IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeals Nos: EA/2011/0106 & 0107

BETWEEN:

DON VAN NATTA

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) COMMISSIONER OF THE METROPOLITAN POLICE SERVICE

Respondents

DECISION ON COSTS FOLLOWING APPELLANT'S WITHDRAWAL OF APPEAL

Determined on the Papers by Andrew Bartlett QC, Tribunal Judge
On 3 October 2011

Subject matter:
Costs

Legislation:
The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended), rule 10(1)

Cases:
McPherson v BNP Paribas [2004] EWCA Civ 569
Royal Mail Group Ltd v Information Commissioner 8 September 2010

Representation (by written submissions):
For the Appellant (Mr Van Natta, New York Times): Finers Stephens Innocent LLP
For the Second Respondent: Metropolitan Police Solicitor
The Information Commissioner did not make submissions.

DECISION

The Appellant shall pay to the Second Respondent within 14 days from the date of this decision the sum of £500 in respect of costs.

REASONS

The application

1. The hearing of this appeal was due to take place on 10-11 October 2011. On 2 August 2011 the appellant withdrew his appeal to the Tribunal.

2. The second respondent applies for an order in respect of costs against the appellant under rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"); and, or in the alternative, against the appellant's legal representatives under rule 10(1)(a) of the Rules.

3. The material parts of rule 10(1) provide that the Tribunal may make an order in respect of costs "only-

   (a) under section 29(4) of the 2007 Act (wasted costs);

   (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings; ... "

4. The second respondent seeks to recover costs incurred from 1 July 2011, as that is the date by which, according to the second respondent, it would have been reasonable for the appellant to take steps to avoid wasted costs being incurred by the second respondent. Costs are claimed in the sum of £4,689.50. A schedule has been provided showing the make-up of this figure.

The grounds of the application

5. The second respondent contends-

   a. The appellant decided to withdraw at the start of July 2011 but failed to communicate his decision promptly to the Tribunal and the respondents.

   b. This should be inferred from the following: (i) the appellant stated that he had considered his position "several times"; (ii) the appellant did not comply with the Tribunal's direction to supply a draft hearing bundle index by 7 July. As the draft index was required to be sent to the respondents by 7 July, and as it is reasonable to assume that one would allow at least a week to take instructions and complete the work, the decision must have been made on or around 1 July.

   c. Alternatively, by 7 July he must have been having serious doubts whether he would proceed. In that event, his solicitors should have notified the respondents, on a without prejudice basis if necessary, with a view to extending the deadlines under the directions, or to obtain a stay from the Tribunal.

   d. Instead he failed or refused to reply to correspondence and telephone messages from the respondents, being emails of 8, 13, 22 and 25 July, and telephone calls of 18 and 20 July and 2 August. He also failed to make a timely response to the Tribunal's communication of 25 July ("unless you comply with direction 3 within the next 5 working days then the First Tier Tribunal will be seeking representations from you as to why

e. This continued failure or refusal to respond became increasingly unreasonable the longer it continued. The result was that the second respondent spent significant time preparing for the appeal hearing under the misapprehension that the appellant still intended to pursue his appeal, as well as time chasing up the appellant's solicitors for a response. This not only wasted the second respondent's solicitors' time, but also the time of senior police officers involved in Operation Weeting and associated investigations, who would have given witness evidence had the appeal gone ahead.

f. These facts demonstrate that the appellant acted unreasonably in conducting proceedings, and, or in the alternative, that his legal representatives acted unreasonably.

6. The second respondent emphasizes that its complaint is not about the decision to withdraw, but about the unjustified and persistent failure to communicate with the Respondents and the Tribunal, which had the result that costs were incurred unnecessarily.

