

Judgments

QUEEN'S BENCH DIVISION

Community legal service funding; Unassisted person's costs out of community legal service fund; Jurisdiction; Publicly funded third party seeking orders in ancillary relief proceedings for transfer to her of property legally owned by applicant non-funded interveners; Judge dismissing entirety of third party's claims; Interveners successfully seeking costs orders against respondent Legal Services Commission (LSC); LSC challenging master's decision to award costs to interveners; Whether master applying correct test in respect of 'financial hardship'; Whether master erring in failing to consider awarding lesser amount; Whether just and equitable to make order; Community Legal Service (Cost Protection) Regulations 2000,

Case No: FD04D0365

Neutral Citation Number: [2011] EWHC 899 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE

Master Simons, Costs Judge, 28 June 2010

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 08/04/2011

Before:

THE HONOURABLE MRS JUSTICE SHARP

Sitting with Assessors

Master Gordon-Saker

Greg Cox

Between:
The Legal Services Commission
- and -
F, A & V

Appellant
Respondents

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

Robert Marven (instructed by **Legal & Governance Team, Legal Service Commission**) for the **Appellant**

Guy Mansfield QC (instructed by **Kingsley Napley LLP**) for the **Respondents**

Hearing date: 19 November 2010

Judgment

As Approved by the Court

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Mrs Justice Sharp:

*Introduction and preliminary matters*¹. This is an appeal by the Legal Services Commission ("the LSC")

with the permission of Master Simons, a Costs judge of the Senior Courts Costs Office, from his reserved costs decision handed down on 28 June 2010. Mr Robert Marven appears on behalf of the LSC and Mr Guy Mansfield QC appears on behalf of the respondents. Both counsel also appeared before the Master.

2. The Master's costs decision arose out of costs orders made by Singer J following lengthy proceedings in the Family Division of the High Court between a husband and a wife in which the wife was a funded party, and the husband and the three respondents (who were interveners in the litigation) were non-funded parties. The husband and the respondents were wholly successful in the litigation. I shall refer to the husband and wife as R and P respectively, and to the respondents as the interveners.

3. The Master was satisfied R and the interveners were entitled to be paid the costs (the amount of which was agreed) they had incurred in the family proceedings by the LSC, in accordance with the regulations which govern the awarding of costs in such circumstances, because they would otherwise suffer financial hardship, and it was just and equitable for them to receive those costs. The relevant regulations are the Community Legal Service (Cost Protection) Regulations 2000 ("the 2000 Regulations"). He ordered the LSC to pay to each intervener the full amount of their recoverable costs, which Singer J had earlier ordered should be assessed on an indemnity basis and which were in total, about £495,000. He also ordered the LSC to pay R the full amount of his recoverable costs assessed on an indemnity basis, namely £185,000.

4. The LSC says that the Master was wrong to order the LSC to pay any of the interveners' costs, or alternatively wrong to order the LSC to pay all those costs. There is no appeal against the determination in favour of R.

5. Two preliminary matters arise. First, whether this appeal should be dealt with in the Queen's Bench Division; and second, the extent to which details should be given of the identity of the parties in the family proceedings.

6. When the Senior Courts Costs Office took over the responsibility for the assessment of costs in the Family Division, the Costs judges were appointed Deputy District Judges in the Principal Registry of the Family Division. They normally assess costs in family cases sitting in that capacity. In the ordinary way, appeals from a Deputy District Judge in such circumstances would be heard by a High Court judge sitting in the Family Division. There would however appear to be no bar to this matter proceeding in the Queen's Bench Division since the relevant legislation simply provides that appeals from a Costs judge lie to a High Court judge (Access to Justice Act 1999 (Destination of Appeals) Order 2000 SI 2000/1071); and the parties were in any event agreed that the matter should proceed before me.

7. It will be necessary to refer to various matters arising in the family proceedings, and in the judgments of Singer J. His judgments were handed down in private. He gave permission for them to be reported but directed that in any report, the anonymity of the children and the adult members of their family must be strictly preserved. To avoid any risk of that occurring by a side wind, I shall therefore anonymise the judgment to the extent that the parties concerned in the family proceedings shall be referred to, both in the heading and body of this judgment, by initials. The question which arises is principally one of construction, and the identity of the interveners or the other parties to the family proceedings is not in itself a matter of relevance or of sufficient public interest such as to justify their being identified in such circumstances.

The statutory framework

8. The relevant part of the 2000 Regulations provide as follows:

"5 Costs order against Commission

(1) The following paragraphs of this regulation apply where:

- (a) funded services are provided to a client in relation to proceedings;
- (b) those proceedings are finally decided in favour of a non-funded party; and
- (c) cost protection applies.

(2) The court may, subject to the following paragraphs of this regulation, make an order for the payment by the Commission to the non-funded party of the whole or any part of the costs incurred by him in the proceedings (other than any costs that the client is required to pay under a section 11(1) costs order).

(3) An order under paragraph (2) may only be made if all the conditions set out in sub-paragraphs (a), (b), (c) and (d) are satisfied:

(a) a section 11(1) costs order is made against the client in the proceedings, and the amount (if any) which the client is required to pay under that costs order is less than the amount of the full costs;

(b) unless there is a good reason for the delay, the non-funded party makes a request under regulation 10(2) of the Community Legal Service (Costs) Regulations 2000 within three months of the making of the section 11(1) costs order;

(c) as regards costs incurred in a court of first instance, the proceedings were instituted by the client, the non-funded party is an individual, and the court is satisfied that the non-funded party will suffer financial hardship unless the order is made; and

(d) in any case, the court is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds.

(3A) An order under paragraph (2) may be made--

...

(b) in relation to proceedings in the Court of Appeal, High Court or a county court, by a costs judge or a district judge;

...

(4) Where the client receives funded services in connection with part only of the proceedings, the reference in paragraph (2) to the costs incurred by the non-funded party in the relevant proceedings shall be construed as a reference to so much of those costs as is attributable to the part of the proceedings which are funded proceedings.

...

(6) Subject to paragraph (7), in determining whether the conditions in paragraph (3)(c) and (d) are satisfied, the court shall have regard to the resources of the non-funded party and of his partner.

(7) The court shall not have regard to the resources of the partner of the non-funded party if the partner has a contrary interest in the funded proceedings.

..."

9. Significantly for present purposes it is to be noted that until 2001 the court had to be satisfied that a non-funded party would suffer "severe financial hardship" before an order could be made for the payment to the non-funded party of any of its costs by the LSC and its predecessors; and there was no restriction as to who could apply. The word "severe" was removed by the Community Legal Service (Cost Protection) (Amendment No 2) Regulations 2001. At the same time, the class of those able to claim was reduced by confining it to individuals. Whilst there is some authority relating to the meaning of the old test of "severe financial hardship" there is none on the new test of "financial hardship" simpliciter.

10. It was common ground between the parties below that the conditions for making an order against the LSC in paragraph 5(1), 5(3) (a) and (b) of the 2000 Regulations were satisfied, and that the issues the Master had to decide were whether R and the interveners would suffer financial hardship unless an order was made, and whether it was just and equitable in the circumstances that provision for costs should be made out of public funds. He determined that each would suffer financial hardship and that it was just and equitable for a payment to be made to each.

The factual background

11. R and P are from Iran. They married there, but then settled in this country. R has two sisters, F and V, and an elderly mother, A. F, A and V still live in Iran. K is a limited company in which V owns all the shares.

