Davey v Aylesbury Vale District Council

[2007] EWCA Civ 1166

COURT OF APPEAL, CIVIL DIVISION
SIR ANTHONY CLARKE MR, SEDLEY AND LLOYD LJJ
16 OCTOBER, 15 NOVEMBER 2007

Judicial review – Costs of application – Application for permission for judicial review – Costs incurred prior to grant of permission – Costs awarded to defendant after full judicial review proceedings – Award of pre-permission costs – Guidance.

On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs. However, costs should ordinarily follow the event and it is for the claimant who has lost to show that some different approach should be adopted on the facts of a particular case. If awarding costs against the claimant, the judge should consider whether they are to include pre-permission costs incurred by the defendant other than the costs of preparing and serving an acknowledgment of service with grounds of opposition (preparation costs) in addition to acknowledgment costs. It will be for the defendant to justify these. There may be no sufficient reason why such costs, if incurred, should be recoverable. If the claimant wishes to submit that any or all the costs which would be otherwise recoverable should not be recovered, however reasonable and proportionate they were, it is for him to persuade the court to that effect. It is highly desirable that these questions should be dealt with by the trial judge and left to the costs judge only in relation to the reasonableness of individual items. If at the conclusion of such proceedings the judge makes an undifferentiated order for costs in a defendant's favour the order has to be regarded as including any reasonably incurred preparation costs; but the *Practice Note* (*Administrative Court*) [2004] 2 All ER 994 which deems pre-permission costs, if the order is silent on them, to be costs in the case, should be read so as to exclude any costs of opposing the grant of permission in open court, which should be dealt with on the principles explained in *R* (*on the application of Mount Cook Land Ltd*) *v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405 (see [21], [25], [29]–[31], below).

Notes

For administrative law: practice and procedure; costs, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 178.

Cases referred to in judgments

Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93, [1982] AC 617, [1981] 2 WLR 722, HL.

R (*Ewing*) *v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 WLR 1260.

R (*on the application of Corner House Research*) *v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600.

R (on the application of Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346, [2004] 2 P & CR 405.

R v Lord Chancellor, ex p Child Poverty Action Group, R v DPP, ex p Bull [1998] 2 All ER 755, [1999] 1 WLR 347.

R (on the application of Thurman) v Lewisham London BC (2003) unreported, Admin.

Young [2001] EWHC 905 (Admin).

Appeal

The claimant, Mr Davey, brought judicial review proceedings against the defendant, Aylesbury Vale District Council. The claim was dismissed and an order for costs made by Forbes J on 11 March 2005 for the claimant to pay 75% of the costs of the claim not to include costs of the permission hearing. The parties could not agree the costs. At the taxation Master Campbell held that the claimant was liable to pay costs incurred reasonably incurred before the grant of permission. On 1 February 2007 Wyn Williams J dismissed the claimant's appeal ([2007] EWHC 116 (QB), [2007] All ER (D) 01 (Feb)). The claimant appealed with permission of Sir Henry Brooke. The facts are set out in the judgment of Sedley LJ.

Robert McCracken QC and *Mark Westmoreland Smith* (instructed by *Richard Buxton*, Cambridge) for the claimant.

James Findlay (instructed by *Sharpe Pritchard*) for the defendant.

Judgment was reserved.

15 November 2007. The following judgments were delivered.

SEDLEY LJ (giving the first judgment at the invitation of Sir Anthony Clarke MR).

[1] The question before the court is whether, as a matter of law or of practice, an order for costs made in favour of a successful respondent to judicial review proceedings includes costs incurred prior to the grant of permission unless these are expressly excluded.

[2] I can take the material facts directly from the judgment of Wyn Williams J, who on 1 February 2007 concluded that the answer was Yes (see [2007] EWHC 116 (QB), [2007] All ER (D) 01 (Feb)):

> '[1] On 3 February 2004 the defendant granted planning permission and listed building consent to a company known as Mentmore Towers Ltd in respect of a scheme of development upon an area of land known as Mentmore Towers. On 30 April 2004 the appellant filed a claim for judicial review in which he sought orders quashing those grants. By an order dated 11 March 2005 Forbes J dismissed the claim after a substantive hearing. Permission to proceed with the claim for judicial review had been granted to the appellant by Richards J (as he then was) on 23 September 2004.
>
> [2] At the conclusion of the hearing before Forbes J on 11 March 2005 he made certain consequential orders one of which was in the following terms:
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> "... the Claimant do pay 75% of the costs of this claim not to include costs of the permission hearing to be subject to detailed assessment if not agreed and paid by the Claimant to the Defendant's solicitors."
>
> [3] The parties could not agree upon the bill of costs presented by the respondent. In consequence, the respondent sought a taxation of its costs.

