

C3/03/1198, Neutral Citation Number: [2004] EWCA Civ 1342

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 15th October, 2004

B e f o r e:

LORD JUSTICE BROOKE
VICE-PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION),
LORD JUSTICE BUXTON
AND
LORD JUSTICE CARNWATH

SONIA BURKETT

Claimant/ Appellant

- v -

LONDON BOROUGH OF HAMMERSMITH AND FULHAM

Defendant/Respondent

(Transcript of the Handed Down Judgment of
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J U D G M E N T
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Lord Justice Brooke : This is the judgment of the court.

1. This is an appeal by the claimant Sonia Burkett against the order for costs made by Newman J on 18th June 2003 following his dismissal of her application for judicial review of a planning decision made by the defendants, the London Borough of Hammersmith and Fulham ("the council"). At the outset of the hearing on 21st July we granted permission to appeal.
2. This litigation has a long history. Mrs Burkett lives in Fulham in a ground floor maisonette adjoining a very large development site at Imperial Wharf. In February 1998 the interested party St George West London Ltd (which has played no part in the present appeal) lodged an application for planning permission for mixed use development of the site, which was to include over 1,800 residential units, a hotel, public open space, and a riverside walk. It was described at the time as one of the largest current development sites in London. In March 1998 the council, as the local planning authority, requested an environmental statement, and two months later nine different reports were submitted. Newman J said that updates were later provided on three different occasions as revisions to the original proposal were made.
3. In July 1999, the claimant's solicitor, who had previously been assisting a pressure group on a *pro bono* basis, wrote to the council on Mrs Burkett's behalf to complain that there were inadequacies in the environmental statement that had been provided. Undeterred by this warning, on 15th September 1999 the relevant committee of the council resolved to grant outline planning permission subject to certain conditions being fulfilled, and on 12th May 2000 planning permission was formally granted. In the meantime, on 6th April 2000 the claimant initiated judicial review proceedings, more than six months after the committee's resolution. On 18th May 2000 Newman J refused permission to apply for judicial review on the papers, both on the merits of the application and because it had been made out of time. On 29th June 2000 Richards J considered that the application was properly arguable on the merits, but refused permission on the grounds of delay, a ruling subsequently upheld in this court on 20th November 2000 at a hearing concerned only with the question of delay.
4. On 20th May 2002 the House of Lords allowed the claimant's appeal on the delay point and remitted the matter to the High Court for a ruling on the substantive merits. On 15th May 2003 Newman J dismissed the application following a four-day hearing, and although permission to appeal on one issue was granted by this court, the claimant did not in the event pursue an appeal against his decision on the merits. We are concerned only, therefore, with the question: Who should pay for all this (ultimately unsuccessful) litigation, and on what basis?
5. One person who will not pay is Mrs Burkett, who has been in receipt of funding from the Legal Services Commission ("LSC") throughout, with a nil

contribution. Other people who will not pay are all those people who opposed the development and who would have stood to benefit from a successful outcome of Mrs Burkett's claim at no expense to themselves whether she won or lost. By one route or another, any liability that is established will fall on public funds. It is well known that the LSC is now very sorely pressed in its efforts to make adequate funding available for civil litigation. It is also well known that local authorities face comparable funding pressures. The importance of this appeal was marked by the fact that both the LSC and the Law Society were granted permission to intervene, and they both made written and oral submissions to the court. We have benefited greatly by the advice of the senior costs judge, Master Hurst, who has acted as our assessor.

6. About one matter there was no dispute. The claimant's application for LSC funding was made on 3rd April 2000 and granted on 6th April 2000. On 1st April 2000 the repeal of the Legal Aid Act 1988 ("the 1988 Act") and its substitution by the relevant sections of the Access to Justice Act 1999 ("the 1999 Act") took effect. It is common ground that all the issues we have to determine relate to the proper interpretation of the new statutory regime. The Community Legal Services (Costs) Regulations 2000 and the Community Legal Service (Cost Protection) Regulations 2000 also came into effect on 1st April 2000.

7. Richards J ordered the claimant to pay the defendants their costs of the permission application subject to costs protection. The precise terms of his order were that

"The Applicant pay the costs of the First Respondent but the determination of the amount of such costs that it is reasonable for the Applicant to pay be postponed generally."

That order has remained undisturbed. We were told that the claimant's bill of costs up to and including the hearing before Richards J amounted to about £10,500. The House of Lords, for its part, ordered the council to pay the claimant's costs in the Court of Appeal and the House of Lords, and we were told that the process of assessment of the claimant's bill had already begun when Newman J heard the substantive claim.

8. Newman J's costs order, about which the claimant now complains, was in these terms:

"×that the Defendant's costs be subject to detailed assessment if not agreed, and that the Defendant's 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 to which the Defendant is assessed as liable to pay according to the House of Lords and no more."