The appellant's response

7. The appellant provided a lengthy response:

> *We oppose this application on the grounds that our conduct on behalf of the appellant was not unreasonable in the circumstances of the broader developments in the phone-hacking story, including the announcement of various public and judicial inquiries through which the information requested will be made public, and in light of the fact that we withdrew long before the hearing date (10-11 October). Awarding costs in this case would be contrary to the public interest and would discourage parties from discontinuing cases where there was a reasonable prospect that information would come out or has come out from alternative sources. Additionally, there is clearly a duty on applicants to monitor a case on an on-going basis to ascertain whether the information can be obtained reasonably and proportionately by other routes and methods. The obverse of this is, or ought to be, an on-going obligation on the data controller to consider whether or not circumstances have changed in such a manner that means that data at first refused is now likely to be disclosed in other proceedings/processes and therefore there can be no useful purpose in maintaining an objection to disclosure.*
>
> *We submit that the Tribunal ought not exercise its discretion to impose costs in these circumstances.*
>
> *Costs awards by the Tribunal: discretionary and exceptional*
>
> *The wording and case law on cost applications under Rule 10(1)(b) is clear: cost awards by the Tribunal, particularly under the new Rules, are discretionary and exceptional.*

Rule 10(1)(b) provides that the Tribunal 'may' award costs where the party or its legal representatives have acted 'unreasonably'. It is important to recall that this power is discretionary and one exercised in an otherwise cost-neutral environment, which is different from the Courts where costs generally follow the event. As emphasised by the Tribunal and cautioned in the recent case of Royal Mail Group Ltd v Information Commissioner, EA/2010/0005 (Withdrawn), 8 September 2010 the public should not be deterred from bringing proceedings in Tribunals for fear of costs and, further, that costs awards for withdrawing prior to a hearing might serve to discourage Appellants from withdrawing and may have the unintended consequence that unmeritorious appeals would be more likely to go to a full hearing and waste time and resources. This militates against cost orders for withdrawal.

In our particular case, an even further injustice would be perpetrated since we are not withdrawing because the case is unmeritorious. To the contrary, we are firmly of the view that our appeal would be successful and that there is immense public interest in pursuing this case to full hearing. The decision to withdraw the appeal was reached in the light of incredible subsequent developments in the phone-hacking scandal and out of concern for preserving the resources of the Tribunal, our client and the respective parties. The information we had requested and that was subject to this appeal (which should have properly been disclosed to our client last April) is now the subject of other public inquiries and legal proceedings which were announced subsequent to the filing of our appeal and just prior to our decision to withdraw, including a public inquiry chaired by Lord Justice Leveson, an ongoing judicial review claim by Lord Prescott and others against the MPS over its handling of the phone hacking scandal, and the filing of numerous privacy actions against News of the World (NoW) and News International in which police evidence is being disclosed.

Furthermore, subsequent to our initial FOIA request, Mr Coulson, then advisor to the Prime Minister, was forced to resign (following the expose published by our client in September related to this FOIA request) and the decision was later taken by the Second Respondent to re-institute criminal investigations against him and other NoW staff. Subsequent to the filing of our appeal, we have seen the arrests of Andy Coulson, Rebekah Brooks (nee Wade), ex-NoW assistant editor Ian Edmondson, ex-NoW chief reporter Neville Thurlbeck, senior ex-NoW journalist James Weatherup, freelance journalist Terenia Taras, ex-NoW managing editor Stuart Kuttner, ex-NoW royal editor Clive Goodman and Greg Miskiw, ex- NoW senior editor.

More recently, former MPS Chief, Sir Paul Stephenson, and Deputy Commissioner, John Yates, have resigned from their positions with the MPS over the phone-hacking scandal and the Independent Police Complaints Commission is investigating complaints about police handling of this matter and its relationships with the media.

It will not escape the attention of the Tribunal that a number of these names appeared in our client's FOIA request to the MPS and that all of these developments touch upon or raise squarely the subject matter of our respective FOIA requests.

In light of these developments, a decision was taken that the information requested by us is going to be disclosed through other public and judicial inquiries and, therefore, we did not think it reasonable to continue the appeal at expense to our client, the MPS and the Tribunal. This decision was taken notwithstanding what we believe to be the immense public interest in pursuing this appeal against the MPS with respect to both the phone hacking scandal itself but also as a point of principle to highlight the MPS's wholly inadequate approach to FOIA requests (a point noted by the ICO itself last year in its review of public authorities compliance with FOIA). We reiterate again that this was not a decision about the merits of our case, which we are confident we would win on appeal (and in any event, even if we were not successful, there would be no cost order made against us), but the result of a practical and pragmatic decision regarding the future availability of the information requested and the associated decision to therefore avoid further legal cost to all involved.

