rules, a positive requirement that not only should there be an acknowledgement of service filed, but that that acknowledgement of service should include a summary of the grounds for contesting the claim, and, as Mr Corner correctly submits, that will almost inevitably involve some work on the part of the defendant or the interested party in deciding what should be put in and how the desire to contest should be indicated.”

13. Then, having set out r.54.14 (which requires a defendant to serve a detailed response if permission is granted), Collins J went on:

“14 The purpose of subparagraph (2) would appear to be that where points which showed that the claim lacked merit were not made at the permission stage but were raised on the hearing, the court might take the view that it was not fair that the applicant should pay the extra costs which could have

been avoided if only the points had been made at the earlier stage. But that, of course, only underlines the point made by Mr Corner, that if that is one of the purposes behind the new provisions, and the requirement is there, then 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... It seems to me that, in principle, he must be right, and that if a defendant incurs costs in submitting an acknowledgment of service, as required by the rules, then he ought to be able, if he succeeds, to recover his costs of so doing.”

14. *Leach* was considered by this court in *R (on the application of Mount Cook Land Limited) v Westminster City Council* [2003] EWCA Civ 1346 which dealt with the potentially different considerations that apply to the defendant’s costs of filing an AoS, on the one hand, and its costs of attendance at any permission hearing, on the other.
15. Mr Westaway noted that, in *Mount Cook*, there was only one defendant and no interested party and submitted that, in consequence, it was not authority for the award of costs in a multiple party case. I do not agree. It is quite clear that the Court of Appeal considered that it was setting out guidance as to what the costs consequences were of Part 54 for defendants and interested parties, when permission for judicial review was refused. That can be seen from the following paragraphs:

47 The fourth issue raises a matter of considerable public importance, namely as to the guidance to be given by this Court concerning the award of costs at the permission stage of claims for judicial review. The issue affects not only claimants and defendants, but also interested parties and the court itself in the access that it provides to justice, having regard to the overriding objective of dealing with cases justly in CPR Part 1.1 and good public administration. More precisely, on the facts of this case, the issue is whether Moses J. was entitled in the exercise of his discretion to order Mount Cook to pay the Council's costs of filing an acknowledgment of service and of successfully resisting its oral application.

48 The issue arises under the relatively new procedure for the grant of permission for claiming judicial review introduced by CPR Part 54 on 2nd October 2000, supplemented by a Judicial Review Practice Direction...

49 The new procedure involves the proposed defendant and any interested party right from the start and is generally dealt with in the first instance as a paper application. By CPR 54.7, the claimant must serve a claim form on the defendant and any interested party within seven days of issue. By CPR 54.8 any such person "who wishes to take part in the judicial review" is required to file an acknowledgment of service". If he files an acknowledgment of service and intends, in taking part in the judicial review, to contest the claim, CPR 54.8(4) requires him to plead it in the acknowledgment of service and to summarise his grounds for doing so.

50 However, CPR 54 says nothing direct about the costs of filing such a document, nor indeed about the costs of and incurred by a defendant who chooses, in accordance with his entitlement under paragraph 8.5 of the Practice Direction, to attend and argue his case at an oral renewal hearing. There is an indirect reference to costs in CPR 54.9. By 54.9(1), a failure to comply with the requirements as to acknowledgment of service by a party who subsequently seeks to take part in a permission hearing may, but will not necessarily, result in the court not allowing him to do so. But if he is allowed to take part, by 54.9(2), the court may take his failure into account "when deciding what order to make about costs", a provision that may have as one of its premises that a successful defendant at the permission stage who *has* complied with CPR 54.8 should normally be entitled to his costs of filing the acknowledgment of service. Another premise may be that a defendant who has not complied with CPR 54.8 and who has not attended a permission hearing, but who later succeeds on the substantive hearing of the claim, should have some or all of his costs disallowed because of his failure to comply with rule and thus to put his case to the court at the permission stage.

51 However, regardless of the question of costs, there is now a positive obligation on a defendant or other interested party served with the claim form to acknowledge service and to consider in doing so: 1) whether to contest the claim, and, if so, on what grounds and at what stage; and 2) if he decides to contest it, to summarise his case at the permission stage..”