9. In his short judgment Newman J made it clear that he could see no reason for distinguishing the decision of this court in *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492. Among the contentions he rejected was a submission that the case of *Lockley* had been decided *per incuriam* and that it was inconsistent with the decision of this court in *Re A Debtor* (The Times, 19th February 1981). This argument has been repeated on this appeal.
10. At the hearing of the appeal we were shown figures proffered for illustrative purposes, and when the hearing was over the claimant's solicitor sent us more detailed figures in a letter to which the defendant's solicitors had contributed information about their own costs. The comparative figures (excluding VAT) were:

	Party	Solicitors' bill	Counsel's fees	Other disbursements	Total
Court of Appeal (One day)	Claimant	£18,487	£5,100	£1,247	£25,834
	Defendant	£3,000	£4,000		£7,000
House of Lords (Leave hearing & two days)	Claimant	£39,946	£83,450	£11,945	£135,341
	Defendant	£5,500	£23,800		£29,300
High Court (Four days)	Claimant	£9,482	£17,275	£969	£27,726
	Defendant	£8–10,000	£24,300		£32–34,300

11. We must make certain comments about these figures. The defendant's solicitors' bill included disbursements, which is

why there is no separate entry under this head. The claimant's lawyers' comparatively low bill in the High Court (where they failed) was charged at the rates prescribed by the relevant regulations. Their bill in the Court of Appeal and the House of Lords (where they obtained an order for costs in their favour), on the other hand, was set at what they regarded as reasonable market rates.

These were the figures they claimed, which will in due course be subject to detailed assessment (if not agreed). We were told that the bills for solicitor's costs were based on time records, and that counsel's fees were based on the fee notes they submitted. We were also told that there were several complex factors, including the high costs case regime, underlying these figures, and that there were a number

of factors, not before the court, which might explain the differences between the figures advanced by each side.

12. This reference to the "high costs case regime" requires explanation. Because her likely costs were to exceed certain defined limits, in February 2001 the claimant was granted a new funding certificate for the proceedings in the House of Lords which prescribed a total costs limit for expenditure in those proceedings of £62,756. Within that limit leading and junior counsel were permitted to recover fees from the LSC at hourly rates which appear from a footnote to the claimant's skeleton argument to have been £50 for junior counsel and £90 for leading counsel.
13. Although these represent the limit of the fees recoverable from the LSC, by reason of the effect of regulation 107B (3) of the 1989 Regulations solicitors acting for a client funded by the Community Legal Service ("CLS") are able to recover what are described as their "full commercial rates" from the paying party if an order for costs is made in their clients' favour, even though the LSC is only liable to pay them at prescribed rates. We were told in this context by the LSC that the prescribed hourly rate for an experienced solicitor conducting civil litigation in the South-East has been frozen at £78.50 since April 1996, whereas he could ordinarily expect to be paid a reasonable market rate of £175 per hour in non-funded litigation.
14. These more detailed figures do not alter the position in any material respect from what was suggested to us at the hearing of the appeal. We were then being invited to assume that the claimant's costs that were recoverable at full commercial rates under the order of the House of Lords amounted to £135,000 and that the council was entitled to a set-off of £35,000 under Newman J's costs order. The prescribed fees which the claimant's solicitors and counsel were entitled to recover from the LSC were then posited at £70,000, so that the effect of Newman J's costs order was a matter of indifference to the LSC, whereas it will leave counsel and solicitors for the claimant in the House of Lords £35,000 out of pocket.

15. The costs comparisons we have set out in paragraph 10 above do not take into account the costs incurred by the developers, who took a full part in these judicial review proceedings as an interested party. We were told that they instructed a major firm of City solicitors, together with leading and junior counsel, and that they prepared most of the evidence which was submitted to the court by either respondent for the substantive judicial review hearing. We were reminded that in such circumstances the role of the public body in these cases is often not particularly active.
16. Whether the claimant's present bill will be allowed in full on assessment is an open question. Following the completion of the hearing our assessor has shown us the Practice Directions applicable to Judicial Taxations in the House of Lords (November 2003), which appear to show guideline figures for counsel which total £2,000 for the presentation and hearing of a petition for leave to appeal, and £17,900 for leading and junior counsel thereafter (on the basis that both were concerned with the statement of facts and issues and the preparation of the authorities, and there was only the need for one conference and one joint advice: whether the fees of a second junior, which are not mentioned in the guidelines or in the House of Lords's costs order, would be allowed would be a matter for the costs judge to consider). Under the Practice Directions counsel is entitled to argue for higher figures, when appropriate, and we must emphasise that we did not hear any argument on the effect of the guideline figures.
17. It has been suggested to us, for instance, that the decision of the House of Lords on time limits has been of more benefit to the development of the law in this area than any other, and that it will result in savings to public funds in future cases in which issues about delay would otherwise have arisen. It has also been suggested to us that the level of fees reflect the work always involved with House of Lords cases, particularly when lawyers are acting for the appellant. We were told that the preparatory work for this particular appeal traversed into practice in other jurisdictions, and particularly those on the continent of Europe (which was primarily the reason for the instruction of a second junior counsel), although in the event the House of Lords adopted an approach which did not require the consideration of any of this material.
18. While the issues to be decided on the appeal were of interest and importance to planning lawyers (they raised not only a jurisdictional issue, but also the question whether the time for mounting a judicial review challenge ran from the date of the relevant council resolution or the date of the actual grant), they did not on the face of it appear to raise any points of extraordinary difficulty subject to the appropriateness of embarking on research into comparative law, particularly as the planning law point had already been argued twice in the courts below.
19. Since, apart from what we have been told, we do not know anything of the detailed justification for the size of counsel's fees (let alone the size of the solicitor's bill - nearly £40,000 excluding the necessary disbursements - in a case in which three counsel were instructed to research and argue the law), it will be

sufficient for us to say that we view with concern a bill of costs which includes claims 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.

