



Neutral Citation Number: [2014] EWCA Civ 225

Case No: A3/2013/2130

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
VOS J
HC13E00089

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7th March 2014

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE PATTEN
and
LORD JUSTICE CHRISTOPHER CLARKE

Between :

THE QUEEN ON THE APPLICATION OF
SPECIALITY PRODUCE LIMITED **Appellant**
- and -
THE SECRETARY OF STATE FOR ENVIRONMENT,
FOOD AND RURAL AFFAIRS **Respondent**

Aidan Robertson QC (instructed by Taylor Vinters Solicitors) for the Appellant
George Peretz (instructed by The Treasury Solicitor) for the Respondent

Hearing date : 27 February 2014

Approved Judgment

Lord Justice Patten :

1. This is an appeal by Speciality Produce Limited (‘SPL’) against the refusal by Vos J to order the Secretary of State for Environment, Food and Rural Affairs to pay the costs of judicial review proceedings which SPL brought to challenge a decision of the Rural Payments Agency (‘RPA’) to withdraw SPL’s recognition as a Producer Organisation (‘PO’) under the Common Agricultural Policy Fruit and Vegetables Aid Scheme. The application for judicial review was due to be heard on 13 November 2012 but was discontinued by consent after the Secretary of State wrote to SPL on 7 November 2012 informing the company that its internal statutory appeal against the decision under review had been successful and that the decision to withdraw recognition would be set aside. In these circumstances both sides correctly recognised that a judge of the Administrative Court would be unwilling to embark upon an application which had become academic. But they remained in disagreement about the appropriate order for costs. SPL said that it had obtained by consent the primary relief sought in the claim for judicial review and should have its costs. The Secretary of State contended that the grounds upon which SPL had been given leave by Mitting J to seek judicial review were quite distinct from the grounds of the statutory appeal on which they had succeeded and that there should be no order for costs in respect of the judicial review proceedings.
2. Vos J ([2013] EWHC 2196 (Ch)) accepted the arguments of the Secretary of State and made no order for costs.
3. In order to put the arguments in context, it is necessary to begin with a relatively brief summary of the decision under review and the background to the claim for judicial review. A PO is an entity through which a number of growers (in this case fruit and vegetable producers) market their produce. Financial support for their operations is provided by the European Union (‘EU’) through the Common Agricultural Policy. Loss of recognition as a PO therefore has serious financial consequences for its grower members. SPL says that its loss of EU funding caused by the withdrawal of recognition amounted to between £1.3m and £1.8m per annum.
4. The criteria for recognition as a PO are set out in a number of EU Regulations which also provide for recognition to be suspended or withdrawn in certain circumstances. In this particular case, SPL’s loss of recognition was concerned with its use of intermediaries to market its products to multiple retailers such as large supermarkets. The outsourcing of marketing functions is permitted but under Article 29 of Regulation 1580/2007 the PO is required to remain *‘responsible for ensuring the carrying out of that activity, and overall management control and supervision of commercial arrangements for the provision of the activity’*.
5. SPL was said not to have retained overall management control and supervision of one marketing agent (S&A Produce (UK) Ltd) which marketed soft fruits to supermarkets. The concerns arose because S&A Produce (UK) Ltd is a sister company of two companies which are members of SPL. The precise detail of the dispute does not matter for the purposes of this appeal.
6. Under the Common Agricultural Policy Non-IACS Support Schemes (Appeals) (England) Regulations 2004/590 there is a right of appeal against the refusal or withdrawal of recognition as a PO. This is a two-stage appeal process. At stage 1 the

appeal is considered by the RPA Customer Relations Unit which prepares a case summary and decides within 60 days whether or not to uphold the appeal. A PO which is dissatisfied with the outcome can then bring a stage 2 appeal which leads to a further internal review and (if unsuccessful) to an Appeal Panel comprised of three independent members with knowledge of the agricultural sector who are appointed in accordance with the Code of Practice on Public Appointments. They are not legally qualified. The Panel then advises the Secretary of State within 60 days of the receipt of the appeal whether or not to allow the appeal and he must then decide whether to accept the Panel's recommendation. The Secretary of State then advises the appellant accordingly. There are no costs awarded under the statutory appeals procedure.

