IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: GC 20 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF GCR O.53

BETWEEN:

(1) MAPLES CORPORATE SERVICES LIMITED

(2) MAPLESFS LIMITED

Plaintiffs

AND

CAYMAN ISLANDS MONETARY AUTHORITY

Defendant

IN COURT

Appearances:

Mr Paul Bowen KC of counsel and Mr Adam Huckle of Maples and Calder (Cayman) LLP for the Plaintiffs, Maples Corporate Services Limited ("MCSL") and MaplesFS Limited ("MFS")

Mr Hector Robinson KC, Mr Laurence Aiolfi and Ms Laura Stone of Mourant Ozannes (Cayman) LLP for the Defendant (the "Authority")

Before: The Hon. Justice Kawaley

Close of submissions: 24 May 2023

Date of hearing: On the papers

Draft Ruling circulated: 26 May 2023

Judgment delivered: 5 June 2023

INDEX

Costs-extent to which 'costs follow the event' rule should be departed from-impact of overall loser achieving success on some issues-relevance of public law character of proceedings and public importance of issues in dispute-Judicature Act (2021 Revision), section 24-Grand Court Rules (2023 Revision) Order 62 rule 4 (2), (5), (7)

COSTS RULING

Background

1. The present proceedings were commenced by a Notice of Application for Leave to Seek Judicial Review dated 12 February 2021. Following interlocutory skirmishes over, *inter alia*, discovery, the main hearing took place between 13 and 17 February 2023. In my Judgment dated 30 March 2023, I summarized the issues in dispute as follows:

> "*8. The List of Agreed Issues submitted by the Plaintiffs on behalf of the parties provides as follows:*
>
> "*(1).* ***Nature / purpose of business: Reg. 12(1) (d) (MCSL Grounds 1, 9(a))***
>
> *1. Whether CIMA's findings and conclusions ("Findings") of breaches of regulation 12(1)*

G0020/2021 Page 2 of 18 2023-06-05

(d) of the Anti-Money Laundering Regulations (2017 Revision) (the "AMLRs") and/or the associated Requirement in relation to "nature and purpose of business" are lawful or unlawful.

*(2).**Authorised signatories: Reg. 12(1) (b) (MCSL Grounds 2 and 9(a), MFS Grounds 1 and 7)***

2. Whether CIMA's Findings of breaches of regulation 12(1) (b) of the AMLRs and/or the associated Requirements in relation to missing due diligence for authorised signatories of bank accounts held by corporate clients are lawful or unlawful.

*(3). **Scrutiny of transactions: Reg. 12(1) (e) (i) (MCSL Grounds 3 / 7 and 9(a), MFS Grounds 2 / 6 and 7)***

3. Whether CIMA's Findings of breaches of regulation 12(1) (e) (i) of the AMLRs and/or the associated Requirements in relation to ongoing monitoring and periodic reviews and 'scrutiny of transactions' are lawful or unlawful.

*(4). **Source of wealth and/or source of funds: Reg. 12(1) (e) (i) (MCSL Grounds 4-7 and 9(a), MFS Grounds 3-6 and 7)***

4. Whether CIMA's Findings of breaches of regulation 12(1) (e) (i) of the AMLRs and/or the associated Requirements in relation to "source of wealth and/or source of funds" are lawful or unlawful.

5. Except that CIMA concedes that it made an error of law solely in relation to its Findings and Requirements in relation to "source of wealth".

*(5). **Review and update of documents: Reg. 12(1) (e) (ii) (MCSL Grounds 8 and 9(a))***

6. Whether CIMA's Findings of breaches of regulation 12(1) (e) (ii) of the AMLRs and/or the associated Requirement in relation to keeping due diligence documentation up to date are lawful or unlawful.