16. Thereafter, in his judgment, Auld LJ went on to identify the issue that underlies this appeal. He said:

74 But where does that general rule leave *Leach* and the costs of filing an acknowledgment of service upon which a defendant has relied and followed through by successfully resisting the claim at the permission stage? As I have said, as a result of the note in the White Book, the ruling of Collins J. in *Leach* appears to be regarded as an authority for the proposition that a defendant who successfully resists the grant of permission should, as a matter of principle, be entitled to his costs, not only of filing an acknowledgment of service as required by CPR 54.8, but also of his preparation for and attendance at any permission hearing. In fact, as Mr. Steel observed, there was no permission hearing in that case. The only hearing was of an application by an unopposed defendant for an order that the claimant should pay his costs of filing of the acknowledgment of service. It was not, therefore, a case that would have engaged paragraph 8.6 of the Practice Direction since, when read with paragraph 8.5, the guidance that a defendant or other interested party attending an oral permission hearing should not generally have his costs clearly applies only to the costs of and occasioned by his attendance at such a hearing. Given that distinction and the absence of any such constraint on the narrower issue before him, there was, with respect, good sense in Collins J's. recourse to the obligation in CPR 54.8 to file an acknowledgment as a reason for requiring a claimant to pay the costs of that initial procedural step. Different considerations, which he did not have to consider, would obviously apply to the costs of a permission hearing at which a defendant who intends "to take part in the judicial review" chooses voluntarily to attend and orally to argue his case...

76 Accordingly, I would hold the following to be the proper approach to the award of costs against an unsuccessful claimant, and to the relationship of the obligation in CPR 54.8 on a defendant "who wishes to take part in the judicial review" to file an acknowledgment of service with the general rule in paragraph 8.6 of the Practice Direction that a successful defendant at an oral permission hearing should not generally be awarded costs against the claimant:

1) The effect of *Leach*, certainly in a case to which the Pre-Action Protocol applies and where a defendant or other interested party has complied with it, is that a successful defendant or other party at the permission stage who has filed an acknowledgment of service pursuant to CPR 54.8 should generally recover the costs of doing so from the claimant, whether or not he attends any permission hearing..."

17. In my view, therefore, this court in *Mount Cook* was setting out general guidance as to the entitlement of defendants and interested parties to their costs of the AoS and summary grounds of dispute, in circumstances where permission to bring judicial proceedings is then refused. The decision in *Mount Cook* was not, as Mr Westaway suggested, either *per incuriam* or in some other way limited to single defendant cases only.
18. In addition, I consider that the same principles were restated, albeit in much shorter form, in *R (on the application of Luton BC) v Central Bedfordshire Council* [2015] EWCA Civ 537; 2 P.&C.R.19. This court refused an appeal against the decision of Holgate J to allow the interested parties their costs of filing an AoS and summary grounds of dispute following the refusal of permission. Luton BC (the claimant) had reached an agreement with Central Bedfordshire Council (the defendant) that no costs would be payable as between those two parties, and objected to being ordered to pay the costs of the interested parties. Sales LJ (as he then was) dealt with the point shortly:

“80 Finally, Luton BC appeals in relation to the costs order made against it in favour of the interested parties, in respect of their costs of preparing their acknowledgement of service. In my judgment, the appeal against the costs order is wholly unsustainable.

81 Luton BC's claim qualified as an Aarhus Convention claim for the purposes of the special costs regime for such claims set out in the Civil Procedure Rules (CPR Part 45.43 and the associated Practice Direction). Luton BC and CBC made an agreement that any costs order to be made as between them should be for a nil amount. However, the interested parties were not a party to that agreement and were in no way bound by it. The judge was fully entitled to award the interested parties their costs of preparing the acknowledgement of service, in line with ordinary principles as identified by him. The costs awarded were at a level well below the maximum costs award permissible in respect of an Aarhus Convention claim under the Rules.

19. Mr Westaway complained that this statement of principle was unsatisfactory because it was so brief. I disagree: it is a short point, readily susceptible of terse exposition. I note too that this principle was subsequently followed by Holgate J in *D2M Solutions Limited v SSCLG* [2017] EWHC 3409 at paragraph 84, again in brief terms, where he described the argument which Mr Westaway now advances as “misconceived”.