<u>Cost awards by the Tribunal</u>

This application is made pursuant to the relatively new Rules regime of the First-tier Tribunal (General Regulatory Chamber). In recent decisions considering the new Rule 10, the Tribunal has emphasised that cost awards are discretionary and exceptional. These cases have also established that the meaning of "unreasonable" in rule 10 is defined as being "not in accordance with reason, irrational" (as defined by the Oxford English Dictionary) as distinct from the precise administrative law definition of the word, connoted by Wednesbury unreasonableness" (see Seevaratnam v Charity Commission for England and Wales [2009] UKFTT 393, adopted in Royal Mail [17]-[19]). Unreasonableness "must depend on the facts of each case, there being no hard and fast principle applicable to every situation" (European Environmental Controls Ltd v The Office of Fair Trading, CCA/2009/0002).

The application to withdraw in this case was made under rule 17(1)(a) of the Rules by written notice of withdrawal, which permits such an application "at any time before a hearing". Our application was made by letter of 2 August 2011. By email of 3 August 2011, the Tribunal consented to the withdrawal under Rule 17(2) of the Rules. It ought to be noted that the hearing for this matter was not set down until 10-11 October 2011. The directions specify that witness statements were not due to be exchanged until 5 September, with skeletons to be exchanged on 3 October. Therefore the notification of our decision to withdraw came long before the hearing date and before any significant work will have been completed by any party to the proceedings.

This can be contrasted with the situation in Royal Mail, where the party against which the cost award was sought had withdrawn the day before

the hearing, after significant work had been completed and costs incurred. In that case, the stated reason for the withdrawal application was that the appellant had learned at a late stage of its preparations that a key part of the requested information had entered the public domain. As set out in Royal Mail (at [27]):

> *"If a last minute decision to withdraw an appeal were to be penalised in costs but if that party were to proceed to a full hearing it would bear no costs if unsuccessful, the Tribunal would clearly be sending out the wrong message to litigants. If an Appellant concludes, even at a late stage, that its appeal should be withdrawn, it must preferable for an application for withdrawal to be made than for that matter to proceed to a hearing."*

In that case, the Respondent argued that a cost award should have been made on the grounds of the delay in notifying the Tribunal and the Respondent of its decision. In that case there was a delay of a month between the disclosure of the information (5 June) and the withdrawal of the appeal (5 July), but the final decision to withdraw was actually made on 1 July. The Tribunal rejected the argument that the delay was unreasonable on the grounds that (at [21]):

> *"the disclosures did not cover all of the requested information so there needed to be a detailed consideration not only of the issue of withdrawal but also of whether to disclose the remainder of the information. ... . The Appellant submitted that it acted with as much speed as the situation allowed but that the communication of its position prior to a formal decision being taken would have prejudiced its case before the Tribunal in the event that the matter proceeded to a hearing."*

The Tribunal was "mindful of the fact that the Appellant needed to deal with a complicated set of circumstances and to respond to a situation not of its own making" (at [26]) and therefore concluded it was not "unreasonable" to have taken time to carefully consider the disclosures, the relationship between the disclosures and the requested information subject to the appeal, and how notification of an intention to withdraw may have impacted on the subsequent appeal. The application for wasted costs was thus rejected.

The same considerations apply here. In our case, the decision to withdraw was taken after close consideration of unfolding developments in July which we now consider will lead to the information requested coming into the public domain (outlined in detail below) - developments which, on any view, were extraordinary and could not have been predicted. A detailed consideration was required of these events and how they impacted upon our request. The decision to withdraw has come in advance of the disclosure of information (on the basis of what we now predict will be disclosed by other means) and well before the hearing date. On the Royal Mail standard, this can hardly be said to be "unreasonable".

The Second Respondent nevertheless alleges that (1) a decision must have been taken in early July not to continue with the appeal and (2) it was "unreasonable" under Rule 10(1)b), in accordance with the definition set out above, for us not to have put the Second Respondent on notice of our intention to withdraw. This is based on pure conjecture: the Second Respondent has no reasonable basis to presume a decision had already been taken. The Second Respondent asserts this must have been the case because we had not complied with the 7 July directions deadline in providing the index to the open bundle.

