Essex CHAMBERS

PUBLIC LAW UPDATE

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INTRODUCTION

1. I will address the following topics:
   (1) Proportionality.
   (2) Purposive statutory construction.
   (3) Fairness.
   (4) Candour.
   (5) Retrospective Tax legislation
   (6) Remedies.
   (7) Costs.

Proportionality

2. In *R (Tigere) v SSBIS* [2015] UKSC 57 [2015] 1 WLR 3820 the Supreme Court was asked to decide whether the settlement criterion[1] for eligibility for a student loan was a breach of the Claimant's rights under A2P1 read with A14.

3. The Claimant was born in 1995, and had come to the UK with her parents in 2001. When her father returned home to Zambia in 2003 she and her mother overstayed. She was educated in England throughout her school career. It was only in January 2012 when she was granted discretionary leave to remain, and it would be another 6 years until she was eligible to apply for Indefinite Leave to Remain, at which point she could apply for a student loan. The Claimant challenged both the settlement criterion and the requirement for three years ordinary (lawful) residence prior to the commencement of the course.

4. The case turned on whether the interference with A2P1 were justified, which meant analysis of the following issues (see *Bank Mellat v HM Treasury (No 2)* [2014] AC 700:

   (1) Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right?
   (2) Is the measure rationally connected to that aim?

[1] Ie at least Indefinite Leave to Remain: see s33(2A) Immigration Act 1971 – "ordinarily resident… without being subject under the immigration laws to any restriction on the period for which he may remain".

(3) Could a less intrusive measure have been used?

(4) Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?

5. Mr. Justice Hayden in the High Court allowed her claim, differing from the analysis of Burnett J in *R (Kebede) v SSBIS* [2013] EWHC 2396 (Admin) [2014] PTSR 92, who had dismissed a similar claim on the basis that the margin of appreciation was "manifestly without reasonable foundation", following the test set out in *Humphreys v Revenue & Customs Commissioners* [2012] UKSC 18 [2012] 1 WLR 1545, and that there was "ample justification" for the discrimination complained of.

6. The Court of Appeal allowed the appeal on the basis that there was a wide margin of appreciation (although it did not adopt the "manifestly without reasonable foundation" test), and a bright line rule was plainly lawful where certainty on all sides was a virtue.

7. The Supreme Court allowed the appeal by a majority. There were three different approaches.

(1) Baroness Hale and Lord Kerr held that the wide margin of appreciation ordinarily enjoyed by the state in the field of social and economic benefits had to be varied in the field of education, which enjoyed direct protection under the ECHR, although given the context, which concerned the distribution of finite resources at some cost to the taxpayer, the Secretary of State's judgments must be treated with "appropriate" respect. That respect would have been heightened where there was evidence that the decision maker had addressed his mind to the particular issues (cf. Belfast City Council v Miss Behavin' Ltd [2007] 1 WLR 1420) or that the issue had received active consideration in Parliament: *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449. Neither had occurred here.

(2) Lord Hughes did not commit himself to an answer to the margin of appreciation question (para 58).

(3) Lords Sumption and Reed, dissenting, held that student loans were a form of state benefit, and that the proper test was the "manifestly without reasonable foundation" test.

8. The majority held that the current rule failed to strike a fair balance, which appeared to be a question which the court had to decide itself rather than apply a margin of appreciation. Baroness Hale and Lord Kerr also held that the measure was not rationally connected to the aim, for those like the Claimant were just as likely to stay as those who were legally settled, being effectively irremovable unless they committed a serious criminal offence.

9. The Justices differed on the solution. Baroness Hale and Lord Kerr held that a bright line rule to which a discretion "might" be added would suffice. Lords Hughes, Sumption and Reed held that a bright line rule would be lawful, even without any superadded discretion.

10. This case can be contrasted with the challenge to the controversial subordinate legislation imposing a cap on the amount of welfare benefits which can be received by claimants in non-working households, equivalent to the net median earnings of working households. In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449 it was alleged that the interference with the Claimant's A1P1 rights when read with A14 (the cap disproportionately affecting women over men) was not justified.