7. SPL was first recognised as a PO in 1998. In 2006 its recognition was withdrawn due to concerns over its marketing arrangements. After organisational changes, it re-applied for recognition in 2007 which was refused. It then appealed under the statutory procedure. There were very considerable delays in the appeal process both before and after the hearing before the Appeal Panel. The whole process took over 19 months. The Appeal Panel recommended that the appeal be allowed but six months later the Secretary of State disagreed and informed SPL that its appeal was unsuccessful.
8. SPL then sought to judicially review the decision not to restore its recognition as a PO. The hearing took place in May 2009. By then the Secretary of State had accepted most of the grounds relied on by SPL with the exception of an argument based on EU law about abuse. The judge rejected this argument ([2009] EWHC 1245 (Admin)) and the Secretary of State then agreed to re-instate SPL as a PO with effect from 1 January 2007.
9. Later in 2009 there was a general review of all POs following the decision of the European Court of First Instance in Case T-432/08 *France v Commission* which was handed down on 30 September 2009. This led to protracted correspondence between DEFRA and SPL. On 11 April 2011 the RPA informed SPL that its recognition as a PO was to be removed with effect from 1 January 2007. Once again the principal issue seems to have related to the use of S&A Produce (UK) Ltd as a marketing agent. In a letter of 16 February 2011 the RPA had said:

In relation to SPL, our primary concerns relate to the route to market taken by products marketed via individual member owned marketing agents. It would appear in these cases that although product moves through the PO's marketing desk it is in reality simply 'sold' back to the member for onward marketing to the final consumer. Our main concerns at this time are the relationship between S&A Group Holdings Ltd, S&A Produce (UK) Ltd, S&A Soft Fruits Ltd and Moneypeak Ltd and the route to market taken by all produce marketed via the PO. In essence we need to establish whether the PO is marketing its members' produce in a meaningful sense or if the PO is an additional step in the chain.
10. In October 2011 SPL issued the proceedings for judicial review which have given rise to this appeal. It sought an order quashing the April 2011 decision to withdraw recognition from 1 January 2007 or alternatively from 5 June 2009. This was because

the RPA had confirmed in August 2011 that it would not be seeking to recover funds paid to SPL in respect of the period before judgment in the first claim for judicial review which was handed down on 5 June 2009.

11. In its statement of grounds SPL set out two grounds of challenge to the 2011 decision to remove recognition. The first was that the grounds relied on for the decision (relating to the same marketing agent) either were or could have been dealt with in the previous appeal and judicial review proceedings. It was an abuse of process as well as being unlawful, irrational and procedurally unfair for the RPA to rely upon them as the basis of the 2011 decision. The second and alternative ground was that in withdrawing SPL's recognition as a PO, the RPA had made various material errors of fact and law in relation to its assessment of SPL's use of S&A Produce (UK) Ltd as a marketing agent.
12. The Secretary of State served Summary Grounds of Resistance to the application on 1 November 2011 in which he took the point that SPL should be required to use the statutory appeal procedure before bringing any claim for judicial review. On 7 February 2012, after considering the application for leave on the papers, Mitting J granted permission on ground 1 but refused it on ground 2. He wrote:
 1. Ground 1 raises the difficult question of the circumstances, if any, in which a public authority may be barred from relying on grounds upon which it could have relied and/or which it abandoned in an earlier judicial review about the same matter. On the facts (which can be established without the need for oral evidence), this ground is clearly arguable. It cannot be determined by the CAP support schemes appeal procedure. Even if it could be, a panel of laymen is not qualified to determine it.
 2. The matters relied on in support of ground 1 could give rise to a substantive legitimate expectation challenge. If that has been considered and rejected by the claimant's advisers, well and good. If not, ground 1 should be amended so as to put that ground of challenge expressly in issue.
 3. As the summary grounds of defence make clear, there is no live issue of law between the parties on ground 2. The only issues are factual. They are best disposed of by the appeals procedure. There is no reason why that informal process should not take place concurrently with this claim.
13. SPL amended its grounds to include breach of legitimate expectation. The legitimate expectation ground was based on representations made to SPL in the context of the earlier judicial review proceedings as to the manner in which it could legitimately operate through intermediaries. On 14 March 2012 SPL also lodged its stage 1 appeal against the RPA's withdrawal of recognition. As part of its submissions on the stage 1 appeal, it set out an analysis of and relied on a decision of the Scottish Land Court in *Angus Growers v Scottish Ministers* [2012] EuLR 539 which was handed down on 14 February 2012, a week after Mitting J had considered SPL's application for leave. This case concerned the meaning of the requirement that a PO should retain *overall*

management control and supervision of outsourced activities and was obviously of relevance to the grounds upon which recognition had been withdrawn from SPL.

