IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 55 OF 2021 and
CAUSE NO. G 150 OF 2021

BETWEEN: **CTMH HOLDINGS LIMITED**

Applicant

AND **THE GOVERNMENT OF THE CAYMAN ISLANDS**

Respondent

(1) NARAYANA HRUDAYALAYA PRIVATE LIMITED
(2) ASTER CARIBBEAN HOLDINGS LIMITED

Interested Parties

Appearances:	**Mr. Chris Buttler KC instructed by Ms. Sally Bowler on behalf of McGrath Tonner for the Applicant** **Mr. Tom Hickman KC instructed by Mr. Jevon Alcock and Mr. Nigel Gayle of the Attorney General's Chambers for the Respondent**
Before:	**Hon. Justice Richard Williams**
Hearing:	**On the papers**
Applicant's submissions:	**19 February 2023 and 6 March 2023**
Respondent's Submissions:	**27 February 2023**
Draft Judgment Circulated:	**13 June 2023**
Judgment Delivered:	**16 June 2023**

HEADNOTE

Judicial review - costs related to the relief and costs hearing - perfecting court order

JUDGMENT – COSTS

Background - The parties

1. This is an application made by the Applicant in relation to the costs arising from a relief and costs hearing held on 25 January 2023 ("the January 2023 Hearing"). The Application is opposed by the Respondent. The Court is now also asked to assist with the disputed wording contained in the competing draft orders prepared by the two parties which arose (i) from the Judgment delivered on 24 February 2023 following the January 2023 Hearing ("the February 2023 Judgment"); and (ii) upon the reasons given in the Judgment delivered on 18 August 2022 ("the Judgment") which followed the substantive hearing of the Applicant's two consolidated applications for Judicial Review held in April 2022.

2. The Applicant is CTMH Holdings Limited ("CTMH"). CTMH trades as the Doctors Hospital. The Respondent is the Government of the Cayman Islands ("the Government").

3. Narayana Hrudayalaya Private Limited ("NHPL") is an interested party. NHPL is an Indian domiciled company which set up an integrated hospital in Grand Cayman primarily aimed at medical tourists, with an assisted living facility. In April 2010, NHPL entered into a contract with the Respondent ("the 2010 Contract") to provide medical care facilities and, as a part of the agreement, it was agreed that it would benefit from tax and duty waivers. NHPL has not sought to take up the opportunity to actively participate in these proceedings.

4. Aster Caribbean Holdings Limited ("ACHL") is also an interested party and has also not sought to take up the opportunity to actively participate in these proceedings. ACHL agreed to set up a three-phase project to develop new medical facilities to provide affordable healthcare to residents and further the growth of medical tourism, with an assisted living facility and a medical university. In December 2020, ACHL entered into a contract with the Respondent ("the 2020 Contract") to provide medical care facilities and, as a part of the agreement, it was agreed that it would benefit from tax and duty waivers. ACHL has not sought to take up the opportunity to actively participate in these proceedings.

Background - Application Cause No. G 55 of 2021 ("Cause 55") and Cause No G 150 of 2021 ("Cause 150")

5. On 20, 21 and 22 April 2022, I heard the substantive hearing of the Applicant's consolidated applications for Judicial Review ("the April 2022 Hearing"). The first application was brought in Cause 55. The second application was brought in Cause 150.

6. After the close of each party's case and after receiving comments on the draft judgment pursuant to Practice Direction 1/2004, I delivered the Judgment on 18 August 2022. The background, the nature of the claims made and the Court's findings are set out in the Judgment. I do not intend to rehearse the same again herein and the parties should refer back to the Judgment for that detail.

7. At the end of the Judgment[1], on the issue of costs, I remarked as follows:

> *"Neither party has been fully successful in this matter. My provisional view is to make no order for costs. However, if either party wishes be heard on costs, they may apply by Summons for a costs hearing."*

The relief and costs issues resulting from the Judgment – the background and the parties' submissions

8. The parties were unable to agree the costs order and their primary position was that costs orders should be made in their favour. Therefore, on 15 November 2022, directions were given to a hearing to address the question of consequential relief and costs flowing from the Judgment. The costs of the November 2022 case management hearing were reserved.