The taxation was heard by Master Campbell on 3 July 2006. Before the master, the appellant raised a point which both parties and the master considered was a point of principle. The point raised by the appellant was that under the order of Forbes J he should not be liable for any costs incurred by the respondent before the decision was made to grant him permission to bring his judicial review proceedings except for the costs incurred in preparing the respondent's acknowledgment of service and grounds of opposition to the claim.

[4] In a reasoned judgment the master rejected the appellant's contention. He held that under the order of Forbes J the appellant was liable to pay what he described as "pre-permission costs" subject, of course, to such costs being reasonably incurred. The respondent was not limited simply to the costs of preparing the acknowledgment of service and grounds of opposition.

[5] The Master gave permission to appeal against that ruling.

[6] Both parties agree that if the order of Forbes J had been made after a civil trial in the context of a private law dispute the master's ruling would be correct. However, the appellant argues that in the particular context of judicial review proceedings the master's conclusion is wrong. In effect, the case for the appellant is that the order of Forbes J is to be taken to mean that no pre-permission costs are recoverable (other than the costs of preparing the acknowledgment of service and summary grounds) notwithstanding that there are no words within the order which expressly suggest that is to be the case.

[7] It is to be noted that no argument was addressed to Forbes J upon the issue of "pre-permission costs" generally. As his order makes clear, however, he was asked to exclude from the costs payable to the defendant the costs of the permission hearing—an application on the part of the claimant to which he acceded.'

[**3**] The bill of costs, assessed on the standard basis and reduced by 25 per cent because the council had belatedly met one of the grounds, came to a little under £20,000. Almost £3,000 of this was the cost of the dispute about the ambit of the judge's order. The pre-permission costs in issue (that is to say, excluding the preparation of the council's acknowledgment of service and grounds of opposition) were the costs of obtaining the advice of junior counsel, a total of £1,090 before discounting, together with part of the solicitor's costs of preparation.

[**4**] It follows that the second appeal now before this court by permission of Sir Henry Brooke concerns an issue of principle which far outweighs the amount at issue. In giving permission Sir Henry wrote:

'This appeal raises an important point of practice. I note that it said that different judges in the Administrative Court are exercising their discretion in different ways on the point at issue.

For my part, I would regard the extract from the judgment of Ouseley J in *Young* (see p 17 of the small bundle) as representing the correct position, but it is incumbent on the costs judge on an assessment to be watchful in relation to the nature of the respondent's pre-permission costs he decides to allow.

It appears to me to be desirable for the full court to carry out an authoritative review of the whole position.'

[**5**] The *Practice Note* (*Administrative Court*) [2004] 2 All ER 994, [2004] 1 WLR 1760 deems the pre-permission costs, if the order is silent on them, to be costs in the case. This will be the norm in cases where permission has been obtained, whether on the papers or on renewal in open court, without opposition. But it is a feature of final costs orders in many judicial review cases that the costs of having unsuccessfully opposed the grant of permission are not to be recovered by the ultimately successful defendant. Here the grant of permission had been vigorously opposed at an oral hearing before Richards J, as he then was. Upon the grant of permission, Mark Lowe QC for the council realistically conceded that the claimant's costs vis-à-vis the council should be the claimant's costs in the case; but Richards J preferred to reserve them. The failure of the council's opposition to the grant of permission was accordingly reflected in the limitation placed by Forbes J upon his eventual costs order.

[**6**] While therefore Wyn Williams J was right to say that the task of the costs judge was to interpret Forbes J's order by deciding whether it gave the council 75 per cent of all its costs save those of the permission hearing, or 75 per cent of its costs following the permission hearing plus (as was conceded) the costs of its acknowledgment of service and grounds of opposition, the question for this court is wider: it is whether an order that a defendant is to recover its costs in judicial review proceedings which have gone to a full hearing embraces all costs reasonably incurred by it before the grant of permission. That is how the costs judge, Master Campbell, approached the case: he described the issue, correctly, as a point of principle.