We submit this position does not properly account for the particular facts of this case - a relevant consideration for the Tribunal in deciding whether to exercise its discretion, nor is it supported by the case law on costs set out above.

Facts of this case

The Tribunal will be familiar with the background to the FOIA request.

We wish to draw to the Tribunal's attention the developments that took place within the relevant period in which the Second Respondent alleges it was unreasonable for us not to have taken a decision on whether to withdraw (i.e. from 1 July to 2 August). As this list of developments indicates, there was a complicated series of events that had to be considered before our decision to withdraw could be taken in May and June, which escalated throughout July.

Lord Prescott, Mr Bryant and Mr Paddick won in their High Court bid to allow them to bring a judicial review claim against the over the handling of the phone-hacking investigation (Telegraph, 23 May 2011).

The Independent Police Complaints Commission ("IPCC") had made contact with the MPS to investigate claims of payments made to police officers in relation to the hacking scandal in which the MPS told the IPCC it was aware of certain conduct involving payments to officers (22 June 2011), but it was announced by the IPCC on 6 July 2011 that it would only be taken up as a complaint when individual officers were identified (6 July 2011): http://www.ipcc.gov.uk/news/Pages/Met-Police-contact-with-the-IPCC-regarding-allegations-of-payments-to-officers.aspx

Lawyer for the family of missing girl, Milly Dowler, reports her phone was hacked. Police later say they also contacted the parents of two 10-year-old girls killed in the town of Soham in 2002 (Reuters, 4 July 2011)

News International says new information has been given to police. The BBC says it related to emails appearing to show payments were made to police for information and were authorised by Andy Coulson, former editor of News of the World (Reuters, 5 July 2011)

Reports that the families of the 7/7 terror bombings victims,the parents of missing girl, Madelaine McCann, and family members of soldiers killed in Afghanistan were also hacked (Reuters, 6 July 2011).

News Corp announces it will close down the NoW, the most popular newspaper in Britain, in the wake of the phone-hacking scandal. The July 10 edition is the last (Reuters, 6 July 2011).

A public inquiry announced by Prime Minister David Cameron into the police investigation of the matter (Times, 7 July 2011) and subsequently announces that Lord Justice Leveson would be appointed to conduct the inquiry (Times, 13 July 2011).

The IPCC announced the London Commissioner would oversee the investigation into allegations that officers were paid by newspaper (IPCC, 7 July 2011): http://www.ipcc.gov.uk/news/Pages/pr_070711_hacking.aspx.

Andy Coulson is arrested and Clive Goodman is re-arrested (Reuters, 8 July 2011).

John Yates, assistant commissioner at London's Metropolitan Police, is criticised for deciding in 2009 not to reopen the earlier inquiry, tells the Home Affairs Committee he probably did only the minimum work required before deciding (Reuters, 12 July 2011).

Neil Wallis is arrested on 14 July (Times, 15 July 2011).

Rebecca Brooks, former NoW editor, resigns as chief editor of News International (Reuters, 15 July 2011).

Rebecca Brooks is arrested on 16 July (Times, 17 July 2011).

Sir Paul Stephenson, the Metropolitan Police Commissioner, announces his resignation (BBC, 17 July 2011).

John Yates, Assistant Commissioner, announces his resignation (Guardian, 18 July 2011).

Sean Hoare, former NoW journalist, and our client's main source in its expose revealing the extent of phone-hacking at NoW and raises questions about police handling of the matter, is found dead at his home (Reuters, 18 July 2011).

The ongoing Home Affairs Committee Inquiry into phone-hacking and police conduct of the hacking investigations was published (19 July 2011), which recommended certain further action and reforms of police: http://www.parliament.uk/documents/commons-committees/home-affairs/CRCFinalReportEmbargoed.pdf

Theresa May, Minister for Home Affairs, "announced a further three inquiries into the phone hacking allegations and police relations with the media. Elizabeth Filkin, former Parliamentary Commissioner for Standards, had provisionally agreed to examine the ethical considerations that should form the relationship between the Met and the media. The new inquiries are in addition to the slew of investigations already announced by the police" (Times, 19 July 2011).

