JUDGMENT : MR JUSTICE MUNBY 11th April 2005

No hearing : submissions on costs dealt with on paper in accordance with order dated 25 June 2004

1. I have now to deal with the costs of this protracted and expensive litigation.

The litigation

2. I do not propose to take up time describing the proceedings. I have already done so in two previous judgments to which reference can be made if need be for the purpose of elucidating what follows. It suffices for present purposes to recall that the litigation comprised two separate sets of proceedings: judicial review proceedings in the Administrative Court (CO/4843/2001), brought by the claimants (initially A and B, subsequently by X and Y as well), and `best interests' proceedings in the Family Division (FD02P00242), brought by ESCC and seeking the removal of A and B from the care of X and Y. The judicial review proceedings were commenced on 29 November 2001 and the best interests proceedings on 19 February 2002. There had in fact been earlier judicial review proceedings (CO/740/2000) commenced on 29 February 2000 which were compromised by a consent order dated 21 July 2000.

3. In accordance with directions I gave on 5 March 2002 both sets of proceedings came on for hearing before Wilson J on 11 June 2002. What had been intended to be a final hearing in fact turned into an interim hearing culminating in an order defining the interim arrangements for A and B that were to apply pending a re-fixed final hearing. By then it was fairly apparent that ESCC was unlikely to succeed on its *`best interests'* application. Expert evidence supported the view that it was in the best interests of A and B to remain in the family home with X and Y. Wilson J described the evidence adduced by ESCC in support of its claim as being *"thin or non-existent"* and said that "the barrenness of the application under the inherent jurisdiction referable to best interests" had been all but accepted by ESCC. From then on the best interests proceedings were for most of the time largely moribund. Certainly the vast bulk of the costs incurred since 14 June 2002 would seem to have been spent on the judicial review proceedings and not the best interests proceedings.

4. In accordance with orders made by Wilson J on 14 June 2002 and 31 July 2002 the matter came on for hearing before me for six days in October and November 2002. A and B were (and are) represented by one firm of solicitors, X and Y by another. At the hearing before me A and B were represented by Leading Counsel, X and Y by Junior Counsel. ESCC was represented by both Leading and Junior Counsel. In the event the hearing concentrated on two legal issues only: the *`user independent trust'* issue and the *`manual handling'* issue. Having reserved judgment on both issues, I made an order on 25 November 2002 giving further directions and defining the interim arrangements for A and B that were to apply pending a final hearing.

5. I gave judgment on the `user independent trust' issue on 17 December 2002: **R (A, B, X and Y) v East Sussex County Council** [2002] EWHC 2771 (Admin); [2003] LGR 529. I gave judgment on the *`manual handling'* issue on 10 February 2003: **R (A, B, X and Y) v East Sussex County Council (No 2)** [2003) EWHC 167 (Admin), (2003) 6 CCLR 194. On 4 April 2003 I made an order giving further directions, including directions for the preparation of Scott Schedules in relation to the outstanding disputes about the user independent trust and the manual handling issue. There then followed a lengthy period during which protracted discussions and negotiations between the parties took place, including mediation in respect of certain outstanding issues relating to the user independent trust. In September 2003 the claimants amended their judicial review proceedings and A and B (but not X and Y) served a cross-application in the best interests proceedings. However, by November 2003 the parties were sufficiently close to consensus to agree that the final hearing fixed for 9 December 2003 should be vacated. I made another interim order on 4 December 2003.

6. Eventually both the judicial review proceedings and the best interests proceedings were brought to a conclusion by consent orders which I made on 25 June 2004. These orders provided that any outstanding questions as to costs were to be determined by me without an oral hearing and on the basis of written submissions. The timetable for that process was extended by agreement between the parties and the various written submissions were in the event served on various dates between 8 October 2004 and 20 November 2004.

The issues

7. The costs of the litigation down to June 2002 were the subject of a ruling by Wilson J on 13 June 2002 embodied in an order dated 14 June 2002. Wilson J ordered that ESCC was to pay the claimants 85% of their costs; the remaining 15% of the costs were to be costs in the judicial review proceedings.

8. I am therefore concerned with (a) the 15% of the costs prior to 14 June 2002 not included in the order for costs made in the claimants' favour by Wilson J and (b) the whole of the costs since then. These costs can conveniently be considered under three headings:
   i) the remaining 15% of the costs from 29 November 2001 to 14 June 2002;
   ii) the costs from 14 June 2002 until the order I made on 25 November 2002; and
   iii) the costs from 25 November 2002 to 25 June 2004.