14. The stage 1 appeal was rejected on 20 July 2012 on the ground that SPL did not on the evidence retain sufficient control over the marketing of produce by S&A Produce (UK) Ltd. The decision letter contained no specific reference to the decision in *Angus Growers*. SPL lodged its stage 2 appeal on 17 September 2012 by which time the hearing date for the claim for judicial review had been fixed for 13 and 14 November in accordance with a direction for expedition. The stage 2 appeal took place by agreement very promptly on 18 and 19 October 2012. This was an oral hearing at which SPL was represented by counsel and a number of witnesses were called. Mr Peretz was present to assist the RPA as counsel to the appeal and both he and Mr Robertson QC addressed the Appeal Panel on the significance of the *Angus Growers* decision. We are told that Mr Peretz accepted that in the light of the decision a number of the reasons relied on by the RPA for its decision were no longer sustainable but said that because an appeal was pending against the decision to the Inner House he would advise the Secretary of State that no decision should be made on SPL's appeal until judgment in the appeal in *Angus Growers* had been handed down.
15. The Appeal Panel recommended to the Secretary of State that SPL's appeal should be allowed. On 7 November the RPA wrote to SPL stating that the Secretary of State had decided to accept its recommendation. On the same day SPL received a letter from the Treasury Solicitor seeking agreement that the judicial review application should be withdrawn and the hearing fixed for 13 November vacated. An order was then made to that effect by consent but no agreement could be reached about the costs of the judicial review application which by then were very substantial. The total bill for SPL's costs is £215,000 and it seeks an interim payment on account of costs of £150,000.
16. Mr Robertson QC for SPL submitted to Vos J, and now submits to us, that it was reasonable for SPL to have pursued its application for judicial review alongside its statutory appeal. It had experienced very serious delays in the earlier statutory appeal and could not risk the additional delay which the postponement of the claim for judicial review would involve. The setting aside of the decision to withdraw recognition was imperative if it was to survive commercially. The absence of EU funding had caused some of its grower members to switch to other POs and if the delay continued it was likely to cease to be viable. It therefore decided to rely on both the statutory appeal and the judicial review in order to give itself the maximum chance of overturning the decision. Mitting J had given permission for the abuse of process point to be taken in the judicial review claim and directions for an expedited hearing were subsequently made without opposition from the Secretary of State. The end result of the process was that SPL obtained the quashing of the RPA decision because the Minister agreed to withdraw the decision under challenge. In these circumstances the fact that the decision was withdrawn following the successful outcome of the statutory appeal is not, Mr Robertson says, a good reason for denying SPL the costs of the claim for judicial review. What matters is that the relief sought by way of judicial review was obtained.
17. In terms of judicial guidance about the principles to be applied when relief is conceded in judicial review proceedings without a hearing, Mr Robertson referred us

to the decision of this court in *R (M) v Croydon London Borough Council* [2012] EWCA 595; [2012] 1 WLR 2607. The case concerned a claim for asylum by a boy whose age was wrongly assessed by the local authority. Eventually the local authority conceded that its assessment was wrong and settled a claim for judicial review on that basis leaving the court to determine the incidence of costs.

18. Having set out the general rule under CPR 44.3(2) that *“the unsuccessful party will be ordered to pay the costs of the successful party”* but that *“the court may make a different order”* by reference to the circumstances of the case including the conduct of the parties, Lord Neuberger of Abbotsbury MR said:

“51. In many cases which are settled on terms which do not accord with the relief which the claimant has sought, the court will normally be unable to decide who has won, and therefore will not make any order for costs. However, in some cases, the court may be able to form a tolerably clear view without much effort. In a number of such cases, the court may well be assisted by considering whether it is reasonably clear from the available material whether one party would have won if the case had proceeded to trial. If, for instance, it is clear that the claimant would have won, that would lend considerable support to his argument that the terms of settlement represent success such that he should be awarded his costs. An example of such a case is *Brawley v Marczinski*, [2002] EWCA Civ 756, [2003] 1 WLR 813 where the court could determine, without too much effort, who would have won, and then took that into account when awarding costs.

The position where cases settle in the Administrative Court

52. The question which then arises is whether the principles discussed in the preceding section of this judgment should apply in the Administrative Court, just as much as to other parts of the civil justice system: in particular, where the defendants accept that the claimant is entitled to all, or substantially all, the relief which he claims, should the defendants pay his costs, unless they can show good reason to the contrary? At least on the face of it, the fact that a claim is a public law claim should make no difference. Such claims are subject to the CPR, and a successful claimant who has brought such a claim is just as much entitled to his costs as he would be if it had been a private law claim. The court's duty to protect individuals from being wronged by the state, whether national or local government, is every bit as vital as its duty to enable them to vindicate their private law rights. And the fact that the defendants are public bodies should make no difference, as Pill LJ explained in *Bahta* at para 60. However, a number of points could be raised as to why defendants who concede claims in the Administrative Court should be less at risk on costs than those who concede in ordinary civil actions.

