



Neutral Citation Number: [2019] EWCA Civ 1041

Case Nos: C1/2017/2909, C1/2018/0400
& C1/2018/0401

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

Peter Marquand (sitting as a Deputy High Court Judge)

CO1580/2017

And Richard Clayton QC (sitting as a Deputy High Court Judge)

CO1765/2017 and CO1766/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2019

Before:

LORD JUSTICE GROSS
LORD JUSTICE NEWEY

and

SIR TIMOTHY LLOYD

Between:

- | | |
|---|--------------------------|
| (1) THE QUEEN ON THE APPLICATION OF MEDWAY SOFT DRINKS LIMITED | First Respondent |
| (2) THE QUEEN ON THE APPLICATION OF DRAYMAN DRINK LIMITED | Second Respondent |
| - and - | |
| (3) THE QUEEN ON THE APPLICATION OF BEVIQUA LIMITED | Third Respondent |
| - and - | |
| THE COMMISSIONERS OF HER MAJESTY'S REVENUE AND CUSTOMS | Appellant |

Will Hays (instructed by **Solicitor to HMRC**) for the **Appellant**
David Bedenham (instructed by **Rainer Hughes** for the **1st Respondent**
Lawrence McDonald (instructed by **ASW Solicitors**) for the **2nd and 3rd Respondents**

Hearing date: 04 April 2019

Approved Judgment

Sir Timothy Lloyd:

1. In these appeals HM Commissioners for Revenue and Customs (HMRC) appeal against orders for costs made in favour of the respective Respondents by judges in the Administrative Court upon consideration of the papers without a hearing. In each case the Respondent had sought permission to apply for judicial review in order to be able to seek interim relief by way of injunction, to protect its position pending another process. It obtained such interim relief, and eventually it secured its objective without having to pursue the judicial review proceedings to a conclusion. The parties agreed to an order disposing of the judicial review proceedings, under which the issue of costs was to be determined on written submissions without a hearing. In each case the judge decided to order HMRC to pay the Respondent's costs. With permission from the Court of Appeal, HMRC appeal, arguing that the circumstances are such that the order made is wrong in principle, and that the correct order would be no order for costs.
2. I am grateful for their assistance to Mr Hays, Counsel for HMRC, Mr Bedenham, Counsel for the First Respondent, Medway Soft Drinks Ltd (Medway) and Mr McDonald, Counsel for the other Respondents, Drayman Drink Ltd (Drayman) and Beviqua Ltd (Beviqua). For reasons that I will explain, I have come to the conclusion that the order made in each case was a proper order to be made within the scope of the judge's discretion as to costs, so that the appeals should be dismissed.
3. The factual context is that of the regulation of wholesale dealing in alcoholic drinks. A new scheme of legislation was introduced (the AWRS), with full effect from 1 April 2017, under which all businesses (with specific and currently irrelevant exceptions) which supplied alcohol on a wholesale basis had to be approved by HMRC and included on a register of such approved businesses. This took effect under section 88C of the Alcoholic Liquor Duties Act 1979, in provisions introduced by the Finance Act 2015. The sanctions included criminal penalties not only for unregistered wholesale dealers but also for anyone purchasing from an unregistered wholesaler. The new legislative regime was intended to control this type of business more rigorously, in order to reduce the loss of revenue due to fraudulent trading.
4. Each of the Respondents already carried on the business of wholesale dealing in alcohol. Each applied to be approved and entered on the register. In each case HMRC sent a "minded to refuse" letter early in March 2017, giving details of its objections. Each Respondent sought to show that the objections were not sound, but in each case on 28 March HMRC sent a letter refusing approval and registration. By then, there remained only 3 days before the new regime would take effect, with its criminal sanctions. For each Respondent the sale of alcoholic liquor was said to be either the whole or substantially the whole of its trade, so that the application of the new regime would have a major impact on its ability to continue in business.
5. Two remedies were provided for by the legislation for a challenge to a refusal of approval. The applicant could appeal to the First-tier Tribunal (FTT) or it could apply to HMRC for an internal review. In neither case, however, did the legislation provide for any interim protection under which an existing trader could continue pending the outcome of the appeal or the review. Medway appealed, and sought expedition of its appeal, whereas Drayman and Beviqua requested a review. Medway asked HMRC to grant interim approval, but HMRC refused to do so, taking the view that they had no

power to do so. Medway applied for judicial review on 29 March and sought interim relief immediately, which was granted the same day on the papers, without notice. Drayman and Beviqua asked for interim approval on 31 March. HMRC responded on 3 April stating that they were prepared to proceed on the basis that they might have power to grant such approval, as the Court of Appeal had by then said that this contention was arguable, but they asked for further information. This was not forthcoming.

