NO. 858

Insurance Appeal Tribunal
2015 No. 1

Between:

AA

Appellant

-and-

The Bermuda Monetary Authority

Respondent

Ruling on Costs

---

1. This is a ruling on costs, following the Tribunal's substantive Ruling in this matter dated 27 June 2016. The defined terms and abbreviations contained in the aforesaid Ruling of 27 June are adopted herein.

2. This Costs Ruling follows correspondence from the parties, as follows on the question of costs:

   a. Appleby letter of 9 June 2016
   b. Cox Hallett Wilkinson letter of 15 June
   c. Appleby letter of 22 June
   d. CHW letter of 24 June
   e. Appleby letter of 27 June

3. The parties agreed to the issue of costs being dealt with by way of written submissions only, without a further hearing. Submissions were ordered to be submitted within 7 days, later extended to 14 days. Following the exchange of written submission, the parties made a joint request to the Tribunal for the exchange of Reply Submissions on the question of costs. The Tribunal acceded to this request and was greatly assisted by both the Costs Submissions and the Reply Submissions.

4. In their aforesaid letter of 9 June 2016, Appleby on behalf of the Authority, requested that the Tribunal make an order as to costs at the time of handing down its Ruling. On 22 June Appleby expanded on this to request a costs order nisi. They made the point, that:

   > "We agree with CHW's submission that there is no rule in the Insurance Act 1978 or the Insurance Appeal Tribunal Regulations 2011 that costs follow the event. <u>There is, however, an accepted body of general practice that in the ordinary course, and barring any reasons to the contrary, costs follow the event."</u>

5. At first blush the above proposition seemed attractive. However, given the strong objection from the Appellant, the Tribunal agreed to hear the parties in substance without making an order nisi.

6. In their main Costs Submissions dated 12 July 2016, the Respondent appeared to abandon the submission that we should start from the position that costs should normally follow the event in an appeal to the Insurance Act Appeals Tribunal. At least this argument did not form part of their aforesaid written submissions of 12 July.

7. In the submissions of 12 July 2016, Mr White for the Appellant contended (at para 3) in summary, as follows:

   i. there is no presumption in these tribunal proceedings that costs should follow the event (the Respondent's key contention in correspondence);
   ii. the Tribunal has a wide discretion as to costs, which is to be exercised judicially and reasonably by taking account of, and giving due weight to, all relevant factors in a principled and proportionate fashion;
   iii. the costs of regulatory tribunals should generally fall where they lie unless there is a good reason in the circumstances of the case to make a different order;
   iv. that this case is the first under the Act's statutory appeals regime and has acted to establish the legal boundaries and scope for future cases. As a 'test case', significant time and cost has been incurred in dealing with establishing and/or clarifying fundamental legal issues and tests, where by contrast, the actual facts of the appeal were simple and were agreed by the parties in the chronology, and the factual papers were relatively light;
   v. while the Respondent's decision on the substantive issues was upheld, the Respondent did not succeed on all the legal issues, and in particular its legal contentions in respect of jurisdiction (the Tribunal's power to reverse a penalty) and ground 2 were rejected and the Appellant's submissions accepted; and
   vi. that in all the circumstances the appropriate order would be 'no order as to costs'.

8. The starting point is to determine first where the starting point should be. Should the Tribunal approach this matter following the usual rule in court proceedings that costs normally follow the event? Or should there be a different starting point, as submitted by the Appellant, namely that normally there should be no order as to costs, save in particular circumstances where there is good reason to order costs against one of the parties (or some other starting point)?

9. The Tribunal's discretion as to costs is set out in section 44D of the Insurance Act 1978 which briefly states:

   > "(1) A tribunal may give such directions as it thinks fit for the payment of costs or expenses to any party to the appeal"

10. The Insurance Appeal Tribunal Regulations of 2011 do not add much to this and say only the following on costs:

    > "17 (1) Any costs or expenses which the tribunal directs to be paid under section 44D(1) of the Act and required to be taxed shall be taxed by the Registrar of the Supreme Court.
    > (2) A direction by the tribunal under section 44D(1) of the Act in respect of the payment of costs or expenses by a party to the appeal shall, on application being made to the Supreme Court by the party to whom costs have been directed to be paid, be enforceable as if he had obtained a judgment of that Court in his favour."

11. As can be seen, the Tribunal's discretion is stated in broad terms in the Act and there is no fetter placed on this. This is quite different to the position as relates to ordinary court litigation which is governed by Order 62, r 3(3) of the Rules of the Supreme Court 1985 ("the RSC") which states the general principle that:

    > "(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, <u>the Court shall order the costs to follow the event</u>, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs"

12. The Insurance Act and Regulations contain no provision that costs should follow the event. Nor is there an express provision that costs are only awarded where a party behaves unreasonably. All will depend on the circumstances of each case. This position is not unique to this particular Bermudian Tribunal[1]. The Tribunal must deal with cases justly. The question of unreasonable behaviour should enter into the consideration as to what is just, amongst other things.

