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**T (Children)**

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**Court** : UK Supreme Court

**Decided On :** Jul-25-2012

**Judge** : Lord Phillips, President, Lady Hale, Lord Mance, Lord Dyson, Lord Carnwath

**Appeal No.** : On appeal from: [2010] EWCA Civ 1585

**Advocate for Pet/Ap.** : Appellant: Janet Bazley QC Elizabeth Shaw Sally Stone (Instructed by Hull City Council Legal Section) Respondent: Simon Hirst (Instructed by Sandersons Solicitors) Intervener: (Children and Family Court Advisory and Support Service) Teertha Gupta QC Dorothea Gartland (Instructed by CAFCASS Legal Services) (The Grandparents' Association) Charles Hale Rebecca Foulkes (Instructed by Freemans Solicitors)

**Judgement** :

**LORD PHILLIPS, DELIVERING THE JUDGMENT OF THE COURT**

Introduction

1. It is rare for the Supreme Court to entertain an appeal that relates exclusively to costs, but this appeal raises an important issue of principle in relation to the liability of a local authority to pay the costs of a party to care proceedings.

2. The proceedings related to two children, whose parents were separated. The children made allegations of sexual abuse by their father and six other men in which the father's parents ("the grandparents") had colluded. These allegations

were included by the appellant ("the Council") in the schedule of matters relied upon in the care proceedings as meeting the threshold criteria for a care order under section 31(2) of the Children Act 1989. The grandparents were joined as interveners, as were five of the six men. The judge conducted a discrete fact-finding hearing which occupied a total of five and a half weeks between February and December 2009. The lengthy findings that he then made exonerated the grandparents and five of the other six interveners.

3. Four of the five men who intervened qualified for legal aid (the fifth represented himself), but the grandparents' relatively modest income disentitled them from this. The grandfather was aged 67. He is a retired fireman. The grandmother was aged 63 and worked, as she still does, as a part time bookkeeper. His pension and her earnings together amount to about 25,000 a year. The grandparents borrowed 55,000 from a building society, of which they spent 52,000 on legal advice and representation at the hearing. They cannot hope to pay this off in less than 15 years. In these circumstances the grandparents applied for an order that the Council pay their costs.

4. It was and is common ground that the Council could not be criticised for advancing in the care proceedings the allegations made against the grandparents. The judge, His Honour Judge Dowse, summarised the basis of their application for costs as based "on the apparently inequitable fact that they have largely succeeded in defending the allegations made against them but must bear their own costs". The judge dismissed their application. He did so on the basis that it was not usual to order costs in a child case against a party unless that party's conduct has been reprehensible or its stance unreasonable. In support of that proposition the judge cited authorities that included the judgments of Wilson J in Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317 and Wilson LJ in In re J (Costs of Fact-Finding Hearing) [2009] EWCA Civ 1350; [2010] 1 FLR 1893. The judge expressed the view that it was unacceptable that more and more people in the position of the grandparents were faced with "potentially life-changing allegations" without being able to gain some financial assistance from the State.

5. The grandparents appealed to the Court of Appeal, consisting of Wilson and Munby LJJ and Coleridge J. The appeal was allowed: [2010] EWCA Civ 1585. Wilson LJ gave the leading judgment. He held that Judge Dowse had failed to appreciate the true purport of his judgment in In re J, which was favourable rather than adverse to the grandparents' application for costs.

6. Permission to appeal to this Court was given on terms that, whatever the result, the grandparents' entitlement to recover their costs from the Council would not be disturbed. Permission to intervene was granted to the Children and Family Court Advisory and Support Service ("CAFCASS") and to the Grandparents' Association. It is a remarkable fact, and ironic in an appeal about costs, that all counsel are appearing pro bono. We would like to express our gratitude for the assistance that they have given.

