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Case Summary posted by the Task Force on Access to Justice

Davey v Aylesbury Vale District Council EWCA Civ 1166

1. Key issue	Costs - The Court of Appeal established guidelines for the judge's discretion as to cost recovery from an unsuccessful claimant in public law cases, particularly with regard to preparation costs.
2. Country/Region	UK
3. Court/body	Court of Appeal
4. Date of judgment /decision	15 th November 2007
5. Internal reference	EWCA Civ 1166, paras 17-24
6. Articles of the Aarhus Convention	Article 9(4)
7. Key words	Prohibitive costs

8. Case summary

In this case, the claimant referred the Court to Article 9(4) of the Aarhus Convention, as explicitly adopted in Article 3(7) of the EC the Public Participation Directive 2003/35/EC. As such, the Court was asked to decide 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. The defendant argued that this would do no more than follow the practice in civil litigation. However, the Court expressed a view that this is not a sufficient justification in public law.

The Court set out its view that in a case in which the defendant has successfully opposed the grant of permission, the proper approach was set out in *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346. Absent such fine-tuning, the position is as described by Collins J in *R (Thurman and Earle) v LB Lewisham* (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*". The Court therefore deemed the following to the appropriate guidelines for these circumstances (subject to the caveats set out in the judgment of the Master of the Rolls):

"(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 Statement 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."

As such, although the courts have the power to ensure that costs are not prohibitive, they are not required to secure any particular result.

9. <i>Link address</i>	http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/UNITED_KINGDOM/Davey/DaveyJudgment.pdf
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