í ..

58. Accordingly, I conclude that the position should be no different for litigation in the Administrative Court from what it is in general civil litigation. In that connection, at any rate at first sight, there may appear to be a degree of tension between this conclusion, which applies the 'general rule' in CPR 44.3(2)(a), and the fifth guideline in *Boxall*, at least in a case where the settlement involves the defendants effectively conceding that the claimant is entitled to the relief which he seeks. In such a case, the claimant is almost always the successful party, and should therefore, at least *prima facie*, be entitled to his costs, whereas the fifth guideline seems to suggest that the default position is that there should be no order for costs. Similarly, there could be said to be a degree of tension between what was said in paras 63-5, and the view expressed in para 66, of *Bahta* .

59. In my view, however, on closer analysis, there is no inconsistency in either case, essentially for reasons already discussed. Where, as happened in *Bahta*, a claimant obtains all the relief which he seeks, whether by consent or after a contested hearing, he is undoubtedly the successful party, who is entitled to all his costs, unless there is a good reason to the contrary. However, where the claimant obtains only some of the relief which he is seeking (either by consent or after a contested trial), as in *Boxall* and *Scott*, the position on costs is obviously more nuanced. Thus, as in those two cases, there may be an argument as to which party was more 'successful' (in the light of the relief which was sought and not obtained), or, even if the claimant is accepted to be the successful party, there may be an argument as to whether the importance of the issue, or costs relating to the issue, on which he failed.

60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated,

and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that *Bahta* was decided on this basis.

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in *Scott*. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. *Boxall* appears to have been such case.

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.

19. Mr Robertson says that the effect of the Secretary of State's decision as communicated in the RPA's letter of 7 November 2012 was to grant SPL the relief which it had sought. It has therefore been wholly successful in the sense which Lord Neuberger contemplated in his case (i) example and it should have its costs. It was submitted to the judge by the Secretary of State that SPL had been asked to wait until after the completion of the statutory appeal process before progressing its claim

for judicial review. But Mitting J, he says, gave leave for judicial review on the abuse of process and legitimate expectation arguments and no opposition was subsequently made to the application for expedition. It is also significant, he submits, that the Secretary of State did not wait for the outcome of the appeal in the *Angus Growers* case before deciding to allow the statutory appeal. The decision of the Inner House dismissing the appeal of the Secretary of State was handed down on 7 December 2012. This, says Mr Robertson, is a strong indication that the Secretary of State took a pessimistic view both of the prospects of success on the *Angus Growers* appeal and on the forthcoming judicial review.

20. Mr Peretz for the Secretary of State contends that SPL should have exhausted the statutory appeal procedure before progressing the claim for judicial review. The judicial review proceedings eventually became moot because SPL had succeeded on the grounds relied on in the statutory appeal. To the extent that these were based on the RPA having relied on an erroneous construction of the regulation, they were supported by the Land Court's decision in *Angus Growers* which remained good law throughout the appeal process and was subsequently affirmed on appeal. The issues relied on in the judicial review proceedings were quite separate, self-contained points of law on which there has been no judicial determination and which the Secretary of State intended to contest.
21. Mr Peretz submitted to the judge that had SPL waited as initially requested until after the conclusion of the statutory appeal, the costs of the application for judicial review would have been avoided. It was no answer to that point to rely on the fact that permission was given by Mitting J or that the Secretary of State agreed to expedition. The grant of permission did not require SPL to press ahead. A stay could have been agreed. It was SPL's choice to pursue both sets of proceedings simultaneously and they had good commercial reasons for doing so. In these circumstances, the Secretary of State felt unable to oppose the application. But his consent was not to be treated either as approval of the course on which SPL embarked or of any acceptance that he should be liable for the costs involved. SPL took the risk that, depending on which set of proceedings was heard first, the other might prove to have been unnecessary.
22. Vos J said that it was important to remember that SPL had taken whatever steps were available to it in order to obtain the quickest means of setting aside the decision of the RPA. But he said:

36. What effectively has happened here is that SPL has backed two perfectly proper horses. The first horse was the abuse of process claim in the judicial review proceedings, and the second horse was the statutory appeals process. Both were properly brought. SPL was entitled to make both claims and to pursue both claims in parallel, as Mitting J held.

37. The question is whether, if one horse finishes first and entitles the applicant to the relief that it would have obtained had the other horse finished first, the applicant can seek the costs of both sets of proceedings. This is not a situation that is presaged in Lord Neuberger's judgment in *R(M) v Croydon London Borough Council*. This is a slightly unusual situation, and neither counsel has been able to find any authority which

bears directly on it. But it may be quite common in judicial review situations for there to be two parallel processes leading to the identical relief.

38. In my judgment, the argument advanced by Mr Robertson that, simply because he obtained the identical relief from the statutory appeals procedure, he is entitled to his costs of a judicial review claim in respect of a quite different argument about abuse of process is wrong. The question of whether SPL is entitled to its costs of the judicial review process is to be determined by the principles set out in Part 44.3 and in *R(M) v Croydon London Borough Council*.

39. In this case, unless it is possible for the court to say that SPL would have won its abuse of process ground without wasting undue judicial time, the normal default order, as Lord Neuberger makes clear, is no order as to costs. Nor does it benefit Mr Robertson to be able to say that the Secretary of State has effectively brought about the unfortunate position in which SPL is deprived of its costs. In my judgment, no criticism can properly be levelled at the Secretary of State for taking the step she took in deciding the statutory appeal quickly so as effectively to pre-empt the abuse of process decision. It may be that she did so because she thought that her chances of succeeding on the abuse of process argument were less than certain. But that, in my judgment, does not matter. What matters is whether or not I can say that SPL would have succeeded in its abuse of process claim. That is something I cannot say on the evidence before me, as is common ground between the parties.

40. In these circumstances, though SPL can quite reasonably think that they have been deprived of the opportunity to argue their points, which they might well have won, it does not seem to me appropriate that they should be awarded their costs. They took a belt-and-braces approach to the litigation. They obviously regarded it as extremely important that they obtained the relief they wanted, by whichever route, as quickly as possible. For that they had to hazard some costs, as they said in another context they were prepared to do. Unfortunately for them (to mix my metaphors), the horse that they backed, which did not have very good odds, came home first. In those circumstances they cannot, unfortunately, claim the winnings for the horse that never came home because it did not need to.

23. Mr Robertson says that the judge's principal error was to concentrate on the grounds on which the decision under appeal was withdrawn rather than on the end result. SPL obtained the relief it sought in the judicial review proceedings because the Minister withdrew the decision under challenge. The effect of the judge's decision has been to leave SPL in an impossible position. It could not have the merits of its application for judicial review decided without a full hearing. But it was unable to obtain a hearing

because, as both sides agreed, the issue had become academic following the withdrawal of the decision. It has therefore been denied the costs of the application even though it has succeeded in obtaining the relief which it sought.

24. I think that the difficulty with this argument is that it seeks to treat the withdrawal of the decision under challenge as the consequence of the application for judicial review. If that is factually correct then I can see the force of the argument that SPL has thereby succeeded in obtaining the relief it sought notwithstanding the fact that the decision was withdrawn before the judicial review application was heard and in the context of the statutory appeal.
25. But the outcome of the statutory appeal was the recommendation of the Appeal Panel that SPL's recognition as a PO should be restored. Although the Secretary of State accepted that recommendation without waiting for the Inner House to hand down its judgment in the *Angus Growers* appeal, that cannot detract from the fact that the Appeal Panel determined the appeal by reference to SPL's submissions on the facts and the law which, as I understand it, adopted the reasoning of the Scottish Land Court. It is not possible for this Court to treat the Minister's acceptance of the recommendation to allow the appeal as anything other than an endorsement of the decision of the Appeal Panel on the arguments presented to it.
26. We are not able to draw any inferences from the timing about his view of the prospects of success on the claim for judicial review. This raised very different issues as Mitting J recognised when granting permission limited to the two grounds of abuse of process and legitimate expectation. They are directed to the injustice of SPL being prejudiced by claims which either were or should have been dealt with as part of the earlier review and appeal process and to the effect of representations made in the course of those proceedings. They are not concerned with the merits of those arguments as such. The judge was not addressed on the issues raised by the claim for judicial review nor was he asked (or able) to express any view about their prospects of success. All that we know is that the Secretary of State intended, Mr Peretz says, vigorously to oppose them. To what effect we know not and cannot judge.
27. In these circumstances, Vos J was, I think, right to say that the present case does not fit very easily or at all into the three categories of case discussed by Lord Neuberger MR in the passages I have quoted from the decision in *M*. He was concerned with the issue of costs where the proceedings for judicial review were compromised on terms which resulted in the grant of the relief sought or in the grant of partial or some different relief. In each of the examples given the court is being asked to make a determination of whether, for the purposes of CPR 44.3, it can be said that the claimant has been the successful party. This, as the court recognised, involves an assessment of the link between the basis of the claim and the agreed result. The further that one moves from the relatively straightforward category (i) cases the more difficult it becomes to make that link with the degree of assurance necessary to justify an adverse order for costs.
28. The problem discussed in *M* is that on a strict reading of CPR 44.3(2) it might be said that a party cannot be successful in the proceedings unless he obtains judgment for the relief sought in his case following judicial determination of the claim. In such cases the judge will be able to decide whether the success has been complete or only partial and to make an order for costs accordingly. Where the claim is settled on terms that