6. These were not the only companies affected by the new legislation and by a refusal of approval which they wished to challenge, wanting also to continue in business pending the resolution of the challenge. Earlier in 2017 three companies, referred to as ABC Ltd, X Ltd and Y Ltd, had been refused both approval and temporary authorisation, and each had sought judicial review of the latter refusal. Each was refused relief at first instance, X and Y by Andrew Baker J on 3 February 2017, and ABC by William Davis J on 14 February 2017. They all appealed to the Court of Appeal. On 28 March Burnett LJ in the Court of Appeal granted to ABC an interim injunction, pending determination of the full appeal, requiring HMRC to admit ABC to the register of approved businesses on a temporary basis. Following this decision, on 31 March a number of judicial review claims of this kind came before Collins J in the Administrative Court.
7. After all this, on 3 April Medway's application came before Holgate J in the Administrative Court who continued the interim injunction and stayed the judicial review proceedings pending the outcome of the appeals by ABC and by X and Y.
8. The events concerning Drayman and Beviqua followed a similar course, though a little later in time, as already mentioned. Interim approval was not granted when it was sought at the end of March. Judicial review proceedings were commenced on 11 April, and an interim injunction was granted by Lang J, together with a stay of the judicial review proceedings pending the appeals, on 12 April.
9. The appeals by ABC, X and Y were heard on 10 and 11 May and judgment was handed down on 7 July 2017.
10. The grounds given by HMRC for refusing approval to Medway had included the existence of an outstanding VAT assessment. Following steps taken by Medway in relation to that assessment, with the relevant department of HMRC, that assessment was withdrawn. When this came to the attention of the office of HMRC dealing with approval of wholesale suppliers of alcohol, approval was given under the AWRS and it was agreed that Medway would be admitted to the register. This was agreed on 1 June 2017. On this basis there was no further need for the judicial review proceedings and they were disposed of by a consent order made on 13 July. This recited the relevant sequence of events and HMRC's agreement to enter Medway on the register, if it had not already done so, and set out the following in the body of the order: the claim was withdrawn, the interim injunction was discharged, a timetable was set out for written submissions as to costs, and the issue of costs was to be determined by a judge on the papers.
11. In the case of Drayman and Beviqua, HMRC's initial refusal was also because of outstanding liabilities. Those companies asked HMRC to review the decision. They did so, and the review led to the conclusion that the withholding of approval had not

been justified. The decision to refuse registration was cancelled “as there is insufficient evidence to support it”: letter dated 2 June. Approval under the scheme was given on 15 June. Later, it was agreed that the judicial review proceedings be disposed of on the same basis as in the Medway case, the consent order in this instance being dated 17 October 2017. In the meantime, following a letter on behalf of the individual behind Drayman and Beviqua to his Member of Parliament, an officer of HMRC wrote to him on 25 August saying, among other things, that following the in depth review that had been carried out

“we have concluded that we could have handled your case better. We should have looked more closely at the specific circumstances of your case before we made our decision to refuse the applications. I am sorry we did not do this. If you wish to make a claim for reimbursement of costs incurred we will consider this.”

12. Each case came before a Deputy High Court Judge for consideration on the papers in accordance with the consent order. Mr Peter Marquand dealt with the Medway case on 4 October 2017. Mr Richard Clayton QC dealt with Drayman and Beviqua on 22 January 2018.
13. Mr Marquand recited the relevant history, referred to *M v Croydon* [2012] 1 WLR 2607 (which I will mention later) and said that he regarded Medway as having won the case completely as, looking at the final order sought and the consent order, there was no material difference between the two. He therefore held that Medway should have its costs as having won the litigation.
14. Mr Clayton dealt with the other cases more briefly, saying no more, in substance, than that the case fell within the first category in *M v Croydon*.
15. The starting point is of course CPR 44.3 which gives the court a discretion as to orders for costs, sets out the general rule “that the unsuccessful party will be ordered to pay the costs of the successful party”; but goes on to say that the court may make a different order.
16. *M v Croydon* provides guidance as to the application of that rule in cases where the parties have resolved their substantive dispute but have not agreed as to what (if any) order for costs should be made. The substantive issue in the case had been whether the claimant had been a minor at a relevant date. Croydon Borough Council had taken the view, on advice, that he was not. Initially it was thought that such a decision could only be challenged on normal judicial review grounds, that the conclusion was *Wednesbury* unreasonable. However the Supreme Court held in other proceedings in 2009 that it was instead a question of primary fact as to which, if it was put in issue, the court had to decide the facts for itself.
17. In *M v Croydon* the issue had arisen before the Supreme Court had given judgment but it was eventually resolved, by consent, though not for quite some time afterwards. Those proceedings were disposed of by a consent order in which Croydon accepted that M had been born on the date for which he contended, but no agreement was reached as to costs, which therefore the court had to determine. In the High Court the judge decided to make no order for costs, but M appealed, successfully. The case is

important for present purposes not at all for the actual decision as to costs but for what the Court of Appeal said about the proper approach to making an order for costs in litigation where the substantive proceedings were settled but on terms leaving it to the court to decide the incidence of costs.