20. In view of the size of the claimant's bill, but of course without in any way seeking to prejudge any of the issues which may arise, we direct that if agreement cannot be reached, the detailed assessment of costs in all stages of these proceedings (including the litigation up to and including the House of Lords on the delay issue but excluding the assessment of LSC costs) should be undertaken by the senior costs judge or another costs judge nominated by him for this purpose.
21. We turn, then, to the substance of the appeal. Although the present case falls to be determined under the new statutory regime, most of the cases to which we were referred were decided under earlier regimes, and it was necessary to notice whether there was any material alteration in the wording of the scheme at different stages in its development. We concluded that there was not.
22. *Lockley* was concerned with an interlocutory dispute over the granting of an extension of time for service of the defence. In this court the legally aided plaintiff challenged the costs orders made by the district registrar and the judge. Each ordered that the costs be the defendants', "not to be enforced without leave of the court save by way of set-off as against damages and/or costs". In the leading judgment, with which Farquharson LJ and Sir John Megaw agreed, Scott LJ was concerned to interpret the effect of sections 16 and 17 of the 1988 Act and regulation 124 of the 1989 Regulations.
23. Section 16(6) of the 1988 Act gave the Legal Aid Board a charge "on any property which is recovered or preserved for [the assisted person] in the proceedings". Section 16(8), however, provided that

"The charge created by subsection (6) above on any damages or costs shall not prevent a court allowing them to be set off against other damages or costs in any case where a solicitor's lien for costs would not prevent it."
24. Scott LJ held that section 16(8) simply preserved those rights of set-off that the general law would allow and protected them against the charge created by section 16(6). It did not create any new right of set-off. Its effect was to make it clear that whatever rights of set-off were available under the general law were available against legally aided parties notwithstanding the board's charge.
25. He then turned to consider section 17(1) of the 1988 Act and regulation 124(1) of the 1989 Regulations. The former provided that:

"The liability of a legally assisted party under an order for costs made against him with respect to any proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the financial resources of all the parties and their conduct in connection with the dispute."

He held that the words "the liability of a legally assisted party" must be construed as a reference to a liability to pay.

26. Regulation 124 provided that:

"(i) Where proceedings have been concluded in which an assisted person~~x~~ is liable or would have been liable for costs if he had not been an assisted person, no costs attributable to the period during which his certificate was in force shall be recoverable from him until the court has determined the amount of his liability in accordance with section 17(1) of the Act~~x~~

(3) The amount of an assisted person's liability for costs shall be determined by the court which tried or heard the proceedings."

Again, Scott LJ interpreted the reference to "a person who~~x~~ is liable ~~x~~for costs" as meaning "a person liable to pay costs".

27. This approach led to the following conclusion:

"The operation of a set-off does not place the person whose chose in action is thereby reduced or extinguished under any obligation to pay. It simply reduces or extinguishes the amount that the other party has to pay. The operation of a set-off, in respect of the liability of a legally assisted person under an order for costs, does not require the legally aided person to pay anything. It does not lead to any costs being recoverable against the legally aided person. Accordingly, in my judgment, there is nothing in section 17(1) or in regulation 124(1) to prevent set-off. An assessment of the amount that it would be reasonable for the legally aided person to pay, is not, therefore, a precondition of, and, indeed, has nothing to do with, set-off."

28. He went on to say that this conclusion was consistent with most of the authorities on this point. In this context he cited *Carr v Boxall* [1960] 1 WLR 314, 317 (Cross J); *Cook v Swinfen* [1967] 1 WLR 457, CA; and *Currie & Co v The Law*

Society [1977] QB 990 (May J). He ended his judgment by stating the following five propositions at pp 496F - 497C:

"(1) A direction for the set-off of costs against damages or costs to which a legally aided person has become or becomes entitled in the action may be permissible.

(2) The set-off is no different from and no more extensive than the set-off available to or against parties who are not legally aided.

(3) The broad criterion for the application of set-off is that the plaintiff's claim and the defendant's claim are so closely connected that it would be inequitable to allow the plaintiff's claim without taking into account the defendant's claim. As it has sometimes been put, the defendant's claim must, in equity, impeach the plaintiff's claim.

(4) Set-off of costs or damages to which one party is entitled against costs or damages to which another party is entitled depends upon the application of the equitable criterion I have endeavoured to express. It was treated by May J. in *Currie & Co. v. The Law Society* [1977] QB 990, 1000, as a 'question for the court's discretion.' It is possible to regard all questions regarding costs as being subject to the statutory discretion conferred on the court by section 51 of the Supreme Court Act 1981. But I would not have thought that a set-off of damages against damages could properly be described as a discretionary matter, nor that a set-off of costs against damages could be so described.

(5) If and to the extent that a set-off of costs awarded against a legally aided party against costs or damages to which the legally aided party is entitled, cannot be justified as a set-off (i) the liability of the legally aided party to pay the costs awarded against him will be subject to section 17(1) of the Act of 1988 and regulation 124(1) of the Regulations of 1989; and (ii) the section 16(6) charge will apply to the costs or damages to which the legally aided party is entitled."

29. This decision has been applied in practice on many occasions in the last 12 years, and unless there is any significant difference arising from the new statutory regime it would ordinarily be treated as binding on us.

30. It has been suggested, however, that there is another, earlier line of authority in this court which we should prefer. This is to be found in *Anderson v Hills Automobiles (Woodford) Ltd* [1965] 1 WLR 745 which Scott LJ considered in his judgment, and *Re A Debtor* (CAT 9th February 1981; summarised in *The Times* 19th February 1981), which he did not.