Four senior police officers were referred to the IPCC for investigation by the Metropolitan Police Authority (MPA), including Sir Paul Stephenson, the Metropolitan Police Commissioner, John Yates, the former Assistant Commissioner, and retired police officers, Andy Hayman, the former Assistant Commissioner who writes for The Times, and Peter Clarke, the retired Deputy Assistant Commissioner. The MPA cited concerns about their handling of investigations into the alleged phone hacking scandal (Times, 19 July 2011).

Dick Fedorcio, MPS Public Affairs, referred to the Independent Police Complaints Commission over his relationship with hacking suspect Neil Wallis (Independent, 19 July 2011)

Announced that former NoW editor, Miskiw, will return to the UK to meet with police over phone hacking (Guardian, 22 July 2011)

Tom Watson MP asks police to investigate the Murdochs (Reuters, 22 July 2011)

Sir Hugh Orde, the president of Britain's Association of Chief Police Officers, speaks out on phone hacking and calls for corrupt officers to be jailed (BBC and Guardian, 24 July 2011)

Details of Andy Hayman's expenses paid by of NoW and News International emerge (SMH, 25 July 2011)

Metropolitan Police Authority (MPA) questioned Acting Commissioner Tim Godwin on phone hacking (Independent, 28 July 2011)

MPS to release hospitality records in coming weeks (BBC, 28 July 2011)

Judge sets out phone hacking inquiry plan (BBC, 28 July 2011)

MPS accused of 'endemic corruption' over phone-hacking scandal (International Business Times, 1 August 2011)

Stuart Kuttner arrested by police (Guardian, 2 August 2011).

Fedorcio placed on leave pending outcome for IPCC investigation (Guardian, 10 August).

We draw the Tribunal's attention to this timeline of events prepared by Reuters on 10 August, which sets out in detail the raft of developments in this story in the past few months: http://www.reuters.com/article/2011/08/10/newscorp-hacking-events-idUSL6E7IS1LS20110810.

We also draw the Tribunal's attention to the numerous civil claims being brought against News International in which information from the police is being disclosed. By way of example, we refer in particular to the claim of Ms Hoppen in which the police disclosed information it had previously alleged did not exist (in that case handwritten notes relating to the hacking of claimant's phone). Counsel for Ms Hoppen noted that it was "regrettable, to put it mildly" that the police had twice denied that this material existed and that "[i]t could and should have been provided

earlier," concluding that "[t]he simple and unavoidable fact is that [the MPS] misled Ms Hoppen" (Guardian, 17 February 2011). We note that the test case claim of Sienna Miller, which was only finally determined on 7 June 2011, has paved the way for the filing of many more civil claims in subsequent months, all of which have had to be considered.

It is clear that the wealth of developments through July and into early August required careful and detailed consideration before we could come to a decision as to whether or not to continue with the appeal. In these circumstances, we submit it was not unreasonable to withdraw our appeal when we did or in the manner we did.

<u>Other factors</u>

In addition to these factors relevant to the Tribunal's consideration of a costs award under Rule 10, we submit that the Tribunal ought to consider the broader context of this FOIA request and appeal and the Second Respondent's conduct throughout this process, which has caused inordinate delay and additional costs to our client.

The Second Respondent's approach to this request has been characterised by delay and obfuscation, with the MPS having shifted its position on the reasons it would not disclose the relevant information - ultimately hiding behind the cost limit after a delay of more than 8 months. The Tribunal will note from the Decision Notice of the Information Commissioner that the Second Respondent was found in breach of the Act for the delay in responding to our request (though no remedy was provided for this breach). The failure of the Second Respondent to properly advise on how to narrow the response to come under the cost limit and the extensive communication that resulted served only to compound the delay and the cost to our client.

Further, the responses during the course of our correspondence with the Second Respondent during the internal review process raise real questions about how the Second Respondent files and stores information - a fact reiterated in the civil claim brought by Ms Hoppen cited above.

<u>Conclusion</u>

It would be unjust and contrary to the overriding objectives of the FOIA scheme to require our client to pay costs in these circumstances.