3.3 The Position in Judicial Review

20. For reasons explained in paragraph 26 below, I begin my analysis by considering the position in judicial review cases. For a number of reasons, I consider that there is no general rule in planning cases which limits the number of parties who can recover their reasonable and proportionate costs of preparing an AoS and summary grounds, if the application is refused at the permission stage.
21. First, that is the clear and obvious consequence of CPR Part 54. Rule 54.8 makes it mandatory for any person served with the claim form who wishes to take part in the statutory/judicial review to file an AoS. If such a person fails to file an AoS, they may not be permitted to take part in the permission hearing (r.54.9(1)(a)). When they first came into force 20 years ago, rules 54.8 and 54.9 were novel because, for the first time in judicial review cases, they required a defendant or interested party to incur costs in order to set out their response to the claim made. It is implicit that such parties, who were being put to that time and expense, were *prima facie* entitled to their costs of so doing. Indeed, that is recognised by r.54.9(2), as explained by Auld LJ in *Mount Cook*.
22. The authorities noted in paragraphs 12 – 19 above establish that, having served an AoS and summary grounds, any party served with the claim form is *prima facie* entitled to its reasonable and proportionate costs of their preparation if, having considered that documentation, the judge refuses permission to allow the claim to go further. That is the point first made in *Leach*; it is expressly endorsed by Auld LJ at paragraph 76(1) of *Mount Cook*, and again by Sales LJ at paragraph 81 of *Luton BC*. At no point in any of the authorities is it suggested that, in some way, this principle applied only to one defendant. On the contrary, the guidance in all these cases was general: for example, Auld LJ talked about “a successful defendant or other party at the permission stage”, which is plainly wide enough to cover all successful defendants or interested parties.
23. *Bolton* therefore needs now to be read in the light of the subsequent development of the law. When in 1995 Lord Lloyd said that “as in all questions to do with costs, the fundamental rule is that there are no rules”, he could hardly have envisaged the complex rules relating to costs which arise out of purely procedural rules like Part 54, or those specific sections of the CPR concerned directly with principles of costs (like Parts 43 and 44), still less the smorgasbord of fixed and other new categories of costs set out in such detail in Part 45. Insofar as the costs of preparing and filing an AoS are concerned, *Bolton* has, at least up to a point, been overtaken by events.
24. But that is not to say that the *Bolton* principles are irrelevant: on the contrary, they still have an important part to play in planning cases. Why? Because a successful defendant or interested party will only recover its costs of preparing and filing an AoS where those costs are reasonable *and proportionate*. Proportionality has become much more important as a yardstick by which to assess costs following the amendments to CPR 44.3 in 2013, which themselves followed Sir Rupert Jackson’s costs review. In

particular, r.44.3(2)(a) only allows recovery of those costs “which are proportionate to the matters in issue”. This is assessed by reference to factors particular to the litigation (r.44.3(5)) and any relevant wider circumstances (r.44.4(3)).

25. 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.

3.4 The Position in Statutory Review

26. During his oral submissions, Mr Westaway advanced the submission that the position was different in statutory review cases. This was a novel point, which was not foreshadowed in the appellant’s grounds of appeal or skeleton argument. However, the court allowed it to be advanced because Ms Lean said she was in a position to address it. She was subsequently given an opportunity (which she took) to put in further written submissions and Mr Westaway then replied in writing³. Indeed, there was then a second exchange of written material, the appellant apparently determined to have the last word. However, despite this flurry of post-hearing activity, I consider that the issues remain straightforward.
27. Mr Westaway’s first point was that, because *Mount Cook* and *Luton* were judicial review cases, whilst this was a statutory review subject to Practice Direction 8C, those two Court of Appeal decisions were not binding on this court, and that a different (and more restrictive) costs regime should apply.
28. I disagree. It is plain that the guidance given in those two cases, about the recoverability of the costs of an AoS and summary grounds when permission is refused, was and is equally applicable to both judicial review and statutory review claims.
29. Furthermore, both counsel accepted that, although there are some minor differences, there are significant similarities between the statutory review process in certain planning cases, now set out in PD8C, and the judicial review process in Part 54. In consequence, Ms Lean submitted that it would be impractical and potentially unfair for