9. Mr Jan Luba QC and Ms Nicola Mackintosh on behalf of A and B submit that ESCC should pay two-thirds of their costs under all three headings. Ms Mountfield on behalf of X and Y submits that ESCC should pay the whole of their costs. Ms Jenni Richards on behalf of ESCC submits, in substance, that there should be no order as to costs. The DRC, which was an interested party and took an active part in the hearings both before Wilson J and before me, has played no part in the dispute -about costs. Presumably everyone, including the DRC, is content that there should be no order for costs so far as it is concerned.

The context

10. In my judgment on the manual handling issue, R (A, B, X and Y) v East Sussex County Council (No 2) [2003] EWHC 167 (Admin), 2003) 6 CCLR 194, I made criticisms of the way in which this litigation had been conducted by all concerned. One criticism related to the truly astonishing volume of material that had been put before the court. As I said at para [14]:
    "A mass of evidence was filed ... I do not propose even to summarise let alone to attempt to analyse this vast mass of material. Suffice it to say that it examines, from a variety of viewpoints and often in enormous detail, the history of this sad dispute, the problems faced by A and B, the suggested means by which those problems can best be addressed, in particular the problems surrounding the manual handling issue, the appropriateness or otherwise of ESCC's care plans and the legality or otherwise of ESCC's manual handling policies."

    In relation to the manual handling issue I added this at para [63]:
    "In the present case there is a truly astonishing mass of material filed with the court which charts and records in enormous detail - in relentless and remorseless detail - the problems faced by A and B and their carers X and Y, the details of their daily routines, the precise details of virtually every `lift' that occurs during the day, and the various views which have been expressed not merely by X and Y but also by a wide range of other people as to how each of these `lifts' can and should appropriately be achieved. I do not propose even to summarise let alone to analyse this almost unmanageable mass of material."

11. These remarks seem to have had only limited effect. I am told that the Scott Schedule in relation to the manual handling issue extends to no fewer than 207 observations or complaints by the claimants, to each of which ESCC has had to respond.

12. My other main criticism related to the entire manner in which the proceedings were being pursued. As I said at paras [156], [158]:
    "I have commented on the vast and almost unmanageable mass of the evidence and other materials I have been asked to consider. But this is merely a manifestation of a deeper and more serious problem ... Put plainly, I felt at times that singularly little thought had been given to identifying precisely what the task was upon which I was supposed to be engaged."

    I then proceeded at paras [159]- [161], [163], to explain what that task was:
    " ... the manual handling issue comes before the court in the final analysis, and notwithstanding the important human rights arguments, as a matter raising issues of public law. Now this has two important corollaries: first, that the primary decision maker is ESCC and not the court; and, secondly, that the court's function, notwithstanding the important human rights aspects of the case, is essentially one of review - review of ESCC's decision, whatever it may - rather than one of primary judicial decision making ... It is not the task of the court to make and draw up the necessary assessments. That is a task for ESCC ... At times during the argument I

almost felt as if I was being asked to write, in the guise of giving a judgment, a textbook or manual on the law and practice of manual handling. This is not the function of the court ... "

13. It may be appropriate to refer here to what I subsequently had to say about this in **CF v Secretary of State for the Home Department** [2004] EWHC 111 (Fam), [2004] 2 FLR 517 at paras [216]-[219]. I described this as *"a case where the filing of expert evidence came close to escaping all control". I added: "The result, if I may adapt a military metaphor, was `litigation creep', the forensic equivalent of the `mission creep' that is the bane of military planners."*

14. It was, I suppose, inevitable that the costs of this litigation were going to be large. But I confess that even in the light of all I already knew about the proceedings I was astonished and dismayed to learn that the claimants' costs amount in all to something of the order of £750,000. I am not told what ESCC's costs are, but it would seem that the total cost of this litigation cannot be much short of, even if it does not in fact exceed, £1,000,000. The claimants are all publicly funded, being in receipt of funding from the Legal Services Commission. So the whole of this vast expenditure has come out of the public purse.

15. I do not doubt that the case raised issues of importance - great importance to the claimants and importance to the public generally - but I have to say that I view with the gravest misgivings and very considerable concern the expenditure in litigation such as this of costs anywhere approaching the immense amounts that have seemingly been spent here.

