

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO BVIHCV2012/0179

BETWEEN:

CABLE AND WIRELESS (BVI) LIMITED ("LIME BVI")

Claimant

And

THE TELECOMMUNICATIONS REGULATORY COMMISSION ("COMMISSION")

Respondent

Appearances:

Ms. Kassie Smith QC and with her Mr. Callum McNeil for the Claimant

Mr. Brian Kennelly and with him Ms. Sinead Harris for the Respondent

2016: September 23rd

JUDGMENT ON COSTS

- [1] Byer J:** By written decision delivered in this matter, the issue of costs was reserved upon the provision of written submissions by the parties.
- [2]** Those submissions were subsequently filed and provided to the Court for its consideration.

Court's analysis and Considerations

- [3]** The history and background of this litigation is well known between the parties but in the present circumstances it may be of some assistance to utilize a modified version of the factual matrix so helpfully provided by Counsel for the Respondent to put this litigation into perspective.

Chronology of Litigation

- a. On the 28th June 2012 leave to claim judicial review, along with a stay of the Respondent's decision, was granted to the Claimant on an ex parte basis by the order of Mr Justice Redhead (the "Ex Parte Order").
- b. Due to the lack of co operation by the Claimant to facilitate a note to the Respondent of the ex parte proceedings, on the 17 July 2012, Mr Justice Wallbank found that the Claimant had failed to comply with its obligations to deliver up documents relating to its original ex parte application for leave and made an order requiring it do so.
- c. By application dated the 9th October 2012 the Respondent sought to set aside the leave granted and on 9 August 2013, Madam Justice Ellis set aside the initial grant of leave and the stay on the grounds that the Claimant had deliberately failed in its duty of full and frank disclosure and its duty of candour. Madame Justice Ellis re-granted leave on the same day.
- d. On 13 August 2013, the Respondent's lawyers wrote to the Claimant's then lawyers to seek confirmation that it intended to rely on its previously filed Fix Date Claim Form ("FDCF") and evidence in support. The response by email

dated 2 September 2013, was that *"we intend to rely on the FDCF as filed on 13 July 2012 and anticipate also relying on all the evidence filed in support thereof, as may be necessary to advance our case at the hearing..."*.

- e. Having received that confirmation, the Respondent proceeded to prepare its evidence in line with the timetable directed by Ellis J.
- f. On 3 October 2013, shortly before the deadline for the Respondent's evidence, the Respondent received notice that the Claimant had changed legal practitioners and made a request that the proceedings should be stayed for two months.
- g. The Claimants, without notice or further reference to the Respondent, filed an application for a stay of the proceedings and indicated an intention to amend its Fix Date Claim Form ("FDCF"). In doing so, the Claimant expressly indicated, in paragraph 32 of the Third Affidavit of Sean Auguste that it *"may have to compensate [the Commission] for costs thrown away"*.
- h. The First Hearing took place before Ellis J on 8 June 2015 and by order dated 17 June 2015, Ellis J gave the Claimant permission to amend its FDCF.
- i. The matter proceeded to trial finally on the 14th and 15th December 2015. On the amended FDCF.

[4] What is therefore clear to this Court is that the history of this litigation was far from straightforward. These parties commenced their legal wrangling in 2012 and it was not until the end of 2015 that this matter was indeed fully and completely ventilated and along that journey this Court accepts that the path was anything but smooth.

[5] What is clear to this Court however and to which both parties agree, on the issue of the payment of costs, this Court is guided first and foremost by the general principle encapsulated in Part 64.6(1) that where *"the Court...decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party"*. Indeed it is pellucid to this Court, that this is the position as agreed by both parties. Where the parties differ and what the Respondents have argued by way of their

submissions is that this general rule or principle should be departed from in the instant case having regard to all the circumstances as they presently exist.

- [6] The nub of the argument proffered by the Respondent, is that the Claimant having argued and sought relief on several grounds, were however ultimately only successful on one of those and even though that one successful ground achieved their ultimate goal, the Respondents urged this Court to consider awarding costs on an "issue basis". By this argument, the Respondent therefore submitted that they should be awarded costs on those grounds that the Claimant had argued and on which they were unsuccessful.
- [7] Counsel for the Claimant on the other hand, made it clear that there are no circumstances to substantiate any reduction or non application of the general principle. He submitted to this Court, that the circumstances that would warrant the reduction in a costs award to a successful claimant did not arise here, in that although there were no hard and fast rules as to what a Court looked to in exercising any such discretion, it was generally in relation to the conduct of the litigation and the conduct of the parties that may give rise to allegations of whether litigation was reasonable and thereby impinge an entitlement to costs. He therefore submitted, that the mere fact that the Claimant may not have been successful on all their grounds as argued did not mean, he posited, that there was anything to suggest that the Claimant's claim generally met the threshold of being an unreasonable claim. Counsel submitted that the grounds they argued were legitimate and there was no evidence that those grounds caused any exacerbation of costs. As such, Counsel submitted to this Court that it was clear that there were no circumstances that could support any reduction in the costs following the event and any order for costs should so reflect the same.
- [8] This all being said, this Court is mindful that the "***discretion of the Court is paramount and when determining any application for costs the Court will have regard to all material circumstances which prevail***"¹. In so saying, it must therefore be the mandate of this Court to assess and consider the heavily litigated nature of the proceedings.
- [9] In order to conduct such an assessment, this Court must consider the comprehensive arguments for the Respondent and whether those submissions in fact find merit in this case at Bar.