³ I note that, in support of her subsequent written submissions, Ms Lean referred to various documents that surrounded the introduction of Practice Direction 8C, including DCLG’s original proposals, papers provided to the CPR, and even judicial comments on the proposals. In my view, it is only in a very rare case, where there was some particular dispute about the interpretation of a particular Rule, that such material could possibly be relevant or even admissible. It is becoming much too common for parties to deluge the court with the written materials that surrounded the introduction of a new part of the CPR. That is not good practice. The Rules say what they say and will be interpreted accordingly. No assistance can usually be gained from this sort of extraneous material. I make no further reference to it in this Judgment.

different costs regimes to be applied to what are, on any view, very similar types of proceedings, and that the precise nature of the planning challenge in question should make no difference to the parties’ costs entitlement. In the absence of any express provision in the CPR that provides for or even hints at different costs regimes, I agree with that submission. In addition, the points I have made at paragraphs 24 and 25 above are equally applicable to judicial and statutory review cases.

30. As to the other points raised by Mr Westaway on statutory review, it is necessary first to set out the relevant parts of PD8C:

4.1 The claim form must be served on the appropriate Minister or government department and, where different, on the person indicated in the following table:

<p>If the application is brought under –</p> <p>1. section 287 of the Town and Country Planning Act 1990; or</p> <p>2. section 113 of the Planning and Compulsory Purchase Act 2004.</p>	<p>The authority who prepared the relevant document.</p>
<p>If the application relates to any decision or order, or any action on the part of a Minister of the Crown to which –</p> <p>1. section 288 of the Town and Country Planning Act 1990 applies; or</p> <p>2. section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 applies.</p>	<p>a. The authority directly concerned with the decision, order or action; or</p> <p>b. if that authority is the claimant, on every person who would, if he were aggrieved by the decision, order, relevant document or action, be entitled to apply to the High Court under section 288 of the Town and Country Planning Act 1990 or section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 as the case may be.</p>
<p>If the application relates to any decision on the part of a Minister of the Crown to which section 22 of the Planning (Hazardous Substances) Act 1990 applies.</p>	<p>a. The hazardous substance authority who made the decision on the application to which the proceedings relate; or</p> <p>b. if that authority is the claimant, on every person who would, if he were aggrieved by the decision, be entitled to apply to the High Court under section 22 of the Planning (Hazardous Substances) Act 1990.</p>

Acknowledgment of service

5.1 Rules 8.3(1) and 8.3(2) do not apply to a claim for planning statutory review.

5.2 Any person served with the claim form who wishes to take part in the planning statutory review must file an acknowledgment of service in the relevant practice form in accordance with paragraphs 5.3 to 5.6.

5.3 Any acknowledgment of service must be –

(a) filed not more than 21 days after service of the claim form; and

(b) served on –

(i) the claimant; and

(ii) any other person named in the claim form, as soon as practicable and, in any event, not later than 7 days after it is filed.

5.4 The time limits under paragraph 5.3 may not be extended by agreement between the parties.

5.5 The acknowledgment of service –

(a) must –

(i) where the person filing it intends to contest the claim, set out a summary of his grounds for doing so;

(ii) state the name and address of any person the person filing it considers should be served in accordance with paragraph 4.1; and

(iii) comply with rule 10.5; and

(b) may include or be accompanied by an application for directions.

5.6 Rule 10.3(2) does not apply.

5.7 The provisions of Part 15 (defence and reply) do not apply.”

31. Mr Westaway’s second argument was that because, all the references are to “a defendant” in the singular, that somehow meant that PD8C did not envisage multiple defendants. I consider that to be a bad point. The Rules regularly use ‘claimant’ and ‘defendant’ in the singular, but that is for reasons of economy. It would be unnecessarily wearisome for the CPR to provide repeatedly for “a claimant or claimants” and “a defendant or defendants”. In PD8C, a reference to “a defendant” includes (where appropriate) more than one defendant.
32. More significantly, perhaps, Westaway also noted that PD8C was entirely silent as to the position of interested parties. Although they are defined in r.54.1(f), he said that that related to judicial review applications only. He said, therefore, that the statutory review process did not recognise interested parties (with the corollary, of course, that such interested parties were not entitled to recover their costs).
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. But I do not consider that, simply because they are not separately identified in PD8C, that means that interested parties have no role to play (and are therefore not entitled, in an

appropriate circumstance, to their costs of filing and serving an AoS when a claim form has been served on them). There is nothing in the PD (or any other part of the CPR), that supports such a rule.