(6). ***Proportionality of the Requirements (MCSL Ground 9, MFS Ground 7)***

7. Whether the Findings (MCSL Grounds 1-8, MFS Grounds 1-6) justify the Requirements and are rational and/or necessary and/or proportionate and/or compliant with section 9 and/or section 19 of the Bill of Rights in Schedule 2, Part I of the Cayman Islands Constitution Order 2009 (the "Constitution") and/or the principle in section 6(3) (d) of the Monetary Authority Act (2020 Revision) (the "MAA") and/or section 5 and Schedule 1, Part 1, paragraph 3 of the Data Protection Act (2017 Revision) (the "DPA"), or whether the Requirements, in whole or in part, are irrational and/or unnecessary and/or disproportionate and/or non-compliant with the Constitution, MAA or DPA.

(7). ***(MCSL Ground 9(c), MFS Ground 7)***

8. Whether CIMA had power to make any of the Requirements under section 6(2) (f) of the MAA or otherwise."

2. In the Judgment, I summarized the findings reached in relation to those issues as follows:

"*167.To summarize, for the reasons set out above the Agreed Issues are resolved in the following way:*

(a) Issues 1 and 5 are resolved in favour of MCSL and Issues 2, 3, 4 and 5 are resolved in favour of MCSL and MFS;

(b) I did not consider it necessary to resolve Issue 6, but if I did, I would resolve it on the basis set out in paragraph 145 above [i.e. I would have rejected the Bill of Rights argument but accepted the Plaintiffs' complaint that requiring implementation of the Authority's changes within 3 months was disproportionate]*; and*

(c) Issue 7 is resolved in favour of the Authority."

G0020/2021 Page 4 of 18 2023-06-05

3. The parties sensibly agreed to address all contentious costs issues through written submissions without a hearing to save costs.

The contentious costs issues

4. It was common ground the Plaintiffs achieved substantial success overall. The only controversy turned on (a) whether there should be any percentage discount to take into account the Authority's success on some issues, and (b) how the reserved costs in relation to certain interlocutory applications should be dealt with.

5. The Plaintiffs in their Costs Submissions most broadly submitted as follows:

> "*15. There can be no reasonable argument that CIMA should not pay the Plaintiffs' costs of the whole proceedings, including in relation to those interim applications and hearings.*"

6. In addition, the Plaintiffs sought their costs of a withdrawn Summons dated 27 February 2023 seeking to stay further inspections until the issues arising in the present proceedings were finally determined. The Authority ultimately on 18 April 2023 agreed that the inspections scheduled for 2023 should be postponed until the conclusion of its appeal in CICA No.006 of 2023 and that the costs of the Plaintiffs' Summons should be determined on the papers by this Court.

7. In outline, the Authority submitted as follows:

   (a) there should be no order as to costs, because the proceedings raised issues of fundamental public importance and had been contested in the public interest;

   (b) alternatively, the Plaintiffs' costs should be proportionately reduced (by 30%) because the Plaintiffs were not entirely successful on Issues 1-5, the Court did not need to consider Issue 6 and they were unsuccessful on Issue 7;

   (c) as regards applications in respect of which costs had been reserved, the Authority submitted:

(i) there should be no order as to the costs of the Plaintiffs' 14 May 2021 Letters of Good Standing Application, because it was resolved without the Court's intervention within 7 days;

(ii) there should be no order as to the costs of the Plaintiffs' Disclosure Summons dated 18 July 2022 and the Authority's Public Interest Immunity Summons dated 30 September 2022;

(iii) the Plaintiffs should pay the Authority's costs in relation to their own 27 February 2023 Inspection Stay Application which was "*unnecessary and premature*";

(d) the Authority should be awarded its costs of the costs application if the Plaintiffs "*are not awarded all of their costs, as sought*".

Findings: does the public importance of the issues canvassed displace the usual 'costs follow the event' rule?

8. The Authority referred to the breadth of the statutory discretion in relation to costs which is conferred upon this Court by section 24 of the Judicature Act (2021 Revision):

> "*24. (1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in –*
> *(a) the Court of Appeal; and*
> *(b) the Grand Court,*
> *shall be in the discretion of the relevant court.*
> …
> *(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.*"

9. It also referred to the following rule which it was conceded meant that costs following the event was the "*starting point*":

> "*If the Court in the exercise of its discretion sees fit to make any order as to the cost of any proceedings, the Court shall order the costs to follow the event, 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.*" (GCR Order 62 rule 4 (5)).