¹ Halsbury Laws of England Volume 61 para 684

[10] It is not disputed, as submitted by the Respondent, that some instances may warrant a consideration by the Court to award costs to the party in proceedings who may be considered the unsuccessful party where there has been substantial loss on issues raised and argued by the substantive successful party. In fact the Courts have considered that approach as being a method of encouraging **"discipline generally [that there would be]... a risk as well as a reward in relation to the conduct of litigation"**². Be that as it may however, in the case at Bar, this Court is not satisfied that in the instant case that costs awarded on that basis could or would accurately reflect how this matter unfolded.

[11] Indeed there can be no argument that of the heads of judicial review argued, under Ground 11 (a) – (e) the Claimant was successful on one, namely 11(c) and that on Ground 13 they were completely unsuccessful. However the prayer that was before the Court and being sought by the Claimant, was to have the decision of the Respondent quashed. This prayer is what the Claimant ultimately obtained, notwithstanding that they were not individually successful on each and every ground argued. Having accepted this therefore, this Court is not in a position and does not accept the argument as made by the Respondent seeking costs as against the Claimant. It is the view of this Court that even though the issue based approach as submitted by the Respondent is bolstered by the specific wording of Part 64.6(5) and (6)³ this Court is satisfied that consideration of those factors identified therein are better suited to an assessment of the litigation to determine whether the Claimant was "unreasonable" in making and arguing grounds before the Court and therefore disentitled to costs as per Part 56.13(6)⁴.

[10] When an overall view is therefore taken of this litigation, this Court maintains its view that these Claimants were entitled to bring the claim seeking to have what they considered an incorrect decision against their interest vindicated by the Court. In fact this Court adopts the words of Pill LJ in the case of **R(Valentines Homes and Construction Ltd) v HMRC**⁵ when in dealing with whether costs should have been awarded to the Claimant on a judicial review application as against Her

² **R(BASCA) V Business Secretary (Nos 1 & 2)** [2015] EWHC 1723 (Admin) and [2015] EWHC 2041 (Admin) at 1545

³ Part 64.6(5) and (6) states as follows: (5) In deciding who should be liable to pay costs the court must have regard to all the circumstances. (6) In particular it must have regard to – (a) the conduct of the parties both before and during the proceedings; (b) the manner in which a party has pursued – (i) a particular allegation; (ii) a particular issue; or (iii) the case; (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings; (d) whether it was reasonable for a party to – (i) pursue a particular allegation; and/or (ii) raise a particular issue; and (e) whether the claimant gave reasonable notice of intention to issue a claim.

⁴ CPR 2000

⁵ CA [2010] STC 1208 [2010] EWCA Civ 345

Majesty's Revenue Commissioners(HMRC) he opined that there was no unreasonableness on the part of the Claimant to bring the application when HMRC insisted on a full sum as owed and therefore the application had not been "*an abuse of the process of the Court or unreasonable for the appellants to resort to a public law claim in the prevailing circumstances.....the decision to apply for judicial review was reasonable*" In agreement with these sentiments this Court therefore finds that for the purposes of Part 56.13 (4) that costs are to be awarded to the Claimant as the successful party. I find that having considered the provisions of Part 64.6(6) that the Claimant was entitled to pursue their heads of judicial review; they were entitled to ask this Court to make a determination as to whether the Respondent had acted ultra vires the Telecommunications Act 2006(the Act). Thus, despite not having convinced the Court that the Respondent decision was ultra vires all the provisions of the Act as argued, this Court did find that substantively, the Respondent had no power to take action against the Claimant in the manner that they had.

- [11] In the circumstances and considering what is reasonable in all the circumstances and the nature of the matter and taking into consideration the factors in Part 65.2(3) and this in all regards being a matter of public importance even though it affected a private commercial entity, I therefore award the sum of \$8,000.00 to the Claimant on their application for judicial review.

Order of the Court

Costs to the Claimants in the sum of \$8,000.00.



Nicola Byer
High Court Judge