34. Moreover, I can see practical problems with Mr Westaway's interpretation of PD8C, well-illustrated by what happened in the present case. Roxhill was served with the claim form. Although they were described as the 'interested party' by the appellant, there was no difference between their response to the claim form in that guise, and the response which they would have provided had they been named as a defendant. Having been served with the claim form, they wished to challenge the application for statutory review, and so filed an AoS and summary grounds. It cannot be right that their costs entitlement for so doing could turn on how they were described by the appellant on the face of the claim form.
35. In my view, the final answer to Mr Westaway's argument is provided by paragraph 5.2 of PD 8C. Roxhill was 'a person' who, having been served with the claim form, 'wished to take part in the statutory review' in order to object to the claim. In those circumstances, pursuant to paragraph 5.2, they were entitled to seek their reasonable and proportionate costs of the AoS, just as if they had been a defendant. Paragraph 5.2 does not differentiate between defendants and interested parties.
36. I should add this. Mr Westaway's post-hearing submissions hinted darkly that, if a claimant in the position of the appellant has to pay more than one set of costs arising out of their failed statutory review, this might lead to proper parties not being served in the first place. Again I disagree. In a statutory review case, the service of appropriate defendants must be in accordance with PD8C. The decision to serve potential interested parties (if any) will thereafter be a matter for the claimant in any given case.

3.5 Summary

37. I set out below in summary form my conclusions on the applicable principles. These apply both to judicial review and statutory review cases.
 - a) When permission to seek review is refused, a claimant may be liable to more than one defendant and/or interested party for their costs of preparing and filing their AoS and summary grounds.
 - b) It is not necessary for the additional defendant(s) and/or interested party to show "exceptional" or "special" circumstances in order, in principle, to recover those costs.
 - c) However, to be recoverable, those costs must be reasonable and proportionate. So, for example, 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. That is an assessment which is case-specific and not susceptible to more general rules.

4 Issue 2: Who Should Be The Lead Defendant?

38. In his oral arguments, Mr Westaway suggested that an issue arose as to whether, in s.113 cases, the SSCLG or the Local Planning Authority was the correct first defendant.
39. In my view, this is not an issue that needs to be decided. Mr Westaway's sole reason for trying to distinguish between the two defendants in this case was by reference to the appellant's liability to pay their costs. His suggestion that it was the Council who should be considered as the first defendant was made so that he could argue that it was only the Council who were entitled to their costs of the AoS and summary grounds. For the reasons that I have given, that is not the right approach to a claimant's liability for costs in cases of this kind. Accordingly, in my view, this tangential issue does not arise.
40. Furthermore, I would be very wary about laying down hard and fast rules as to who the correct first defendant should be in any civil action. That should, in my view, be left to the claimant in the circumstances of any particular case. Moreover, it is easy to envisage the potential abuse of any rule which required a particular defendant to be the first defendant in any statutory review. To some extent, those tactical considerations can be seen in the present case. I note that, in the arguments before HHJ Evans-Gordon, the appellant argued that they would pay the SSCLG's costs, but objected to paying the Council's costs (doubtless because the Council's costs were higher). For the purposes of this appeal, the appellant has now reversed its position entirely. In my view, this tactical *volte face* highlights the problem of endeavouring artificially to identify one party as the first defendant in every case. It also confirms my view that the right approach to multi-party costs in these cases is as I have set out in paragraph 37 above, and not by reference to any sort of straitjacket.

5 Issue 3: Quantum And The Aarhus Cap

5.1 Overview

41. For the reasons set out below, I do not consider that Mr Westaway's underlying complaint (namely, that the judges here took the £10,000 cap and then worked backwards, without regard to the fact that the case did not get beyond the permission stage) has been made out. More broadly, I reject the suggestion that, once the court has identified the reasonable and proportionate costs of the successful defendant(s) or interested party following the refusal of permission, and those costs are in total below the Aarhus cap, the cap should nevertheless be deployed as a further means of reducing costs.