18. Lord Neuberger MR reviewed the authorities and the arguments, and summarised the position starting at paragraph 60 where he said this:

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

61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols.”

19. Cases within the second of Lord Neuberger’s categories may present difficulties in practice, but that does not arise in the instant case. The third, on the other hand, is relevant because HMRC contends that the judges below should have treated the cases before them as falling into that category, not into the first. Lord Neuberger said this at para 63:

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

20. For HMRC Mr Hays also relied on *Speciality Produce Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2014] EWCA Civ 225. In that case Patten LJ (with the agreement of the other members of the court) said at para 29:

“The decision in *M* represents an acceptance that there will be cases where the link between the claim and the agreed relief is so clear that the claimant can properly be treated as the successful party for the purpose of an award of costs. But for that link to be established the court is, I think, usually required to be satisfied that the claimant is likely to have won: see Lord Neuberger at [51] of *M*. In any event, the claim must be causative of the relief obtained.”

21. Mr Hays argued that the judges below were wrong to treat the instant cases as within the first category in *M v Croydon*. He said that these were not cases in which the claimant had been wholly successful in the litigation as a result of the settlement, and moreover that the settlement had resulted from extraneous events, namely the further examination of the underlying facts by HMRC, and further information provided by the relevant claimant, rather than from the litigation, so that there was no causal link such as Patten LJ identified as necessary.
22. This submission requires attention to the detail of the proceedings. The judicial review claim form sought the quashing of HMRC’s decision not to grant the claimant’s request for interim approval pending the determination of the claimant’s statutory review or appeal. The interim application to the Administrative Court sought an interim injunction requiring HMRC to approve the Claimant and to add it to the register, on a temporary basis pending the final determination of the judicial review application or further order of the court. The application was also accompanied by a draft final order showing what relief would be sought on the eventual substantive judicial review application, namely an order requiring HMRC to approve the claimant and to add it to the register, that order to have effect until 28 days after the determination of the claimant’s appeal to the FTT against the refusal of approval. Thus, both the interim and the final orders sought would be temporary, one pending the judicial review application itself being determined, the other pending the statutory appeal to the FTT.
23. By the consent order in each case, it was recited that HMRC had approved the relevant claimant for AWRS purposes and agreed to admit the claimant to the register (if it had not already done so). On that basis the claimant’s claim was withdrawn and the interim injunction discharged. Thus the claimant had achieved what it set out to do, namely, first, to secure a situation in which it could continue to trade pending the resolution of its challenge to the initial refusal of approval, and secondly to secure its approval for the purposes of AWRS. To the judges dealing with the costs issue it may have seemed that the claimant had secured exactly what it had sought by the draft final order submitted with the original interim application. Mr Hays pointed out that this is not the correct view of the case, since the interim application, and indeed the judicial review proceedings as a whole, were concerned only with the interim situation. The Administrative Court had no power to deal with the challenge to the failure to approve, for which the remedy was either an appeal to the FTT or a statutory review by HMRC. Therefore the relief granted by the consent order was not the same as the relief sought by the judicial review proceedings.