12. In November 2004 P began ancillary relief proceedings in her divorce from R.

13. P sought orders that certain properties legally owned by F, A, and V (as to a half share she owned) or by companies in which K owned shares, be transferred to her. P asserted that the beneficial interests of those family members in the relevant properties were held on trust for R absolutely and that R was also in fact the beneficial owner absolutely of the property interests held by K, so that V's shares in it were held for R's benefit absolutely.

14. The court directed that there be a trial of the issue of where the beneficial interest lay. Having regard to the issues raised, F, A, V and K were each given permission to intervene. The same firm of solicitors (Kingsley Napley) acted for all the interveners, but had a separate retainer from each.

15. P was publicly funded throughout the proceedings; R and the interveners were non-funded parties.

16. In September 2006 Kingsley Napley wrote on behalf of each of their clients to the LSC referring the LSC to the documentary evidence contradicting P's claims, pointing out that P's case rested on mere

assertion and inviting the LSC to review P's funding, on the basis her claim had no merit. On 8 October 2007 Kingsley Napley wrote to the LSC again, in similar terms and said this, amongst other things:

"You are aware we have previously expressed our view that the wife has failed to produce any compelling evidence that our clients' properties are not in fact beneficially owned by them as she claims. We are now several months further down the line and have incurred significant costs on behalf of our clients in order to defend the wife's claims which have been extended to include yet further properties. To date the wife has still not produced any substantive evidence to support her allegation that our clients are not beneficially entitled to the properties held by them...You will see that to date our clients' costs total approximately £215,000. It is envisaged that by the end of the preliminary hearing which is currently listed for ten days commencing on 29 October, our clients' costs will be in the region of £400,000. Indeed it now appears that the ten day time estimate will not be sufficient...which will increase our clients' costs still further.

In the circumstances, it is our view that there is no justification for the continuance of the wife's Public Funding Certificate given her failure to produce any significant evidence in support of her case to date. Furthermore, should her Public Funding Certificate be continued and should she fail to prove her claim...we hereby put you on notice that it is our intention to apply for an order for costs against the Legal Services Commission."

17. P's public funding nonetheless continued. The trial of the preliminary issue took place before Singer J, and lasted 23 days.

18. On 27 April 2009 Singer J handed down judgment, dismissing all P's claims in respect of the beneficial ownership issue. He found that P's case was based on lies, speculation, errors and "pure self-serving invention" with which her evidence was replete.

19. On 24 July 2009 Singer J made the order concluding this part of the proceedings, and gave a separate judgment dealing with the issue of costs.

20. As it had been made clear on behalf of R and the interveners that they intended to apply for costs against the LSC, Singer J made findings for the purpose of assisting in the determination by the Costs judge of the amount payable by the LSC to R and the interveners (as his order expressly recorded).

21. His order so far as material:

i) Dismissed P's claim against the interveners.

ii) Directed that P pay R's costs (from 5 October 2005 to 24 July 2009) and the interveners' costs of and incidental to the claim on an indemnity basis, and subject to directions that:

a) Pursuant to Regulation 9 of the 2000 Regulations, the amount which P was personally to pay pursuant to the order was assessed at nil;

b) The court made findings for the purpose of assisting in the determination by the Costs judge of the amount payable by the LSC to R and the interveners. These were:

- i) The findings given in the costs judgment of the 24 July 2009, which were incorporated into his order;
- ii) That the interveners had been wholly successful in defending the claim brought by P and P had been wholly unsuccessful;
- iii) For the reasons given in the judgment of 27 April 2009, P had pursued her claim unreasonably against the interveners and in a manner which substantially increased the costs of all the parties in that the case she presented contained numerous lies, exaggerations and self-serving invention;
- iv) The complexity of the proceedings was increased by the fact that P called for the production of 65 lever arch files of conveyancing documents which needed to be perused by all parties.

22. The costs incurred in dealing with the preliminary issue were enormous, totalling nearly £2 million. P's legal aid costs alone were in the order of £945,000. R's total costs were £210,669.94. The solicitor/own client costs of the interveners were in the order of £612,000, although not all those costs could be recoverable against the LSC. Before the hearing before the Master took place, the LSC and the interveners agreed that the total amount of recoverable costs assessed on an indemnity basis payable by the LSC, subject to liability would be £495,000 (that is, about 81 per cent of the total costs the interveners had incurred). A similar agreement was reached with R. It was agreed that his recoverable costs, subject to liability would be £185,000. As I have said, the interveners had separate retainers with their solicitors, and the costs of £495,000 were apportioned between them as follows: F: £123,106; A: £60,291 and V: £311,602.

23. K's costs were extremely modest in the context (£1,190). It took no active part in the litigation. The court had no jurisdiction to make an order in its favour, because it was not an individual (see paragraph 5(3) (c) of the 2000 Regulations).

The hearing before the Master

24. On 29 October 2009, R and the interveners issued an application seeking orders for costs against the LSC pursuant to the 2000 Regulations; and there followed Points of Dispute and Replies.

25. The evidence before the Master consisted of Statements of Resources filed by R and the interveners and two witness statements of Emily Watson, the solicitor from Kingsley Napley with conduct of the matter. Ms Watson's second witness statement, served shortly before the hearing, modified/corrected some of the information in the Statements of Resources and dealt with the position of K. The R and each intervener set out their resources, and explained why they would suffer financial hardship if an order for costs in their favour against the LSC was not allowed. Under the Regulations, the LSC could have required the interveners to attend for cross examination on their Statements of Resources, but it did not do so.

26. The Master summarised their evidence, and what Mr Mansfield said about it in this way (I have substituted initials or omitted addresses where appropriate):

"33. Mr Mansfield referred me to the means of the individual Interveners. With regard to F [the First Intervener], she will have paid her solicitors a total sum of £152,317, but as a result of the agreement on quantum with the LSC, she can only recover £123,106, which leaves a shortfall of £29,211 plus her travel expenses for attending Court which were in the region of about £10,000. She had also had to bear the further irrecoverable costs of £33,712 in connection with possession proceedings that she had to institute against the Petitioner, who had been occupying her flat at ... London NW8.

34. F lived in Tehran, Iran, with her mother A, the Second Intervener. Her income consisted of investment returns received on funds held by KA in Dubai. In her witness statement, F stated that prior to the commencement of the proceedings, her capital upon which the returns were based, amounted to £750,000, but this capital has now been reduced to £278,000. This has correspondingly reduced her income return. F has stated that the reduction in capital is partly as a result of the legal costs that she has incurred, and partly due to the fact that KA has had to keep the funds accessible rather than invest them freely as he has done in the past. She has incurred significant costs, involved in travelling to and from Iran for the purpose of these proceedings, and in respect of the possession proceedings.

35. F's non liquid capital consists of a half share in a seaside villa in Northern Iran, and a property at ... London NW8, which has a net value, after taking into account the mortgage, of £2,270,000. This property has, since the possession proceedings against the Petitioner, remained empty, and requires approximately £50,000 worth of work to refurbish it into a lettable state. It has been indicated that the potential rental value is £62,000 per annum, but the mortgage on the property is payable at the rate of £48,000 per annum and there is a service charge of £11,000 per annum, providing a profit rental of just £3,000 per annum.

36. Although Mr Mansfield accepted that F lives a comfortable middle class existence, nevertheless there was a clear case of financial hardship in that she has continued to draw down from her capital and that to recover her income position, she would be forced to sell her property at Mr Mansfield reminded me that the political situation in Iran was volatile and F is comforted by the fact that she has a property in the UK in which she could reside should she have to leave Iran. Consequently, it is not her wish to sell this property.

