Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0036
Information Commissioner's Ref: FER0072936

Considered on the papers
On 5 November 2006

Decision Promulgated
6th November 2007

BEFORE

CHAIRMAN

John Angel

and

LAY MEMBERS

ANNE CHAFER AND GARETH JONES

Between

MILFORD HAVEN PORT AUTHORITY

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

RICHARD BUXTON ENVIRONMENTAL & PUBLIC LAW

1st Additional Party

And

SOUTH HOOK LNG TERMINAL CO LTD

2ND Additional Party

Decision

The Tribunal makes no award of costs against the Appellant or any other party.

Reasons for Decision

Introduction

1. The Appellant appealed to the Tribunal against the Information Commissioner's (IC) Decision Notice in this case. The original complainant, Richard Buxton, was joined as the 1st Additional Party. A Directions Hearing was held and orders issued. Later the Appellant decided to withdraw its appeal and disclosed the disputed information to the 1st Additional Party.

2. The 1st Additional Party then applied to claim their costs and this hearing is solely for the purposes of considering that application.

The proceedings

3. The IC issued the Decision Notice on 28th March 2007 and ordered that disputed information, namely the Milne Report and the sections of the Qatargas II Report that constituted environmental information, be disclosed to the 1st Additional Party within 35 days of the Notice. The IC also found that the Appellant was in breach of Regulations 5(2) and 14(2) of the Environmental Information Regulations 2004 (EIR) and had not provided the information requested or a refusal notice within the specified time limits. The Appellant appealed to this Tribunal on 25th April 2007.

4. The Appellant requested that South Hook (2nd Additional Party) be joined and Richard Buxton, the complainant, also applied to be joined and both were joined as parties on 11th May 2007.

5. A directions hearing was held on 21st June 2007 and directions issued on 2nd July 2007. A notice of hearing was sent to the parties on 3rd July setting down the hearing for 3 days on 5th, 6th and 7th November 2007. A transcription service was booked because of the likely complexity of evidence and submissions.

6. The Appellant withdrew the appeal on 28th September 2007. Before that time a number of directions orders would have had to be complied with involving all parties in a significant amount of preparation work. In the letter of 28th September the Appellant explained that the appeal was being withdrawn "purely as a commercial matter" and despite the existence of a confidentiality agreement between the Appellant and 2nd Additional Party.

7. On 15th October the Appellant sent the disputed information to the 1st Additional Party.

The Tribunal's powers to award costs

8. The Tribunal's power to make a costs order both under the Freedom of Information Act 2000 and EIR are set out in rule 29 of the Information Tribunal (Enforcement Appeals) Rules 2005 (IT Rules), which provide as follows:

> "*(1) In an appeal before the Tribunal, including one withdrawn under rule 12 above, the Tribunal may make an order awarding costs -*
> *(a) against the appellant and in favour of the Commissioner where it considers that the appeal was manifestly unreasonable;*
> *(b) against the Commissioner and in favour of the appellant where it considers that the disputed decision was manifestly unreasonable;*
> *(c) where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of any other.*
> *(2) The Tribunal shall not make an order under paragraph (1) above awarding costs against a party without first giving that party an opportunity of making representations against the making of the order.*
> *(3) An order under paragraph (1) may be to the party or parties in question to pay to the other party or parties either a specified sum in respect of the costs incurred by that party or parties in connection with the proceedings or the whole or part of such costs as taxed (if not otherwise agreed).*
> *(4) Any costs required by an order under this rule to be taxed may be taxed in the county court according to such of the scales prescribed by the county court rules for proceedings in the county court as shall be directed by the order.*"

9. Costs are defined in rule 3(2) of the IT Rules to include "*fees, charges, disbursements, expenses and remuneration*".

10. The Tribunal can only award costs against a "party". Party is defined in rule 3(3) of the IT Rules to mean '*the appellant, or the Commissioner, or a person joined to an appeal in accordance with Rule 7 …".* The Additional Parties have been joined as parties in accordance with rule 7.

11. To summarise, rule 29(1)(3) authorises the Tribunal to make an award of costs against a party and in favour of any other in three circumstances:

    (1) where "*it considers*" that a party has been "*responsible for frivolous, vexatious, improper or unreasonable action*" or;
    (2) for "*any failure to comply with a direction*" or;
    (3) for "*any delay which with diligence could have been avoided*".

12. In relation to the second limb of rule 29(1)(3) on the facts of this case there has been no failure to comply with a directions order.

13. In relation to the third limb the Tribunal considers that the delays envisaged by the rule relate to the conduct of the proceedings and again on the facts of this case we find that there have been no such delays.