The Family Procedure Rules 2010

7. On 6 April 2011 the Family Procedure Rules 2010 (SI 2010/2955) ("FPR") came into force. They apply to family proceedings in the High Court, County Courts and Magistrates' Courts. Part 28 deals with costs. It is common ground that Part 28 of FPR consolidates the previous law relating to costs, including the relevant provisions of the Family Proceedings Rules 1991 (SI 1991/1247) and that it does not change the law in relation to costs that is applicable to this appeal. In these circumstances it is sensible to consider the issues raised by this appeal within the context of those Rules.

8. FPR 1.2, which is new, requires the court to give effect to the overriding objective, which is defined in FPR 1.1, which provides:

"1.1 The overriding objective

This section has no associated Explanatory Memorandum

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable”

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

9. FPR 28.3 makes special provision for costs in financial remedy proceedings. Paragraph (5) provides that the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party. This is subject to paragraph (6) which permits the court to make such an order when it considers it appropriate to do so because of the conduct of a party in relation to the proceedings. Paragraph (5) is a particular example of the departure in family proceedings from the general rule applicable in civil proceedings that "the unsuccessful party will be ordered to pay the costs of the successful party": CPR 44.3(2)(a).

10. FPR 28.1 provides that "The court may at any time make such order as to costs as it thinks just". This is not an unfettered discretion, for FPR 28.2 makes applicable to family proceedings, other than financial remedy proceedings, the majority of the rules in relation to costs of the CPR. The most significant of the rules excluded is the general rule that costs follow the event, quoted above in CPR 44.3(2). In the context of this appeal, the most relevant of the rules that are applicable are included in the following provisions of CPR 44.3:

"(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including “

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes “

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

11. (4)(b) is relevant in relation to a regime where the general rule in (2)(a) applies. For this reason we do not see that it has any direct relevance to family proceedings. (4)(c) can have no relevance to public law proceedings and can thus be disregarded in the present case. The other rules are simply examples of circumstances that will be relevant when considering the result that justice requires in the individual case. In family proceedings, however, there are usually special considerations that militate against the approach that is appropriate in other kinds of adversarial civil litigation. This is particularly true where the interests of a child are at stake. This explains why it is common in family proceedings, and usual in proceedings involving a child, for no order to be made in relation to costs. The reasons for departing from the principle that costs normally follow the event differ, however, depending upon the nature of the family proceedings. On this appeal it is necessary to identify the policy considerations that should inform the approach to costs that is required in the interests of justice in care proceedings.

Reasons for making no order for costs in family proceedings that are not relevant in the present case

12. The Court has been referred to a number of authorities dealing with costs in family proceedings. In order to see the wood from the trees it is helpful to remove from the forest the timber that does not bear on the issues raised by this appeal. The following reasons for not awarding costs in family proceedings are not relevant:

i) In ancillary relief proceedings each party's liability for costs will be taken into consideration when making the substantive award. This approach has the advantage of discouraging the parties from running up unnecessary costs “ see Baker v Rowe [2009] EWCA Civ 1162; [2010] 1 FCR 413, paras 20 to 23 per Wilson LJ.

ii) Orders for costs between the parties will diminish the funds available to meet the needs of the family “ see Gojkovic v Gojkovic [1992] Fam 40, 57, per Butler-Sloss LJ and R v R (Costs: Child Case) [1997] 2 FLR 95, 97, per Hale J. (This could, of course, be a good reason not to award costs against a family member in care proceedings).

iii) It is undesirable to award costs where this will exacerbate feelings between two parents, or more generally between relations, to the ultimate detriment of the child: see B (M) v B (R) (Note) [1968] 1 WLR 1182, 1185 per Willmer LJ; Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317, 1319 per Wilson J. (Once again this could be a good reason not to award costs against a family member).