We have withdrawn the appeal well before the hearing. As a result we have saved the Second Respondent a considerable amount of costs, as they will not have to prepare for or attend the hearing. If the hearing had gone ahead, it is highly unlikely that they would have recovered any of those costs, even if our appeal had been unsuccessful. From a costs point of view, as a result of our withdrawal the Second Respondent is in a better position than it would otherwise have been, even if it had ultimately succeeded. In those circumstances it is unfair, and disproportionate, for us to be penalised in costs as a result of the withdrawal.

As set out in Royal Mail, making a costs order in these circumstances could have an undesirable effect, in deterring appellants from withdrawing an appeal prior to hearing, for fear of an adverse costs order as a result of withdrawal.

Our withdrawal on 2 August 2011 was not effected in an unreasonable matter. There were a wealth of developments in the relevant period complained of by the Second Respondent that required our careful consideration, an assessment which led to the very reasonable conclusion that the information requested by us is going to be disclosed through other public and judicial inquiries. The decision to withdraw at that time was inherently reasonable and avoids any further expense to our client, the Second Respondent and the Tribunal.

The Second Respondent's complaint appears to be that they were left uncertain as to whether we intended to go ahead with the appeal. If that was so, they should themselves have applied for an extension of time for submitting witness evidence, so that any uncertainty could be resolved before the Second Respondent did any substantial preparatory work.

It is inherently unlikely that the Second Respondent would have been doing a lot of work before receiving the open bundle. Furthermore, it is clear from the Second Respondent's own application, as well as from the developments outlined above, that the Second Respondent was being required to investigate the matters that were subject to our appeal internally in order to respond to the various legal actions and orders for disclosure being made against them.

For the reasons stated above we request that the Tribunal reject the Second Respondent's application for wasted costs and, in addition, invite the Second Respondent to reconsider its application.

Further submissions

8. The second respondent replied briefly to the appellant's response, submitting that it did not address the real point, which was the failure to comply with directions and to communicate, when communication would have saved costs being expended unnecessarily. "The Appellant saw fit simply not to comply with an order without any attempt whatsoever to seek an extension, explain what was going on, apologise for the delay or even engage with the other side or the Tribunal. It is as if the order did not matter because there were other developments in the phone-hacking story." No explanation or excuse was provided for the failure to communicate, despite repeated chasers. Nor did the response deal with the application against the solicitors personally under rule 10(1)(a).

9. The second respondent further submitted that the appellant also failed to inform the other parties of the decision or intention to withdraw at the earliest time, and even in its response to the application failed to say clearly when the decision to withdraw was made.

10. In a rather more focused submission than previously, the appellant's solicitors denied both that there had been a failure to communicate and that the other parties were not informed at the earliest stage of the decision to withdraw. They stated that in each of the telephone conversations they were apologetic regarding the delay in complying with the Tribunal's direction concerning the index and regarding being unable to give a clearer indication of the position. They said they informed the second respondent, when contacted by telephone, that they were taking instructions from their client and that an answer would be forthcoming as soon as possible. They explained that their client had been considering unfolding developments, beyond its control, relevant to the appeal and to the requested information. The fact that the position was "considered several times" merely indicated that the matter was under continued consideration between client and solicitors in light of developments. When the final decision to withdraw was taken, it was communicated within 24 hours. They denied that there was any unreasonableness on their or their client's part such as would justify an order under either rule 10(1)(a) or rule 10(1)(b).

11. The appellant's solicitors also observed that significant costs to the Tribunal, the Information Commissioner and the second respondent had been saved by the decision to withdraw and that, if the hearing had proceeded, costs would not have been awarded whether the appeal was successful or not.

Analysis

12. I agree with the general approach taken by the Tribunal in *Royal Mail Group Ltd v Information Commissioner,* EA/2010/0005, 8 September 2010, and in particular the remarks made at paragraph 25:

> " .... frequent concern has been expressed by my fellow Tribunal Judges that members of the public should not be deterred from bringing proceedings in Tribunals through fear of costs, especially as the costs-neutral environment of Tribunals is one of the things that differentiates them from the Courts, where costs generally follow the event. The Appellant also makes the point that a costs award in these proceedings might serve to discourage Appellants from withdrawing immediately prior to a hearing in future, so that unmeritorious appeals would be more likely to go to a full hearing and waste time and resources. I have been mindful of these arguments in exercising my discretion."