16. It is no doubt the vast amounts at stake which explain, even if they do not justify, the extravagance with which the parties - ESCC in particular - have now chosen to embark upon the arguments as to costs. The written submissions total no fewer than 112 pages.

17. In order to put these arguments in context it is necessary to explain how the shape of the proceedings changed during and after the hearing before Wilson J: see generally **R (A, B, X and Y) v East Sussex County Council (No 2)** [2003] EWHC 167 (Admin), (2003) 6 CCLR 194 at paras [12]-[24].

18. Initially the focus of the claimants' complaints had been ESCC's `Safety Code of practice: Manual Handling' s re-issued in January 1999. It was said that ESCC's manual handling policies, as applied to A and B were *"unlawful an unjustifiable"*, an allegation with which, as I pointed out in para [15], the DRC unequivocally associated itself. Early in June 2002 - that is, very shortly prior to the hearing before Wilson J - ESCC produced a revised **`Safety Code of Practice: Manual Handling'**. During the course of the hearing before Wilson J it was further revised in consultation with the DRC. On 14 June 2002 ESCC adopted a revised **`Safety Code of Practice**: **Manual Handling'**. Before me, as I recorded in para [23], it was accepted by all parties that this Code was lawful.

19. The order which Wilson J made on 14 June 2002 recited that ESCC had adopted its new policy without accepting that its previous policies did impose a blanket prohibition on manual lifting and that the DRC, without prejudice to its contention that the former policy was unlawful, agreed that the revised policy *"is lawful and represents good practice"*. The order went on to provide so far as is material for present purposes that an independent manual handling adviser was to be appointed *"to prepare a written handling protocol in respect of all lifts including each of the unresolved lifts*". Pursuant to Wilson J's order, Mary-Jayne Bosley was appointed on 26 July 2002 to act as the independent handling adviser. She carried out extensive investigations and produced preliminary Manual Handling Reports on A and B in late August 2002. Exhibited to her witness statement dated 30 September 2002 were Draft Handling Protocols for both A and B prepared by her on or about 10 September 2002. She said that they should be considered dynamic, requiring frequent review.

20. The consequence of all this, as I pointed out in para [24], was that the real dispute had shifted since the hearing before Wilson J began on 11 June 2002:
"Before me the dispute was not as to the lawfulness of ESCC's general policy as enshrined in the Code: rather the dispute was as to the lawfulness of the application of that policy to the specific circumstances of A and B's care and, related to that, the lawfulness of the draft protocols prepared by Mrs Bosley."

21. But the actual ambit of my judgment on the manual handling issue was more limited, for reasons which I set out in paras [27]-[28]:

"In this situation it seems to me that there is not much point in my subjecting what are after all only draft, incomplete and, as Mrs Bosley puts it, dynamic protocols to intensive scrutiny. Better, at this stage, that I address the matters of general principle identified in counsel's submissions and give ESCC and Mrs Bosley such further assistance as circumstances allow so that Mrs Bosley can finish the task on which she is currently engaged. It is when that task is complete that the claimants can, if they wish, challenge the legality of what Mrs Bosley has done or of what, in the light of Mrs Bosley's work, is proposed to be done by ESCC.
This approach may seem unhelpful but it will, in the long run, enable the court to focus, if the need arises, on what will by then have emerged as the real issues. It also reflecs the vitally important fact, which man of the submissions to have tended to overlook or to downplay, that in the final analysis it is for ESCC, assisted by Mrs Bosley, to make the appropriate assessments and produce the appropriate protocols. It is not a matter for the court".

I added at para [165]:
"In the present case, as I have already remarked, ESCC has not in fact completed the process of making and drawing up the necessary assessments. In this situation the present application is, in a very real sense, premature. It is not for me to tell ESCC how to go about a task which Parliament has said is a matter for it and not for me. I have gone as far as I sensibly and properly can at this stage in attempting to set out the relevant legal principles by which ESCC must be guided as it goes about its task."

22. In para [166] I indicated the way forward:
"The proper way forward - and this is provided for in the order that I made on 25 November 2002 - is for ESCC to complete, with Mrs Bosley's assistance, and applying the principles which I have sought to explain, the task upon which it is currently engaged. If the completed assessments and protocols which emerge from that process are not acceptable, either to A and B or to X and Y, then their remedy is a challenge by way of judicial review. I have provided for that in paragraphs 14 and 15 of my order."