11. The Supreme Court (Baroness Hale and Lord Kerr dissenting, but not on the test of proportionality) held the cap to be lawful, on the basis that the issue concerned general measures of economic and social strategy, and that similar issues had and that the proper test for proportionality in those circumstances was the "manifestly without reasonable foundation". It was noted (although it was <u>not</u> a central reason underlying the *ratio*) that the policy had been subjected to a "detailed and vigorous" scrutiny by both Houses of Parliament, over more than 12 months, during the passage of the Bill through Parliament (para 27).

12. In *R (Lumsdon) v Legal Services Board* [2015] UKSC 41 [2015] 3 WLR 121 the proper test for proportionality in EU law when a member state promulgates a measure which is restrictive of one of the fundamental freedoms guaranteed by the Treaties. The measure was the introduction of the QASA[2] scheme for criminal advocates, which required provisional accreditation based on self-certification, with subsequent judicial assessment, for appearances in courts above magistrates' courts and youth courts, thereby limiting freedom of establishment and freedom to provide services.

13. The following illuminating remarks were made in relation to proportionality in EU law:

> "23 It appears from the present case, and some other cases, that it might be helpful to lower courts if this court were to attempt to clarify the principle of proportionality as it applies in EU law. That is the aim of the following summary. **It should however be said at the outset that** the only authoritative interpreter of that principle is the Court of Justice… It has also to be said that **any attempt to identify general principles risks conveying the impression that the court's approach is less nuanced and fact-sensitive than is actually the case. As in the case of other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent on the context.** This summary will range beyond the type of case with which this appeal is concerned, in order to demonstrate the different ways in which the principle of proportionality is applied in different contexts. It will provide a number of examples from the case law of the court, in order to illustrate how the principle is applied in practice.
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> 24 Proportionality is a general principle of EU law. It is enshrined in article 5(4) EU of the Treaty on European Union ("TEU"): "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." It is also reflected elsewhere in the EU treaties, for example in article 3(6) EU: "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred on it in the Treaties." The principle has however been primarily and most fully developed by the Court of Justice in its jurisprudence, drawing on the administrative law of a number of member states.
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> 25 The principle applies generally to legislative and administrative measures adopted by EU institutions. It also applies to national measures falling within the scope of EU law, as explained by Advocate General Sharpston in her

[2] Quality Assessment Scheme for Advocates.

opinion in *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (Case C-427/06) [2009] All ER (EC) 113, para 69:

> "For that to be the case, the provision of national law at issue must in general fall into one of three categories. It must implement EC law (irrespective of the degree of the discretion the member state enjoys and whether the national measure goes beyond what is strictly necessary for implementation). It must invoke some permitted derogation under EC law. Or it must otherwise fall within the scope of Community law because some specific substantive rule of EC law is applicable to the situation."

The principle only applies to measures interfering with protected interests: R (British Sugar plc) v Intervention Board for Agricultural Produce (Case C-329/01) [2004] ECR I-1899, paras 59-60. Such interests include the fundamental freedoms guaranteed by the EU Treaties." (emphasis added)

14. It had been established that the test for proportionality in EU law for EU institutions exercising a discretion involving political, economic or social choices is whether the measure is "manifestly inappropriate" (para 40). In the context of national measures implementing EU measures (such as directives) the court has applied a "manifestly disproportionate" test (para 73).

15. The Supreme Court held that the test for proportionality in EU law in relation to a measure restricting one of the fundamental freedoms was not the four stage domestic human right proportionality test (as in *Bank Mellat v HM Treasury (No 2)*) (para 26). It also held (paras 73 – 82) that the question was not whether the decision-maker's judgment was "manifestly wrong", doubting the *ratio* in the Court of Appeal case of *R (Sinclair Collis) v Secretary of State for Health* [2012] QB 394 (the restriction in that case being against the free movement of goods).