9. At the January 2023 Hearing, the Applicant sought the making of a number of declarations and recitals which it said arose from the Court's findings in the Judgment. Save for one declaration[2], the Respondent submitted that the Court in the Judgment had deemed that it was not appropriate to make any of the other declarations sought in the Notice of Motion. As the parties had very different views about the appropriate relief to be ordered they each provided their own versions of a draft order[3] containing the provisions which they submitted that the Court should make.

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[1] Paragraph 109 of the Judgment.
[2] The declaration a in the Notice of Motion in Cause 55, namely that the Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the interested parties are unfettered by the 2010 Contract between NHPL and the Respondent or the 2020 contract between ACHL and the Respondent.
[3] The Applicant produced two drafts, with a revised one being produced at the hearing.

10. In relation to Cause 150 the Respondent contended that the order should be that the Cause is dismissed. The Applicant stated that the order should be that the Cause stand dismissed (subject to costs), but on the basis that three recitals and one declaration were set out in the order. The Applicant stated that if a revised recital was set out in the order, then the declaration would no longer be required.

11. In relation to Cause 55, the Applicant contended that the order should record that:

"The Claim in G 55 of 2021 is allowed to the extent set out in the judgment and is otherwise dismissed."

The Respondent suggested the following slightly different wording:

"Save to the extent set out in the Judgment, Cause No. G 55 of 2021 is dismissed."

In the February 2023 Judgment, I expressed that I had no issue with either wording, but indicated a preference for the Respondent's wording and noted that this should be included in the order.

12. In relation to Cause 55, the Respondent submitted that *"the result of the claim is clear from the Judgment"* and that, save for the making of the first declaration which the Court has already held should be made, the Cause 55 should be dismissed as there is no proper basis for any other relief. The Applicant, on the other hand, sought one recital and, in addition to the first declaration, two further declarations[4] to be set out in the final order.

[4] 1. It was unlawful for the Respondent to award waivers and concessions to NHPL and ACHL for extremely lengthy periods without any meaningful reference to Parliament [Judgment, para.93]. In particular:
1.1 The following clauses of the 2010 Contract between NHPL and the Respondent are unlawful and of no legal effect:
1.1.1. Clause 2.9 (work permit fee concessions without an expiry date) [Judgment, para.31];
1.1.2. Clause 2.10(a) (stamp duty concessions for as long as Health City is operational) [Judgment, para.35];
1.1.3. Clause 2.10(b) (customs duty exemptions on the first US$800m of imports, with no expiry date) [Judgment, para.32];
1.1.4. Clause 2.10(b)(i) and (ii) (customs duty exemptions for 30 years from the date on which the value of imports has reached US$800m) [Judgment, para.33];
1.1.5. Clause 2.10(c) (customs duty exemptions for 50 years on all life-saving medical equipment and medical supplies) [Judgment, para.34].
1.2 Clauses 2.7-2.8 and Schedule 2 of the 2020 Contract between ACHL and the Respondent are unlawful and of no legal effect (no taxes on profits, estate duty, customs duty on medical equipment and supplies for 25 years; and no stamp duty for as long as Aster Cayman Medcity is operated) [Judgment, para.43].
2. The Respondent acted unlawfully in treating itself as required to grant tax waivers to NHPL in accordance with clauses 2.9, 2.10(a), 2.10(b), 2.10(b)(i)-(ii), and 2.10(c) of the 2010 Contract [Judgment, para.92, taken with paras.31-35].

13. At the January 2023 Hearing, I received oral submissions from Kings' Counsel for each party. I adjourned the matter in order to prepare and later deliver a further reserved written judgment, namely the February 2023 Judgment. Although I will briefly highlight parts of that Judgment, the parties should refer back to it for the full background, the parties' submissions and the reasons for the Court's findings.