31. It was a feature of the argument on the present appeal that various counsel observed that at different stages of the elucidation of the principles that should govern this type of dispute this court had not had the benefit of full citation of authority. In the light of the obvious importance of this appeal to lawyers who are concerned to assist legally aided litigants at a time of great constraints on public funds, and the fact that we heard very full argument for two days from four different parties (including the LSC and the Law Society), we think it necessary to traverse the field again.

Costs and set-off

32. We have already described (in para 14 above) what we were told would be the practical effect of Newman J's costs order. In short, he ordered that the council, being the successful defendant before him, should receive its costs, but that that order should be effected by those costs being "set off" against the costs ordered to be paid by the defendant to the claimant in the proceedings on the delay issue, that set-off being limited to the amount of costs assessed as owed by order of the House. The effect of this will be to reduce by £35,000 the costs which the claimant would otherwise, however notionally, have expected to receive.

33. In normal circumstances this would have been an uncontroversial order. It is contended, however, that everything changes when, as here, the claimant is in receipt of funding from the LSC. The first and main argument advanced on behalf of the claimant, which was supported both by the LSC and by the Law Society, is that it was not open to Newman J as a matter of law to make the order that he did. This, it is important to note, is not an argument about the way in which the judge exercised a discretion, but rather that he had no power to do what he did. The reason for this, we were told, was because the costs ordered to be paid by the defendant in the House of Lords "belonged" not to the claimant herself, but to the LSC. They could not, therefore, be set off against the costs ordered to be paid by the claimant to the defendant by Newman J because there was no mutuality between the two debts. There were other arguments, as to policy and as to discretion, but this first, apparently short, point was seen as a decisive one.

34. Although we have said that these arguments were advanced on behalf of the claimant, in truth Mrs Burkett herself has no interest whatsoever in this appeal. As we have observed, she is not required to pay anything in any event, and there is no question of any charge being imposed on any property she may own. The actual beneficiaries of the order of the House of Lords who may be affected financially by Newman J's order are her lawyers. It is to assert and protect the interests of those lawyers, and others like them in future cases, that this appeal has in reality been brought. The LSC itself is not affected financially by what has taken place. It follows that we heard argument in turn from counsel instructed by Mrs Burkett, by the LSC and by the Law Society (but not the Bar Council), all of whom were concerned to advance the financial interests of the lawyers who appeared for Mrs Burkett on the delay issue (and, of course, so far as the two

intervening parties are concerned, the interests of lawyers generally in relation to situations of the present type). We mention without comment the fact that the claimant's solicitors do not appear to have appreciated that the LSC would not be affected by the result of this appeal until shortly before the hearing took place.

35. Newman J was well aware of the point that is now being raised, which was the subject of argument before him. He considered that not only was he bound by the decision in *Lockley*, but that that decision was plainly right. In that case Scott LJ had defined the issue the court had to decide in these terms (at p 494B):

"The issue in this appeal is whether, in a case where one party is legally aided, an order for costs in favour of the other party can direct that those costs be set-off against either damages or costs to which the legally aided party has become, or may in future become, entitled in the action."

36. As we have seen, this court answered that question in the affirmative. It is necessarily agreed that we are bound by the *ratio* of this decision unless, as is sought to be done in this appeal, it can be displaced as having been reached *per incuriam*. It is clear that we must look again at the jurisprudence affecting issues of costs and set-off. We shall address the following questions:

- (i) What is the nature of the court's jurisdiction as to costs?
- (ii) Is "set-off" when ordered between two amounts of costs subject to the same rules as a set-off relied on as a defence to a substantive claim?
- (iii) In the present case, was the set-off ordered by Newman J not open to him because of either (a) the rules as to community funding; or (b) lack of mutuality between the two amounts that were to be set off against each other?
- (iv) As to mutuality, was the relevant beneficiary of the costs order in the House of Lords the LSC rather than Mrs Burkett?
- (v) If the answers to these questions support the decision of this court in *Lockley*, does earlier authority nonetheless prevent our following that decision?

The nature of the court's jurisdiction as to costs

37. We have already observed (see para 28(4) above) that in *Lockley* Scott LJ, while discussing at some length the general equitable rules as to set-off, also said (at p 497A):

"It is possible to regard all questions regarding costs as being subject to the statutory discretion conferred on the court by section 51 of the Supreme Court Act 1981. But I would not have thought that a set-off of damages against damages could properly be described as a discretionary matter, nor that a set-off of costs against damages could be so described."