16. The correct question was whether it was established that no other measures could have been equally effective but less restrictive of the freedom in question: para 55. A decision would be disproportionate if a less restrictive measure could have been adopted, provided that it would have attained the objective pursued.

17. However, where a relevant public interest is engaged in an area where EU law has not imposed complete harmonisation, the member state possesses "discretion" or a "margin of appreciation" not only in choosing an appropriate measure, but also in

deciding on the level of protection to be given to the relevant public interest (para 64).

18. The Supreme Court held that the level of public protection appropriate in relation to criminal advocates was exactly the sort of question about which the national decision maker is allowed to exercise its judgment within a margin of appreciation (para 115). A self-certifying scheme of the kind proposed by the BSB presented a higher level of risk, and the Respondent was entitled to conclude that the risk was unacceptable, for it fell within the appropriate margin of appreciation.

Purposive statutory construction

19. In *Transport for London v Uber London Limited* [2015] EWHC 2918 (Admin) the somewhat technical question for the court was whether Uber's Private Hire Vehicles ("PHV") are equipped with a taximeter – ie a device for calculating fares. A taximeter means "a device for calculating the fare to be charged in respect of any journey by reference to the distance travelled or time elapsed since the start of the journey (or a combination of both": *s11(3) Private Hire Vehicles (London) Act 1998*. If the PHV was equipped with a taximeter, the owner of the vehicle would be guilty of a criminal offence: s11(2).

20. The evidence was that the driver's smartphone provided time and distance details to Uber servers which then calculated the fare. A black cab contains a taximeter which itself performs the fare calculation as the journey progresses. Mr. Justice Ouseley held that recording and transmitting some (or even all) of the inputs to a calculation made elsewhere did not render the device one for the calculation of the fare.

21. The judge also rejected a "purposive" construction of s11(3) directed at prohibiting the automatic nature of the process and outcome of fare calculation, finding that there was no proper or principled reason to stretch the interpretation of s11(3). He also rejected the submission that an "always speaking" or "updating" meaning to cover changes in technology should be given. Unusually the court made a declaration clarifying that a taximeter did not include a device that receives and forwards GPS data to an external server.

Fairness

22. In *MRH Solicitors Ltd* v *Manchester CC* [2015] EWHC 1795 (Admin) the High Court held that a county court judge had acted unlawfully in making findings that a firm of solicitors had behaved fraudulently in relation to litigation without giving it an opportunity to be heard.

23. A Recorder gave an *ex tempore* judgment at the end of a 4 day trial dismissing a claim for damages for personal injury on the basis that the underlying motor accident was staged and the claims fraudulent. Unusually, the judge found that the Claimant's solicitors were party to the fraud, as were the providers of hire cars.

24. Neither the solicitor nor the hire companies were parties to the proceedings, or had been given any warning that the findings might be made.

25. The High Court had jurisdiction to review decisions of the county court, for it is one of the inferior courts which is amenable to judicial review. Normally an appeal is a more suitable remedy, but neither the solicitor nor the hire companies were able to appeal, since they were not parties to the claim. However they could have applied to have been joined pursuant to CPR 19.2 with the court's permission, in order to ask the judge to sever the offending passages of the judgment. Had he refused to join them, or declined to sever the offending passages, an appealable decision would have been generated.

26. On the facts the availability of this alternative remedy was not considered sufficient to justify declining to consider the claim for judicial review (para 31); but the court may not be so lenient in future.

27. The court found that the Recorder was not entitled to make a conclusive finding of dishonesty or fraud against the solicitor and it should be treated as not having such a finding against it (para 43).