14. In our view rule 29 only relates to the conduct of a party in relation to proceedings before the Tribunal and not before the IC. This is accepted by the Appellant and 1st Additional Party. However rule 29 particularly covers withdrawn appeals, the situation in this case.

The application for costs

15. Following the withdrawal of the appeal the 1st Additional Party wrote to the Tribunal by letter dated 3rd October 2007 claiming that the Appellant's conduct was caught by rule 29(1)(c), and, in effect, that the Appellant had abused the FOI/EIR process to delay disclosing the disputed information for several years. The 1st Additional Party particularly relied on an email dated 2nd April 2007 (the Email) from Ted Sangster, the Chief Executive of the Appellants, following the Decision Notice to the third parties to

whom confidentiality obligations may have been owed including the 2nd Additional Party. The Email considered various options on how to proceed following the issuing of the Decision Notice. The 1st Additional Party refers to the phrase "buying more time" in the Email as evidence of the conduct caught by rule 29(1)(c).

16. The Tribunal accepted the letter of 3rd October as an application for costs under rule 29 and invited the parties to make submissions in relation to the application. Both the Appellant and the 1st Additional Party have made several submissions in response to this invitation which the Tribunal has taken into account.

17. Having considered the application we do not find that it raises questions as to whether the Appellant has been responsible for "frivolous or vexatious" action, but only whether its conduct was "improper or unreasonable". Even if we are wrong to interpret the application in this way we find that the conduct in this case is not frivolous or vexatious. As a result we have restricted our considerations as to whether the Appellant's conduct was improper or unreasonable.

Conduct of a party

18. We turn to consider the first limb of rule 29(1)(3)(c) set out above in paragraph 11(1). A differently constituted division of this Tribunal in *Bowbrick v The Information Commissioner(1) and Nottingham City Council(2) EA/2005/0006* examined the test to be applied in relation to unreasonable actions which is set out below.

19. In analogous situations, it has been considered by tribunals with similar provisions to rule 29. The Financial Services and Markets Tribunal (FSMT), in a written decision from April 2006 (*Baldwin v FSA, Case Number Fin/2005/0011),* stressed that it could and should be distinguished from an administrative court charged with applying the Wednesbury unreasonableness test (that is the test formulated for the purpose of determining whether a public authority has acted outside its statutory powers). According to Andrew Bartlett QC, Chairman of the FSMT, "*the Tribunal, unlike the court in the Wednesbury case, is expressly directed by paragraph 13 to make its own judgment of what is reasonable: "(1) If the Tribunal considers that a party … has … acted unreasonably".*

20. The FSMT, following a review of the facts, concluded that, in its opinion, the investigation at issue in the proceedings had not been unreasonable and made no order for costs against the FSA. Its approach to the application of its power to award costs contained in the Financial Services and Markets Act 2000 Schedule 13 paragraph 13 is summed up in its conclusion at paragraph 27 of the decision:

> "*Taken analytically item by item, and with the benefit of hindsight, it might be possible to characterise some of the elements of conduct … as unreasonable. But we think it important in this case to keep in mind also the broader picture and not to over-emphasize the significance of any individual feature of the investigation. We also remind ourselves that a wrong view or approach is not necessarily an unreasonable view or approach …"*

21. In an earlier case, a differently constituted FSMT appeared to have been guided by the basic, if elusive, principle of "fairness". In *Davidson v the FSA (30 July 2004)* (the notorious "Plumber case"), the FSMT, although recognising that it could only make a costs order if a party acted unreasonably, noted that "fairness" had been a consideration in its review of the facts and its decision of how much the party should be ordered to pay. (There it made an order that the FSA pay 50% of the costs.)

22. The EAT has made costs orders against parties where it has determined that the party's conduct was unreasonable. For example, the EAT has awarded costs against an appellant where the facts indicated that the appellant delayed in withdrawing or abandoning proceedings, or proceeded with unmerited actions contrary to legal advice, or failed to fully engage with the proceedings once the proceedings had commenced.

<u>The Appellant's explanation of their conduct</u>

23. The Appellant has explained that the Email was a private communication and should not have come into the hands of the 1st Additional Party. In any case they maintain that it is entirely proper in contentious proceedings for them to consider the options and tactics open to them with other interested parties, particularly as they considered they were still under confidentiality obligations to the 2nd Additional Party. The Email indicates that the parties were still taking legal advice.