[**7**] The master, having considered authorities to which I shall come in a moment and which, as he recognised, do not speak with single voice, concluded that in principle 'the costs of a threatened claim are generally irrecoverable but, if a claim is made . . . permission is granted . . . and eventually the claimant loses, then in those circumstances costs may well be recoverable'. The reason for the guarded final phrase ('may well be') is of course that the court can always adapt its order to particular circumstances; but the sense of the master's conclusion is that, other things being equal, a costs order in a defendant's favour following a full hearing includes pre-permission costs. Forbes J had not been asked to deal specifically in his order with the pre-permission costs and did not do so.

[**8**] On appeal Wyn Williams J noted that it was common ground that in an ordinary civil claim an unqualified costs order would extend to costs reasonably incurred in the run-up to the issue of proceedings. The question was whether the same was the case in judicial review. Having reviewed the decided cases he concluded (at [20]) that these 'suggest strongly that very experienced judges of the Administrative Court have considered it open to them to make orders for costs against unsuccessful applicants which include "pre-permission costs" after a substantive hearing'. Such a conclusion may well be right, but it does not answer the question of principle as to the prima facie meaning of an unqualified costs order. It led the judge, nevertheless, to the view that this was 'the most obvious and natural meaning' of Forbes J's order (see [21]).

[**9**] I do not think this was an entirely satisfactory basis on which to resolve an issue of general significance to individuals who bring a public authority to court on arguable grounds. What is needed is a general principle upon which costs awarded to a defendant at the end of a full judicial review proceeding are to be assessed, subject always to qualification in any one case. I entirely understand the judge's reluctance to decide more than the case before him, but this court can and I think should look at the issue more broadly.

[**10**] In doing so I will refer to the costs of preparing and serving an acknowledgment of service with grounds of opposition as acknowledgment costs, and to other pre-permission costs incurred by a defendant as preparation costs.

THE PURPOSE OF THE PERMISSION HEARING

[**11**] It may be helpful first to recall what Lord Diplock said in the *Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 106, [1982] AC 617 at 643–644:

> 'The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.'

In the same vein, Lord Woolf in his 1989 Hamlyn Lectures, *Protection of the Public—a New Challenge*, noted that the Justice All Souls Review had argued for the abolition of the leave requirement but said (p 21):

> 'In practice the requirement, far from being an impediment to the individual litigant, can even be to his advantage since it enables a litigant expeditiously and cheaply to obtain the view of a High Court judge on the merits of his application.'

[**12**] We have been shown in the course of argument the transcript of a permission application in the Administrative Court ([2007] EWHC 2352 (Admin)) in the course of which Burton J expressed a preference for the maximum amount of material on a contest at the permission stage. While there may be cases in which it is necessary or helpful to explore issues in depth at this stage, such cases must be quite exceptional. The proper place for a full exploration of evidence and argument is at the hearing of a claim which has been shown at the permission stage to be arguable.

[**13**] It follows that it ought not ordinarily to be necessary for a public body on which a claim for judicial review is served to do much additional work before completing its acknowledgment 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 its decision and 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.

PLANNING DISPUTES AND JUDICIAL REVIEW

[**14**] The pre-action protocol applicable to judicial review proceedings, which centres on trying to sort out the issue by correspondence, recognises that this process has no bearing where the authority has no power in law to withdraw or modify its decision. Planning decisions may well be in this class. Such cases are therefore likely to proceed directly from a disputed decision to the filing of a judicial review claim form requiring an acknowledgment of service with grounds of opposition.

[**15**] Planning cases tend also to lie on or near the boundary between private or commercial judicial review and public interest litigation. Many, including the present one, straddle it: they are brought by a personally interested individual,

typically a neighbouring landowner or occupier, but raise issues of local or general environmental concern. In so far as they do so, it is right to bear in mind what this court said in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600:

> '[69] We are satisfied that there are features of public law litigation which distinguish it from private law civil and family litigation . . .
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> [70] The important difference here is that there is a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties. One should not therefore necessarily expect identical principles to govern the incidence of costs in public law cases . . .'

THE PRESENT PROBLEM

[16] In line with the foregoing guidance, at least two rules of practice have developed under the CPR. One is that an unsuccessful applicant for permission must expect to pay the defendant's costs of putting in an acknowledgment of service. To this extent the effect of the order of Forbes J in the present case is not contentious. The other is that a defendant which chooses to attend and oppose an oral application for permission cannot ordinarily expect to recover its costs of doing so even if permission is refused, but may exceptionally be allowed them—for example where it has been able to alert the court to an abuse of its process. These guidelines were spelled out and explained by this court in *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, [2004] 2 P & CR 405. In relation to them Auld LJ commented (at [77]):

> 'Such an approach seems to me to accord with public policy in providing ready access to the courts by individuals or bodies seeking relief from and/or to draw attention to actual or threatened transgressions of the law by public bodies, whilst, in exceptional cases protecting those bodies and the public that funds them from unnecessary, burdensome and costly substantive litigation. If properly and consistently applied by the courts, I can see nothing about it that would, as Mr. Steel suggested, undermine the fairness and probity of judicial review as a means of control of the administration or run contrary to Art.6.1 of the European Convention of Human Rights, Lord Woolf's Civil Justice Reforms or the adoption of them in this context in the Bowman Report.'