Conclusions in the February Judgment about the recitals and declarations which the Applicant sought to be included in the order relating to Cause 150

14. In the February 2023 Judgment, I noted that there was some agreement concerning the proposed Recital 2 and, to a degree, in relation to Recitals 1 and 3 in the Applicant's initial draft order. In the February 2023 Judgment, I set out the wording that was appropriate for Recital 2. In relation to Recital 3, I therein highlighted my preferred wording which I said could be set out in the preamble to the order. I was satisfied that Recital 3 in the draft order should, as requested by the Applicant, include my observation concerning the interests of the medical profession and patients. I also stated that I was satisfied that Recital 1 in the order should read:

> *"The Court handing down its Judgment on 18 August 2022 and for the reasons given in that Judgment."*

15. I did not agree that Recital 4 set out in the Applicant's draft order should be included in the order. Having made that decision, I had to consider whether to make the 1st Declaration[5] which was set out in the initial draft order submitted by the Applicant. In the February 2023 Judgment, I refused to make this Declaration.

Conclusions in the February 2023 Judgment about the recitals and declarations which the Applicant sought to be included in the order relating to Cause 55

16. In the February 2023 Judgment, I found that Recital 5 set out in the Applicant's draft order should not be included in the order.

[5] *"On the proper interpretation of the Health Practice Regulations (2021 Revision), the requirements of regulation 5(2) (continuing educational requirements for practitioners), regulation 5(3) (required postgraduate qualifications and specialist training for specialist medical doctors) and regulation 5(4) (required experience for general practitioners) apply to institutionally registered practitioners in the same way that they apply to fully registered practitioners [Judgment, para.22]".*

17. At the January 2023 Hearing, it was accepted that in the Judgment I had already ruled that the declaration claimed in paragraph (a) of the Notice of Motion should be made and be set out in the order. In the Judgment I had deemed it inappropriate to make the declarations sought at Paragraph (b) in the notice of Motion and at Paragraph (c) in the Notice of Motion.

18. I declined to make the declarations sought at paragraph 3[6] in the Applicant's draft order.

19. The Applicant contends that the *"key"* declaration in Cause 55 is the one first set out at paragraph 4[7] in its draft order which was placed before the Court at the relief hearing held in January 2023 because it relates to the pleaded Ground 1. It is submitted by the Applicant that it gave effect to the Court's central finding.

20. I note concerning the importance placed on the issue which is sought to be addressed in the above declaration that, in a letter to the Court dated 9 September 2022, the Applicant had stated that:

> *"A central issue at the remedies hearing will be the form of relief to be granted to give effect to the Court's findings at paragraphs 92 and 93 of the Judgment"* adding that:
> *"Clarity is required as to which clauses of the Health City and Aster contracts were wrongly granted and are non-binding."*

Again, in a letter to the Respondent dated 9 September 2022 the Applicant had stated that it had:

> *"succeeded on the key issue in Cause No. 55 of 2021 (lawfulness of long-term concessions)."*

The Applicant went on to say therein that:

> *"The Central issue at the relief hearing will be the form of relief to be granted to give effect to the Court's findings at paragraphs 92 and 93 of the Judgment"* adding that:
> *"Clarity is required as to which clauses of the Health City and Aster contracts were wrongly granted and are non-binding."*

[6] Shown as paragraph 2 in a different version of the draft order submitted by the Applicant.
[7] Shown as paragraph 3 in a different version of the draft order submitted by the Applicant.

21. In the February 2023 Judgment, I agreed that, in the interests of justice, it was appropriate to make the above declaration to reflect this Court's finding in the Judgment. I found that the order should include the declaration that:

> *"The Respondent acted unlawfully in treating itself as required to grant tax waivers to NHPL in accordance with clauses 2.9, 2.10(a), 2.10(b), 2.10(b)(i)-(ii), and 2.10(c) of the 2010 Contract."*

Costs in Cause 150– the parties' submissions and the Court's conclusions in the February 2023 Judgment

22. In relation to Cause 150, the Applicant submitted that it should be awarded its costs. The Respondent's primary position was that it should be awarded its costs but added that, if the Court did not do that, it would not be appropriate to award costs against it and that the order should be that each party bear its own costs.