37. With regard to A, she has paid her solicitors approximately £74,587 but can at the most recover £60,291 from the LSC, as a result of the compromise of the quantum of the costs, which leaves a shortfall of £14,296 plus travelling expenses of approximately £10,000.

38. Mr Mansfield referred to A's Statement of Resources, and pointed out that A is aged 80 and is not in good health. She requires 24 hour nursing care and has recently had heart bypass surgery in the UK.

39. A resides with F in Tehran in a property owned by the Second Intervener, which is valued at approximately £400,000. Her only income is her investment income. Her liquid capital was, prior to the commencement of the proceedings, approximately £170,000, but this has been reduced to £110,000, with a consequent reduction in income. A owns a three bedroom property at ... London NW8, which is valued at £500,000. This is used as a family base and is also used as A's residence when she is in the UK for medical treatment. She has also stated that this property is a safe haven and base for herself and for her two daughters, and her two grandsons, who are in the United Kingdom. Amongst her outgoings are £10,000 per annum nursing care and £5,000 per annum UK medical insurance.

40. V [the Fourth Intervener] will have paid her solicitors £385,595, but can only recover at most £311,602 as a result of the agreement on quantum with the LSC, leaving a shortfall of £73,993, plus travelling expenses of approximately £10,000. V lives with her husband in Tehran. In her Statement of Resources she has stated that her only income is investment income from two sources. The first is income from capital held by KA in Dubai which is invested on her behalf by him. At the time of the making of the Statement of Resources in October 2009, V stated that her income from this source was £25,000 per annum. I am now informed that this has been reduced as a result of the reduction in the capital base to £18,000 per annum. The second source of income is from savings deposits in Iran which produces an income of £8,000 per annum.

41. V owns the property that she and her husband reside in Iran, which is valued at approximately £400,000. She has a half share in a seaside villa in North Iran which she jointly owns with F. She also has a half share at an apartment at ... London NW8, which she jointly owns with Mrs KA. This property is currently valued at

£1.4 million, but there is a mortgage of £400,000. It produces a rental income of £45,000 against outgoings of approximately £20,000. The income is shared with the co-owner.

42. V also has an interest in a number of London business properties via a corporate structure. S has a 50% interest in these properties, KA has a 25% interest in these properties, and V holds the remaining 25%. This 25% interest of V is held via her company, K, the Third Intervener. The value of her interest is approximately £2.57 million (net of mortgage but gross of any costs of sale or tax).

43. V also holds a deposit with the National Bank of Dubai in the sum of £2.6 million. This is held as security for her share of the loan relating to her corporate enterprise with S and KA.

44. With regard to V, Mr Mansfield submitted that her assets were not readily realisable. If V does not recover the substantial sums paid out in costs, she will have to start unravelling her property interests which would be disadvantageous to her financially.

45. Mr Mansfield submitted that the First, Second and Fourth Interveners do not have to establish that they will suffer something approaching penury in order to establish financial hardship. It is clear, he submitted, that the financial positions of each of them have been damaged by having to meet the costs of these proceedings. All of them faced the real possibility that they may, at short notice, have to leave Iran and take up residence in England with adverse financial consequences. They will still suffer shortfalls in their costs even if orders for costs are made in their favour against the LSC. Mr Mansfield submitted that his clients should not have to sell assets, be faced with more onerous terms with their bank lenders, or find it harder to support their children or extended families, if that had been their custom. They should not have to be financially disadvantaged and their long-term financial security should not be jeopardised as a consequence of the circumstances of this case where they were unjustifiably brought in to the proceedings.

46. With regard to V, Mr Mansfield submitted that her position with her bank had been compromised and her business ventures disadvantaged. In respect of each of the Interveners, the substantial upfront expenditure on costs has had an impact on past income and capital, and will continue to have an effect on future income and capital.

47. Mr Mansfield submitted that even if a full order was made in the Interveners' favour, each will suffer financial hardship because of the impact of the solicitor and own client element, and travel expenses and, in the case of the F, the costs of the possession proceedings. Their standard of living has been, and will continue to be, adversely affected, and their ability to deal as they wished with their finances has been impeded.

48. Mr Mansfield submitted that the First, Second and Fourth Interveners have suffered financial hardship. The recovery of these costs from the Legal Services Commission will make a material difference. The sums involved are large. The litigation has tied up capital and depleted their income.

49. Mr Mansfield submitted that if it was found that any of the applicants suffered financial hardship, it must follow that it would be just and equitable for the Court to make these orders. Mr Mansfield referred to the judgments of Mr Justice Singer, which made clear that the Interveners had to meet the ill-founded, dishonest claims of the Petitioner which had been supported by the LSC. The manner of the conduct of the claims was extravagant and ran up unnecessary expense. The Interveners had been wholly successful in their defence, and the Petitioner had been wholly unsuccessful. The Judge found that the claims had been pursued against them unreasonably, and in a manner which substantially increased the costs, and that the proceedings were complex, calling for the production of 65 lever arch files of documents, all of which needed to be considered.

It was significant that the Judge ordered costs to be paid on an indemnity basis. The spurious nature of the claim was brought to the attention of the LSC in correspondence, but nevertheless the LSC continued to support the claim. In all these circumstances it was, Mr Mansfield submitted, just and equitable that provision should be made for the costs expended by the First, Second and Fourth Interveners to be paid out of public funds."

The Master's conclusions

27. On the basis of that evidence, the Master reached the following conclusions:

"75. Mr Marven was correct when he informed me that there were no authorities that could assist me with regard to what "financial hardship" was. The authorities that have been cited to me deal with cases where the issue was that of *severe* financial hardship, and consequently those cases have been of limited assistance to me.

76. The removal of the word "severe" from the regulation must have been intended to have a significant impact, otherwise there would have been little point in making the change. Consequently, in my judgment there must be a significant difference between *severe* financial hardship and financial hardship.

77. As Counsel have all agreed, the test must be an objective one. What is financial hardship to one person may not be financial hardship to another. One has to look at the individual and look at the sums involved. I consider that Mr Mansfield was correct when he stated that the test to show financial hardship is to show that the individual's financial equilibrium has changed.

78. I reject Mr Marven's submission that I should look at the wealth of the whole family. Regulation 5(6) of the Community Legal Service (Cost Protection) Regulations 2000 does not permit me to do so, as it requires that the Court, in respect of each application, should have regard to the resources of just the non-funded party and his partner. Consequently, I consider that I must look at each individual applicant to decide whether or not he or she has suffered financial hardship, and whether it is just and equitable in the circumstances, for payment of the costs of that individual to be made out of public funds.

79. In my judgment there can be little doubt that the Respondent has suffered financial hardship. He does have a high income, but it is clear that most of that is taken with the obligations that he has for the Petitioner. He has no liquid capital and he is heavily in debt. He does have property in Iran and an interest in his late father's estate, but it is clear that these assets are not liquid and are certainly not immediately realisable. His financial equilibrium has changed as a result of this litigation, and his debt has increased.

80. I reject Mr Marven's submission that I should distinguish between this case and the Court of Appeal's decision in *R (Gunn) v The Home Secretary* because the Court of Appeal were dealing with appeal costs. I have seen no references in the speeches made that there should be such limitation. I consider that this is a decision that I must follow and that it would normally be just and equitable that the costs incurred as a result of the unsuccessful claim made by the legally aided party should be defrayed out of public funds where financial hardship has been shown.