10. How important that "starting point" is, however, requires reference to GCR Order 62 rule 4 (2) upon which the Plaintiffs positively relied:

> "*The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*"

11. It seems likely that GCR Order 62 rule 4 (2) was introduced into the GCR in 2003 at the same time as the Overriding Objective was introduced in the Preamble to the Rules as revised in that year. That legislative history is significant, because the discretion the Court was invited to exercise not to award costs against the Authority on public interest grounds was only explicitly supported by reference to authorities which predated these enactments. It was argued:

> "*23. The general rule that costs follow the event applies to a judicial review claim. However, the rule that costs follow the event is only the starting point and the Court is required to consider all the circumstances of the case. Furthermore, in accordance with the decision of the Cayman Islands Court of Appeal in Finsbury Bank & Trust Co v Att. Gen 1996 CILR 349, where a matter raises for the first time issues of significant public importance and is brought in the public interest, including in relation to matters of statutory interpretation, the Court may exercise its discretion not to award a successful litigant its costs against a public authority.*"

12. *Finsbury Bank & Trust Co v Att. Gen* [1996] CILR 349 not only predated the current iteration of the GCR, it did not address the issue of costs awarded by the Grand Court at all. Kerr JA pivotally stated (at page 360):

G0020/2021 Page 7 of 18 2023-06-05

"*On the matter of costs, since the appeal sought a critical review and interpretation of the relevant provisions of the Banks and Trust Companies Law, it was therefore in the public interest that an appeal on this question should be brought. In the circumstances, I would order no costs of appeal.*" [Emphasis added]

13. Reliance was, only slightly more aptly, placed by the Authority on *In re McCorkle* [1998] CILR Note 2a; Cause No. 315 of 1997, Judgment dated 22 April 1998 (unreported), (Harre CJ), who applied the *Finsbury Bank and Trust Co* case in this Court. However, not only did this decision precede the pre-eminence accorded to the costs follow the event rule introduced in 2003, but the Chief Justice's observations (Transcript, pages 1-2), 35 years later, have a distinctly dated ring to them:

"*This case raised a matter of great public importance. It was the first case where wide issues as to the interpretation of the Proceeds of Criminal Conduct Law 1996 fell to be considered. The Attorney-General had conduct of the case pursuant to a request under the Mutual Legal Assistance Treaty with the United States of America…He was in this case as a public official performing a public duty, and not for personal gain…*"

14. The third case upon which the Authority relied also seems to have predated the enactment of GCR Order 62 rule 4(2) in its current form, but it suggests that a bolder spirit less deferential to the Executive was already inspiring a more modern approach to costs in public proceedings in this Court. In *In re Fraser* [2003] CILR 196, Henderson J (Acting) was understandably reluctant to disapprove of the principle articulated by the Court of Appeal in *Finsbury Bank & Trust Co v Att. Gen* [1996] CILR 349, and had no legislative basis for contending that the principle it stood for only applied to the Court of Appeal. But he nonetheless firmly rejected the notion of liberal recourse to the *Finsbury* principle on principled grounds which apply with greater force under the current iteration of GCR Order 62:

"*13 To accede to the position of the Attorney General on this application, would be to create a rule that no successful third party could ever recover its costs after having a restraint order set aside or varied. In a sense, every application for a restraint order and every court appearance by the Attorney General in opposition to its variation is a step taken in pursuit of the public interest. Indeed, whenever the Attorney General is involved*

G0020/2021 Page 8 of 18 2023-06-05

in any litigation in his official capacity, he acts in pursuit of the public interest. The rules make no provision for special treatment of the Attorney General with respect to costs, and there is no principled reason for developing one. Costs are essentially compensatory in nature. A litigant's entitlement to them should not depend on whether the opposing party happens to be the chief law officer of the Crown." [Emphasis added]

15. In their Reply Submissions, the Plaintiffs submitted that while there might be a special rule according to which public entities seeking relief in the public interest might escape adverse costs orders, a proposition these cases potentially support, there was no authority for a public respondent escaping an adverse costs order. In my judgment, there is no rule of law or practice to the effect that merely because a public authority opposes public proceedings which raise matters of considerable importance that they should be protected from being subject to adverse costs orders if they lose. I agree that that there is a fundamental distinction between (1) vindicating the right of access to the Court in the public interest, as illustrated by Anthony Smellie CJ's granting of a protective costs order in *Roulstone-v-Cabinet of the Cayman Islands and others* [2020] 1 CILR 224, and (2) restricting the right of access to the Court by depriving a successful public law applicant of their costs.

