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Intervening in strategic litigation

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Intervening in strategic litigation: examples

Interventions/additional parties not unusual:

- Representatives of devolved nations in *AXA General Insurance Ltd & others v Lord Advocate & others* [2011] UKSC 46 and in *R (Miller) v Prime Minister* [2019] UKSC 41;
- Relevant Government departments, in *Arkin v Marshall* [2020] EWCA Civ 620;
- Individuals such as Sir John Major & Baroness Shami Chakrabarti in *R (Miller) v Prime Minister* [2019] UKSC 41;
- Commercial institutions such as Association of British Insurers in *Re Recovery of Medical Costs for Asbestos Disease (Wales) Bill* [2015] UKSC 3;
- EHRC frequent intervener eg *Adesotu v Lewisham LBC* [2019] EWCA Civ 1405, *R (DA & others) v SSWP* [2019] UKSC 21;
- HLPAs: *Arkin v Marshall* [2020] EWCA Civ 620, *Khan v Mehmood* [2022] EWCA Civ 791;
- PLP in *R (Miller) v Prime Minister* [2019] UKSC 41;
- NGOs:
 - Shelter, CPAG in *R (SG & others) v SSWP* [2015] UKSC 16;
 - Just for Kids in *R (Tigere) v SS for Business, Innovation & Skills* [2015] UKSC 57;
 - Shelter & JustFair in *R (DA) v SSWP* [2019] UKSC 21;
 - Liberty & JCWI in *R (Bibi) v SSHD* [2015] UKSC 68 & many others.

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Intervening in strategic litigation: added value

Lord Hoffmann in *Re E (a child) (Northern Ireland)* 2008 UKHL 66:

"In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.

An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way."[2] – [3] [emphasis added].

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Intervening in strategic litigation: added value

Added value:

- Legal submissions – based on instructions which can provide a different, or more rounded, picture than the parties provide.
- Evidence:
 - Research reports either from own research or publicly available;
 - Surveys of staff, clients etc;
 - Fol requests.

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Intervening in strategic litigation: judicial review

Application for permission at CPR 54.17:

“(1) Any person may apply for permission –

(a) to file evidence; or

(b) make representations at the hearing of the judicial review.

(2) An application under paragraph (1) should be made promptly.”

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Intervening in strategic litigation: judicial review

Procedure at Practice Direction 54A para 12:

12.1 *An application for permission to intervene under rule 54.17 should be made by application in the relevant proceedings, in accordance with the provisions of Part 23.*

12.2 *Any such application must be made promptly. The Court is unlikely to accede to an application to intervene if it would have the consequence of delaying the hearing of the relevant proceedings.*

12.3 *The Application Notice must be served on all parties to the proceedings.*

12.4 (1) *The duty of candour applies. The Application Notice should explain who the applicant is and indicate why and in what form the applicant wants to participate in the hearing.*

(2) *If the applicant requests permission to make representations at the hearing, the application should include a summary of the representations the applicant proposes to make.*

(3) *If the applicant requests permission to file and serve evidence in the proceedings a copy of that evidence should be provided with the Application Notice. The application should explain the relevance of any such evidence to the issues in the proceedings. Cont'd..."*

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Intervening in strategic litigation: judicial review

Procedure at Practice Direction 54A para 12 cont'd...

12.5 *If the applicant is seeking a prospective order as to costs which departs from the provision made by section 87 of the Criminal Justice and Courts Act 2015, the application must include a copy of the order sought and must set out the grounds on which that order is sought.*

12.6 *Where the court gives permission for a person to file evidence or make representations at the hearing of the claim for judicial review (whether orally or in writing), it may do so on conditions and may give case management directions.*

12.7 *Where all the parties consent, the court may deal with an application under rule 54.17 without a hearing."*

NB in Supreme Court application is made after permission to appeal determined or notice of appeal given: SCR 2019 Rule 26.

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Intervening in strategic litigation: judicial review

Permission granted on specific representations & not generally, see Lord Hodge in *R (O) v SSHD* [2022] UKSC 3, [55] – [56]:

“on 2 October 2019 Yip J refused Amnesty International UK permission to intervene at first instance because the claimants could make submissions on those provisions of the 1981 Act and the Convention. Mr Drabble made such submissions..... No appeal was taken on this point and the Court of Appeal did not address the matter....Amnesty International UK’s other two arguments, which are summarised in para 54 above, were not raised in the courts below and are completely new legal arguments which are unrelated to the subject matter of this appeal.

In my view there is substance in Sir James’s challenge and I would not allow these arguments to form part of this appeal.” [55] – [56]

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Intervening in strategic litigation: judicial review

Costs:

- Criminal Justice and Courts Act 2015, s 87:
- Starting point at (3) – (4):

“(3) A relevant party to the proceedings may not be ordered by the High Court or the Court of Appeal to pay the intervener’s costs in connection with the proceedings.

(4) Subsection (3) does not prevent the court making an order if it considers that there are exceptional circumstances that make it appropriate to do so.”