13. Where an appeal to the Tribunal is withdrawn, the fact of withdrawal does not of itself raise any presumption at all that costs should be awarded. For the purpose of rule 10(1)(b) what matters is not the fact of withdrawal, but whether the party against whom a costs application is made has acted unreasonably in bringing, defending or conducting the proceedings. This was emphasized by Mummery LJ in relation to the rather similar costs jurisdiction of the Employment Tribunal in *McPherson v BNP Paribas* [2004] EWCA Civ 569 at [28]-[30]:

> [28] In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It

would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss McCafferty, appearing for Mr McPherson, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation decisions.

[29] On the other side, I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.

[30] The solution lies in the proper construction and sensible application of rule 14. The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable …

14. In the present case it is not in contest that the withdrawal itself was reasonable. The proceedings would have been expensive both for the appellant as requester and for the Metropolitan Police as public authority, and it appeared that the requested information, which was the subject of the appeal, was likely to come into the public domain by other means.

15. Despite the authority's criticisms, I find nothing unreasonable in the timing of the withdrawal. On the material submitted to me, I find that the decision was made on or about 1 August, not 1 July as alleged by the authority. The situation was developing from day to day, and Mr Van Natta and his employers took advice. In my judgment they cannot be criticised for making the final decision to withdraw on the date on which they made it.

16. The appellant and his representatives are more open to criticism in relation to their failure to communicate. The date for providing the draft bundle index in compliance with the order of the Tribunal (7 July) passed without compliance, without any request for time to be extended, and without any explanation being provided. The chasing emails of 8, 13, 22 and 25 July were not responded to. No satisfactory reason has been put forward for these omissions. While I can well understand that the appellant's solicitors would not have wished to reveal the details of their legally privileged discussions with their client, they could without difficulty have explained promptly to the second respondent that their client was considering whether the information might become public by other means so as to make the appeal otiose, and could have asked the Tribunal for an extension of time for compliance with the procedural order concerning the bundle index. In my view their omission to take these steps was unreasonable conduct in relation to the proceedings within the meaning of rule 10(1)(b).

17. The position was to some extent ameliorated by the telephone conversations (which are not denied by the second respondent) in which a partial explanation was given, but the repeated chasers by telephone and email should not have been needed, and the directions order and the Tribunal's communication of 25 July should not have been ignored in the way that they were.

18. In these circumstances I consider that solid grounds exist for making an order under rule 10(1)(b) and the question is how I should exercise my discretion under that rule. In exercising that discretion I must take into account the circumstances of the case and all the considerations set out in rule 2 (the overriding objective to deal with cases fairly and justly).

19. It is relevant to note that a clearer and prompter explanation would have avoided the need for repeated chasers, but would not necessarily have enabled the second respondent to cease preparations. It might have been possible for arrangements to be made for the timetable leading to trial to be re-set. Subject to that possibility, until it was clear that the appeal was to be withdrawn, preparations would have needed to continue. It is unlikely that it would have been practicable to stop all preparations.

20. The second respondent claims the whole costs incurred from 1 July, in the sum of £4,689.50. There is no requirement in the rule that an order must be limited to those costs directly caused by the unreasonable conduct. Nevertheless, in the circumstances which I have outlined, it does not seem to me that it would be fair or just to hold the appellant responsible for the whole, or even the majority, of the costs incurred during the period of uncertainty. I consider that on the present facts the fair approach is to focus on the element of costs incurred by the second respondent which ought not to have been incurred and which the appellant ought to pay because of the unreasonable manner in which the matter was conducted as set out above. Having considered the details of the costs schedule, I consider that the fair and just sum to be awarded is £500. This represents the costs of the repeated chasers and a modest contribution towards work that could probably have been postponed if better information had been provided promptly.

21. For the reasons set out above I order that the appellant shall pay to the second respondent within 14 days from the date of this decision the sum of £500 in respect of costs.

22. I do not consider that in the circumstances of this case the application under rule 10(1)(a) adds anything material to the second respondent's application under rule 10(1)(b). The above order is made pursuant to rule 10(1)(b).

Andrew Bartlett QC

Tribunal Judge

Dated: 3 October 2011