38. On this appeal we are concerned with a set-off of costs against costs within the same proceedings. Section 51 places all such matters, subject to other enactments and rules, in the discretion of the court. Those who are concerned to learn more about the historical origins of what is now section 51 would do well to study not only the leading judgments in this court in *Edwards v Hope* (1885) 14 QBD 922 and *Reid v Cupper* [1915] 2 KB 147, but also these further judgments which flesh out the story: *Barker v Hemming* (1880) 5 QBD 609; *Blakey v Latham* (1889) 41 Ch D 518; *Goodfellow v Gray* [1899] 2 QB 498; *David v Rees* [1904] 2 KB 435; *Puddephatt v Leith (No 2)* [1916] 2 Ch 168; *Knight v Knight* [1925] Ch 835; *In re A Debtor* [1951] Ch 162; and, finally, *Izzo v Philip Ross*, Neuberger J (unreported, 31 July 2001).
39. What these cases show is that in the early nineteenth century the three common law courts followed different practices in exercising what Buckley LJ described in *Reid v Cupper* as "their equitable jurisdiction to do what was fair" when they were considering whether to allow one judgment to be set off against another, so that the party who was ultimately successful could levy execution for the balance. The solicitor whose client was successful in the first action was *prima facie* entitled to a lien over the judgment debt to secure his unpaid costs, and the Court of King's Bench was more solicitous towards the interests of the unpaid solicitor than the Court of Common Pleas. Between 1832 and the time of the jurisdictional reforms of the mid-1870s the court's discretion whether to order a set off was taken away by rule in most cases in favour of the supremacy of the solicitor's lien, but the last of these rules was swept away by Order LXV r 14 of the rules annexed to the Supreme Court (Amendment) Act 1875 which provided that:
- "[A] set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."
40. It is unnecessary for the purposes of this judgment to retrace the process of reasoning which led to this rule being interpreted as meaning that a set-off could be allowed against damages due on a judgment in another action (*Goodfellow v Gray*), but not against a judgment for costs in another action (*David v Rees*). It is sufficient to observe that in *Reid v Cupper* this court held that a judge was entitled to make an order setting off one party's costs in an action against the other party's costs in a different action by reliance not on the language of Order LXV r 14, but on the old discretionary practice of the courts which preceded all the rule changes. The governing principles are best seen delineated in the short judgments

of Bowen LJ in *Edwards v Hope* (at pp 926–7) and Pickford LJ in *Reid v Cupper* (at pp 155–6). In essence, the courts reverted to the old practice of the Court of Common Pleas (which was willing in principle to override the effect of the solicitor's lien) and upheld the approach of Kay J in *Blakey v Latham* when he said (at p 522):

"How can any solicitor possibly have an equity against B to make B pay costs which B is ordered to pay to A when B cannot recover from A the costs which A is ordered to pay B? How can any solicitor have an equity to make B pay instead of setting them off? If this matter were free from authority I should say it is the most extraordinary equity I have ever heard of."

41. All the complications introduced by the language of the 1875 rule have disappeared today when section 51 of the 1981 Act provides quite simply that "subject to the provisions of this or any other enactment and to rules of court" the costs of and incidental to all proceedings in the High Court shall be in the discretion of the court.
42. A set-off as to costs of the kind ordered by Newman J is, therefore, essentially discretionary in nature, a discretion only to be withheld from a judge by specific rules of law. That consideration is reinforced by a comparison of that species of set-off with the rules of set-off as a defence to an action.
43. We do not consider that the fact that the draftsman of the 1999 Act did not include in it any provision similar to section 16(8) of the 1988 Act (see para 23 above) takes the matter any further either way. He may have considered it to be mere surplusage since there was no intention to alter the general rule.

Set-off as a defence to a substantive claim

44. In *Lockley* the court appears also to have been addressed on the basis of the rules as to set-off as a defence, and despite its perception (see para 28(4) above) that the "set off" with which it was concerned was different and discretionary in nature, it reviewed those rules, too: see para 28(3) above. In truth, that step was not necessary, because the set-off ordered by Newman J, and by this court in *Lockley*, and by our predecessors in *Reid v Cupper*, is of a quite different nature from the type of set-off to which the rules of mutuality apply.
45. For her argument as to mutuality the claimant rested upon the exposition in this court in *Hanak v Green* [1958] 2 QB 9. That account, however, was directed at the nature of set-off as a defence to an action following the Judicature Acts. This is quite plain from the whole of Morris LJ's judgment, and not least from Lord Hanworth MR's description of this kind of set-off in *In re a Bankruptcy Notice* [1934] Ch 431, 437 which Morris LJ quoted at pp 15–16. That is why Slade LJ

suggested in *National Westminster Bank v Skelton* [1993] 1 WLR 72 at p 76E–G that such a set–off is merely a sub–species of counterclaim. But it is a special and privileged type of cross–claim, because its effect is to extinguish the original claim and prevent its establishment, rather than merely to provide a sum to be balanced off against the claim once established. That is why the rule in relation to this type of set–off is that it must "impeach" the plaintiff's demand: see the exposition of Lord Denning MR in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] 1 QB 927 at pp 973G–975A.

46. None of this has anything at all to do with a discretionary balance between two sums of costs. First, it is for the judge to decide, in his discretion, what costs order is appropriate. The exercise of striking a fair balance between such payments is quite different from the judge's task in a case of equitable set–off as just discussed, where he has to decide as a matter of law, not of discretion, what claims can be asserted, and then, but only then, decide whether the rules governing equitable set–off permit the one claim to be set–off against the other. Secondly, and illustrative of the point just made, no right to costs arises until the judge decides that the right exists. Since he has discretion in creating the right, so he has discretion in deciding the amount in which, and the form in which, that right should be enforced.
47. In our view, therefore, the objections raised to Newman J's order in terms of lack of mutuality, or the failure of the one set of costs to impeach a claim to the other set of costs, simply beat the air. They are drawn from the jurisprudence of equitable set–off as a defence to action brought. They are irrelevant (except possibly as a guide for the judge to the exercise of his discretion) to the discretionary jurisdiction as to costs.
48. However, we recognise that that view has not been clearly taken in the authorities, not even in *Lockley* despite the court's strong reference to the discretionary nature of its jurisdiction. We must therefore go on and consider whether there are indeed rules of law, or any binding authority, that prevented Newman J from ordering as he did.
49. We deal first, because it is somewhat incidental to the main argument, with a claim that Newman J's order is inconsistent with the costs protection that an assisted party would otherwise have had in losing, as she did, a claim at first instance. We will then deal with the argument that, since the LSC and not Mrs Burkett was the appropriate counter–party to the House of Lords' costs order, there is no mutuality between that order and an order against Mrs Burkett at first instance. We have already indicated that this argument appeals to rules about set–off that are not appropriate to a costs case. We must, however, go further and examine the premise on which the argument is based, namely that the costs ordered in the House of Lords "belong" to the LSC.