Unreasonable conduct

13. CPR 44.3(5) is as relevant in care cases as it is in other kinds of family proceedings. Where a local authority has caused costs to be incurred by acting in a way which was unreasonable justice may well require that the local authority pay the costs in question. Examples of such cases include: In re R (Care: Disclosure: Nature of Proceedings) [2002] 1 FLR 755; In re X (Emergency Protection Orders) [2006] 2 FLR 701; Coventry City Council v X, Y and Z (Care Proceedings: Costs)

[2011] 1 FLR 1045. The principle underlying these decisions has no relevance to the present case, for it has not been suggested that the conduct of the local authority was in any respect unreasonable.

Precedent

14. CAFCASS have submitted that this case is the first occasion upon which a local authority has been ordered to pay costs in public law proceedings in the absence of any criticism of its conduct. CAFCASS is well placed to make that submission and no case to the contrary has been cited to us. In In re M (Local Authority's Costs) [1995] 1 FLR 533 a local authority applied for permission to refuse contact between two children and their parents. The magistrates refused the application and ordered the local authority to pay the father's costs. On appeal Cazalet J set aside that order, holding that there should be no order as to costs. Citing the decision of Wilson J in Sutton London Borough Council v Davis he observed at p 541 that it would be unusual for a court to make an order for costs in a child case where a party's conduct had not been reprehensible or that party's stance had not been beyond the band of what was reasonable. He added at p 544:

"As a matter of public policy it seems to me that where there is the exercise of [a] nicely balanced judgment to be made by a local authority carrying out its statutory duties, the local authority should not feel that it is liable to be condemned in costs if, despite acting within the band of reasonableness (to adopt the words of Wilson J), it may form a different view to that which a court may ultimately adopt."

The reasoning of the Court of Appeal

15. The chain of reasoning of Wilson LJ in this case has its origin in his decision in Sutton London Borough Council v Davis. The local authority had refused to register a childminder, who successfully appealed to the magistrates, who awarded costs in her favour. The local authority appealed against the costs order. In doing so the authority urged the court to apply, by analogy, the principle that costs are not usually ordered in child cases. Wilson J accepted that this was a proposition applied for many years in the Family Division. He gave the following

explanation for that proposition at p 1319:

"Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party. Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties. But the proposition is not applied where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable:Havering London Borough Council v S [1986] 1 FLR 489 and Gojkovic v Gojkovic [1992] Fam 40, 60C-D."

16. Wilson J then dealt with the facts. He observed that the local authority had erred in concluding that the respondent was not fit to mind children, but held that their stance in relation to Mrs Davis was neither reprehensible nor unreasonable.

17. Wilson J went on to reject the analogy with care proceedings, and dismissed the appeal. His reasons at pp 1319-1320 were as follows:

"In care proceedings the local authority and all other parties come into court in order to assist it in choosing the programme for the child's future which will best serve his or her welfare. In the case of Mrs Davis the local authority made an incorrect decision as to her fitness. She had a right to be registered and they infringed it. Mrs Davis afforded them the opportunity to review their decision by lodging an objection pursuant to section 77(3) of the Children Act 1989. But they resolved that the decision should stand. In order to establish her right to be registered, Mrs Davis had to appeal to the magistrates' court. The proceedings were adversarial and the local authority lost the argument. Such were the circumstances for application of the principle that costs should follow the event. Far from being satisfied that the justices were plainly wrong to decide that the local

authority should pay the costs of Mrs Davis, I consider that they were right."

18. This judgment confirmed that it was not the normal practice to award costs in child care cases. It contained, however, the seeds of what was to follow, for in effect Wilson J applied the general common law rule that costs follow the event in adversarial cases.

19. In re J (Children) [2009] EWCA Civ 1350 involved contact proceedings between a mother and father. The district judge held a fact finding hearing to resolve allegations of violence made by the mother and denied by the father. Most of the mother's allegations were held to be established and she sought the costs of the hearing. The district judge refused her application and made no order as to costs. The mother appealed to the county court. She invited the judge to draw a distinction between the fact finding hearing and that part of the hearing that related to the welfare of the children. The judge declined to do so. He held that the father had not acted unreasonably in giving evidence in opposition to the mother and dismissed her appeal.