24. So Mr Hays contended that the judges had been wrong to regard these cases as falling within category (i) in *M v Croydon*, both because the relief ultimately obtained was relief which could not have been obtained in the judicial review proceedings and because there was no causal link between the proceedings and the eventual grant of approval. That approval followed from quite other circumstances, independent of the proceedings. He pointed by way of analogy to *RL v Croydon* [2018] EWCA Civ 726 where judicial review proceedings were brought against the council at the same time as it was carrying out a statutory assessment of the accommodation needs of the relevant children. Once the review was concluded, the council provided accommodation, and the judicial review proceedings were brought to an end by agreement, being no longer necessary. Costs were not agreed and the judge who decided that issue made no order for costs. The claimant challenged that conclusion, seeking an adverse order against the council. The Court of Appeal dismissed the appeal saying that the outcome of the case was not the result of the proceedings but the result of the review being completed. So by analogy, Mr Hays argued, in the present cases the outcome of the litigation was the result of further investigation of the circumstances, not of the judicial review proceedings.
25. That is a fair point so far as it goes, but there is a material distinction between *RL* and the present cases, in that, so the claimants argue, if they had not been able to obtain interim protection which they did through the judicial review proceedings, they would not have been able to carry on their business and the successful outcome might well have come too late to save them from having to close down and even from insolvency. An interim injunction was granted in *RL v Croydon* but, while I would not wish to underestimate the value of that interim protection for the family in question, it was arguably less critical than a situation in which the claimant companies, in these cases, might have been forced out of business and perhaps of existence by having to stop trading altogether.
26. Mr Hays relied on a further argument, namely that if the judicial review proceedings had run their course to a contested determination, the claimants, he said, could not have succeeded, at any rate on the evidence that they had put before the court by the time of the eventual compromise. For this purpose it is necessary to refer to the Court of Appeal's decision in the *ABC* case: [2018] 1 WLR 1205. The court held that HMRC did have a statutory power to admit a trader to the register on a temporary basis pending the determination of an appeal against the refusal of approval, and that the court did have jurisdiction to grant interim relief to a claimant in such a case, if the evidence justified a conclusion, to a high level of probability, that in the absence of such protection the trader's rights under article 6 of the ECHR would be frustrated because the statutory appeal would be rendered nugatory because he would be forced out of business before the appeal could be heard. The court indicated the steps to be taken including, first, requesting interim protection from HMRC, then seeking expedition for the appeal from the FTT, and only then applying if necessary to the court, with compelling and detailed evidence as to the likely outcome in the absence of interim protection.
27. That guidance lay well in the future when the proceedings were commenced in the present cases. Not surprisingly, therefore, the evidence in the instant cases did not measure up to what the Court of Appeal later said would be needed. So, Mr Hays submitted, the claimants could not have obtained the interim relief they sought if the

case had gone to a substantive hearing, and the case should therefore not be treated as within the first of the *M v Croydon* categories.

28. The issues already described represented the first two grounds of appeal by HMRC in each of these cases. In addition, in each case a third ground of appeal contended that the judge had failed to take account of the claimant's pre-action conduct, and in the case of the appeals by Drayman and Beviqua, HMRC complained of inadequate reasoning on the judge's part.
29. For Medway, Mr Bedenham submitted that Medway had indeed secured what it sought by the judicial review proceedings, namely interim protection on a basis on which it was able to continue trading pending its appeal to the FTT. Accordingly, the judge's approach was entirely legitimate, treating Medway as the successful party. Since wholesale trading in alcohol represented 95% of Medway's business, it was clear that some form of interim protection was necessary if the company was to carry on, and it was to be inferred that, if the matter had come to trial with the benefit of the Court of Appeal's judgment in *ABC*, the evidence there indicated as necessary would have been put in without difficulty. Moreover, given the urgency of the issue, after HMRC's refusal letter on 28 March, and the impossibility of expediting the appeal sufficiently, Medway could not fairly be criticised for not following the steps provided for by the pre-action protocol before issuing the judicial review proceedings and applying for interim relief.
30. In turn, for Drayman and Beviqua Mr McDonald presented similar arguments on the principal issues, as well as relying with some force on the fact that HMRC's change of mind on the substantive issue arose from their own internal review of the documents already submitted. Taken with the apology later provided for not having devoted the proper amount of care and attention to the case, he submitted that this fortified the claim of his clients to an order for their costs to be paid by HMRC. As to the adequacy or otherwise of the judge's reasons, he submitted that fuller reasoning was not necessary when dealing with an issue of costs arising in circumstances such as these, and that the judge's reasoning was sufficiently apparent.
31. There is some substance in Mr Hays' submission that the judges in these cases appear to have approached the application of *M v Croydon* to the present cases in a somewhat oversimplified manner, and may perhaps have misunderstood the position as regards the relationship between the relief sought by the judicial review claim and that obtained by the consent order. By the time of the consent order, non-temporary approval had been accorded to each claimant, but that was not what the judicial review claims had sought. The judges may not have observed that what was described as a draft Final Order, at the time when the original application for interim relief was made, was itself temporary, in that it would come to an end once the appeal to the FTT had been determined (in the case of Medway) or once HMRC had completed its internal review (for Drayman and Beviqua). Mr Hays submitted that the judges may also have failed to have regard to the fact that the grant of non-temporary approval was the result of a change in circumstances extraneous to the proceedings, so that there was no clear causal link between the two. So far as that point is concerned, I do not consider it made out on the material before the court.
32. Looking at the matter more broadly, it seems to me that Mr Hays' submissions themselves fail to acknowledge that what was at issue in the judicial review

proceedings was interim protection, which each claimant required in order to be able to stay in business, and that such protection had been obtained by each claimant as a result of bringing the proceedings, and could not have been obtained in any other way.