28. Similar questions arose in the context of a judgment giving reasons for permitting withdrawal of care proceedings, in which fears of adverse findings had been expressed on behalf of an NHS Trust whose clinicians had given evidence in the

case, but which was (unsurprisingly) not party to the proceedings: *West Sussex County Council v G* [2015] EWFC 67. In refusing permission to join the NHS Trust to proceedings in order to make closing submissions on whether a human rights declarations should be made against the Trust the judge stated, having refused to make such human rights declarations:

> "9 [The Trust] was invited to hear the submissions of the parties and my judgment…
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> 10 At the hearing [Counsel] applied on behalf of the Trust to be joined as party to the proceedings, for the court to direct a freestanding Human Rights Application to be issued by the parents, and for disclosure. It was opposed by the parents and the Guardian, the local authority's position being that if the Court were to make the findings sought on behalf of the parents it should accede to the Trust's application to be joined… They wished to be joined in essence to defend the factual issues raised in this case, but in my judgment that was inappropriate. They are a matter of fact and record.
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> 11 This is not a claim in clinical negligence, nor is it an application for damages pursuant to the Human Rights Act 1989 [sic]. This judgment is focussed upon the care case from which it arises and the specific application for permission to withdraw. I do not know whether ultimately such applications will be made, but this judgment is not supportive of either: it is my duty in what are highly unusual circumstances to record the matters which have given rise to the application to withdraw and to provide my own analysis and conclusions, relevant to the application, of the evidence which has emerged."

29. In *McCarthy v Visitors to the Inns of Court* [2015] EWCA Civ 12 the Administrative Court had found that the BSB's failure to disclose the first witness statement of a key witness to the Respondent barrister had been a breach of the relevant procedural rules and had been unfair, but had refused to quash the Visitors' decision dismissing his appeal from the decision of the Bar Disciplinary Tribunal.

30. Counsel had been found guilty of fabricating letters setting out his terms of work to a client for whom he acted under direct access provisions, rather than before the work was done. As a result the BDT had disbarred him.

31. The Court of Appeal allowed the appeal and quashed the decision to disbar Counsel on the basis that the first statement was capable of undermining the credibility of the witness (the client's husband), given the differences between that statement and his

second statement, and there was therefore a real possibility that the Tribunal would have come to a different conclusion had disclosure been made.

Candour

32. All public lawyers are aware of the importance of the duty of candour, which applies to both Claimants and Defendants.

33. The Claimant is subject to an obligation to make full and frank disclosure when making a claim for judicial review, which is a continuing duty:

> "litigants and lawyers are under a **clear and well-known duty to inform the court of all material facts known to them**. That duty does not stop when proceedings are instituted. It continues until the decision is made by the Court; indeed, it continues after the decision is made without notice, if the applicant discovers that the facts placed before the Court were inaccurate or incomplete, or if there is a material change in circumstances while the proceedings continue without notice to the other side" (per Stanley Burnton J in *R (Tshikangu) v Newham LBC* [2001] EWHC Admin 92) (emphasis added)

34. The Defendant is also under a duty of candour – to make full and frank disclosure of material relevant to the decision under challenge.

35. In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 Laws LJ stated:

> "[Counsel] submits, correctly, that there is no duty of general disclosure in judicial review proceedings. However, there is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue which the court must decide" (at [50])

36. In *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 at [86] Lord Walker stated:

> "It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A [Defendant] authority owes a duty to the court to cooperate and to make candid disclosure, by way of [witness statement], of all the relevant facts and (so far as they are

not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."

37. In *Peerless Ltd v Gambling Regulatory Authority (Mauritius)* [2015] UKPC 29 [2015] LLR 539 the Appellant, a Mauritius bookmaker, sought judicial review of the Defendant's decision to suspend and subsequently refuse to renew its licence to conduct fixed odds betting in football matches played abroad.

38. No reason had been given for the refusal to renew.

39. The Supreme Court of Mauritius had refused the Claimant permission to apply for judicial review by reason of its failure to make full and frank disclosure of facts and by reason of misleading statements made in the supporting affidavits.