20. On appeal to the Court of Appeal, Wilson LJ, giving the only reasoned judgment, held that the circuit judge had been wrong not to adopt a "compartmentalised" approach. He held at para 17:

"The order for a bespoke fact-finding hearing was surely to consign the determination of the mother's allegations into a separate compartment of the court's determination of the father's application for an order for contact. It went almost without saying, although the circuit judge chose to say it, that the optimum outcome of the contact application could be determined only by reference to the findings made at the fact-finding hearing; but the effect of the direction for a separate fact-finding hearing was that the costs incurred by the mother in relation to that hearing can confidently be seen to be wholly referable to her allegations against the father. There was, in that sense, a ring fence around that hearing and thus around the costs referable to it. Those costs did not relate to the paradigm situation to which the general proposition in favour of no order as to costs applies."

21. Wilson LJ went on to hold that the husband had not acted irrationally and that a proper exercise of the court's discretion did not depend upon why he chose to deny allegations that he must have known were true. He remarked that issues of fact arose in most disputed cases in relation to children and that his decision in the instant case should not be taken as an indication that it was appropriate to make an order for costs in the vast run of such cases. He held, however, that the mother's case fell into "a separate and unusual category". It was devoted exclusively to consideration of the serious and relevant allegations made by the mother against the father, most of which were established. In these circumstances he held that the proper order was for the father to pay two thirds of the mother's costs of the hearing.

22. This decision could have been justified on the ground that the costs in question had been caused by the father's unreasonable refusal to admit the facts that were ultimately proved against him, but Wilson LJ's reasoning appears to have been simply that a party who makes allegations of fact against another party that prove to be unfounded, or who challenges allegations of fact that prove to be well founded, should be liable for the costs of resolving those issues, whether his conduct was reasonable or not.

23. We turn to the decision of Wilson LJ in the present case. He held that Judge Dowse had erred in relying upon In re J to justify applying the general proposition that no order for costs should be made in a child case. He had failed to appreciate that the true purport of In re J was that the general proposition should not be applied in relation to the costs of a fact-finding hearing. Wilson LJ rejected the submission made on behalf of the Council that the general proposition against awarding costs in care proceedings applied. He held at para 18:

"I consider that, where in care proceedings a local authority raise, however appropriately, very serious factual allegations against a parent or other party and at the end of a fact-finding hearing the judge concludes that they have not established them, the general proposition is not in play."

In that situation he held that the judge should approach the question of costs with a clean sheet.

24. As to the approach that the judge should then follow, Wilson LJ cited at para 20 the statement that he had made in ancillary relief proceedings that were not concerned with a child, Baker v Rowe [2010] 1 FCR 413, para 25:

"Even where the judge starts with a clean sheet, the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion."

25. He added at para 21:

"In my view the facts that the grandparents were faced with allegations of the utmost severity, that accordingly it had been reasonable for them to stretch their economy to the utmost in order to secure for themselves a professional defence against them and that in the event the result was an exoneration, were all matters which should have been of great, indeed in my view of decisive, importance to a judge who was about to write on a clean sheet."

The relevance of a split hearing

26. Care proceedings usually involve allegations of misconduct by some person, typically a parent who is looking after the child, but often, as in this case, of other persons. Those against whom allegations are made are likely to wish to challenge them. The parent's primary concern may be not to lose care of the child. Others may simply be concerned to clear their names. The object of the proceedings is to reach the decision that is in the best interests of the child. The procedure for achieving this in this jurisdiction is adversarial. The proceedings are brought by the local authority. The parents and the child or children concerned are made respondents. Those against whom allegations of misconduct are made may be joined, either on their own application or at the initiative of the court, as interveners. Before deciding what is in the best interests of the child it is sometimes necessary to resolve issues of fact. The court will normally require the local authority to set out the findings of fact that it seeks to establish in order to show that the threshold requirements for making a care order laid down by section 31(2) of the Children Act 1989 are satisfied.