13. The Tribunal is also conscious of the fact that this is the first appeal under the Insurance Act and that as such, the parties lacked guidance as to how aspects of the

[1]See British Telecommunication v. Office of Communications (2005) AER (D) 272 (May); and Napp: interests and costs (2002) CAT 3

matter would proceed, for example, the approach of the Tribunal on costs. In the premises, this appeal and the costs application are of general importance to the insurance industry in Bermuda.

14. It should therefore be noted that although the Tribunal upheld the regulatory action of the Authority, the appeal, in particular as it related to quantum, was reasonably brought. Further it is noted that not every aspect of the Authority's arguments were accepted by the Tribunal (see paragraphs 39 and 40 of the Ruling of 27 June).

15. Mr Wasty submitted on behalf of the Respondent/Authority, inter alia, at paragraph 2.3 of his 12 July 2016 submissions that:

    > "The Appellant's argument is that a statutory regulator should not, in the ordinary course, obtain recovery of its costs in enforcing the law in discharge of its public function."

16. Further the Respondent submitted at para 3.1:

    > "… As will be seen below, the English jurisprudence for the exercise of a similar discretion by a regulatory appeal tribunal establishes that there is no general rule that a regulatory body should not seek, and be awarded it costs. Indeed, there is jurisprudence to support the counter-argument; a regulatory body, subject to budgetary constraints, has a legitimate interest in recovering the costs that it has had to incur in the discharge of its public duties pursuant to appeal actions."

17. These submissions do not address the point made by the Appellant. The Appellant accepts that the Tribunal has power to order costs in favour of the Regulator, but submits it should not do so in the present circumstances.

18. The Appellant made the following substantive submissions:

    9. "The nature of a tribunal's broad discretion was considered in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] All ER (D) 169. This was a decision of the English Court of Appeal (a strong court consisting of Lord Woolf MR, Mummery and Mantell LJJ) on appeal from the Copyright Tribunal. AEI had challenged the decision of PPL, its licensing body, and the Tribunal was asked to review the terms of payment and licence for the use by AEI of certain sound recordings. The result of the appeal was mixed and initially PPL was ordered to pay two thirds of AEI's costs on the basis that PPL was the overall loser[2]. PPL appealed and the High Court (Neuberger J, as he then was) substituted 'no order as to costs'. AEI appealed and the Court of Appeal dismissed the appeal. Principles of general application can be distilled from this decision as follows:

       i. the tribunal (on the basis of a wide discretion, as in section 44D(1) of the Act, to order costs as 'it thinks fit') has the power to make such order as it might determine to be reasonable in all the circumstances[3];
       ii. this power is very different in scope and nature from that of a court adjudicating upon ordinary civil claims. The different nature is reflected in the wide discretion on costs contained in the statute[4];
       iii. it is *"significant"* that neither the legislation nor the rules expressly stated any general principle such as that set out in RSC Order 62, r 3(3), that costs follow the event – *"It had been appreciated by the draughtsman of the legislation and the rules that it was not appropriate to fetter the Tribunal's discretion by reference to the outcome of the application"[5];*
       iv. as such the tribunal's discretion on costs should be interpreted and applied *"… as a wide discretion to be exercised judicially and reasonably by taking account of, and giving due weight to, all relevant factors in a principled and proportionate fashion";*
       v. The tribunal had been wrong to be influenced by the need to find a winner and a loser and that error had infected and vitiated the exercise of discretion in law[6]; and
       iv. when deciding on what is the appropriate order for costs to make, it is always desirable and usually essential to consider the circumstances of the case as a whole[7].

    10. More generally, Lord Woolf observed that in terms of the distinction between courts and tribunals *"…. in general tribunals adopt a more restrictive approach to making orders for costs than courts because they are concerned not to impede*

[2]The Copyright Tribunal's discretion on costs is similarly worded to this Tribunal's: *"The tribunal may, in its discretion, at any stage of the proceedings,* ***make any order it thinks fit*** *in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings"* [emphasis added]. See section 150(1) of the Copyrights Designs and Patents Act 1988.
[3]Headnote and per Mummery LJ, giving the lead Judgment of the Court, at page 10.
[4]ibid.
[5]ibid and per Mummery LJ at page 10.
[6]ibid and per Mummery LJ at page 11.
[7]per Lord Woolf MR at page 12.

access to the tribunal by those who might be deterred if the risk of being made to pay is too great" [8].
…

14. Costs considerations in such a regulatory tribunal context were considered in two decisions of the Competition Appeal Tribunal, acting as an appeal tribunal from the decisions of the telecommunications regulator, OFCOM. In *British Telecommunications plc v Office of Communications* [2005] All ER (D) 271, the tribunal (Sir Christopher Bellamy (President), Michael Blair QC and Dr A Pryor) considered whether the regulator should pay BT's costs of appeal, in circumstances where BT said it was the 'clear winner'. This case was the first made under the new appellant regime established in the Communications Act 2003. In the case of *British Telecommunications plc v Office of Communications* [2005] All ER 272 (Sir Christopher Bellamy (President), Marion Simmons QC and Ann Kelly), the tribunal considered the reverse position, and whether BT should pay OFCOM's costs in a case concerning breach by BT of its general conditions of entitlement (a de facto breach of licence case). The tribunal's statutory discretion on costs was broad and it could make 'any order that it thinks fit'[9] . In each case the tribunal determined that the parties should bear their own costs.