81. Even if the cases were to be distinguishable, nevertheless, given the circumstances of this particular case, the judgment of Mr Justice Singer and his findings set out in paragraph 9(b) of the Order of 24 July 2009, I would still consider that it was just and equitable for the Respondent's costs to be defrayed from public funds. It is, in my judgment, highly relevant when considering the question of whether it is just and

equitable, that the Respondent had no option to defend the claims that were made against him, and that his legal advisers took all steps available to try and draw the weaknesses of the Petitioner's case to the attention of the LSC, and to warn it of the Respondent's financial hardship and his intention to apply for payment of his costs if the Petitioner lost. I agree with Miss Lambert's submission that the Respondent could do nothing more.

82. Although Mr Marven made the alternative submission that the Respondent should only receive a contribution towards its costs, if I were to find that there was financial hardship, it seems to me that the Respondent's means are such that anything less than a full recovery of those costs agreed with the Legal Services Commission will not be just and equitable.

83. Accordingly, I grant the Respondent's application and I direct that the amount of costs payable by the LSC to the Respondent, excluding the costs of this application, is £185,000.

84. Whilst it is unlikely that the First, Second and Fourth Interveners could show that they had suffered severe financial hardship, that is no longer the test. I am satisfied that each of their financial equilibrium has changed and that they have suffered financial hardship.

85. As is with the position with regard to the Respondent, I must not look at the Interveners' situation as a whole, but must look at them individually in accordance with Regulation 5(6).

86. With regard to the First and Second Interveners, it seems that to enable them to restore their income to the level that existed prior to the institution of proceedings by the Petitioner, it would be necessary to sell properties. This is not what the First and Second Interveners want and, in view of the large amount of costs that they have each had to bear from their own resources, this will cause them some financial hardship and their financial equilibrium will certainly have changed.

87. The position with regard to the Fourth Intervener is different in that she has much greater assets than those of the Respondent, the First Intervener, or the Second Intervener. However, there are a number of additional factors. Firstly, that some of the properties are owned jointly with parties who are not parties to these proceedings. Secondly, the amount of costs that have been expended by the Fourth Intervener is £385,595, of which she can only seek to recover £311,602. This is clearly an exceptionally large and significant sum for an individual to have to find, and even though these costs have been found from the Fourth Intervener's liquid assets, the effect has been a reduction in income.

88. Each of the First, Second and Fourth Interveners have had to find large sums of money for costs from their own personal resources. In my judgment they have all suffered financial hardship individually.

89. For the same reasons that I have given with regard to the Respondent, I consider it just and equitable that provision of the costs of the First, Second and Fourth Interveners should be made from public funds. The direction given by Mr Justice Singer in paragraph 9(b) in the Order of 24 July 2009 was clearly directed at the Interveners' situations.

90. I have given thought as to whether or not, having found that there is financial hardship on the part of the First, Second and Fourth Interveners, and that it is just and equitable that they should be reimbursed from public funds, whether they should receive all or part of their costs. No basis has been suggested to me as to how much of their costs should be reimbursed. I do not consider that it is for me to go through each of the individual Interveners' means and decide what figure would alleviate their financial hardship. The amount of

costs is too large for me to do that and, in any event, such an exercise would be purely arbitrary. Consequently, in my judgment it is appropriate that the First, Second and Fourth Interveners should receive all of their costs in the apportionments already agreed with the LSC.

91. For the reasons set out in paragraphs 2 to 6 of the second witness statement of Emily Watson, I reject the LSC's assertion that common costs of the First, Second and Fourth Interveners should be discounted to represent the share of the costs that it submits were incurred on behalf of the Third Intervener. The Third Intervener has taken a very limited role in the proceedings. It has been billed separately. The bulk of the costs of the Fourth Intervener have been incurred by her in her personal capacity to protect all of her assets, including her 100% shareholding in the Third Intervener. There seems to me to be no basis for me to direct that the Third Intervener should bear additional costs over and above the amount that it has already been billed."

This Appeal

28. There are two main limbs to the appeal. First, it is said that the Master erred in his determination of what is meant by financial hardship and how to apply the test (Ground 1). Second, it is said that he erred in not considering whether a figure less than the full amount of costs incurred would alleviate any financial hardship and/or in not determining what such figure would be (Ground 2). A third ground was raised by the LSC, namely whether the Master erred in his determination that it would be just and equitable for the costs to be awarded in this case (Ground 3). The Respondents submit this issue is raised impermissibly, because it was not a matter raised by the LSC in its Notice of Appeal, but without prejudice to that, the issue was argued before me on the merits.

Grounds 1 and 2

29. Mr Marven's principal submission is that the Master applied the wrong test in concluding the interveners will suffer financial hardship unless an order is made. He submits the Master equated the test of "financial hardship" with whether there was a change in the equilibrium of the individual in question (see paragraphs 77, 84 and 88 of his judgment). That represented, Mr Marven says, an impermissible re-writing of the Regulation by the Master. The 'change in equilibrium' test would be satisfied so long as the non-funded party could show any effect at all (beyond perhaps an effect that could be ignored as *de minimis*). The correct 'hardship' test is a significantly more demanding one, namely serious financial suffering which is difficult for the individual to bear, and the effect of which is long-lasting rather than transient.

30. Further, he says the test is an absolute test, which requires that the individual's financial position falls below what would be generally accepted as a level of hardship. That is consistent with the clear purpose of the statutory regime, namely to limit the circumstances in which, and the extent to which, public funds are used to pay the costs of the successful non-funded party; and with the approach to a party's means when deciding whether to grant that party public funding, namely an assessment of their existing resources in absolute terms. On the facts, he submitted, each of the interveners are and remain after paying their legal costs by any normal standards somewhere between comfortably off and wealthy and do not come close to demonstrating financial hardship.

31. As for whether the whole or part of the costs should be recoverable, Mr Marven refers to Regulation 5 (2) and submits an order against the LSC should comprise only so much of the costs as would occasion the non-funded party financial hardship if she herself had to pay them. The effect of the Master's order that the interveners should have their agreed level of costs in full was that none of them could afford to pay one penny towards the costs of the litigation without suffering financial hardship, and this he says, cannot be right. He submits it is plain from the wording of the Regulations that the onus remains at all times on the

non-funded party: and it is not the case that once the funded party shows some financial hardship a presumption arises (which it is for the LSC to rebut) that that party gets all her costs. Rather he says it is for the non-funded party to satisfy the court in respect of every pound claimed that he or she requires it to alleviate financial hardship. Thus, it was for the interveners to identify the alleged financial hardship and the amount required to alleviate it. If they are unable to do so, then the correct outcome is not that the LSC be ordered to pay everything claimed, but rather that no payment should be made. He submits the Master erred in not conducting this exercise.

32. Mr Mansfield submits that by removing the word "severe" from the Regulations, Parliament clearly intended there to be a substantially lower threshold. Severe denotes a high level of financial hardship. The overall effect of the changes to the Regulations he submits is that individuals facing publicly funded litigants have a much improved prospect; but overall numbers are fewer (because only individuals may apply). The test is objective, but only in the limited sense that the question is not judged by the standards of an oversensitive individual. But it is fact specific. The court must consider the circumstances of the particular individual (see the submissions recorded at paragraphs 70 and 77 of the judgment and accepted by the Master). Hence £5000 would be critical for one person but not for another.