[17] To the sources of policy and law referred to by Auld LJ, Robert McCracken QC for Mr Davey adds what is set out in art 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus, 25 June 1998; ST 24 (2005); Cm 6586) (ratified by both the United Kingdom and the European Union):

> '3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
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> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be

given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.' *a*

This policy is explicitly adopted in art 3.7 of European Parliament and Council Directive (EC) 2003/35 (providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives (EEC) 85/337 and (EC) 96/61) (OJ 1997 L156 p 17). *b*

[**18**] It is because of the need to keep the costs of environmental litigation down without encouraging or rewarding misconceived challenges that issues such as the present one arise. What we are asked to decide is whether, as a general rule, an order made following a full judicial review hearing that a successful defendant should recover its costs will entitle it not only to its acknowledgment costs but to any reasonably incurred preparation costs. Such a general rule, as James Findlay for the local authority stresses, would do no more than follow the practice in civil litigation; but, for reasons I have outlined, that is not a sufficient justification in public law. *c*

[**19**] Each side is able to point to an anomaly in the other party's case. Mr McCracken points out that a claimant who fails to obtain permission will have to pay the defendant's acknowledgment costs but not its preparation costs. Why then, he asks, should a claimant who has a good enough case to secure permission but who in the end loses be worse off? Mr Findlay points out that a claimant who succeeds at trial will recover all his costs including preparation costs. Why, he asks, should the same not be the case for a successful defendant? *d* *e*

[**20**] If there is a satisfactory answer to each of these questions, it has to lie in the calibrated exercise of the court's power—a power which is in effect an obligation—to adapt its provision for costs to the conduct and outcome of the case before it. The method of fine-tuning an award of costs to a defendant who has successfully opposed the grant of permission, set out by this court in *R (on the application of Mount Cook Land Ltd) v Westminster City Council*, illustrates the proper approach. Absent such fine-tuning, the position is as described by Collins J in *R (on the application of Thurman) v Lewisham London BC* (CO/2806/2003): 'The costs of dealing with a threatened claim are generally irrecoverable, unless a claim is made, gets permission and eventually the claimant loses.' *f* *g*

[**21**] Taking the same approach, these seem to me to be the appropriate guidelines for dealing with the present problem. They should be read subject to the caveats set out in the judgment of Sir Anthony Clarke MR (at [29]–[31], below). (1) On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs. (2) If awarding costs against the claimant, the judge should consider whether they are to include preparation costs in addition to acknowledgment costs. It will be for the defendant to justify these. There may be no sufficient reason why such costs, if incurred, should be recoverable. (3) It is highly desirable that these questions should be dealt with by the trial judge and left to the costs judge only in relation to the reasonableness of individual items. (4) If at the conclusion of such proceedings the judge makes an undifferentiated order for costs in a defendant's favour (a) the order has to be regarded as including any reasonably incurred preparation costs; but (b) the 2004 *Practice Note* [2004] 2 All ER 994, [2004] 1 WLR *h* *j*

1760 should be read so as to exclude any costs of opposing the grant of permission in open court, which should be dealt with on the *Mount Cook* principles.

THE PRESENT CASE

[**22**] It is apparent from Master Campbell's judgment on the costs hearing that the claimant's solicitor, Richard Buxton, who is extremely experienced in environmental litigation and in the judicial review process, argued this aspect of the assessment not on any issues of detail (save as to one specific amount, on which he succeeded) but on the wider question whether the judge's order, properly interpreted, embraced the council's preparation costs. For the reasons set out above, I consider that it did. For the same reasons, I consider that it was not satisfactory that an order should have been made, without debate, in this broad form, and that in future such orders should be specific. This in turn means that counsel will need detailed instructions.