23. I have dealt with these matters at some length because it is important to understand just which issues have, and which issues have not, been adjudicated upon by the court. Wilson J did not formally adjudicate upon any of the substantive issues in the litigation. The only substantive issues upon which I have ever adjudicated are two matters of law: the lawfulness of a user independent trust and the general principles of law applicable to the manual handling issue.

24. There has never been any judicial adjudication of the various issues relating to the lawfulness or otherwise of the earlier versions of ESCC's Code. There has never been any judicial adjudication of the questions about the lawfulness and appropriateness of the various care packages proposed by ESCC for A and B. There has never been any judicial adjudication of the questions about the lawfulness and appropriateness of the various protocols produced by Mrs Bosley - either the protocols she prepared in the autumn of 2002 prior to the hearing before me or the protocols which she has prepared subsequently. Nor has there been any judicial adjudication of a number of other issues raised by the claimants. As I said at para [187]:
"there is no need for me to consider, and in all the circumstances I think it would be unhelpful if I were to express any considered views on, a number of matters that were canvassed, on occasions at some length, during the course of argument. Accordingly I propose to say nothing about where the responsibility may lie for the present unhappy state of affairs, about whether or not the earlier versions of ESCC's Code were lawful or unlawful, about the allegations that ESCC failed to comply in certain respects both with the consent order of 21 July 2000 and with Wilson J's order of 14 June 2002, or about the meaning and effect of Wilson J's order."

25. It is, however, important to note what I went on to say:
"All I should say is this. It would be a travesty to suggest that the entire responsibility for this very saddening state of affairs lies at ESCC's door. I suspect that in certain respects their handling of an almost uniquely difficult case can be criticised, but for much of the time ESCC and its officers seem to me to have gone out of their way to try and help this family. Legitimate differences of opinion on matters as complex as those I have had to consider should not be treated as anything more sinister."

The relevant principles

26. I need not refer to the general rules and principles governing the award of costs in litigation such as this. The general principle is that in judicial review proceedings costs follow the event. There are, however, three particular principles which are, or may be, of importance in the present case.

27. The first relates to the approach to be adopted in judicial review proceedings where there has been no final determination of the claim. I take the relevant principles from the judgment of Scott Baker J in **R (Boxall) v The Mayor and Burgesses of Waltham Forest LBC** (2000) 4 CCLR 258 at para [22]:
    "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
    (ii) It will ordinarily be irrelevant that the Claimant is legally aided.
    (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.
    (iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
    (v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.
    (vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

28. The second is the principle identified by Newman J in R v The Mayor and Burgesses of the London Borough of Hackney ex p S (unreported - 13 October 2000) at paras [8], [11]:
    "I regard it as undesirable that a substantial bill of "legal costs" should be incurred by a process of monitoring and regulating the performance of the public authority. In the situation which presented itself once LBH had been ordered to provide services and accommodation, it being the authority entrusted with the obligations and the resources, should have been able to decide upon a care plan and provide accommodation without the intervention of lawyers.
    The occasions when it will be appropriate for costly participation by a user's solicitor in the process of preparing a plan and the provision of accommodation by a local authority will be rare. The starting point must be that it is for the authority to act and produce its proposals."

29. The third relates to the approach to be adopted in cases where it is said (as here) that two sets of costs should be allowed. The relevant principles are set out in the speech of Lord Lloyd of Berwick in **Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)** [1995] 1 WLR 1176 at p 1178E and were further considered, specifically in the context of judicial review proceedings, in **R (Smeaton) v Secretary of State for Health and others (No 2)** [2002] EWHC 886 (Admin), [2002] 2 FLR 146, at paras [431]-[440].

The costs down to 14 June 2002

30. These all relate to issues none of which has ever been the subject of judicial adjudication. Some of those issues were carried forward beyond the hearing before Wilson J and are considered below. One - the legality of ESCC's Code - in effect died the death during the hearing before Wilson J. This is not, in my judgment, an issue on which I can come to any clear view without going into a much more detailed investigation of the matter than can be justified in the light of Boxall.

The costs from 14 June 2002 to 25 November 2002

31. Broadly speaking the costs during this period are attributable to three things: (i) the preparation and presentation of the legal arguments in relation to the user independent trust issue, (ii) the preparation and presentation of the legal arguments in relation to the manual handling issue and (iii) the preparation and gathering of expert and other evidence in relation to the factual, technical and expert aspects o the manual handling issue. Whilst both (i) and (ii) have been the subject of judicial determination, (iii) has not.