24. The 1st Additional Party disputes that the Appellant was subject to any confidentiality obligations particularly following the Decision Notice. Whether this is the case is clearly a matter for the Tribunal to determine if relevant at any hearing. The Tribunal is of the view that it would have been likely to have been a relevant consideration and therefore not unreasonable for the Appellant to wish to pursue at the appeal.

25. In relation to the Email although it was clearly intended as an internal matter, it has now been inadvertently disclosed, and cannot be ignored. On closer examination the Tribunal finds that it is a consultation document setting out the position as Mr Sangster saw it following the Decision Notice. He summarises the IC's findings, the position on the confidentiality agreement, the need to decide whether to appeal, the tactics and public position on whichever action they decide and the fact that the matter is also in the hands of lawyers. This seems to us as an approach which is entirely reasonable considering the position of a party who has just lost a case and is deciding what to do next. The fact terms such as "buying time" are used is not unreasonable in the context of the Email. Most such consultations are based on commercial and legal considerations which again is entirely proper.

26. The Appellant then brought our attention to other proceedings with the implication that it was the 1st Additional Party who was being unreasonable. We cannot accept this line of argument as in our view it has no relevance to this application particularly where the Decision Notice was in favour of the 1st Additional Party.

27. The Appellant then raises the Indemnity Principle and whether the 1st Additional Party can bring such an application for costs where it cannot show that it has incurred costs which ought to be reimbursed. The 1st Additional Party are professional advisers who maintain that they made the FOI/EIR request, on behalf of Safe Haven and Alison Hardy (the original complainants) who were concerned with the environmental issues raised by the disputed information. These complainants they maintain are liable for their costs. It is not unusual for advisers to make FOI/EIR requests in their own name on behalf of clients who would be liable for their costs. The Tribunal agrees that the principle does not apply in this case.

28. Our attention was drawn to an appeal for funds by the original complainants to cover the 1st Additional Party's costs. If the funds were raised, the Appellant argues, there

could be double recovery if the Tribunal ordered it to pay costs. The 1st Additional Party makes the point that as it is acting in a representative capacity any monies paid on account would be refunded. The Tribunal accepts this submission.

29. Finally the Appellant seeks to distinguish this case from *Bowbrick*. In that case the Council failed to comply with the Tribunal's directions and took some 21 months to complete a proper investigation of the material requested. In this case the Appellant argues it has brought a genuine appeal and fully co-operated with the Tribunal. In the process of preparing for the appeal the 2nd Additional Party agreed to disclosure of the disputed information and the Appellant then took immediate action to withdraw the appeal. Rather than acting improperly or unreasonably, the Appellant argues that their conduct was entirely reasonable.

The 1st Additional Party's case

30. The 1st Additional Party's principal submission is that the Appellant was wrong to have brought the appeal or at least not to have withdrawn it at an earlier stage. It particularises matters in support of this submission. Some suggest that the Appellant has taken a wrong view or approach. Even if this is the case we agree with the FSMT's decision in *Baldwin* this is not necessarily an unreasonable view or approach. In our view these are proper matters for any party considering an appeal or which would need to be determined by the Tribunal on an appeal. Therefore we cannot find them improper or unreasonable actions.

31. We accept that the time it takes to withdraw an appeal is a factor which needs to be taken into account in determining an application for costs. In this case, however, we find that the time taken was not unreasonable, although we would criticise the Appellant for not sending the 1st Additional Party a copy of the letter of 28th September 2007 on that date.

32. The 1st Additional Party also puts much emphasis on the course of conduct exposed by the Email which it intimates is unreasonable. In view of our findings in paragraph 25 above we do not place much weight on this submission.

The Tribunal's findings

33. We find that the facts of this can be distinguished from *Bowbrick* and accept the Appellant's contentions set out in paragraph 29 above. There was no dispute that the information existed. The grounds of appeal appear to us as proper grounds upon which to launch an appeal. The Appellant conducted itself properly throughout the proceedings. As happens in cases following the joining of parties and the implementation of directions orders, parties reconsider their position, and as in this case, withdraw their appeal.

34. We find that the Appellant's conduct was reasonable in the circumstances of this case. It is clearly unfortunate for the 1st Additional Party who has incurred additional costs in these proceedings and delay in the disputed information being disclosed. Before other courts an additional party in a similar situation may have been awarded costs automatically where an appellant withdraws its case. This is not the position in this Tribunal. Costs are rarely awarded and only under the circumstances set out under rule 29 of the IT Rules.

35. We therefore unanimously find that the Appellant did not act improperly or unreasonably under rule 29 and therefore make no order for costs.

JOHN ANGEL

Chairman Date 6th November 2007