16. Whatever the position may have been at the end of the last century, this Court's costs jurisdiction in adversarial civil proceedings is today (almost) exhaustively circumscribed by the principles set out in GCR Order 62 rule 4 (2).

17. Nothing in the circumstances of the present case justifies departing from the overriding objective of GCR Order 62, namely "*that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by successful party in conducting that proceeding in an economical, expeditious and proper manner*". That this is the ordinary rule in judicial review proceedings was confirmed by Smellie CJ (as then was) in *Roulstone-v-Cabinet of the Cayman Islands and others* [2020] 1 CILR 224 (at paragraph 6).

G0020/2021 Page 9 of 18 2023-06-05

Findings: should the Plaintiffs' costs award be reduced to take into account the extent to which they were unsuccessful on certain points?

Governing principles

18. It is common ground that the Court may reduce the successful party's award to take into account the extent to which certain points were unsuccessfully pursued. The Authority understandably emphasised the flexibility of this jurisdiction while the Plaintiffs emphasised its limits. Rather than approach the question of discounts by reference to whether or not the overall winner is shown to have acted unreasonably in pursuing a point it lost, as the Plaintiffs contended, I prefer to be guided by the point relied upon by the Authority based on a straightforward reading of the relevant rules:

> "*27. Furthermore, as the Court has observed in these proceedings, a successful party is not prima facie entitled to recover all of their costs; the overriding objective pursuant to GCR Order 62, rule 4 (2) is that 'a successful party to any proceedings should recover from the opposing party the reasonable costs incurred by the successful party in conducting that proceeding in an economical, expeditious and proper manner (emphasis added).*"

19. If the starting point under GCR Order 62 rule 4 (2) is that the successful party is entitled to recover its "*reasonable costs incurred in conducting the proceedings in an economical, expeditious and proper manner*", it is not in my judgment a departure from that starting point that, if the Court finds that any material part of the proceedings has not been conducted in the prescribed manner, those costs should not be recovered by the successful party. Such a determination is merely an integral part of applying the 'costs follow the event' rule. However, it is equally important to remember that implicit in this rule is the notion that it will ordinarily be appropriate for the successful party overall to recover all of their costs and that the mere fact that certain points were lost will not be enough to justify some deduction. Something more than mere misjudgement about the merits of a point and how it might be adjudicated must be required. In effect, some form of impropriety in relation to the relevant costs item must be demonstrated to justify the finding that the successful party's costs are not recoverable under the ordinary rule.

20. This Court should also beware of the dangers of creating uncertainty as to the parameters of the overriding objective of GCR Order 62 through effectively departing from the starting point "*too*

G0020/2021 Page 10 of 18 2023-06-05

far and too often" by striving for "*perfect justice in the individual case*" (per Jackson LJ in *Fox – v- Foundation Piling* [2011] EWCA Civ 790 at paragraph 62), upon which the Plaintiffs' counsel aptly relied. The reasonableness of costs in purely quantum terms will generally be a matter for taxation. The Court ought only ordinarily to be concerned with making pre-taxation determinations that the costs of specific aspects of the proceeding should not be recovered by the successful party in cases where:

(a) it is possible to reach such a conclusion in an economical manner which is proportionate to the amount of costs at issue; and

(b) it is seriously arguable that some part of the successful party's case has been conducted in a manner which (by virtue of being either uneconomical, dilatory or otherwise improper) disqualifies them from seeking to recover the related costs.

21. Of course there will be various special contexts where the ordinary rules do not apply. One, pertinent to public law proceedings, is where a judicial review applicant of limited means can only effectively obtain relief from the Court with the benefit of a protective costs order.