32. In relation to the user independent trust the position is clear and simple. The claimants won on all points. ESCC lost on every point. In principle ESCC should pay the costs.

33. In relation to the legal aspects of the manual handling issue the position is not quite so clear cut. Neither the claimants nor ESCC were entirely successful. As Ms Richards puts it, I rejected some of the points advanced in argument by ESCC and accepted others; I rejected some of the points advanced in argument by the claimants whilst accepting others. Now that is true so far as it goes but it does not address the fundamental reality which is, as it seems to me, that my judgment on the manual handling issue was significantly more in favour of the claimants than of ESCC. The fact is that the legal position as it had emerged by the end of argument was significantly closer to that contended for by the claimants than to that contended for by ESCC. That "success", even if not complete, has in my judgment to be reflected in the order as to costs. The claimants may on this issue, in contrast to the user independent trust issue, have achieved only a victory on points, rather than a knockout, but they nonetheless won, and by a reasonable margin.

34. In relation to the other aspects of the manual handling issue the position is very different. Counsel are correctly agreed in the light of Boxall that I have to adopt a `broad brush' approach, looking at matters in the round - albeit, I would add, having regard and giving proper weight to the fact that in this case I have, because of my extensive involvement with the litigation, a greater understanding of the merits of those issues which have not adjudicated upon than will typically be so for a judge faced with a **Boxall** argument.

35. That said, the simple facts remain that not merely have these issues never been adjudicated upon; they are matters which, as I have already pointed out, were investigated only cursorily during the hearing in October/November 2002 and on which I forebore to express any views at all. It is far from obvious to me that the claimants would necessarily have won on all these issues had they been fought out. What can be said - and this in my judgment should be reflected in the order as to costs - is that given the vigour with which the legal arguments on the manual handling issue were deployed, and the outcome of that legal debate, it is reasonable to believe that the claimants would have made significant headway in challenging the work done by Mrs Bosley and the stance being adopted by ESCC in the light of her work.

The costs from 25 November 2002 to 25 June 2004

36. Broadly speaking the costs during this period are attributable to two things: (i) the implementation of the user independent trust in the light of my ruling on that issue, including the preparation for any arguments on the detail of the trust in the event that there were issues requiring adjudication by the court, and (ii) the preparation and gathering of further expert and other evidence in relation to the factual, technical and expert aspects of the manual handling issue, including the preparation for the renewed argument on those issues which had been due to take place at the hearing in December 2003. None of these matters was ever the subject of any judicial adjudication or as hitherto, been the subject of any judicial investigation.

37. In relation to the user independent trust Ms Richards puts forward two distinct reasons why there should be no order as to costs. The first is based on Newman J's observations in the **Hackney** case, the second on **Boxall**. In relation to the manual handling issue she again relies on **Boxall.**

38. Generally, in relation to the costs incurred during this period, I agree with Ms Richards's submission that to form any sensible view as to the legality of what ESCC was proposing and as to the merits or demerits of the opposing arguments, both on the user independent trust issue and the manual handling issue, I would have to hear substantial argument and consider the evidence with some care. It would, as she says, involve an investigation of the substantive merits of what is by now (save in relation to costs) an academic challenge, something which she says, and I agree, would, to adopt the words of Simon Brown J in **R v Liverpool CC ex p Newman** (1993) 5 Admin LR 669, be *"a gross misuse of this court's time and further burden on its already overfull list."* As Ms Mountfield puts it, this is, in effect, a proportionality principle.

39. Even recognising the amount of the costs in issue, and therefore the financial significance to the parties of the outcome (see **Boxall** point (iv)), it simply cannot be appropriate for me now to be invited to delve into the detail of all this, and into the merits of the opposing arguments, to the extent that would be necessary were I to be able to come to any even provisional or tentative view of where the

overall merits lie. Ms Mountfield submits that in a case such as this, where the costs are very substantial, it is worth spending a little time and effort in deciding where the costs burden should fall, indeed that I should adopt *"a relatively careful and painstaking approach to analysing the main issues in the proceedings, and, in relation to each key issue, determine[e] (in ball-park terms) which party had the better of the argument."* That I readily accept. But everyone is agreed that the matter is one to be decided on the basis of written submissions. No-one is suggesting the kind of `in depth' investigation which alone, in my judgment, would allow me to get to the bottom of the various issues which still divided the parties prior to the making of the consent order on 25 June 2004. And the simple fact, with all respect to those who would submit otherwise, is that, save in respect of those issues on which I have previously given judgment, it is not, as Ms Mountfield would have it, *"tolerably clear which side in effect "won"."*