23. I was satisfied that the Applicant should be viewed as being the successful party in relation to Cause 150 and accordingly, I ordered that the Respondent pay the Applicant's costs on the standard basis, to be taxed if not agreed.

Costs in Cause 55 – the parties' submissions and the Court's conclusions in the February 2023 Judgment

24. In relation to Cause 55, the Respondent contended that it should be awarded its costs. The Applicant conceded that it was not successful in every point raised in the Cause, but argued that overall it was the successful party. It submitted that the Court could make a proportional order for costs in its favour.

25. In the February 2023 Judgment, I found that the parties had a similar degree of success/lack of success in the proceedings relating to this Cause. I was not satisfied that this was a case in which the Court should be granting either party a percentage of its costs order. Accordingly, I went on to make no order for costs in relation to Cause 55.

26. At the end of the February 2023 Judgment, I commented:

> *"93.….My preliminary view is that neither party had been globally successful in their arguments for costs and that my provisional view would be to make no order for costs*

relating to the costs hearing. However, if either party wishes to be heard on costs they should communicate that to the Court within 14 days of receiving this Judgment.

94. In relation to the relief part of this hearing, my provisional view again is that that the Applicant has only been partly successful and argued some unsuccessful points that I would be minded to make no order for costs. However, if either party wishes to be heard on costs they should communicate that to the Court within 14 days of receiving this Judgment."

Events post the delivery of the February 2023 Judgment

27. On 16 February 2023, the Applicant's attorney sent a draft order arising from the findings in the February 2023 Judgment to the Respondent. In the draft order, the Applicant stated that the Respondent should pay its costs on the standard basis in relation to Cause 150. Another paragraph in the Applicant's draft provides that there should be no order for costs in Cause 150, but this appears to have been a typographical error as that was actually the order made in relation to Cause 50. It added that the parties should have 14 days from the date of the February 2023 Judgment to apply for an order for costs of and associated with the January 2023 Hearing and that if no application was made, then there should be no order for costs.

28. On 19 February 2023, the Applicant sent by email a letter addressed to the Court, a Costs summons and a concise bundle of authorities to the Court and to the Respondent. In the letter it indicated that an order was sought for the Respondent to pay two-thirds of its costs of and associated with the January 2023 Hearing. The letter also contained the Applicant's submissions as to why the sought costs order should be made. The Applicant indicated that an attached Costs Summons would be filed on 20 February 2023.

29. On 27 February 2023, the Respondent sent a letter to the Court in response to the Applicant's 19 February 2023 letter. The Respondent submitted that the preliminary view expressed at paragraph 93 and 94 in the February 2023 Judgment *was "an appropriate assessment of the position"* and that there should be no orders made in relation to costs. The letter contained the Respondent's submissions as to why it was not appropriate for the Applicant to recover costs in relation to the January 2023 Hearing.

30. In the 10:04 a.m. email sent on 28 February 2023 the Applicant commented that a *"number of points"* in the Respondent's 27 February 2023 letter were inaccurate. Despite that, the email stated that the Applicant would not be making any further submission unless invited by the Court. That position apparently changed during the day, because at 4:30 p.m. the Applicant wrote to the Court requesting an opportunity to reply to the Respondent's letter of 27 February 2023. The Applicant indicated in that later email that it was content for the Court to resolve the costs application on the papers.

31. At 3:55 p.m. on 28 February 2023, the Respondent confirmed that it was content for the Court to deal with the costs application on the papers. On 1 March 2023, the Respondent confirmed that it did not oppose the Applicant's request concerning the filing of a written response.