Costs protection at first instance

50. This argument rests on section 11 of the Access to Justice Act 1999, which limits the costs payable by an assisted person to those which it is reasonable for him to pay. The short answer to it is that given by Scott LJ in *Lockley* at p 495; by Robert Walker LJ in *Hicks v Russell Jones & Walker* (CAT 27th October 2000) at para 11; and by Lightman J in *Hill v Bailey* [2004] 1 All ER 1210: a set-off does not place the person against whom it is asserted under any obligation to pay, but merely reduces the amount that he can recover. We do not agree that this approach is artificial, or contrary to the spirit of costs protection. The latter is not an absolute right, but something carefully moderated by specific statutory provisions to which the judges in the cases just cited made careful reference. If there is any artificiality, it is for this principle to be introduced into a case where it is not the assisted party but her lawyers who are seeking to resist the set-off.

The counterparty to the House of Lords costs order

51. If, however, we assume for one moment that the rules as expounded in *Hanak v Green* do apply to this case, they can still only operate to make Newman J's order wrong in law if there was no "mutuality" between the two costs orders. In this case this lack of mutuality is said to exist because of the interest of the LSC (as opposed to Mrs Burkett) in the House of Lords costs order.
52. Counsel for the LSC argued that ever since legal aid was first introduced in 1949 the legislature has consistently recognised that the beneficiary of any order for costs made in assisted proceedings was the LSC or its predecessors, and not the assisted person. He showed us three provisions that were said to bear out this proposition, which have been in broadly consistent terms throughout the life of the schemes for public assistance. It is only necessary to quote the current versions. They are all taken from the Community Legal Service (Costs) Regulations 2000 ("the 2000 Regulations"):
- (i) "All money payable to or recovered by a client in connection with a dispute by way of damages, costs or otherwise shall be paid to the client's solicitor" (reg 18)
 - (ii) "The solicitor shall pay all money so received by him to the [LSC]" (reg 20(1)(b))
 - (iii) "Where, in relation to any dispute to which a client is a party there is a client's costs order or client's costs agreement the [LSC] may take any steps, including proceedings in its own name, as may be necessary to enforce or give effect to that order or agreement" (reg 23(1)(b))

53. These provisions were said to demonstrate that the order was in favour of the LSC; that the LSC was the counterparty to it; that the defendant owed the costs only to the LSC; and thus that this order could not be set off against a liability of Mrs Burkett to the LSC. They demonstrate no such thing.
54. First, on their very face the provisions emphasise that the costs are recovered by the client and that the costs order is made in favour of the client. This reflects the long-standing principle that, however litigation is funded, the party, not her funder, remains in control of the action, and is to be treated by the court no differently from a non-funded party: see the specific provision in section 22(4) of the Access to Justice Act 1999 (re-enacting section 31 of the 1988 Act) to this effect:
- "22(4) Except as expressly provided by regulations, any rights conferred by or by virtue of this Part on an individual for whom services are funded by the Commission as part of the Community Legal Service or Criminal Defence Service in relation to any proceedings shall not affect -
- (a) the rights or liabilities of any parties to the proceedings, or
- (b) the principles on which the discretion of any court or tribunal is normally exercised."
55. Secondly, Parliament has, no doubt prudently, provided that there should be special arrangements for the management of orders made in favour of assisted persons, as regulation 18 (see para 52(i) above) shows in respect of all monies payable to the assisted person: not only payments of costs but also payments of damages. But nobody has ever suggested that because of this provision damages also "belong" to the LSC. If this were indeed the case there would be no need for the statutory charge. And the fact that a funder has made provision with his principal as to the disposition of that principal's recovery cannot affect the nature of the relationship between the principal and the other party to the litigation in which the principal takes part, even where those arrangements are created by the statutory rules governing public funding rather than by private treaty.
56. The premise of this argument is therefore simply not made out. There are, however, other very serious objections to it. First, it is highly artificial, and inconsistent with the usual understanding of the conduct and result of litigation. As Scott LJ said in *Lockley* at p 497:
- "A set-off of costs against costs, where all are incurred in the prosecution and defence of the same action, seems so natural and equitable as not to need any special justification".

57. Secondly, although we heard no argument on this point, it is not even clear that, were the LSC to be regarded as the counterparty to the House of Lords order, this would in any event be regarded as a cause of lack of mutuality under the rules as understood in *Hanak v Green* .

58. It is of course the case that A, when sued by B, cannot set-off against B a debt or liability owed to A by C, however close in fact, as opposed to in law, the relationship between the three parties may be. But shortly after the Judicature Acts an exception to that rule was recognised in cases where the debt asserted had been acquired by assignment and there was sought to be set-off against it rights obtained from the assignor by his opposite party. This chapter of the law is set out in detail in the judgment of Buxton LJ in *Muscat v Smith* [2003] EWCA Civ 962 at [34] - [49].