33. The court's role is to ask whether, in all the circumstances of this applicant it can reasonably be said that she will suffer financial hardship if the order is not made in her favour. He submits the appellant's arguments that there is an "absolute test" is meaningless and wrong. The Regulations do not (as they could) define financial hardship by reference to some fixed (absolute) measure e.g. has disposable capital and/or income below a given figure, such as is used for the assessment of eligibility for legal aid, or has capital or income which has been diminished by a certain percentage. So he submits the matter is left for the court to assess as a matter of fact and degree on a case by case basis, by reference to the amount involved and the impact on the applicant. And in assessing that, he says the court should have regard to the applicant's "reasonable financial expectations", future demands on the applicant and the applicant's commitments, whether legal or moral.

34. Financial hardship is not to be construed therefore by reference to levels of eligibility for legal aid or some supposed public policy adverse to those of relative affluence. What matters is the amount at stake and its impact on the life of this applicant who does not have to be reduced to penury or some very modest level to qualify.

35. In this case he submits, the sums involved are very large by any standards. If it can be inferred that the interveners will, as a result of the costs, have to realise assets or suffer materially reduced security or income this must be capable of being financial hardship. That was the basis articulated to the Master of the submission that if the financial equilibrium of the interveners has been damaged, this can constitute financial hardship (the phrase, financial equilibrium, was only used by him in his oral submissions in reply).

36. The gravamen of his submissions, which was clearly accepted by the Master looking at his judgment as a whole, was that each individual would be financially damaged or harmed (in the sense that their finances would be knocked out of kilter) if they had to pay their costs. So the interveners should not have to sell assets, be faced with more onerous terms with their bank lenders, or find it materially harder to support their children or extended families, if that had been their habit and expectation. They should not be financially disadvantaged and their long-term security should not be jeopardised. That is financial damage and amounts to financial hardship.

37. The Master was entitled to find that the substantial upfront expenditure on costs has had an impact on past income and capital, and will continue to have an adverse effect on future income and capital. The litigation has tied up capital and depleted their incomes. Each has suffered financial hardship, and will continue to do so, and it cannot be classified as transient. The recovery of these costs will make a material

difference to each.

38. As for reducing the amount payable, he submits the Master was right in law (and in fact) not to reduce the amount payable since it would have been arbitrary. Hardship is no longer required to be "severe". Slices should not be shaved off the amounts claimed. There is a substantial shortfall between what stands to be recovered and how much each intervener is out of pocket from the litigation.

Discussion

39. Both parties referred to earlier authorities which discussed the meaning of "severe financial hardship" under the previous Regulations.

40. In *Hanning v Maitland* (No.2) [1970] 1 QB 580 at pp. 587-588 Lord Denning MR said this:

"The words 'severe financial hardship' were construed in so as to give emphasis to the word 'severe.' But, in the light of experience, I do not think they should be construed so strictly. In future, the words should be construed so as to exclude insurance companies; and commercial companies who are in a considerable way of business; and wealthy folk who can meet the costs without feeling it. But they should not be construed so as to exclude people of modest income or modest capital who would find it hard to bear their own costs."

41. Salmon LJ said at p. 591:

"The words ['severe financial hardship'] should be interpreted broadly to mean just what they say.... I do not believe that it is legitimate for any court to say that because all his life [a man] has lived frugally, there is no severe financial hardship in his having to pay £325 costs, any more than I think it would be legitimate for a court to say that no financial hardship is involved because a defendant has chosen to spend his money liberally on drink or tobacco or, indeed, for any other purpose. On the other hand, I think that there are defendants who are so very rich that it would equally obviously be impossible to say that an outlay of £325 would impose a severe financial hardship upon them. There are no doubt cases in which the defendant's financial position is such that a nice question might arise as to whether or not the payment of his costs would involve a severe financial hardship. In such cases, but I think only in such cases, are the sort of considerations postulated in *Nowotnik's* case [1967] P. 103 relevant."

42. In *Kelly v London Transport Executive* [1982] 1 WLR 1055, a plausible plaintiff pursued a completely unmeritorious personal injury claim to trial with the benefit of legal aid. A small sum paid into court was not accepted. The trial judge found the plaintiff's maladies were largely due to chronic alcoholism and awarded the defendant its costs from the date of payment in. He refused the defendant's application made under section 13 of the Legal Aid Act 1974 for an order for the payment of the defendant's costs of £8,000 from the date of payment in on the ground the defendant would not suffer severe financial hardship within the meaning of section 13(1) of the Legal Aid Act. The Court of Appeal affirmed his decision.

43. At 1067C to 1068A Lord Ackner said this:

"...The matter must, in my judgment, be a question of fact and degree in each case. A small public company might well be obliged to sell off some of its vital assets in order to pay a substantial bill of costs. In such a case there would clearly be material for contending that the public company would suffer hardship if the order was not made.

The real question in this case is whether the defendants can establish that they would suffer not only financial hardship but severe financial hardship if the legal aid fund did not pay the £8,000 which they estimate to be a modest assessment of their costs since the payment into court. ...

To my mind it is essential, when considering a potential claim of financial hardship, to ascertain what are the likely consequences to the unassisted person of the legal aid fund not bearing his costs. If they bear heavily on the unassisted person, be he an individual or a company, then a possible claim for hardship may be made out. Whether or not such financial hardship is severe must be essentially a question of fact and degree in the particular circumstances of the case. To take a clear case, if the obligation to pay their own costs might force a company into liquidation, then a prima facie case would have been made out of severe financial hardship. However, if the consequences of paying a substantial bill of costs results merely in the company having to increase their overdraft and thus reduce to some minor extent their profitability, I would not view such a situation as being one of severe financial hardship or probably even of hardship at all. ...

What are or will be the consequences of the defendants having to pay a bill of £8,000 costs? It will have to, or may have to, apply to the Greater London Council for further funds. This is hardly likely to result, of itself, in an increase in the rates raised by the G.L.C., but if it does, this figure spread around the ratepayers would be minimal. In a sentence, the defendants cannot establish that if the legal aid fund does not pay the £8,000 costs, they will suffer severe financial hardship.

I fully accept that it is very hard to bear the payment out of large sums in order to defeat a legally assisted claim which should never have been brought. That is not the same as saying it is financially very hard to bear such a situation. What has to be evaluated is not the degree of legitimate indignation or sense of grievance but the extent of financial hardship, if any, which such a situation causes."

44. Lord Denning MR looked at the sum claimed in the light of the fact that the LTE were in deficit to the tune of nearly £175 million, and at 1063 G said this:

"No one could ever say that this sum of £8,000 for costs would make any appreciable difference to the defendants' affairs."

45. In *Adams and anor v Riley* [1988] Q.B. 372 the legally aided plaintiff was unsuccessful in his action for professional negligence against the unassisted defendant, an architect (who had retired by the time the case came to be tried). The defendant applied for his costs (some £12,600) from the legal aid fund. Two of the questions for the court were first, whether the plaintiff would suffer severe financial hardship unless an order was made and second, how the power to order the fund to pay "the whole or any part of the costs incurred" by the unassisted party should be exercised. In particular, the issue on the second question as articulated by the judge, Hutchison J, was whether the quoted words required or entitled the court, in a case where it had concluded that payment of his entire costs would occasion severe financial hardship to the successful party, to determine what proportion of those costs he could pay without suffering such hardship, and to direct that he recover only the excess.