40. The Supreme Court stated as follows:

> "14 It must be said at the outset that the conduct of the appellant and its legal advisers in respect of the judicial review proceedings in the court below was lamentable and justifiably open to severe criticism. The blunderbuss motion paper seeking relief is expressed in wide ranging and unfocused terms purporting to challenge 12 decisions… The evidence as presented by the appellant could quite easily have been brought together in one properly drafted, concise and complete affidavit. Instead the evidence of Mr Doomun, a director of the appellant, in support of the application was scattered through six inadequately drafted and at times inconsistent and contradictory affidavits. Exhibits were presented piecemeal and on occasion incompletely. The emerging evidence from Mr Doomun over six affidavits led to replying affidavits from Mr Nuchadee, the GRA's Licensing and Inspectorate Officer, seeking to correct factual averments and ensuring the proper exhibiting of complete documentation. The proceedings themselves appear to have been the subject matter of at least 20 mentions in court before the leave application eventually came on for hearing.
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> 15 The appellant's evidence was not merely presented to the Supreme Court in an untidy and unsatisfactory manner but it was at times positively misleading, whether through mistake and error or through deliberate design. It is difficult not to sympathise with that court's obvious exasperation with counsel's conduct of proceedings, the manner in which the attorney had formulated the affidavits and the way in which Mr Doomum had presented his evidence which failed to tell the whole story accurately at the proper time."

41. However, such was the strength of certain of the grounds of review, it was justified to grant permission, notwithstanding the lack of candour, and the Appellant's conduct of the proceedings below (para 28).

Retrospective Tax legislation

42. In *R (APVCO 19) v Revenue & Customs Commissioners* [2015] EWCA Civ 648 the Claimants had sought to take advantage of tax avoidance schemes designed to escape the payment of stamp duty land tax on property purchases involving the creation of an option exercisable by a third party at a price just over the SDLT threshold. Retrospective changes to s45 by the *Finance Act 2013 s194(1)(a)* and *194(2)* provided that duty was chargeable in full on the Appellants' transactions, and they sought to argue that such retrospective legislation infringed their rights under A1P1.

43. The Court of Appeal ruled that A1P1 was not engaged; but even if it was, it cannot be automatically unlawful or inimical to the rule of law to close a tax loophole retrospectively, just because there are other tax loopholes which are left open – otherwise it would be impossible to close one loophole without ensuring that all other loopholes were being closed at the same time. Nor was there any breach of the rule of law as far as the arbitrary nature of laws was concerned – it could not be said that the changes had been unpredictable, discretionary, or subjective, lacking a principled basis. The government had made it clear that SDLT avoidance schemes based on sub-sales and options would not be tolerated, and that retrospective legislation would be used to achieve that objective.

Remedies

44. In *R (ClientEarth) v SSEFRA* [2015] UKSC 28 [2015] PTSR 909 the Supreme Court made a rare mandatory order against a government department. Directive 2008/50/EC on ambient air quality and cleaner air for Europe provided by Article 13(1) that the limit values for nitrogen dioxide specified in Annex XI might not be

exceeded within a member state's designated zones or agglomerations from 1 January 2010, subject to an application for postponement for a maximum of 5 years under Article 22. The limit values for nitrogen dioxide were previously defined in Directive 99/30/EC of 22 April 1999.

45. In the course of 2010 one or more of the limit values for nitrogen dioxide was exceeded in 40 of the 43 zones or agglomerations within the UK. The UK made applications for postponements in respect of the zones which were not expected to be compliant in time, but was still obliged under Article 23 to prepare air quality plans showing measures appropriate to keep the exceedance period "as short as possible".

46. Such plans had been prepared in 2011, when the litigation commenced. The Supreme Court referred certain questions to the Court of Justice of the European Union in 2013, and also made a declaration of the breach of Article 13, notwithstanding its admission by the government, to allow the way to immediate enforcement action at national or European level.