5.2 The Principal Authorities

42. In *R (Edwards and another) v Environments Agency and another (No 2)* [2013] UKSC 78; [2014] 1 WLR 55, Lord Neuberger referred to the European Court decision in *Edwards* and said at paragraph 21:

“The court reaffirmed the principles established in its judgment in *Commission of the European Communities v Ireland* (Case C-427/07, BAILII: [\[2009\] EUECJ C-427/07](#)) [\[2010\] Env LR 123](#); [\[2009\] ECR I-6277](#), noting in particular that Aarhus Convention does not affect the powers of national courts to award "reasonable costs", and that the costs in question are "all the costs arising from participation in the judicial proceedings" (paras 25-27). In response to the questions raised by the Supreme Court, it began by

affirming the duty of member states to ensure that the directive is "fully effective", while retaining "a broad discretion as to the choice of methods" (para 37). The national court, in turn, when ruling on issues of costs, must satisfy itself that that requirement has been complied with, taking into account "both the interest of the person wishing to defend his rights and the public interest in the protection of the environment" (para 35).

43. At that stage, the CPR had not been amended to reflect the Aarhus Convention or the cap. This happened in 2013, although the principal provisions were introduced in 2017 by way of the introduction into CPR Part 45 of a new section VII, comprising rules 45.41 - 45.45. Rule 45.43(1) provided that a claimant "in an Aarhus Convention claim may not be ordered to pay costs exceeding the amount in paragraph (2)". Rule 45.43 (2)(b) identified the cap in the present case (where the claimant is not an individual but claiming on behalf of others) as £10,000.
44. The principal decision dealing with the new rules is *R(RSPB) v the Secretary of State for Justice* [2017] EWHC 2309 (Admin); [2018] ENV.L.R13, in which Dove J set out the background to these rule changes. As he explained, the protection afforded to the claimants under these rules is that, whatever the actual costs incurred by the defendant or interested parties, and which the claimants would otherwise be liable to pay, the claimant's liability for costs in an environmental claim will not exceed the cap.
45. Mr Westaway referred to earlier cases such as *Davey v Aylesbury Vale District Council* [2007] EWCA Civ 1166 which emphasised the need for costs to be kept to a minimum at the permission stage. However, *Davey* predated the changes to the CPR introduced in 2013 to emphasise the importance of proportionality in costs assessments, as well as the changes noted above giving effect to the Aarhus cap. Moreover, it might be fairly said that there is always a need to keep the costs of all civil litigation down; to that extent, therefore, environmental litigation is no different to any other kind.

5.3 CPR Part 45 and Interested Parties

46. Another point not previously trailed in the grounds of appeal or skeleton argument was Mr Westaway's observation that section VII of CPR Part 45, which deals with the Aarhus cap, made no reference to interested parties. It was rather unclear what he said was the consequence of this; at one point he suggested that this meant that they were outside the scheme of the Aarhus cap altogether, a point which, if taken to its logical conclusion, could have a very detrimental effect on the workability of the Aarhus cap.
47. I am in no doubt that the absence of any express reference to interested parties in CPR Part 45 is of no consequence. It was probably deemed unnecessary by the draftsmen to refer to 'and/or interested parties' after the reference to 'defendant' every time the latter was mentioned. But in any event the omission makes no difference to the application of the Aarhus cap. That is because, as Ms Lean pointed out, r.45.4.3 limits the costs exposure to the claimant; it is the claimant who "may not be ordered to pay more than..." It does not spell out to whom the claimant might be paying the costs up to the limit of the cap. The obvious answer is: any defendant or interested party who is otherwise entitled to their costs.
48. Accordingly, I do not consider that interested parties are outside the provisions relating to the Aarhus cap; nor do I consider that different rules relate to an interested party's

ability to recover their reasonable and proportionate costs, up to the limit of the cap, in the appropriate case.

5.4 Analysis

49. I reject Mr Westaway's basic submission that, because the claim has failed at the permission stage, rather than failing subsequently after a substantial hearing, the costs should be subject to some sort of lower cap than the £10,000 stated in the CPR.
50. The starting point must be the absence of any express sub-caps or lower limits for particular stages of environmental litigation. The CPR provides for no lower cap on the costs that a successful defendant or interested party might be able to recover following success at the permission stage. On the contrary, the Aarhus cap is global. It is applied to the costs that have been incurred by the successful defendant or interested party, at whatever stage the costs assessment is being done.
51. In a single defendant case, if that defendant succeeds in persuading the court through its AoS and summary grounds that permission should be refused, then that defendant is entitled to recover its reasonable and proportionate costs up to the amount of the cap. No different rules will apply to cases with more than one successful defendant or interested party. And there is no reason to limit the recovery (of either single defendants or multiple parties) by means of a further arbitrary cap at a lower level than the stated £10,000. Provided the costs being assessed are reasonable and proportionate then, other than in the imposition of the cap itself at the end of the exercise, it makes no difference for costs assessment purposes whether the case is one to which the cap applies or not. Putting the point another way, the cap does not justify a further reduction in the costs of successful defendants or interested parties below that which is assessed as being reasonable and proportionate.
52. Secondly, many of Mr Westaway's submissions were based on the false premise that the £10,000 was in some way referable to the total costs of an environmental claim, assuming it failed only after a substantial hearing. That is patently not so. The £10,000 is an arbitrary cap designed to bring claimants in environmental claims the benefits noted above. It has nothing to do with the average costs of civil litigation, much less the costs incurred in the making of an environmental claim, which can be notoriously high. It is therefore wrong in principle to assume that the £10,000 Aarhus cap must be referable to the costs of a claim that went all the way through to trial.
53. Thirdly, Mr Westaway's submission that, if this is the correct analysis, it will have a chilling effect, is incorrect. The principle is that the costs of these claims should "not be prohibitively expensive", not that they involve no costs risk at all. The Aarhus cap offers a major advantage to claimants which is not available to any other group of civil litigants⁴. It allows them costs certainty from the outset, and the ability to pursue litigation in the knowledge that, if they lose, their liability will not be a penny more than the cap. Inevitably this has a knock-on effect for the defendants and interested parties in an environmental claim. They 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

⁴ Unsuccessful claimants in personal injury litigation have another form of protection, by way of Qualified One Way Costs Shifting under CPR 44.13-44.17.

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.

54. Mr Westaway's next argument was that the £10,000 was used as a top-down costs assessment tool, which permitted an assessment of figures at a higher total than was reasonable or proportionate. But in my view, that argument has not been made out. On the contrary, in the present case, the Council (who are by agreement the principal defendant) had their reasonable and proportionate costs assessed at £5,245.50. There is no material before this court to suggest that that amount was in some way unreasonable or disproportionate for the amount of work done. The same is also true of the SSCLG's costs at £2,879.
55. The party who has suffered as a result of the cap is Roxhill. They claimed £6,675 but recovered just £1,875.50. The reduction was because of the £10,000 cap. However, they do not complain about that. In my view, the reduction in their costs was justified; they were not a defendant and had a greater freedom to choose the extent to which they were involved in the challenge at the permission stage. In this way, the cap did not operate in any sort of top-down way; instead it acted as it should do, as a cap on the overall costs liability of the appellant.
56. Although Mr Westaway also hinted that the figures allowed by Lang J and affirmed by HHJ Evans-Gordon were excessive in themselves, regardless of the cap, there has been no substantiation of that assertion. No detailed analysis of the bills has been undertaken by the appellants, and Mr Westaway made no submissions on the detail. Accordingly, this court is not in a position to second guess the exercise of discretion by Lang J, as affirmed by HHJ Evans-Gordon.
57. I should add that I do accept the underlying submission that Mr Westaway made in respect of costs generally, to the effect that courts must be astute not to "nod through" claims for costs in environmental cases simply because the total figure can be kept below the Aarhus cap. It is incumbent on a judge to assess the costs in these cases by reference to both reasonableness and proportionality. It is wrong in principle simply to accept the costs claimed without proper consideration of both elements. However, I consider that HHJ Evans-Gordon carefully considered the detailed submissions on costs, and reached conclusions which cannot now sensibly be challenged.

5.3 Summary

58. For the reasons set out above, I do not consider that the £10,000 cap was applied illegitimately or led to the awarding of excessive costs. On the contrary, although the application of the cap had a detrimental effect on Roxhill, that was the consequence of the Aarhus cap and the new rules at CPR Part 45. On the facts of this case, the appellant has no grounds for complaint.

6 Conclusion

59. If my lords agree, this appeal will be dismissed.

Lord Justice Hamblen:

60. I agree.

Lord Justice David Richards:

61. I also agree.