the relief sought is conceded, the judge is called on to make an assessment of the degree of success without being asked to decide the issues of law or fact that were in dispute. In *BCT Software Solutions Ltd v C Brewer & Sons Ltd*. [2004] FSR 150 Chadwick LJ said:

“In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether - having regard to all the circumstances (including conduct) as CPR 44.3(4) requires - the order for costs should be limited in one or more of the respects set out in CPR 44.3(6). But where there has been no trial - or no judgment - the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. As the arguments on the present appeal demonstrate, it does the parties no service if the judge - in a laudable attempt to assist them to resolve their dispute - makes an order about costs which he is not really in a position to make.”

29. The decision in *M* represents an acceptance that there will be cases where the link between the claim and the agreed relief is so clear that the claimant can properly be treated as the successful party for the purpose of an award of costs. But for that link to be established the court is, I think, usually required to be satisfied that the claimant is likely to have won: see Lord Neuberger at [51] of *M*. In any event, the claim must be causative of the relief obtained.
30. The complication in this case stems from the existence of two concurrent challenges to the RPA decision, each raising and relying upon very different and essentially self-contained grounds. All cases are, as Lord Neuberger emphasised, fact-specific and the judgment in *M* is to be treated as judicial guidance on the exercise of the discretion rather than a re-statement of the rules. In the present case, there are, in my view, insuperable difficulties in awarding SPL its costs of the judicial review proceedings. Even if one puts aside the criticism which Mr Robertson makes about the timing of the progress of the application, it is not possible to treat the Minister's acceptance of the outcome of the statutory appeal as anything more than an acceptance of the appeal decision on the grounds on which it was taken. It is not possible for us to say that the Minister's decision owed anything to the potential force of the claim for judicial review or that the grounds relied on of abuse of process and legitimate expectation would themselves have succeeded had they been tried. We have only an outline knowledge of the issues and we have heard no argument about their prospects of success. The 2011 decision was withdrawn by the Minister at the end of the appeal process. It was not obtained in or by the proceedings for judicial

review as is confirmed by the order in those proceedings which (so far as material) simply withdraws the claim and vacates the hearing date.

31. Mr Robertson's fall-back position is to say that even if the considerations discussed earlier led to the judge's conclusions that there should be no order for costs, there will be exceptional cases (of which this is one) where the circumstances will justify an award of the costs of the proceedings on the basis that their prosecution was justified. This is said to be such a case because SPL was forced by the history of delay in the earlier statutory appeal to progress the application for judicial review where, had it been confident that the statutory appeal could be dealt with expeditiously (as in fact turned out to be the case), it would have agreed to stay the claim for judicial review and so avoid the costs.
32. Although sympathetic with the difficulties which SPL faced, I am not satisfied that this is enough to justify an adverse order against the Secretary of State for the costs of judicial review. It is a long way from any of the examples given in *M* and, as a matter of general principle, I cannot see how the judge in such a case can be criticised for making no order for costs which, to some extent, recognises that there was a justification for pursuing the proceedings to trial even if in the event they turned out to be unnecessary.
33. In these circumstances, the judge was, I think, right to make no order as to costs. It would be wrong in principle for SPL to be awarded the costs of the application simply because the end result of the statutory appeal process was to remove the decision which was also the target of the claim for judicial review. That is not enough to enable it to be treated as the successful party in those proceedings.
34. For those reasons, I would dismiss the appeal.

Lord Justice Christopher Clarke :

35. I agree.

Lord Justice Longmore :

36. I agree also.