<u>Issues 1-5: implications of the Plaintiffs achieving partial success</u>

22. I accept the Authority's contention that the Plaintiffs achieved partial success in relation to the following issues:

(a) Issue 2 was conceded but the Plaintiffs further sought an advisory opinion. The Court expressed provisional views which were not completely aligned with the position of either side. The declaration originally sought was not granted;

(b) The Plaintiffs succeeded on the primary limb of their case on Issue 3, but not on the alternative *R (Anufrijeva) v Home Secretary* [2004] 1 AC 604 point. The precise form of declaration sought was not granted. The Court did not deal with the section 59B of the Companies Act point at all;

G0020/2021 Page 11 of 18 2023-06-05

(c) in relation to Issue 4, the Court likewise accepted the Plaintiffs' primary submissions but indicated that alternative arguments based on, *inter alia*, the *Anufrijeva* principle, would fail or need not be considered;

(d) in relation to Issue 5, I reject the submission that MCSL relied solely on the *Anufrijeva* principle which it lost. It won on its primary construction arguments but I accepted that it would have lost on its alternative case based on the *Anufrijeva* principle;

(e) Issue 6 was not formally considered but the Court indicated that it would have rejected the Bill of Rights limb of that point;

(f) Issue 7 was resolved in the Authority's favour;

(g) the change of position case set out in the Plaintiffs' Reply was in fact addressed to some extent in the Plaintiffs' Skeleton Argument, but was not considered by the Court.

23. It was then submitted:

> "*50. It is clear from the above that a significant amount of costs and Court time were expended on arguments that the Plaintiffs did not succeed on, or which the Court did not entirely accept. The Plaintiffs were not wholly successful on Issues 2, 3, 4 and 5. The Court did not determine Issue 6 (on which the Plaintiffs' arguments would not have been wholly successful) and the Plaintiffs were wholly unsuccessful on Issue 7.*
>
> *51. In the circumstances, it is submitted that the Plaintiffs should only be awarded a portion of their costs. Whilst it is always difficult to be precise in any such assessment it is submitted that it would appropriate for the Court to exercise its discretion to award the Plaintiffs 70% of their costs, to be taxed on the standard basis if not agreed.*"

24. In my judgment this submission falls short of articulating a proper basis for concluding that the Plaintiffs' costs should be reduced to reflect the fact that a significant amount of time was spent on issues which were not only unsuccessfully pursued, but were also further not pursued in an "*economical, expeditious and proper manner*". In effect the Court is invited to infer from the mere

G0020/2021 Page 12 of 18 2023-06-05

fact that unsuccessful points were pursued that they were pursued in an uneconomical or dilatory manner. In their Reply Submissions, the Plaintiffs' counsel submitted:

> "*12…The Court need only ask one question; were any of the issues on which the Plaintiffs were unsuccessful* *unreasonably* *taken…*"

25. Having rejected the framing of the Authority's counsel's submissions on technical grounds, it is still necessary to consider whether there is a sufficient basis in the procedural history of the proceedings for concluding that this higher threshold for making a proportionate deduction has been met. In my judgment there is no clear basis for finding that some proportional discount is appropriate because the Plaintiffs have to a material extent not merely pursued unsuccessful points but advanced their case in an uneconomical manner. I have arrived at this conclusion for the following main reasons:

    (a) although the Plaintiffs have arguably from the early stages of these judicial review proceedings adopted a somewhat aggressive approach more familiar in the context of commercial litigation, in the run-up to the trial they pursued settlement and creditably agreed to narrow the issues for the Court's determination;

    (b) the *Anufrijeva* point occupied less than 5% of the Judgment. Because of my primary findings I considered the point somewhat summarily. However, I was invited to deal with this point in case the Authority appealed and the Plaintiffs were required to rely on these alternative arguments. The Authority has appealed, and it is not fairly open to me to find that the Plaintiffs ought not in the interests of economy to have advanced this alternative point at all;

    (c) it is true that I saw no need to deal with the factual and/or change of position arguments. However, because the Plaintiffs rightly anticipated that if they succeeded on their main statutory construction points the Authority might appeal, I cannot fairly conclude that these alternative points, the merits of which I have not considered, ought not to have been pursued;

G0020/2021 Page 13 of 18 2023-06-05

(d) although the Authority ultimately decisively won the power to make the Requirements point (Issue 7, which occupied just over 10% of the Judgment), this was an entirely novel point and the winning legal analysis was only clearly articulated in the course of the main hearing.

