Interim costs depend on final result of case

COURT OF APPEAL

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Regina (Burkett) v Hammersmith and Fulham London Borough Council (No 2), Law Society and Legal Services Commission intervening

Before Lord Justice Brooke, Lord Justice Buxton and Lord Justice Carnwath

Judgment October 15, 2004

In a case where one party was legally aided, being funded by the Legal Services Commission, an order for costs in favour of the other party could direct that those costs be set off against either damages or costs to which the legally aided party had become, or might in future become entitled in the action.

The Court of Appeal so held in a reserved judgment dismissing the appeal of the funded claimant, Sonia Burkett, against the order for costs made by Mr Justice Newman sitting in the Queen's Bench Division on June 18, 2003 following his dismissal of her application for judicial review of a planning decision made by the defendant, the London Borough of Hammersmith and Fulham.

The unsuccessful application before Mr Justice Newman followed referral back to him after the claimant had successfully appealed, as far as the House of Lords (*The Times*, May 24, 2002; [2002] 1 WLR 1593) his earlier ruling that the case could not be heard by him because of delay.

Mr Justice Newman had considered himself bound by *Lockley v National Blood Transfusion Service* ([1992] 1 WLR 492), and ordered that the defendant's costs be subject to detailed assessment if not agreed and that its costs should be set off against the costs which the House of Lords ordered the defendant to pay the claimant, linked to the amount of costs which the defendant was assessed as liable to pay according to the House of Lords and no more.

The grounds of appeal were, inter alia, that the judge had erred in finding that he was bound by *Lockley* such that he had a discretion to make the order he did.

Mr Nicholas Bacon for Ms Burkett; **Mr Richard McManus, QC** and **Mr Andrew Tabachnik** for the council; **Mr Simon Browne** for the Legal Services Commission, intervener; **Mr Nigel Cooksley, QC** for the Law Society, intervener.

LORD JUSTICE BROOKE, giving the judgment of the court, said that the case fell under the new statutory legal aid regime.

On April 1, 2000 the Legal Aid Act 1988 was repealed and substituted by the relevant sections of the Access to Justice Act 1999; and the Community Legal Service (Cost Protection) Regulations (SI 2000 No 824) also came into effect on that day. There were no material alterations in the wording of the scheme.

The judge had rightly found that *Lockley* was to be applied to the new regime.

First, set-off could not be resisted by submitting that there was a lack of mutuality between the respective costs being considered; nor was it possible to argue that the costs ordered belonged to the Legal Services Commission rather than the claimant; indeed the concept of mutuality relied on was drawn from set-off as a defence rather than set-off in costs.

Second, the fact that the draftsman of the 1999 Act did not include any provision similar to section 16(8) of the 1988 Act, stating that the charge given under section 16(6) to the Legal Aid Board did not prevent set-off between costs, took matters no further, where he might have considered it mere surplusage since there was no intention to alter the general rule.

Third, there was no rule of law or binding authority that prevented Mr Justice Newman from ordering as he did: in particular, neither *Anderson v Hills Automobiles (Woodford) Ltd* ([1965] 1 WLR 745), before the court in *Lockley* nor *In re a Debtor* (*The Times* February 19, 1981), led to the conclusion that *Lockley* was decided per incuriam. The judge thus had a discretion as he found, and there were no grounds to interfere with his exercise of it.

The Law Society and the claimant submitted that such a finding would work harshly and in a manner contrary to the financial interests of the lawyers who acted for clients in receipt of public funding; and that it might deter those solicitors and barristers who would otherwise be willing to act for such-funded clients.

For example, in a case such as the present, specialist counsel might be instructed in the House of Lords, and after they had won an appeal at that level, they might find their fees slashed as the result of a subsequent adverse decision in the case when they were no longer instructed.

However, such considerations could not affect the court's interpretation of the 1999 Act. If Parliament had wished to insert into the legal aid scheme an overriding lawyers' lien of the type imposed in the mid-19th century, it could have done so, but had not.

The problem appeared to arise from the fact that, perhaps uniquely among those who were remunerated out of public funds, the remuneration of lawyers who acted for Legal Services Commission-funded litigants had been frozen since April 1996 at a level that was already markedly lower than the market rate; and history had shown that distortions in rates of pay on that scale were always likely to work substantial injustice.

Further, it was to be noted that the very limited profit yielded by environmental cases had led to little interest in the subject by lawyers generally; and, particularly in the context of the 1998 Aarhus Convention, to which this country was a party and which contained provisions on access to justice in environmental matters.

The court would be troubled if the effect of this judgment were left uncorrected by other means, because of the importance of maintaining the viability of the few legal practices which operated in the field of publicly funded environmental litigation. Such concerns were not confined to environmental law.

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