46. Hutchison J looked at the detail of the defendant's financial position and his personal circumstances, excluding for this purpose the value of the matrimonial home and £40,000 which the defendant had used to set his son up in business, during the course of the litigation. The defendant had a modest income, free capital of some £21,000 representing his savings towards retirement and two further properties worth less than £50,000. Hutchison J concluded that, plainly, the defendant was somebody who had the means to pay this sum of £12,600 without reducing himself to a state of penury, or anything approaching it. Nonetheless, he went on to say at p381H to 382A:

"It seems to me, approaching the matter in the way Ackner L.J. indicated in Kelly's case was appropriate, that plainly the payment of this sum would cause hardship to the defendant; and treating the question whether that hardship would be severe as one of fact and degree in the particular case, it is impossible to escape the conclusion that if he has to pay this sum the defendant will suffer severe financial hardship. For a man at the end of his professional career, with only relatively modest savings towards his retirement, and no pension entitlement beyond whatever state pension he will ultimately receive, it seems to me that the depletion of his resources by so large a sum cannot realistically be categorised as anything other than a severe financial hardship. In principle, therefore, I conclude that this is a case in which the requirements of the section are satisfied and an order should be made against the fund."

47. Having reached that conclusion however, he determined that the defendant should recover only part of his costs. He said this at p383B - D:

"By definition almost anyone, certainly anyone possessed of any significant capital, will be able to meet some part of his bill of costs without suffering severe financial hardship. Plainly, moreover, as I have already indicated, it could in certain cases legitimately be concluded that it was not just and equitable to order the whole of the costs to be paid out of public funds, even where the balance was not recoverable from some other source such as the legally aided litigant himself. Equally plainly, merely because part of the costs could be paid without the successful party's suffering severe financial hardship, that would not be a reason for concluding that it was not just and equitable to order them to be paid; see Salmon L.J. in *Hanning's* case, [1970] 1 Q.B. 592. However, if the words of section 13(3) are read together with the words of section 13(1), it appears to me that the intention of the section is that in first instance cases, notwithstanding that it is just and equitable to make an order, that order should comprise only so much of the costs as would occasion the unassisted party severe financial hardship if he himself had to pay them. If I am right, then in almost every case only part of the successful party's costs will be ordered to be paid by the fund."

In the present case, no doubt because this particular point only emerged in the course of argument as a result of a question that I posed, neither the evidence nor the arguments of either party were addressed to the specific question of what sum could be paid by the defendant without his suffering severe financial hardship, assuming that payment of the whole would occasion severe financial hardship. In the circumstances, a relatively arbitrary approach is called for and the conclusion I have reached, after carefully reconsidering the figures that I have referred to earlier in this judgment, is that I should direct that he recover from the fund any costs that he has incurred over and above the sum of £4,500."

48. I consider the approach to construction in the earlier authorities is of assistance here. Whether someone will suffer financial hardship if their costs are not reimbursed by the losing party, is in my view, a question of fact and degree. I do not accept there is some absolute standard, by which this can be judged, nor that whether someone has suffered or will suffer financial hardship should be gauged against the criteria laid down for determining whether a person is eligible for public funding in order to bring a claim. If there was to be an absolute standard, one may reasonably ask what it is. Mr Marven did not say, and it seems to me, if Parliament had intended there to be one, or had wished to provide specific criteria against which financial hardship should be judged (whether absolute or otherwise) then it would and could have so provided in the Regulations. I also consider Mr Mansfield is correct in his submission that there has been a deliberate and significant relaxation of the formerly stringent test by the removal of the word "severe".

49. There is an obvious difficulty in endeavouring to define "financial hardship" by reference to other phrases which themselves need definition. The words are plain English words and I respectfully adopt what Salmon LJ said in *Hanning*, namely that the words should be interpreted broadly to mean just what they say. What must be looked at is the impact or the likely consequences to the non-funded person of the LSC not bearing his or her costs in all the circumstances. I agree with Mr Mansfield that an applicant's reasonable financial expectations, future demands on the applicant and the applicant's commitments, whether legal or moral, may well be relevant. Whether or not an applicant has been financially damaged or harmed to the

extent that he or she has or will suffer financial hardship is, in my view, quintessentially, a fact specific question to be considered by the Costs judge dealing with the matter with all the relevant information at his or her disposal, bearing in mind the lower threshold that now applies. Plainly, there will be cases where the answer to the question will be obvious. Equally, as when the requirements were more stringent, there may be cases which are more difficult. The fact however that a non-funded party is comfortably, or even well off by ordinary standards even after paying his or her own costs is not in my judgment, a bar to an order being made, as Mr Marven's submissions, implicitly, if not explicitly suggested. If further support for that proposition is needed it can be found in the facts of the *Adams* case, which, after all, was one which fell to be considered when the test was significantly more stringent.

50. Did then the Master apply the wrong test? In my judgment, when his decision is read as a whole, he did not. I agree with Mr Marven to a limited extent in that the phrase "financial equilibrium" taken in isolation, might leave it open to a party to argue as Mr Marven has suggested, that some minor inconvenience would be sufficient. But I do not think that was what the Master meant by the phrase (i.e. to suggest that a minor inconvenience or a minor imbalance would be sufficient); nor, when the judgment is read as a whole, was it the threshold test he applied. See in particular, paragraphs 32, 42 to 48, 70 to 72 and 86 to 91, where the submissions made on behalf of the interveners are set out more fully, and which explain the basis of the Master's reasoning.

51. In the event, I consider the Master was entitled to draw that conclusion on the facts before him that the threshold test of financial hardship was met by the interveners for the reasons advanced in argument by Mr Mansfield and which I accept. It cannot be said in my view that the Master's judgment on this issue was plainly wrong, and there is no basis to overturn his decision on appeal. If it had been necessary for me to do so however, on a fresh consideration of the matter I would have reached the same conclusion as did the Master on the facts.

Two further points in the Appeal

52. This brings me to two further points raised by Mr Marven. First, he says the Master should not have taken into account the second witness statement of Ms Watson (which, as I have said, revised some of the information in the Statements of Resources filed by the interveners, and raised other matters). In my judgment, the Master was entitled to have regard to the content of that witness statement. As Mr Mansfield points out, no objection was raised as to its admissibility before the hearing or at the hearing itself, until after Mr Mansfield had finished his submissions on behalf of the interveners, and the hearing had been underway for some time. Mr Marven did not apply to strike out the paragraphs in the witness statement to which he objected, nor did he suggest the interveners should attend for cross-examination. Neither did he ask for an adjournment. I consider it is too late for objection to be raised now.

53. Second, Mr Marven says the Master was wrong to reject the LSC's submission that some common costs should be attributed to K. Adopting the correct approach on the facts he says, a little less than half of V's bill (£140,000) should be recoverable from the LSC in any event. The Regulations prohibit payment of costs other than to an individual, and since K is a company, it cannot therefore seek an order for payment of its costs from the LSC. But he says, the Master's approach on this issue undermined that prohibition.

54. He points to the fact that K was an intervener, and a necessary party to the proceedings. The fact that the instructions in the proceedings came from V and not from K was he said an artificial point: V owned K and if she had wanted to, she could have characterised the instructions as on behalf of K as well. Insofar as the work done related to properties owned by K, it must in principle have been done on its behalf, and the costs in that respect would be common between V and K. Moreover, V has a right to claim a contribution from K for the work they both needed the solicitor to do (*Keen v Towler* TLR 28/11/24). Accordingly he says V is only ultimately liable for half of such common costs. As the bill was a global bill, he accepts that it is not

possible to identify precisely what costs should be attributable to K; but that "doing the best that can be done" a little less than half should be. Hence the figure of £140,000 to which I have referred.