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Intervening in strategic litigation: judicial review

Mandatory requirement to make costs order against intervener unless exceptional circumstances:

- (5) *On an application to the High Court or the Court of Appeal by a relevant party to the proceedings, if the court is satisfied that a condition described in subsection (6) is met in a stage of the proceedings that the court deals with, the court must order the intervener to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings.*
- (6) *Those conditions are that—*
- (a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;*
 - (b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;*
 - (c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings;*
 - (d) the intervener has behaved unreasonably.*
- (7) *Subsection (5) does not require the court to make an order if it considers that there are exceptional circumstances that make it inappropriate to do so.*

Intervening in strategic litigation: civil litigation

Application under CPR 19.2(2):

"(2) The court may order a person to be added as a new party if—

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings"

Guidance at CPR PD 19A 1.1- 1.5

1.1 *Parties may be removed, added or substituted in existing proceedings either on the court's own initiative or on the application of either an existing party or a person who wishes to become a party.*

1.2 *The application may be dealt with without a hearing where all the existing parties and the proposed new party are in agreement.*

1.3 *The application to add or substitute a new party should be supported by evidence setting out the proposed new party's interest in or connection with the claim.*

1.4 *The application notice should be filed in accordance with rule 23.3 and, unless the application is made under rule 19.2(4), be served in accordance with rule 23.4.*

1.5 *An order giving permission to amend will, unless the court orders otherwise, be drawn up. It will be served by the court unless the parties wish to serve it or the court orders them to do so."*

Intervening in strategic litigation: civil litigation

Costs:

- CICA s.87 does not apply;
- Some application of principle that losing party should not have to pay 2 sets of costs:
 - *Berkeley Burke Sipp Administration LLP v Charlton* [2017] EWHC 2396 (Comm) Financial Ombudsman intervened
 - *Cadbury UK Ltd v Comptroller General of Patents, Designs & Trade Marks (Costs)* [2016] EWHC 1690 (Ch), Societe des Produits Nestle SA intervened in appeal against decision of Comptroller of Patents Designs and Trade Marks.

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Intervening in strategic litigation: tips and tactics

- Identify potential application at an early stage whether NGO looking to intervene or party approaching NGO or other organisation;
- Seek parties' consent:
 - most often obtained if "no order for costs" can be agreed (NB in *Arkin v Marshall*, the Appellant did not consent to HLPAs' application for permission to intervene but was prepared to agree "no order for costs" if application was allowed);
 - Parties are concerned about not increasing time estimate and/or costs of hearing;
 - Agree page limits for written submissions and time limits for oral submissions;
 - Agree if necessary that time for intervener's submissions will come from a party's time.
- Ensure added value:
 - Evidence;
 - Submissions not replicating those of parties but able to provide a broader approach;
- Frontload:
 - Draft submissions and witness evidence in application.

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Intervening in strategic litigation: materials

- *To Assist the Court: third party interventions in the public interest* (Justice, 2016);
- *Administrative Court Judicial Review Guide 2021* (Judiciary for England & Wales, 2021) at para 3.2.4;
- *Interventions in strategic litigation* (Legal Action, July/August 2022, Liz Davies & Matthew Ahluwalia).

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Intervening in strategic litigation: alternatives

- Representation of party by NGO (such as Shelter/CPAG), see *R (SC) v SSPW* [2021] UKSC 26, but note Lord Reed:

“In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign.” [162]

“Typically, the organisations which bring cases of the present kind will themselves have campaigned against the legislation during its passage through Parliament, as Lord Bingham noted. They will have made sure that their concerns were drawn to the attention of Parliamentarians, as the Child Poverty Action Group did in the present case” [187]

- Providing evidence in support of party’s case.

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Intervening in strategic litigation: alternatives

- As party in own right:
 - *R (JCWI) v SSHD* [2020] EWCA Civ 542, note National Residential Landlords' Association, EHRC & Liberty all intervened;
 - Note standing issues: *R (Good Law Project & Runnymede Trust) v Prime Minister & Secretary of State for Health & Social Care* [2022] EWHC 298 (Admin), review of standing at [16] – [58]:
 - Good Law Project did not have standing: *"No individual, even with a sincere interest in public law issues, would be regarded as having standing in all cases. We do not consider that the position differs simply because there is a limited company which brings the claim. It also cannot be right as a matter of principle that an organisation could in effect confer standing upon itself by drafting its objects clause so widely that just about any conceivable public law error by any public authority falls within its remit. In all the circumstances of this case, we are not persuaded that such a general statement of objects as is now set out in the GLP's Articles of Association can confer standing on an organisation."* [57] – [58]
 - Runnymede Trust did in respect of PSED challenge: *"an organisation which exists specifically to promote the cause of racial equality"* [58]

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Intervening in strategic litigation: HPLA's successes

Arkin v Marshall [2020] EWCA Civ 620:

- Evidence from HPLA members as to effects on lawyers & clients' ability to comply with case management direction due to the pandemic & lockdown;
- Submissions on justification for PD 51Z operating to stay proceedings (as opposed simply to preventing evictions) during the relevant period (Ground 1 and, to a lesser extent Ground 2) and (b) the potential implications of judges being able to lift the stay in individual cases (Ground 3) and the factors they should consider if they are able to do so.

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Intervening in strategic litigation: HLPAs' successes

Khan v Mehmood [2022] EWCA Civ 791 Baker LJ

"As demonstrated by the statement and submissions on behalf of the HLPAs, CFAs play an important role in assisting tenants to bring claims for breach of repairing covenants. Such claims are therefore manifestly within the category of cases for which the 10% uplift was specifically intended, by way of compensation for the success fee which the claimant tenant's lawyer is entitled to be paid by his client but which, following LASPO, cannot be recovered from the defendant landlord. The need to secure funding for claims in the post-LASPO environment was integral to the recommendations in Jackson Report and the declaration made by this Court in Simmons v Castle. The arguments put before this Court on behalf of the HLPAs demonstrate that it remains a very important consideration in this category of litigation." [58]

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Thank you

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