33. Given that the statutory regime made no provision for interim protection pending either an appeal to the FTT or an internal review by HMRC, and made it a criminal offence both to sell alcohol if not registered under the scheme and to buy alcohol from a trader not so registered, the refusal of approval would be likely in a substantial number of cases to cause serious difficulties for existing traders while the statutory procedures for challenging a refusal to approve were pursued. The position would also foreseeably be particularly difficult just at the moment when the new regime came into full force, with applications for approval having to be dealt with in large numbers and under intense pressure (which might well lead to the facts of each case not being accorded sufficient care and attention by HMRC, as was acknowledged to have been the case as regards Drayman and Beviqua) and a large number of consequent challenges by one form of process or the other. In addition, some kind of interim protection would be needed by the trader in many if not all of such cases if it was not to be forced out of business.
34. It could have been foreseen that there would be applications to the court for interim protection, in the face of HMRC's stated position that it had no power to grant such relief itself in any way. We do not know the numbers in full, but it is clear from the papers that there were a good many such applications, many of them at a late stage before the legislation came fully into force on 1 April 2017. Equally, some at least of those cases would have involved continuing steps as between the trader and HMRC (sometimes other departments, such as those dealing with outstanding VAT assessments, as in Medway's case) which might well lead to the underlying issue of approval being resolved sooner than a challenge to the refusal of approval could be brought on for determination. That would have been the case as regards Medway, whereas in the cases of Drayman and Beviqua the internal review which was invoked did resolve the issue quite quickly, HMRC resiling, on further consideration, from its position of non-approval.
35. In my judgment, against that background, applications for judicial review such as those made by the claimants, with interim applications for protective relief pending the determination of the judicial review claim, were to be expected, and it was also to be expected that the underlying issue might well be resolved before the judicial review claim could come to a substantive hearing. That was all the more clearly likely given that HMRC took the position that they could not grant interim approval themselves, and took issue with the proposition that the court could do so.
36. Accordingly, while, on a narrow view of the cases, I see some force in Mr Hays' criticism of the judges in the present cases for treating the claimants as fully successful on the basis that they obtained in the end under the consent orders the whole of the relief that they had sought by the judicial review proceedings, nevertheless I would accept that, in these rather unusual circumstances, the cases should be regarded as falling within the first category in *M v Croydon*. I say so because the claimants had to start the judicial review proceedings in order to have any chance of obtaining interim protection, and they did secure that protection, by virtue of having brought the claims, for as long as they needed it, namely until the problem that had led to approval being refused had been resolved. In many other cases it

might not be sufficient to show that interim protection had been obtained by bringing proceedings which are later compromised, in order to bring the case within the first category in *M v Croydon*, but in these cases it seems to me that it is appropriate to consider the interim orders obtained, rather than the eventual consent order, in assessing whether the claimants are to be regarded as the successful party and therefore, under the general rule, entitled to their costs. To have obtained that interim protection was the crucial factor for the claimants, and the costs incurred at that initial stage are presumably the majority of the sums at issue on the question of the proper order for costs. The need for a causal link is satisfied because it was, and could only have been, by bringing the judicial review proceedings that the claimant could and did secure interim protection.

37. Mr Hays is correct in pointing out that the evidence put before the court in each of these cases did not satisfy what the Court of Appeal later said was needed on such an application. However, I do not accept that this shows that, if the matter had come to a substantive hearing after the Court of Appeal's decision, relief would necessarily have been refused. In that hypothetical and rather unrealistic case, the claimants would surely have had the opportunity to adduce further evidence in the light of what the Court of Appeal had said by then. It should not be assumed that they would not have been able to put in evidence satisfying the relevant requirements, and that they would not therefore have succeeded at the substantive hearing.
38. The circumstances as they were at the end of March 2017, following refusal to approve on the part of HMRC on 28 March, with only 3 days to go before the legislation came fully into force, seem to me to have justified the speed with which the claimants brought their proceedings and their interim applications. I therefore do not accept HMRC's third ground of appeal based on pre-action conduct. While Mr Clayton's reasoning is very succinct, I do not see that it is too brief to satisfy the judicial obligation to give reasons, in relation to an issue of this kind as to costs, arising as this did under a consent order.
39. Accordingly I would dismiss the appeals.

Lord Justice Newey:

40. I agree.

Lord Justice Gross:

41. I also agree.