55. I reject this argument. First, under the Community Legal Service (Costs) Regulations 2000, paragraph 11(4), an appeal against a decision of a Costs judge under the Regulations is confined to one on a point of law. It is important to emphasise that the court on this appeal is exercising a power of review, and this is not a re-hearing (see in this context the observations of Lord Donaldson of Lynton M.R. in *Piggott Brothers and Co. Ltd v Jackson and ors* [1992] I.C.R. 85 at p.92 D-E). This further argument of the LSC seems to me to be an attempt to run again an argument which the Master rejected on the facts (which were for him to decide) for the reasons he gave in paragraph 91 of his decision. Second, this argument was not a matter which was raised by the LSC at all in its Notice of Appeal (which is perhaps suggestive at least that at first sight it was considered it did not raise a point of law), an issue I return to at paragraph 69 below. Mr Marven did not ask for permission to amend his Notice of Appeal to rely on it, and Mr Mansfield's responses to it, were without prejudice to his principal argument that it was not open to the LSC to argue this point at the hearing.

56. Third, and in any event, I consider the Master's decision was correct on the facts for the reasons advanced by Mr Mansfield. In short, billing was to V not to K because she was the legal owner of the shares. The question for determination in the ancillary relief proceedings was whether V was the trustee for R's beneficial interest in the assets she held through her shareholding in K. K and V had separate retainers: and each party was billed separately. K took no active part in the proceedings after the initial billing as Ms Watson's evidence makes clear. Mr Mansfield says that Ms Watson, as a solicitor and officer of the court, answered a direct question from the Master about these costs at the hearing (a matter not challenged by Mr Marven before me). It is a moot point Mr Mansfield says as to whether K was a necessary party or not. The work was done to protect V's assets, and K played no role in the proceedings other than to lodge points of defence. What mattered was the beneficial ownership of the shares. The fact that the property interests in question were held through a corporate vehicle was nothing to the point. If V had been found to have been a trustee, then the company would have vested in R beneficially, and his interest in it would have been made subject to the application for a property transfer/adjustment orders by P. As Mr Mansfield pithily described it therefore, the company was simply the container: the court was concerned with who owned the container. That was all.

57. I turn next therefore to the question raised under Regulation 5(2), namely whether the Master erred in awarding the interveners the whole of their costs. I entirely accept, as Mr Marven submits, that the onus of establishing financial hardship is on the non-funded party; and it is not the case that once that threshold is surmounted, a presumption arises that the party gets all of his or her costs. I reject however as both unrealistic and impractical, his further submission that it is therefore for the non-funded party to demonstrate in respect of every pound claimed that he or she requires it to alleviate financial hardship. It would hardly be a proportionate exercise - even if it were one that the courts could actually carry out - for a non-funded party to justify the need for every pound without which it would be said the non-funded party would tip over the edge of financial hardship, as though personal finances were a seesaw with an identifiable tipping point; particularly, as here, where the costs are enormous running into hundreds of thousands of pounds. Such an approach is also capable in my judgment of resulting in practical injustice to the non-funded party, who, ex hypothesi has already been put to considerable unjustified expense by a litigant backed by the LSC; and who could well be deterred from applying for an order by the potentially enormous costs that such an exercise might lead to.

58. It is also not the case in my judgment, that it is appropriate for the LSC to adopt an "all or nothing" approach to the making of an order in front of the Master, and then after the event, seek to disturb his decision on appeal either by criticising his failure to adjudicate as to every "pound"; or by suggesting a reduction should have been made on a basis unexplained either to the Master (or the Appeal court for that matter). In this case, as the Master pointed out in his judgment at paragraph 90, no basis was suggested to

him as to how much of the interveners' costs should be reimbursed. During the course of his submissions, Mr Marven said it would hardly be appropriate for him to have bid against himself by addressing the specifics of any reduction in front of the Master. But it seems to me, at the very least, the Master must be addressed on some rational basis for making a reduction, if that is what the LSC considers should be done in the instant case, notwithstanding, as I have said the onus remains on the applying party to justify an order in his or her favour. It is to be noted in this context that the LSC made it plain before the hearing that they did not want to cross-examine the interveners on their Statement of Resources, which therefore stood subject to comment.

59. There are occasions when the court can take a 'broad brush' approach to an issue. One example, is when dealing with a summary assessment of costs. The court will have experience of costs claims, and will have a very good "feel" for how much work a particular application may have needed. It can then consider the bill of costs against that background, and, guided by the relevant rules on costs contained in the CPR make a determination as to what should be recoverable. The exercise which, by inference, it is suggested the Master should have engaged in of working out for himself what sum would or would not alleviate financial hardship is a much more difficult one. There may be cases where the facts are sufficiently clear and straightforward, so that the exercise can be done without much assistance from the parties. But in my judgment, the Master was entitled to conclude this was not such a case on its facts, and that in the absence of any rational basis advanced for ordering payment of part of the costs, rather than all of them, any reduction would be arbitrary. It would hardly be fair either in my view to encourage Costs judges to take a slice off a costs order, merely for the sake of appearance, rather than because there was some factual, reasonable and defensible basis for doing so.

60. In *Adams* Hutchison J determined a reduction himself, albeit as he said on a relatively arbitrary basis, without the assistance of the parties as to evidence or argument on the point. However as he said, the issue had not been addressed by the parties, because it was not one then covered by authority and it had been raised for the first time as a result of a question put by the court during the course of argument. Here, the position is very different. The parties had the benefit of extremely experienced counsel; and the LSC was well aware of the point if they wished to address it, in the context of a claim for enormous costs. It is also to be borne in mind that the threshold test in *Adams* was significantly higher. It may be that if only "financial hardship" had to be demonstrated, Hutchison J would not have made any deduction at all; or looking at it from a different perspective, no reduction would have been made if the bill itself had been very substantially higher, say £50,000.

61. Be that as it may, in the event, the Master did consider whether a reduction should be made on the facts of the case as it was presented to him, and in my judgment he was not wrong to decline to make a reduction, for the reasons he gave.

Ground 3

62. Mr Marven concedes that in the light of the fact that the judgment of Singer J was highly critical of P's claim and the manner in which it had been conducted, this is not a case where the LSC could begin to say it would not be just and equitable to make an order in favour of the non-funded party because of some particular feature of the litigation. He does not concede however that this is a case in which the LSC's conduct could be open to criticism since he submits, it was guided by lawyers for the funded party. Nor does he accept it can be criticised for not withdrawing funding on the basis of representations made by the solicitors for the other party to the litigation.

63. He submits however, that the Master's approach overlooked an important point: namely that the non-funded parties' resources are relevant at the "just and equitable" stage as well as at the "financial hardship" stage, at least at first instance. He submits the clear meaning of regulation 5(3)(d) when read with Regulation 5(6) is that in deciding whether it is just and equitable to make an order for payment from public

funds the court shall have regard to the resources of the non-funded party (and if applicable those of her partner). Accordingly even if the Master was right to identify financial hardship (contrary to the LSC's primary position), he should still have had regard to the resources of each of the interveners respectively when deciding whether it was just to make an order. Here the overall shape of the evidence is that the interveners are members of a family with substantial resources and sophisticated financial arrangements, about which the court has only limited information. In this situation even if an element of financial hardship on the part of one or more of each intervener can be identified, it is not just and equitable to make a costs order against the LSC.