40. The point can be illustrated by reference to one of Ms Richards's arguments. She asserts that "most or all" of the challenges in relation to the manual handling issue identified in the Scott Schedule would have failed and goes so far as to suggest that if any party is entitled to its costs it should be ESCC. She founds this submission on the assertion that "many" of the claimants' challenges largely ignore the critical point that the balancing exercise involved in drawing up the manual handling protocols was for ESCC to undertake, not the court, and that the court's role was simply one of review. She may be right. She may be wrong. But short of my examining and evaluating (at least to some extent) all of the 207 items raised in the Scott Schedule I cannot form any useful view. The same point can also be illustrated by reference to two of the arguments deployed on behalf of the claimants, namely (i) that the eventual compromise of the manual handling issue shortly before the hearing fixed for 9 December 2003 came about only because of a *"concession"* - a *"last minute reversal"* - by the ESCC which removed the need for a hearing and that the manual handling protocols prepared following my judgment *"were clearly out with judgment"*. All of that is disputed by ESCC. Short of a detailed appraisal of the protocols and of the party and party correspondence I do not see how I can safely arrive at any very useful conclusions.

41. So far as concerns the **Hackney** point in relation to the user independent trust issue, it would seem that a significant part of the costs was indeed incurred by the claimants' advisers doing the very things hat Newman referred to. I d o not suggest that there was anything necessarily wrong in that - and no doubt it was done with the appropriate sanction of the Legal Services Commission - but that is no reason why ESCC should be made to bear the costs of the exercise.

Mediation

42. Ms Richards submits that this is a case in which the claimants could and should have agreed to ESCC's offers of mediation. In particular, she says that the user independent trust issue cried out for mediation. She goes so far as to assert that if there had been mediation at the outset it is "probable" that a huge amount of costs would have been avoided. She points to the comments and the actual order made by the Court of Appeal in R **(Cowl) v Plymouth City Council (Practice Note)** [2001] EWCA Civ 1935, [2002] 1 WLR 803.

43. I have to say that I simply cannot accept this. In the first place, bearing in mind the vigour with which, seemingly, every conceivable point of law and every possible factual issue was canvassed in court, and the enthusiasm with which the forensic battle was apparently waged by all parties, the idea that mediation would have been successful at any earlier stage than in the event proved to be the case seems to me to verge on the fanciful. Moreover, the user independent trust issue raised questions of ESCC's vires which in the nature of things would have been difficult to resolve in the absence of a judicial determination - something which even ESCC appears to have recognised. Secondly, and as the claimants point out, ESCC's offers of mediation were for most of the time unrealistic. ESCC's attitude is, perhaps, best exemplified by the offer it made (without prejudice save as to costs) on 18 October 2002. True it offered to concede the user independent trust issue (but how could it?), but this was tied to a requirement that the claimants abandon their challenge to ESCC's manual handling policy and withdraw the judicial review proceedings. In my judgment the claimants were justified in the particular circumstances of this "almost uniquely difficult case" (see paragraph [25] above) in taking the view that, however appropriate it might otherwise have been, mediation on the only terms being

proposed by ESCC was inappropriate and likely to be futile. Of course parties should mediate wherever possible, but a party who reasonably rejects an unreasonable or unrealistic proposal for mediation may still recover his costs.

44. I should not want to be thought to be in any way watering down the salutary principles expounded by the Court of Appeal in **R (Cowl) v Plymouth City Council (Practice Note)** [2001] EWCA Civ 1935, [2002] 1 WLR 803. And with the benefit of hindsight it may be that if in March 2002 I had been more proactive and vigorous in exercising the robust case management which is necessary in cases such as this (see **R (Cowl) v Plymouth City Council (Practice Note)** [2001] EWCA Civ 1935, [2002] 1 WLR 803, at paras [2]-[3], and **CF v Secretary of State for the Home Department** [2004] EWHC 111 (Fam), [2004] 2 FLR 517, at para [218]) it might have been possible to compel all parties to agree to sensible mediation on at least some of the issues, even if some matters (for example the question of vires in relation to the user independent trust) would still have required to be litigated. But be that as it may, it does not seem to me that these are matters of which ESCC can now take advantage at the expense of the claimants. Matters might have been very different if ESCC had been willing to embark upon mediation without pre-conditions. But it was not.