27. The decision to have a split hearing of care proceedings is essentially one of case management. It is taken by the court. The position was clearly spelt out by Lady Hale in In re B (Children)(Care Proceedings: Standard of Proof) (CAFCASS intervening) [2008] UKHL 35; [2009] AC 11:

"74. Care proceedings are not a two stage process. The court does have two questions to ask. Has the threshold been crossed? If so, what will be best for the child? But there are many cases in which a court has two or more questions to ask in the course of a single hearing. The same factual issues are often relevant to each question. Or some factual disputes may be relevant to the threshold while others are relevant to the welfare checklist: it may be clear, for example, that a child has suffered an injury while in the care of the mother, but whether the father or stepfather has a drink problem and has been beating the mother up is extremely relevant to the long term welfare of the child.

75. The purpose of splitting the hearing is not to split the two questions which the court must answer. It is to separate out those factual issues which are capable of swift resolution so that the welfare professionals have a firm foundation of fact upon which to base their assessments of family relationships and parenting ability: see Inre S (Care Proceedings: Split Hearing) [1996] 2 FLR 773. A fact finding hearing is merely one of the case management possibilities contemplated by the new Public Law Outline There is no point in splitting the issues if the facts cannot be determined relatively quickly, still less if it is unlikely to result in clear cut findings to help the professionals in their work.

76. But the finding of those facts is merely part of the whole process of trying the case. It is not a separate exercise. And once it is done the case is part heard"

28. The decision to have a split hearing cannot affect the principles to be applied by the court when dealing with costs, although it may have a practical impact on the court's decision. The first part of a split hearing isolates specific issues of fact. For the local authority and the court the resolution of those issues is a stepping stone to the final decision in relation to the welfare of the child or children concerned. So far as interveners are concerned, their interests in the proceedings may be restricted to the findings that are made at the first hearing. Having a split

hearing makes it much easier to identify both the manner in which the issues of fact have been resolved and the costs reasonably incurred by the parties in relation to the issues affecting them. It follows that, if it is correct in principle to award costs in relation to individual issues of fact, this can much more readily be done where there has been a split hearing. Indeed the exercise may well be one that it is not practical, and therefore not desirable, to undertake where there has not been a split hearing. Courts are, however, accustomed to making a special award of costs in relation to a discrete issue that forms part of a single hearing. This appeal raises an issue of principle in relation to that practice in the context of care proceedings.

The issue of principle

29. The issue of principle raised by this appeal is whether in care proceedings a local authority should be liable to pay an intervener's reasonable costs in relation to allegations of fact, reasonably made by the authority against the intervener, which have been held by the court to be unfounded. The principle advanced by Cazalet J that I have quoted at para 14 has continued to be applied in cases not involving split hearings subsequent to the decision in In re J. Thus in Coventry City Council v X, Y and Z (Care Proceedings: Costs) [2011] 1 FLR 1045 at para 192 His Honour Judge Bellamy ruled that it was still an appropriate test to apply. In Kent County Council v Mother and others [2011] EWHC 1267 (Fam) Baker J rejected an application for costs against a local authority by an intervener who had been wholly exonerated in a fact finding hearing that was the first part of a split hearing. He did so on the ground that the impetus for making the allegations against the intervener had been that of the court not the local authority.

30. The principle applied by Cazalet J appears to mirror the approach in proceedings under the Court of Protection Rules 2007 (SI) 2007/1744). Rule 157 provides that where proceedings concern a protected person's welfare the general rule is that there will be no order as to the costs of the proceedings or of that part of the proceedings that concern his personal welfare. Rule 159 permits departure from the general rule if the circumstances so justify. In G v E and Manchester City Council and F [2010] EWHC 3385 (Fam) Baker J awarded costs against a local

authority that had been guilty of misconduct that he held justified departure from the general rule. He observed at para 40:

"Parties should be free to bring personal welfare issues to the Court of Protection without fear of a costs sanction. Local authorities and others who carry out their work professionally have no reason to fear that a costs order will be made. It is only local authorities who break the law, or who are guilty of misconduct that falls within the meaning of rule 159, that have reason to fear a costs order. Local authorities who do their job properly and abide by the law have nothing to fear. "

These comments were endorsed on appeal by Hooper LJ: [2011] EWCA Civ 939, at para 17.

31. The statement of principle of Wilson LJ that we have quoted at para 23 above is at odds with the principle applied by Cazalet J and the judges who have followed him, giving rise to the issue that we have set out at para 29.

Should local authorities be protected from liability to costs in care cases?

32. The duties imposed on local authorities often require them to initiate public law proceedings. The Court of Appeal has recently considered, in the context of cases where claims are conceded, whether different principles apply in the case of public authorities in proceedings in the Administrative Court. The court held that the position should be no different for litigation in the Administrative Court from what it is in general civil litigation “ see M v Croydon London Borough Council [2012] EWCA Civ 595. There is no general principle that protects a local authority that has acted reasonably in the course of its duties from liability for costs in public law proceedings. Are there special considerations that apply in family proceedings involving children?

33. At para 12 we have identified a number of circumstances in which there is good reason for not applying the general rule that costs follow the event to family proceedings. They are all circumstances in which orders for costs might have consequences that conflicted with the object of the individual proceedings. They have no application to the position of a local authority that has caused costs to be

incurred by making allegations that have proved to be unfounded.

Submissions

34. Miss Bazley QC for the Council advanced a broad argument of policy in support of the Council's appeal. Local authorities have limited funds. Their costs in relation to care proceedings are met from their Children's Services budgets. There are many other claims on this budget. Miss Bazley submitted that if local authorities are to be at risk of paying the costs of those against whom they reasonably make allegations in care proceedings, this is likely to inhibit them from doing so, to the general detriment of children at risk. More generally, the child services provided would suffer as a result of this additional financial burden. Miss Bazley produced in support of her submissions the results of what might be described as an amateur survey carried out by junior counsel and Bar students into the attitudes of 28 local authorities to the risk of liability to costs in care cases. Although no objection was made to this material, we do not consider that it would be appropriate to base conclusions upon it. No evidence is needed, however, to support the proposition that if local authorities are to become liable to pay the costs of those that they properly involve in care proceedings this is going to impact on their finances and the activities to which these are directed. The Court can also take judicial notice of the fact that local authorities are financially hard pressed, as demonstrated by the fact that their counsel have appeared before us without payment.

35. Miss Bazley's submissions were supported by CAFCASS. They made the further point that if costs are to be awarded against local authorities who fail to make good allegations reasonably made, costs are likely to be awarded against interveners who are held wrongfully to have challenged allegations made against them, which is likely to result in a reluctance to intervene, to the detriment of the conduct of care cases.

36. Although the Grandparents are no longer at risk, Mr Hirst who appeared for them, advanced their case with vigour. He accepted that there was a general principle that costs should not be awarded in cases involving children, but argued that Wilson LJ had been correct not to apply this principle to fact finding hearings.

Interveners in such hearings would be concerned principally in clearing their names. The issue was not what was in the best interests of the child but whether the facts alleged by the local authority were true. Local authorities who failed on that issue should, in justice, pay the interveners' costs.

37. Mr Hale, who appeared for the Grandparents' Association, did not put the distinction between a single hearing and a split hearing at the forefront of his argument and, indeed, some parts of his written case did not support that distinction. Thus he submitted at para 47 that whether the fact finding was listed separately or together with the welfare determination made "no discernable difference" and at para 48 that not every fact finding hearing would lead to an order for costs. All other factors and considerations were in play.

38. Mr Hale focussed primarily on general considerations of policy. He submitted that there was no reason of public policy for treating local authorities differently from other parties in public law proceedings. The suggestion that potential liability to costs would fetter their performance of their public duties was anecdotal and unjustified. Justice would best be served by giving the court an unfettered discretion in relation to costs. In a case such as the present it would be an affront to natural justice to leave the interveners to pay their own costs.

Discussion

39. The question of whether it is just to make an award of costs against a public authority must be distinguished from the question of whether a litigant's costs should be publicly funded. The former question is for the court; the latter for the legislature. Whether a litigant's costs should be publicly funded involves issues in relation to access to justice and the requirements of article 6 of the European Convention of Human Rights. Mr Hale invoked that article in support of his argument that where allegations made against an intervener are not made out, the local authority which advanced those allegations should be liable for the intervener's costs. We consider that this argument was misconceived. The requirements to provide public funding in the interests of access to justice and of compliance with article 6 apply at the outset of legal proceedings, not when they are concluded, in the light of the result.

40. The Funding Code prepared by the Legal Services Commission pursuant to section 8 of the Access to Justice Act 1999 makes provision for public funding in proceedings under, inter alia, section 31 of the Children Act 1989. The effect of the code is that children, parents and those with parental responsibility are granted funding without reference to means, prospects of success or reasonableness, but such funding is not available to interveners who are joined in such proceedings: see volume 3C-427 of the Legal Services Commission Manual. There may be a case for saying that this results in injustice in the case of interveners in the position of the grandparents in the present case, but it does not follow that justice demands that any deficiency in the provision of legal aid funding should be made up out of the funds of the local authority responsible for the care proceedings.

41. If in principle a local authority should be liable for the costs of interveners against whom allegations have been reasonably made that are held unfounded, then this liability should arise whether or not the interveners are publicly funded. In the present case, the five men who intervened and were exonerated should also have sought and been awarded costs. The burden of costs awarded against local authorities in such circumstances is likely to be considerable. When considering whether it is just to make an award of costs against a local authority in circumstances such as those of the present case it is legitimate to have regard to the competing demands on the limited funds of the local authority.

42. In the context of care proceedings it is not right to treat a local authority as in the same position as a civil litigant who raises an issue that is ultimately determined against him. The Children Act 1989 imposes duties on the local authority in respect of the care of children. If the local authority receives information that a child has been subjected to or is likely to be subjected to serious harm it has a duty to investigate the report and, where there are reasonable grounds for believing that it may be well founded, to instigate care proceedings. In this respect the role of a local authority has much in common with the role of a prosecuting authority in criminal proceedings. It is for the court, and not the local authority, to decide whether the allegations are well founded. It is a serious misfortune to be the subject of unjustified allegations in relation to misconduct to a child, but where it is reasonable that these should be investigated by a court,

justice does not demand that the local authority responsible for placing the allegations before the court should ultimately be responsible for the legal costs of the person against whom the allegations are made.

43. Since the Children Act came into force, care proceedings have proceeded on the basis that costs will not be awarded against local authorities where no criticism can be made of the manner in which they have performed their duties under the Act. Wilson LJ in In re J at para 19 disclaimed any suggestion that it was appropriate "in the vast run of these cases to make an order for costs in whole or in part by reference to the court's determination of issues of historical fact". But, as I have indicated, there is no valid basis for restricting his approach in that case to findings in a split hearing. The principle that he applied would open the door to successful costs applications against local authorities in respect of many determinations of issues of historical fact. The effect on the resources of local authorities, and the uses to which those resources are put would be significant.

44. For these reasons we have concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings. Judge Dowse's costs order was founded on this practice. It was sound in principle and should not have been reversed by the Court of Appeal.

45. Accordingly we allow this appeal and restore Judge Dowse's order, on the basis that it shall not be relied upon to deprive the grandparents of the costs to which the Court of Appeal held that they were entitled.

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