26. I accordingly find that there should be no reduction of the amount the Plaintiffs are entitled to recover upon taxation for their reasonable costs of successfully pursuing (in overall terms) the present proceedings.

Findings: reserved costs

Letters of Good Standing Application (Summons dated 14 May 2021)

27. The Authority's counsel submits that since this application was resolved on a "*sensible and pragmatic*" basis without being determined and so there should be no order as to costs.

28. The Plaintiffs submitted that this application:

> "*…was only necessary because of the Defendant's unreasonable and continued refusal to grant those letters, despite the existence of the Ex Parte Order dated 10 May 2021 (the 'Stay Order'), made on an urgent basis (in relation to the same specific issue) only four days prior to the interim injunctive relief application being filed by the Plaintiffs, making it clear that the Defendant could not rely upon the challenged Findings and Requirements (or any purported filing obligations arising therefore* [sic]*) as grounds for taking or refusing to take any step, until the judicial review proceedings had been determined. The Defendant only agreed to issue the letters following the making of an interim injunctive relief application by the Plaintiffs, and the strong steer by the Judge at the resulting hearing (no ruling was made). It may be inferred that those letters were only granted because of the interim injunctive relief application, and that accordingly, the application was successful and the usual rule of costs should apply.*"

G0020/2021 Page 14 of 18 2023-06-05

29. In my judgment it is far from obvious that the effect of the Stay Order was to oblige the Authority to issue the Letters of Good Standing despite the regulatory findings it had at that juncture purportedly made. It is obvious that such a regulatory step was far from a straightforward one for the Authority to take, and their initial reluctant response was consistent with how one would expect any reasonable regulator in the circumstances to respond. It is accordingly far from obvious that if the matter had been fully argued, I would have granted the Plaintiffs' application. When it was initially heard I formed no provisional view as to the merits of the Plaintiffs' subsequent application. I merely assumed it to be obvious that if the Letters of Good Standing were not issued substantial financial loss might be sustained which might potentially form the subject of a damages claim if the Requirements were ultimately set aside. Pursuant to the Preamble to the GCR paragraph 4.2 (d), and taking into account the Plaintiffs' obvious general good standing and the comparatively low-level of the regulatory infractions in issue, I simply encouraged the parties to settle this part of the present proceedings with a view to saving the costs and Court time of a contested hearing on a potentially difficult matter.

30. In these circumstances, in my judgment, it would be wrong in principle to apply the 'costs follow the event' rule. It would undermine the ability of the Court to promote the consensual resolution of interlocutory disputes if the mere fact that an application was resolved in one party's favour would invariably be treated for costs purposes as a "result", even in circumstances where the merits of the application are unclear. I find that the appropriate order is that proposed by the Authority, and I make no order as to the costs of the Plaintiffs' 14 May 2021 Summons.

The Disclosure Summons and the PII Summons

31. By Summons dated 18 July 2022, the Plaintiffs sought to inspect certain documents referred to in a List of Documents which the Authority contended were irrelevant and protected by public interest immunity privilege ("PII"). In my Ruling of 24 August 2022, I granted the Plaintiffs' application subject to the Authority's right to assert PII and reserved costs. The Authority disclosed three of the "Withheld Documents", but applied by Ex Parte Summons dated 30 September 2022 to enforce its PII claim. On 22 November 2022, I granted the Authority's application and reserved costs.

32. The Authority submits that there should be no order made as to the costs of either Summons. This is, implicitly at least, on the basis that the Summonses are closely connected, each side achieved a

G0020/2021 Page 15 of 18 2023-06-05

material degree of success and that its claim to PII was substantially vindicated. The Plaintiffs reply that the applications were necessitated by the Authority's inadequate initial approach to discovery.