[**23**] The fee paid to junior counsel for settling the acknowledgment of service was accepted by Mr Buxton as part of the acknowledgment costs. The fee paid to leading counsel for advice prior to the permission hearing was disallowed. Whether, had the claimant contested the need in addition to have junior counsel's advice before and after settling and serving the acknowledgment, at a cost of a further £1,090, the costs judge would have taken the attitude indicated in [14], above, we do not know.

[**24**] This appeal must therefore be dismissed. It has nevertheless served the valuable purpose of allowing this court to consider and, we hope, regularise a problematical and too often neglected area of practice which can have very substantial financial repercussions.

LLOYD LJ.

[**25**] I agree with both judgments.

SIR ANTHONY CLARKE MR.

[**26**] I agree that this appeal should be dismissed for the reasons given by Sedley LJ. I add a few words of my own on some of the topics which he has considered.

[**27**] The order made by Forbes J was that: 'the Claimant do pay 75% of the costs of this claim not to include costs of the permission hearing to be subject to detailed assessment if not agreed and paid by the Claimant to the Defendant's solicitors.' As I see it, in an order in that form 'the costs of [the] claim' means the 'costs of and incidental to' the claim: see s 51(1) of the Supreme Court Act 1981. Those costs can include costs incurred before issue of the proceedings, although, this being an order for assessment on the standard basis, in order to be entitled to payment of any particular item of such costs, the successful party (whether claimant or defendant) must show (as in the case of every other item of costs claimed) that it was reasonably incurred and both proportionate and reasonable in amount: see CPR 44.4(1), (2).

[**28**] The order made by Forbes J shows that the court can restrict the costs to be recoverable. In this case he only awarded 75 per cent of the costs and excluded the costs of the permission hearing. He could have excluded pre-issue costs if he had been asked to do so and thought it appropriate to do so.

[**29**] I entirely agree with the guidelines set out by Sedley LJ at [21], above. I would however add one note of caution. It does seem to me that costs should ordinarily follow the event and that it is for the claimant who has lost to show that

some different approach should be adopted on the facts of a particular case. That principle is supported by the decision and reasoning of Dyson J in *R v Lord Chancellor, ex p Child Poverty Action Group, R v DPP, ex p Bull* [1998] 2 All ER 755 at 764, [1999] 1 WLR 347 at 355–356. That passage concludes as follows:

> '. . . in considering whether, and in what circumstances, there should be a departure from the basic rule that costs follow the event in public interest challenge cases, in my view it is important to have in mind the rationale for that basic rule, and that it is for the applicants to show why, exceptionally, there should be a departure from it.'

The basic rule he refers to is, as he explained, that costs follow the event in public law cases, as in others, because, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of money diverted from the funds available to fulfil its primary public functions.

[**30**] That said, I agree with Sedley LJ's second proposition at [21], above, namely that it will be for the successful defendant to justify preparation costs. That is, however, because (as stated above) he must show that it was reasonable and proportionate to incur such costs. If the claimant wishes to submit that any or all the costs which would be otherwise recoverable should not be recovered, however reasonable and proportionate they were, it is, as I see it, for him to persuade the court to that effect.

[**31**] I should add that I also agree with Sedley LJ's third proposition, namely that these questions should be dealt with by the trial judge, leaving to the costs judge only the question whether the individual items are reasonable.

[**32**] The only other point upon which I wish to comment arises out of a submission made by Mr McCracken on behalf of the appellant to the effect that to permit defendants to recover preparation costs would encourage public authorities to incur costs needlessly at the pre-permission stage. I do not accept that submission. In *R (Ewing) v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 WLR 1260 Carnwath LJ, with whom Brooke and Dyson LJJ agreed, considered (at [40]–[47]) what he called 'Costs under Mount Cook', where this court considered the position in a case in which the application for permission to claim judicial review failed. Carnwath LJ explained what is meant by a 'summary of grounds' at the permission stage. He stressed (at [43]) that the purpose of the summary is not to provide the basis of full argument of the substantive merits, but rather to assist the judge in deciding whether to grant permission and, if so, on what terms. He added that it should be possible to do what was required without incurring 'substantial expense at this stage'.

[**33**] It seems to me that any defendant who incurs more cost at the permission stage than is contemplated by Carnwath LJ will not be awarded such additional costs at the permission stage if the application is unsuccessful. Moreover, as I see it, the court should at that stage decline to look at anything which goes beyond the 'summary of grounds' described in *Ewing*'s case. In these circumstances, I am not persuaded that the approach we have adopted in this case will give rise to a risk of defendants recovering more expense than is reasonable at the permission stage.

Appeal dismissed.

Marie-Thérèse Groarke Barrister.