47. By the time the CJEU had answered the referred questions, which largely concerned the ability to seek postponement for up to 5 years, the relevant postponement period had almost passed, and the Appellant wished to seek a mandatory order to enforce compliance with the obligation to prepare new air quality plans. In the meantime candid evidence filed on behalf of the government had revealed a significant deterioration in the prospects for compliance since 2011: by 2020 only 15 zones would be compliant (previously 42) and 2020 only 38 (previously 43). One of the reasons was the failure of the European vehicle emissions standards for diesel vehicles to deliver the expected emissions reductions of nitrogen oxides.

48. However despite this the limit values of the Directive had not been relaxed, and remained legally binding.

49. The High Court and Court of Appeal had refused to make a mandatory order. Mitting J stated the enforcement was a matter for the Commission, and the Court of Appeal had agreed.

50. However the CJEU, critically, had stated that where a member state had failed to comply with Article 13 it was for the national court having jurisdiction to take any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the Directive.

51. Lord Carnwath approached the question as follows:

> "29 The CJEU judgment, supported by the Commission's observations, leaves no doubt as to the seriousness of the breach, which has been continuing for more than five years, nor as to the responsibility of the national court for securing compliance. As the CJEU commented, at para 31:
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> > "Member states must take all the measures necessary to secure compliance with that requirement [in article 13(1)] and cannot consider that the power to postpone the deadline, which they are afforded by article 22(1) of Directive 2008/50, allows them to defer, as they wish, implementation of those measures."
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> 30 Furthermore, during the five years of breach the prospects of early compliance have become worse, not better. It is rightly accepted by the Secretary of State that new measures have to be considered and a new plan prepared. **In those circumstances, we clearly have jurisdiction to make an order. Further, without doubting the good faith of the Secretary of State's intentions, we would in my view be failing in our duty if we simply accepted her assurances without any legal underpinning.** It may be said that such additional relief was not spelled out in the original application for judicial review. But the delay and the consequent change of circumstances are not the fault of the claimant. That is at most a pleading point which cannot debar the claimant from seeking the appropriate remedy in the circumstances as they now are, nor relieve the court of its own responsibility in the public interest to provide it.
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> 31 **In normal circumstances, where a responsible public authority is in admitted breach of a legal obligation, but is willing to take appropriate steps to comply, the court may think it right to accept a suitable undertaking, rather than impose a mandatory order. However, Miss Smith candidly accepts that this course is not open to her, given the restrictions imposed on Government business during the current election period. The court can also take notice of the fact that formation of a new Government following the election may take a little time. The new Government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue. The only realistic way to achieve this is a mandatory order requiring new plans complying with article 23(1) to be prepared within a defined timetable.**" (emphasis added)

52. The Supreme Court therefore granted a mandatory order requiring the Secretary of State to prepare new air quality plans under Article 23 in accordance with a defined timetable to end with delivery of the revised plans to the Commission not later than 31 December 2015.

Costs

53. In *R (Hunt) v North Somerset Council* [2015] UKSC 51 [2015] 1 WLR 3575 the Supreme Court appears to have laid down a wider principle for recovery of costs than might have been thought. The leading case on costs in judicial review is *R (M) v Croydon LBC* [2012] EWCA Civ 595 [2012] 1 WLR 2607 which clarified that even where a case settled, costs generally followed the event.

54. But what should happen when the Claimant does not obtain the relief sought? In *Hunt* the Claimant had succeeded on the substantive challenge to the Council's decision to approve a revenue budget for 2012/3 in relation to the provision of youth services, but relief had been refused by the Court of Appeal because the quashing of a budget decision for a financial year which had expired before the appeal had been heard would be impractical and detrimental to good administration.

55. However the Court of Appeal granted the Council half of its costs.

56. The Supreme Court allowed the appeal and granted the Claimant his costs. Lord Toulson stated the following:

> "16. …If a party who has been given leave to bring a judicial review claim succeeds in establishing after fully contested proceedings that the defendant acted unlawfully, some good reason would have to be shown why he should not recover his reasonable costs."

57. This statement of principle appears to go further than *M v Croydon*, which makes reference to costs being awarded to the "successful party". It will be interesting to see how faithfully it is adhered to.

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