33. Two extracts from my Rulings on these two Summonses bear repetition here. Firstly, as regards the Disclosure (or Inspection) Summons, I observed:

> *"31. Accordingly, my strong provisional view is that because it might emerge at the end of the day that the present application was only meritorious in wholly abstract and technical terms, a risk which I am unable to dismiss out of hand, the costs of the present application should be reserved until the conclusion of the proceedings as a whole."*

34. Secondly, as regards the PII Summons, I observed:

> "*21. In summary, I granted the Authority's public interest immunity application and declined to require production of redacted versions of documents which contained relevant non-privileged information on case management grounds since the non-privileged information had already been disclosed to the Plaintiffs in another documentary form. As I observed in my 24 August 2022 Ruling in this matter:*
>
> '*25… The Court should be astute to ensure that the discovery sought is genuinely needed to assist the Court to adjudicate the case before the Court, having regard to the need for a nuanced application of the Overriding Objective in the public law arena in which the requirements of expedition are an obvious public policy concern. How this case management power should be exercised depends on the circumstances of each case…*' "

35. In my judgment, although the Plaintiffs did manage through the Discovery Summons to access three further documents, overall they only achieved substantial success in "*wholly abstract and technical terms*". There is no basis for concluding that the amount of costs consumed by the application, which had echoes of an interlocutory application in hostile commercial litigation, was proportional to the procedural benefit achieved. The Authority's probity deserved greater acknowledgement than this application implied. The Authority has reasonably not sought to recover the costs of its own successful Summons.

36. I make no order as to the costs of the Disclosure and PII Summonses.

G0020/2021 Page 16 of 18 2023-06-05

The Inspection Stay Summons

37. Was the 27 February 2023 Inspection Stay Summons premature and unnecessary or should it have been obvious to the Authority that no further inspections could take place until the statutory interpretation disputes raised in these proceedings had been resolved? The key chronology may be summarised as follows:

- **5 January 2023**: the Authority scheduled inspections between 6 and 24 March 2023;
- **7 February 2023**: the Authority requests the Plaintiffs to complete questionnaires and provide documents by 20 February 2023;
- **10 February 2023**: the Plaintiffs request the Authority to reschedule the inspections pending the determination of this judicial review;
- **13 February 2023**: the main hearing of the present proceedings commences;
- **17 February 2023**: the hearing concludes and judgment is reserved. The Authority indicates that the inspections will proceed as scheduled;
- **27 February 2023**: the Inspection Stay Summons is issued;
- **30 March 2023**: Judgment is delivered;
- **6 April 2023**: the Authority indicates that the inspections will be postponed pending its appeal to the Court of Appeal;
- **24 April 2023**: the Inspection Stay Summons is withdrawn by consent on terms that costs will be determined by the Court.

38. In my judgment it is clear that the 27 February 2023 Summons was not prematurely filed by the Plaintiffs in circumstances where the Authority was, inexplicably, asserting the right to carry out

G0020/2021 Page 17 of 18 2023-06-05

the inspections in March 2023 without regard to the pendency of the present proceedings. The Plaintiffs are accordingly awarded the costs of their 27 February 2023 Inspection Stay Summons.

Findings: costs of the costs application

39. The Plaintiffs' counsel invited their opponents by letter dated 23 March 2023 to indicate any reason why their client should not pay all of the Plaintiffs' costs. The Authority's counsel responded tersely, by letter dated 21 April 2023, that any costs order should take into account the fact that the Plaintiffs "*were not successful in relation to all of the pleaded grounds*" and so all costs issues should be determined by the Court.

40. It is self-evident that the most substantial portion of the costs are those of the proceedings as a whole. The main dispute was (a) whether the costs of the action should be paid by the Authority at all and/ or (b) whether or not there should be some discount because of the limited success the Authority achieved. Those main issues have been resolved in favour of the Plaintiffs who have been awarded their costs of the action without any deduction.

41. And so, it follows that the Plaintiffs have achieved substantial success on the present costs application, despite the Defendant's comparatively minor success in relation to the costs of two of the three reserved costs issues. I accordingly award the Plaintiffs their costs of the costs application to be taxed if not agreed.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

G0020/2021 Page 18 of 18 2023-06-05