59. It is not necessary to go into this matter any further here because the present point is not dispositive of the appeal. However, we do feel bound to say that, while the position of the LSC, if indeed it can assert a right of its own to the costs order, is not exactly like that of an assignee, it is very close to it; and we doubt if the leading Victorian judges who decided the assignment cases would have had much patience with the technical argument advanced in our case, even if they could have been persuaded, which we certainly are not, that the House of Lords costs order was made in favour of, and "owned" by, the LSC.

60. We should add, for the sake of completeness, that because of the view we have taken as to the irrelevance of these provisions, we do not consider that the authority of *Lockley* is shaken by Scott LJ's mistaken belief that the regulations at that time did not contain any provision equivalent to regulation 17(1) of the Legal Aid (General) Regulations 1962 ("the 1962 Regulations") – in fact it was reproduced by regulation 87 of the 1989 Regulations, which was in turn succeeded by regulation 18 of the 2000 Regulations, for which see para 49(i) above – nor by the fact that his attention was not drawn to regulation 91(b) of the 1989 Regulations, which was the predecessor of regulation 23(1) of the 2000 Regulations (for a material part of which see para 52(iii) above).

Authority

61. The considerations so far set out make it possible to deal comparatively rapidly with the two cases in this court that are said to be inconsistent with *Lockley* , by which, it is said, we are bound.

62. In *Anderson v Hills Automobiles (Woodford) Ltd* [1965] 1 WLR 745 the unassisted party had a costs order made against it, and paid the sum in question into court. The assisted party, being dissatisfied with the judgment in his favour, appealed unsuccessfully to this court and then sought to appeal to the House of Lords. On both occasions costs were awarded against him. The unassisted party then sought to take out of court the sum paid in, in part satisfaction of the costs

award made in its favour. It was met by the specific provisions of regulation 17(1) of the Legal Aid (General) Regulations 1962 and Order 11 r 10(2) of the County Court Rules, both of which provided that money in court for the benefit of an assisted person could only be paid out to his solicitor. This court applied those rules in their literal terms. It did not go wider than that. It did not consider the relative position of the assisted party and the funding party in general terms. And it was not addressing a case such as ours, where the judge is deciding what costs order to make in the first place.

63. We do not think that the case assists us. We note in passing that if and in so far as Lord Upjohn disapproved in the course of his judgment of the approach adopted by Cross J in *Carr v Boxall* [1960] 1 WLR 457, the editors of the leading contemporary text-book on *Legal Aid and Advice* and *the Supreme Court Practice* both stated that this decision must be treated as having been given *per incuriam* because the court's attention did not appear to have been drawn to section 3(6) of the Legal Aid Act 1949 which was a lineal predecessor to section 16(8) of the 1988 Act (for which see para 23 above).

64. In *Re A Debtor* (CAT 9th February 1981) the issue was between the husband of an assisted party and the Law Society. The husband had been the opposite party in assisted proceedings brought by his wife, in which he was ordered to pay a sum of costs. He did not pay, and acting under powers as set out in para 52(iii) above the Law Society brought proceedings against him for their recovery. He sought to set-off against that claim a debt allegedly owed to him by his wife. This court, speaking through Templeman LJ, referred to the machinery for the collection and administration of a costs order in favour of an assisted person, as set out in para 49 above, and then said (at p 4D of the transcript) that:

"[T]his means that the assisted person never obtains the slightest entitlement as beneficiary to a single penny payable by virtue of an order in his favour for costs. Any order for costs is only made in the name of the assisted person for the purposes of identification and taxation. No set-off can arise because the money never belongs to the assisted person; it belongs to the Legal Aid Fund."

65. We agree that these observations, read without reference to their context, are helpful to the appellant in this case. Nevertheless it has to be remembered that the contest was between the Law Society, as guardians of the legal aid fund, and a person who was seeking to resist payment of an amount in which that fund had a direct interest.

66. It was understandable that, in those circumstances, the court should emphasise, admittedly in very general terms, that the interest was indeed that of the fund rather than of the assisted party. But the court, addressing as it did the enforcement stage, came nowhere near to considering the issue that arises on the present appeal, which relates to the exercise of the court's discretion in deciding what costs order should be made in the first place. Nor is there any indication

that the court was addressed on the nature of set-off, as discussed earlier in this judgment. Again, we do not consider that this case coerces us in a direction different from that taken in *Lockley*, or that the fact that this case was not cited to the court in *Lockley* diminishes the authority of that decision.

67. Both Mr Bacon, who appeared for the claimant, and Mr Cooksley QC, who appeared for the Law Society, gave us examples of the way in which the *Lockley* approach to set-off might operate harshly and in a manner contrary to the financial interests of the lawyers who acted for a client in receipt of LSC funding. For example, in a case like 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.
68. We do not see how considerations like this can affect our interpretation of the Act and the regulations. If Parliament had wished to insert into the legal aid scheme an overriding lawyers' lien of the type imposed by rule in the middle of the nineteenth century (see para 39 above) it could have done so at any time during the last 50 years, but it has chosen not to do so. The problem appears to us to arise from the fact that perhaps uniquely among those who are remunerated out of public funds the remuneration of lawyers who act for LSC funded litigants has been frozen since April 1996 (see para 13 above) at a level that was already markedly lower than the market rate. History has shown that distortions in rates of pay on this scale are always likely to work substantial injustice, and this unhappy situation is no exception.
69. Neither Mr Bacon nor Mr Cooksley were able to show us any good reason why the London Borough of Hammersmith and Fulham should have to pay the claimant's costs in the Court of Appeal and the House of Lords in full, and then have to bear its own costs of its successful resistance of the substantive application without being able to set off one liability against the other in a manner which belies the principles set out in section 22(4) of the 1989 Act. They merely suggested that the council would have to bear with equanimity the fate of any defendant faced at first instance by a LSC funded claimant. This insouciance about the council's financial position as successful litigants does not appear to us to be consonant with justice.
70. It was suggested to us that it might be difficult to determine how solicitors and counsel should determine the extent to which their fees should proportionately be reduced in the light of the set-off that has been allowed. We do not see how this can be a new problem, and if there is any difficulty about it in any particular case which cannot be amicably resolved, this must be a matter for the Bar Council and the Law Society to resolve in discussion with the LSC, and not a matter for this court.
71. We are of course troubled by the submissions we received to the effect that a judgment along the present lines may deter those solicitors and members of the