15. Principles of general application that can be distilled from these two decisions can be summarised as follows:

    i. in the exercise of a broad discretion to make a costs order as 'it thinks fit', and there is no presumption costs will follow the event and *"all will depend on [consideration of] the particular circumstances of the case"[10] ;*
    ii. as a matter of general principle, public authorities should be encouraged to make and stand by reasonable decisions and should not be discouraged from doing so by the risk of substantial costs orders being made against them (referred to as in the principle in *Bradford Metropolitan District Council v Booth)[11];*
    iii. as such, the tribunal rejected the contention that refusal of a costs order would have a *chilling* effect on either the regulator or regulated entity i.e. by dissuading a regulated entity from appealing where it would not recover its costs or by discouraging a regulator from defending its decision where it was at risk of a costs order[12];
    iv. whether the parties had been unreasonable in their arguments (unreasonable conduct) and whether the issues raised matters of public interest[13] were all relevant factors for consideration, as was the question of financial hardship, in the event no order as to costs was made, as this may be relevant depending on the circumstances of the appellant party in each case[14] ;
    v. the costs of maintaining specialist regulatory and compliance departments, and taking specialist advice, would not ordinarily be recoverable prior to proceedings. Although the situation changed once proceedings were afoot, the question as to whether costs orders should be made in any particular case arose against a background in which the parties were, in their own interests, routinely incurring regulatory costs, which were not recoverable as, in a regulated industry such as the telecommunications industry (and it is submitted the regulated insurance sector in Bermuda), the parties would *"be in a constant regulatory dialogue with OFCOM on a wide range of matters"[15];* and
    vi. ultimately, the tribunal had to strike a balance between the various interest involved. It was said to be *"desirable, in a technical sector such as that in the instant case, not to expose parties who sought to exercise their right of appeal to the tribunal to unduly onerous risks as to costs, in addition to their own costs which might already be substantial by virtue of the inherent complexity of the subject matter.* ***In those circumstances, a good reason would need to be shown before the tribunal was prepared to award costs in OFCOM's favour in regulatory appeals'"[16]*** [emphasis added]. "

19. The Tribunal have in essence accepted the submissions set out in paragraph 18 above, as summarizing the law and the approach which the Tribunal should take in relation to costs.

[8]see page 15. The characteristics of tribunal proceedings are also different to those of a court. Tribunal proceedings are intended to provide speedy, inexpensive access to justice, they are meant to be user friendly and less legalistic, the tribunal applies its own industry/area specific expertise, can adopt an inquisitorial approach, and there is greater procedural simplicity.
[9]Rule 55 of the Competition Commission Appeal Tribunal Rules 2000 (as amended).
[10]Headnote and per Sir Christopher Bellamy at pages 9-10, paras 48 to 52 in case 271. This further reflects the approach taken by the Court of Appeal in AEI *Rediffusion Music Ltd v Phonographic Performance Ltd.*
[11]per Sir Christopher Bellamy at page 12, para 62 in case 271. Also, per Sir Christopher Bellamy at page 7, paras 25 to 26 in case 272.
[12]per Sir Christopher Bellamy at page 12, para 63 in case 271.
[13]This was a particular important factor in case 272 where the appeal had resulted in clarification of the law and practice in an area which had previously been unclear; cf headnote and para 34 on page 8.
[14]Headnote and per Sir Christopher Bellamy at page 11, paras 61 to 62 in case 271.
[15]per Sir Christopher Bellamy at page 11, para 60 in case 271.
[16]Headnote and per Sir Christopher Bellamy at in case 271. Also, headnote and per Sir Christopher Bellamy at page 3, para 3, and pages 8 to 9, paras 36 to 39 in case 272. The tribunal further noted that vexatious appeals would be rare, as the (own party) costs of appealing would always be high, and the tribunal had wide case management powers to deal with preliminary issues and to ensure that appeals before it are conducted economically, expeditiously and fairly (see para 35 on page 8). It is submitted that the same points apply with equal force to appeals under the Act.

20. One of the English Court of Appeal cases relied upon by the Appellant was that of R *(on the application of Perinpanathan) v City of Westminster Magistrates Court & Anor* [2010] EWCA Civ 40. Here the Court of Appeal summarized the authorities and stated the following propositions of law: