Setting off a battle for costs

Stephen Gerlis reports on how lawyers for publicly funded litigants can make a loss when litigation becomes an unaffordable luxury

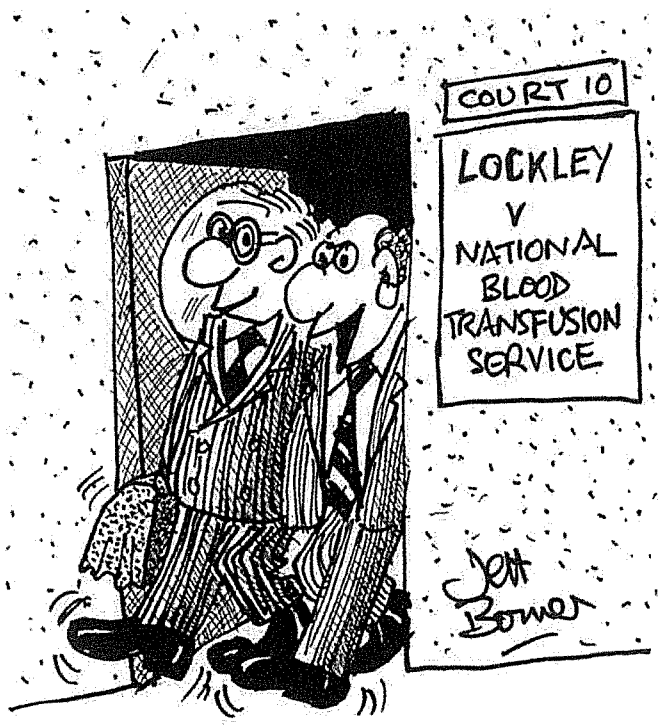
Publicly funded litigants are in a unique, protected position. In civil litigation, even if they lose the case, a costs order cannot be enforced against them unless, rarely, a means enquiry reveals that they have the ability to pay.

However, there are two areas where the successful party stands a chance of recovering some of its costs, without a means enquiry – where the assisted person is awarded some damages or achieves some costs. In those circumstances, the winning party can set off their entitlement to costs against the assisted person's entitlement to damages or costs.

This principle was tested and approved in *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492. In that case, it was pointed out that section16(8) of the Legal Aid Act 1988 states that a set-off against damages or costs recovered by an assisted party takes priority over the statutory charge. By section 17(1) of the same Act, the liability of an assisted person for costs is not to exceed 'the amount, if any, which is a reasonable one for him to pay'.

In *Lockley,* Lord Justice Scott said a set-off does not actually require an assisted person to pay anything personally – it is applied to costs that their lawyers might otherwise have recovered or is deducted from damages the assisted person was expecting.

In *R (on the application of Burkett) v London Borough of Hammersmith & Fulham* [2004] EWCA (Civ) 1342, [2004] *The Times*, 20 October, Lockley was challenged on appeal for the first time since the Civil Procedure Rules 1998 came into force. Ms Burkett, with the benefit of Legal Services Commission (LSC) funding, issued judicial review proceedings against the local authority in connection with its grant of planning permission for a large property development near her Fulham home. Her application for permission was turned down on grounds of delay and merit by Mr Justice Newman.



Well, it proves you can get blood out of a statutory charge

An appeal on the question of merit was successful, but that on delay was not, and the latter matter was taken to the House of Lords where Ms Burkett won. The case was remitted back to Mr Justice Newman, but he dismissed Ms Burkett's application.

She was awarded the costs of the Lords proceedings, but Mr Justice Newman ruled that the local authority's costs of the four-day final hearing, estimated at £35,000, should be set off against Ms Burkett's costs in the Lords, estimated at a whopping £135,000.

The Court of Appeal had some harsh words about the Lords costs. Lord Justice Brooke said: '... we view with concern a bill of costs for legal fees on this scale for a comparatively brief hearing in the House of Lords, particularly when the ultimate payer is not some commercial giant but the public purse. Litigation fees must be both reasonable and proportionate, and this principle includes claims for fees for work performed in the House of Lords'.

In addition, in an addendum to the judgment, Lord Justice Brooke described as 'disturbing' the large expenditure by the assisted person's lawyers on an environmental claim, which had not yielded any practical benefit to Ms Burkett or her neighbours. He had severe concerns that such uneconomic litigation may have an adverse effect on the environmental justice system generally. He observed that such cases might be of great interest to lawyers but of little practical assistance to those they were designed to protect. In this case, the development in question had been largely completed by the time the litigation had concluded.

Ms Burkett's lawyers challenged *Lockley* on several grounds, including that the decision had been *per incuriam*. They argued that it was not a question of whether Mr Justice Newman had exercised his discretion properly, but that he had no power to do what he did at all.

Although, as the Court of Appeal noted, Ms Burkett had no particular interest in this challenge, the lawyers certainly did. They expected to receive £70,000 from the LSC for the publicly assisted work, but the effect of Mr Justice Newman's decision was that they were £35,000 out of pocket on total party-and-party costs of £135,000.

This particular interest was noted by Lord Justice Brooke. 'It is to assert and protect the interests of those lawyers, and others like them in future cases, that this appeal in reality has been brought. The LSC itself is not affected financially by what has taken place.'

The other 'reality' was that the appeal arose from the difference between the amount lawyers can expect to get on a party-and-party basis and what they are paid by the LSC – in this case a difference of £65,000. How had this come about? Lord Justice Brooke had the answer, making it clear that the problem had arisen by virtue of the fact that legal aid rates had been frozen since April 1996 – more than eight years ago – at a level considerably lower than the market rate. 'History has shown that distortions in rates or pay on this scale are always likely to work substantial injustice, and this unhappy situation is no exception.'

The heart of the Court of Appeal was unmoved by this perceived injustice. 'Issues relating to public funding are for others to take: our task is to interpret the present system as we find it.' The court was satisfied that Mr Justice Newman had a discretion under *Lockley* and the appeal judges saw no grounds for interfering with the way in which he exercised it.

The lawyers ended up £35,000 short. So where does the fault lie? Firstly, the court maintained that the fees claimed by Ms Burkett's lawyers were excessive. Secondly, the 'freeze' on legal aid fees means that the gap between those fees and party-and-party costs has widened considerably over the years.

As there is no sign of the fees being made more generous – indeed, if anything, the opposite is more likely – this is a situation that can only get worse. Finally, litigation that produces no beneficial result for those it is intended to benefit, while it may be of interest to lawyers, will become an unaffordable luxury if a substantial part of the cost has to be met out of scarce public funds.

District Judge Stephen Gerlis sits at Barnet County Court