The costs of the `best interests' proceedings

45. The best interests proceedings, as I have said, have been largely moribund for much of the time since the hearing before Wilson J and, at least since then, have consumed only a fairly modest part of the costs. I see no reason to differ at all from Wilson J's characterisation of ESCC's claim - a claim which was in effect abandoned very soon thereafter. The best interests proceedings came back to life when A and B made their cross-application in September 2003. Ms Richards submits that their cross-application was fundamentally misconceived, relying in support of this submission not merely on my judgment on the manual handling issue, **R (A, B, X and Y) v East Sussex County Council (No 2)** [2003] EWHC 167 (Admin), (2003) 6 CLLR 194, but also on my judgments in two other cases: **A v A Health Authority**, In **re J (A Child), R (S) v Secretary of State for the Home Department** [2002] EWHC 18 (Fam/Admin), [2002] Fam 213, and **CF v Secretary of State for the Home Department** [2004] EWHC 111 (Fam), [2004] 2 FLR 517. With this submission I have some sympathy. I have none for Ms Richards's further submission that I should in these circumstances order A and B to pay ESCC's costs of the cross-application and direct, in accordance with **Lockley v National Blood Transfusion Service** [1992] 1 WLR 492 and **R (Burkett) v London Borough of Hammersmith & Fulham** [2004] EWCA Civ 1342, a set-off of these costs against any costs ordered to be paid by ESCC. In all the circumstances it seems to me that, insofar as these costs are not already covered by Wilson J's order, there should in principle be no order as to the costs of the best interests proceedings - that is, no order as to the costs either of the original application by ESCC or of the cross-application by A and B.

One or two sets of costs

46. Ms Richards vigorously resists any order that allows both A and B and X and Y to recover their costs. She has particular submissions in relation to the user independent trust issue but more generally she submits that there was no justification for separate representation continuing - and certainly no reason why ESCC should have to pay for it - after the point in June 2002 when ESCC in effect abandoned the best interests claim.

47. Down to that point it hardly lies in ESCC's mouth to complain, for it was its own act in commencing the best interests proceedings which created the conflict between A and B on the one hand and X and Y on the other and the consequent necessity for their separate representation. Moreover, it is not unimportant that Wilson J in his order of 14 June 2002 awarded costs - very substantial costs - to both sets of claimants. Thereafter, I readily concede, matters are not so straight-forward. And Ms Richards can marshal powerful arguments - most helpfully set out in paragraphs 9395 of her *`Submissions ... in response to the costs application made by X and Y'* - as to why there should from then on be only one set of costs. As against that there are the points made by the claimants, in particular by Ms Mountfield in paragraphs 23 and 29 of her *`Written submissions on costs on behalf of the third and fourth claimants*' and paragraph 17 of her *`Submissions ... in response'*. Those submissions persuade me, I have to say without much enthusiasm, that it would not be right to limit the claimants to only one set of costs for the

period down to 25 November 2002. They have persuaded me, essentially for the reasons they give; that it would in the circumstances- be appropriate - fair, just and appropriate - to depart from what I accept is the typical starting point and to award the claimants two sets of costs. The facts of the present case are very different indeed, but in coming to this conclusion I have adopted the principles to be found in **Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)** [1995] 1 WLR 1176 at p 1178E and **R (Smeaton) v Secretary of State for Health and others (No 2)** [2002] EWHC 886 (Admin), [2002] 2 FLR 146, at paras [431]-[440], principles which, I believe, justify my coming to this conclusion.

48. The point does not in the event arise, but it should not be assumed that I would necessarily have come to the same conclusion in relation to the period after 25 November 2002.

Other issues

49. A number of other issues have been canvassed in the various written submissions. I have taken them all into account but there is no need for me to deal with each of them in terms. I should merely say that, in the particular circumstances of this case, and bearing in mind that the major focus of the litigation since June 2002 has been on the judicial review proceedings and not the best interests proceedings, I do not find Ms Richards's reference to the Family Division case-law on costs particularly useful. Essentially, as Ms Mountfield puts it, these were community care proceedings. And I agree with the claimants that this is not the occasion for any general exegesis of the principles by which the costs of best interests proceedings in the Family Division should be dealt with.