Bar who would otherwise be willing to act for LSC funded clients. There can be no doubt that the present scarcity of public funding for such clients is inimical to the future potential of what used to be known as the legal aid scheme, but issues relating to public funding are for others to take: our task is to interpret the present statutory scheme as we find it. Our observations on the impact of this judgment on practitioners in the field of environmental law may be found in an addendum to this judgment (see paras 74–80 below).

72. Given that we are satisfied that the judge possessed the discretionary powers he asserted, we can see no grounds for interfering with the way in which he exercised his discretion.

73. This appeal is therefore dismissed.

ADDENDUM

74. We cannot leave this appeal without commenting on the effect that the current policies for LSC-funded civil litigation are likely to have in the field of environmental law. The 1998 Aarhus Convention, to which this country is a party, contains provisions on access to justice in environmental matters. (The full title is the "UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters"). In particular, it requires each signatory to have in place judicial procedures allowing members of the public to challenge acts of public authorities which contravene laws relating to the environment; and that those procedures should be "fair, equitable, timely and not prohibitively expensive" (para 4).

75. A recent study of the environmental justice system ("Environmental Justice: a report by the Environmental Justice Project", sponsored by the Environmental Law Foundation and others) recorded the concern of many respondents that the current costs regime "precludes compliance with the Aarhus Convention". It also reported, in the context of public civil law, the view of practitioners that the very limited profit yielded by environmental cases has led to little interest in the subject by lawyers "save for a few concerned and interested individuals". It made a number of recommendations, including changes to the costs rules, and the formation of a new environmental court or tribunal.

76. We would be troubled if the effect of our ruling on this appeal were left uncorrected by other means, because of the importance of maintaining the viability of the few legal practices which operate in the field of publicly funded environmental litigation. On the other hand, if the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions would be raised as to the possibility of ever living up to the Aarhus ideals within our present legal system. And if these costs were upheld on detailed assessment, the outcome would cast serious

doubts on the cost-effectiveness of the courts as a means of resolving environmental disputes.

77. Equally disturbing, perhaps, is the fact that this large expenditure on Mrs Burkett's behalf has not, as far as we know, yielded any practical benefit to her or her neighbours. It has been of great interest to lawyers in other respects; it has resolved difficult issues about jurisdiction and time limits in judicial review, and (now) issues about set-off in relation to costs within the domain of the LSC. However, as we understand it, the four years since the proceedings began have seen the development substantially completed in accordance with the original permission. We have not been told whether Mrs Burkett sought or obtained any mitigation of the environmental impact of the works, which led to her original concerns.

78. When granting permission (with Park J) for appeal to this court from the substantive decision of Newman J (principally on a legal issue relating to environmental assessment), Carnwath LJ referred to the recent judgment of the European Court in Case C-201/2 *Wells v Secretary of State*. This had been relied on by Mr McCracken QC for Mrs Burkett as raising the possibility of some form of retrospective remedy. He commented:

"In the present case, I understand, development has begun. Park J queried what exactly Mrs Burkett is now expecting by way of remedy. The European Court certainly envisages a possibility of the permission being quashed and compensation being given to the developer, but I do not realistically think Mrs Burkett expects that. However, that is an important aspect to be considered, because there is a great danger in these cases of losing sight of the fact that the remedy is being sought on behalf of a specific person× "

Following the withdrawal of the substantive appeal, we have not been given any more information on this issue. Nor have we had to consider what practical relief Mrs Burkett could realistically have expected to obtain - now, or indeed at any previous stage of these protracted proceedings.

79. These considerations do not directly affect the issue before us, which must be decided by reference to the legal principles set out in our judgment. We mention them only because of the weight placed by Mrs Burkett's representatives, and by the Law Society, on the potential economic effects of our decision on lawyers engaged in publicly funded work, given the way in which prescribed rates of pay have been frozen at a very low level for so many years. We share these concerns (which are not of course confined to environmental law).

80. We would strongly welcome a broader study of this difficult issue, with the support of the relevant government departments, the professions and the Legal Services Commission. However, it is important that such a study should be

conducted in the real world, and should look at the issue not only from the point of view of the lawyers involved, but also taking account of the likely practical benefits to their clients and the public. It may be thought desirable to include in such a study certain issues that relate to a quite different contemporary concern (which did not arise on the present appeal), namely that an unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm.

ORDER: Appeal dismissed; Appellant to Respondents cost of appeal if not agreed. Application for permission to appeal to House of Lords refused. Further orders as per agreed minute of order

(Order does not form part of approved judgment)