64. The Master did not follow this approach, but rather applying *R (Gunn) v Home Secretary* [2001] EWCA Civ 891 said that an order should 'normally' be made once financial hardship had been shown. However the whole basis of the Court of Appeal's conclusion in *ex parte Gunn* was that 'just and equitable' had a well established meaning in appellate proceedings (where the non-funded party has never been required to show financial hardship) which did not involve consideration of the non-funded party's resources (see judgment paras [47] to [50]). However that approach cannot be applied to first instance proceedings where the non-funded party's means are plainly relevant as she must first demonstrate financial hardship.

65. Mr Mansfield's first point in response is that, as with the issue of apportionment, the Notice of Appeal does not challenge the finding that it was just and equitable to make an order for payment out of public funds in favour of the interveners; and it is therefore not open to the LSC to raise the matter now.

66. Without prejudice to that submission, broadly it is said by Mr Mansfield QC that the Master adopted the right approach; and he adopts the reasoning of the Master at paragraphs 80 and 81 of his judgment and at paragraph 89 (a finding in respect of R which was adopted for the interveners too).

67. He reminds me that the practical position of the interveners as a consequence of the litigation is as follows:

i) F will have paid her solicitors' costs of £152,317, of which she can only recover £123,106. Her shortfall is £29,211 plus travel expenses of £10,000 (plus irrecoverable costs of £33,712 for possession proceedings brought to oust P from a flat she owned in this country the beneficial ownership of which had been in dispute in the proceedings). If no order is made in her favour against the LSC, the litigation will have cost her £196,029;

ii) A will have paid her solicitors costs of £74,587 of which she could only recover at most £60,291. Her shortfall is £14,296 plus travel expenses of about £10,000. If no order is made in her favour against the LSC the litigation will have cost her £84,681;

iii) V will have paid her solicitors about £385,595, but can only at most recover £311,602 leaving a shortfall of £73,993, plus K's costs of £1,190 plus travel expenses of £10,000. If no order is made the litigation will have cost her £396,785.

68. He submits these interveners did nothing to bring the litigation on themselves. They had no option but to intervene in the proceedings to defend their assets which P was attempting to "seize", incurring huge costs through no fault of their own because of the disgraceful conduct of P and the unreasonable manner in which the litigation had been conducted by her, backed by the LSC. The spurious nature of the claim was brought to the attention of the LSC in correspondence, but it nonetheless supported the claim throughout. He submits it would add insult to injury were it to be determined in the circumstances that it was not just and equitable to make such orders particularly bearing in mind the unrecovered costs and expenses they will still have

suffered. As to Regulation 6, he submits this could only be relevant to quantum if there are matters arising out of the conduct of the litigation, but on the facts this was not a consideration arising here.

Discussion

69. In my view, this ground should have been raised by the LSC in its Notice of Appeal, or at least, it should have applied to add it by amendment, if it wished to argue the point on this appeal (see for example what was said by the Court of Appeal in *IS Innovative Software Ltd v Howes* [2004] EWCA Civ 275).

70. But in any event, I do not accept the LSC's arguments on the merits. In *ex parte Gunn* the LSC asked the Court of Appeal to consider the lawfulness of adverse costs orders made against it in three cases. The costs orders followed unsuccessful applications by funded litigants on renewed applications for permission to appeal in two cases, and against the refusal of a renewed application for permission to apply for judicial review in the third.

71. Lord Phillips M.R, giving the judgment of the Court said (at paragraph 1) that the issues raised were of general importance at all levels of civil litigation. Having set out the relevant statutory and regulatory framework in detail, Lord Phillips considered the principles relating to whether it is "just and equitable" that costs should be paid out of public funds, and at paragraphs 46 to 50 he said this:

"46. In *re O (Costs: Liability of Legal Aid Board)* [1997] 1 FLR 465, the applicant was again a local authority. Lord Woolf MR stated, at p.470G:

"If the court comes to a conclusion that in those circumstances it would make the hypothetical order for costs [what is now a section 11(1) order] then in the case of an appeal the court will usually conclude in the absence of some special circumstance that for the purposes of s 18(4) (c) [of the 1988 Act] it is just and equitable to make an order. Contrary to Mr Howard's submission a local authority, because it is a public body, is not at a disadvantage as compared with any other litigant in seeking an order against the Board."

47. Mr Morgan submitted that these authorities were no longer authoritative. He submitted that the fact that the Court is required to have regard to the resources of the non-funded party in deciding whether it is just and equitable to make the order, cannot be reconciled with the approach of the Courts to the earlier legislation. A well-resourced public authority is not to be treated as in as good a position as a party with few resources.

48. We do not agree that the now well established meaning of "just and equitable" in this context requires change by reason of the introduction of paragraph (6). That provision applies to both sub-paragraphs (c) and (d) of Regulation 5(3). Its relevance to the exercise required in Regulation 5(3) (c) is obvious as is the newly introduced requirement under Regulation 10(3) (b) of the Costs Regulations to provide a statement of resources. Resources could, in some circumstances, be of relevance to the 'just and equitable' test and it would have been curious, as a matter of drafting, if the paragraph 6 requirement had not been extended to Regulation 5(3)(d). It does not, however, follow that the requirement was intended to modify the practice based on the authorities already cited, in relation to applications in Courts other than Courts of first instance.

49. It seems to us that this practice reflects reasoning that it will normally be just and equitable that when a costs order is made against a party who has been supported by public funds, the costs covered by the order should, insofar as they cannot be recovered from the funded party, be defrayed out of public funds.

50. We consider that the practice laid down in *re O* should be followed by costs judges when applications are made to them for costs against the Commission following a Court of Appeal decision in favour of non-funded parties, even if they are government departments. Costs judges should proceed on the premise that it is just and equitable that the Commission should stand behind their "client", by definition under the Regulations the individual who receives funded services, unless they are aware of facts which render that result unjust or inequitable."

72. There are two points here. First, I am not persuaded Mr Marven is correct in submitting that the observations of the Court cited above are not of general application when considering whether it is just and equitable to make orders for costs in favour of a non-funded party. Normally, it seems to me it will be just and equitable for a non-funded party to recover his or her costs from public funds to the extent they cannot be recovered from the funded party where he or she would otherwise suffer financial hardship, unless there are facts which render that result unjust or inequitable. Like the Master, I can see no reason to conclude otherwise.

73. But in any event, whether that is right or not, I do not accept the premise of Mr Marven's submission, which is that the Master overlooked the interveners' resources when considering whether it was just and equitable to make any order in this case. The Master was obviously well aware of the financial position of the interveners, and of the LSC's submissions - repeated before me - that their means precluded an order being made in this case under both Regulation 5(3)(c) *and* (d). It was against that background, that he concluded in paragraph 81 of his judgment that in the particular circumstances of this case, the facts were such that, whether *ex parte Gunn* was distinguishable or not, it was just and equitable for an order to be made in any event. I can see no grounds for concluding that the Master was plainly wrong. Indeed in my view, the conclusion he reached was one which was fully justified on the facts for the reasons he gave.

74. Accordingly, for all the reasons given above, this appeal is dismissed.

75. Finally, though the views expressed and conclusions I have reached in this judgment are mine alone, I should express my grateful thanks to the assessors sitting with me during the hearing.