Discussion

50. For the reasons which I have already set out I propose to make no order in relation to any part of costs of the litigation after 25 November 2002. Nor do I propose to make any separate order in relation to the costs down to 14 June 2002, the vast bulk of which have already been dealt with by Wilson J. To the limited extent that the rest of those costs relate to matters which were still in issue thereafter I will take that into account when dealing with the costs for the period from 14 June 2002 to 25 November 2002.

51. In relation to the period from 14 June 2002 to 25 November 2002 the claimants, for reasons already given, have plainly established in my judgment that they are entitled to at least some costs of the judicial review proceedings. I cannot agree with Ms Richards that there should be no order as to these costs. Such an order would simply not begin to recognise the very real extent to which the claimants did in fact succeed. They are, as I have said, entitled to two sets of costs. And they are not to be deprived of their costs because o any failure to mediate. The more difficult question is as to how much o f their costs they should be allowed to recover from ESCC.

52. I approach this question on the basis of the analysis in paragraphs [31]-[35] above. Any appraisal of what is a fair, just and appropriate order has to take into account the facts that:
    i) the claimants are in principle entitled to their costs in relation to the user independent trust issue;
    ii) in relation to the legal aspects of the manual handling issue the claimants, although they did not succeed on every point, did nonetheless win, and by a reasonable margin; and
    iii) it is reasonable to believe that the claimants would have made significant headway in challenging the work done by Mrs Bosley and the stance being adopted by ESCC in the light of her work; but
    iv) on the other hand, a very large part of the costs - how much I do not know - was incurred in the preparation and gathering of a vast mass of expert and other evidence in relation to the factual, technical and expert aspects of the manual handling issue, matters which were never in the event adjudicated upon.

53. My difficulty is that I lack the material to apportion these various elements of the costs on anything other than the most impressionistic basis. But it is unthinkable that I should make an 'issues-based' order necessitating separate assessments by a taxing judge of different parts of the costs. Broad indeed though the axe I take has to be, this is a case in which I must do the best I can to fix an appropriate percentage. That, after all, is the approach contended for by Mr Luba and Ms Mackintosh - as I have

said they are claiming two-thirds of their costs - and no-one has suggested that this is not an appropriate approach to adopt.

54. In the same way, although, as I have said, there should in principle be no order as to the costs of the best interests proceedings, I am anxious to spare the parties the need to disentangle the costs of the two sets of proceedings. I propose therefore to make an order expressed to be in relation to the costs - that is, the whole of the costs, both of the judicial review proceedings and of the best interests proceedings - for the period from 14 June 2002 to 25 November 2002. But in assessing the appropriate percentage I will take into account that there should in principle be no order in relation to that fairly modest part of the overall costs attributable to the best interests proceedings.

55. Acknowledging that this is at best a very rough and ready calculation I have concluded that the claimants should have 50% of their costs from 14 June 2002 to 25 November 2002 - that is, 50% of the whole of their costs both of the judicial review proceedings and of the best interests proceedings.

56. This figure is intended to take account of the various factors referred to in paragraphs [52] and [54] above and at the same time to reflect, albeit very impressionistically, the various elements which go to make up the overall costs. It is also intended to take account, to the very limited extent appropriate, of t he fact that part -though only part – of the costs for the period down to 14 June 2002 not already dealt with by Wilson J relate to the same matters as are referred to in paragraph [31] above.

Conclusions

57. I shall therefore direct that ESCC is to pay both A and B and X and Y one-half of their costs from 14 June 2002 to 25 November 2002, such costs, if not agreed, to be the subject of a detailed assessment on the standard basis. This order is, of course, without prejudice to the order made by Wilson J on 14 June 2002. That apart I shall direct that there is to be no order for costs other than such formal orders as the claimants may require for the purposes of their public funding certificates.

Costs of this application

58. Neither side has been fully successful. Each side has gone away with less - significantly less - than it had hoped for. In these circumstances it seems to me that so far as the present application is concerned the appropriate order is that there should be no order as to costs. That is the order I shall make unless anyone wishes to address me further on the point.

Mr Jan Luba QC and Ms Nicola Mackintosh (instructed by Mackintosh Duncan) for the claimants A and B Ms Helen Mountfeld (instructed by Leigh, Day & Co) for the claimants X and Y

Ms Jenni Richards (instructed by the Legal Department, East Sussex County Council) for the defendant.