32. On 1 March 2023, the Respondent sent an email concerning the Applicant's draft order circulated with the 16 February 2023 email. A draft order containing amendments to the Applicant's version was attached to that email. The Respondent's draft contained the same standard basis costs provision in relation to Cause 150, but it included a no order for costs provision in relation to Cause 55. The Respondent's draft of the order deleted the Applicant's provision that:

> *"The Respondent acted unlawfully in treating itself as required to grant tax waivers to NHPL in accordance with clauses 2.9, 2.10(a), 2.10(b) (i)-(ii) and 2.10(c) of the 2010 Contract."*

33. On 2 March 2023, the Court informed the Applicant that it could provide a response to the 27 February letter by 3:00 p.m. on 6 March 2023.

34. At 3:33 p.m. on 6 March 2023, the Applicant's response letter with the latest version of the draft order was received by the Court. It contained further submissions concerning the issue of costs arising from the January 2023 Hearing as well as about the wording of other provisions found in the submitted draft orders. I will deal with the wording issues first and then concentrate on the costs application.

Disputed provisions in the submitted draft orders produced after the February 2023 Judgment

35. Recitals 1, 2, 4 and 5 in the submitted draft orders are not disputed and I approve them. The dispute is in relation to Recital 3. The Applicant's version provides:

> *"The Respondent having accepted that it must review designated institutions against the Designation Criteria at reasonable intervals."*

The Respondent's version replaced the word *"must"* with *"should"*. The Applicant contends that upon instructions to Mr. Hickman KC, the Respondent conceded at the April 2022 Hearing that it must conduct the said review.

36. The best way to resolve this issue is to review what King's Counsel actually stated at the April 2022 Hearing. Towards the close of the second day of the hearing, he stated:

> *"I accept my instructions that there should be and must be[8] and will be a review of designated institutions against the designated criteria at reasonable intervals.'*

He then added that this did not amount to a concession that the Government was under a duty to formulate and publish these criteria. He stated that the concession was being made because following the formulation and distribution of the designation criteria, it was necessary for a mechanism for review to also be set out.

37. Having regard to the above, and placed in that context, I direct that the 3rd recital should read:

> *"The Respondent having accepted that it there should be and must be a review of designated institutions against the Designation Criteria at reasonable intervals."*

38. In relation to Order 4, I am satisfied that it should read:

> *"No order for costs of Cause No.55 of 2021."*

39. The remaining apparently still disputed provision is the declaration that the Respondent had acted unlawfully.[9] It is not clear to me why the Respondent now seeks to remove that paragraph from the version of the draft order provided by the Applicant. As already mentioned herein[10], I made that

[8] My emphasis by underlining.
[9] See paragraph 21 above.
[10] See paragraph 21 above.

order at paragraph 59 in the February 2023 Judgment. For the avoidance of doubt, I direct that paragraph 2 of the declaration part of the order should be worded:

> *"The Respondent acted unlawfully in treating itself as required to grant tax waivers to NHPL in accordance with clauses 2.9, 2.10(a), 2.10(b) (i)-(ii) and 2.10(c) of the 2010 Contract."*

The costs issues relating to the January 2023 review/costs hearing

40. When considering the issue of costs in these proceedings, I have reviewed all the case precedent presented and have commented upon some of the same in the February 2023 Judgment. Although I have regard to that case law and GCR Order 62 in determining the costs issues now before me, I do not intend to rehearse that same detail again herein.

Costs of the January 2023 Hearing – the Applicant's submissions

41. The Applicant submits that it should be viewed as being the successful party in relation to both causes and that pursuant to GCR Order 62, a costs order should be made against the Respondent. The Applicant rightly highlights that it successfully argued at the January 2023 Hearing that the Respondent should pay its costs in Cause 150. The Applicant reminds the Court that prior to that hearing, the Respondent was contending that there should be no order as to costs of Cause 150 and that at the hearing it sought an order that the Applicant should pay its costs in relation to the Cause. The Applicant had to attend the costs hearing to seek those costs, but the issue for determination was a straight forward one and did not occupy a great deal of court time. In relation to Cause 55 both parties had unsuccessfully asked for their costs.

42. The Applicant correctly states that it obtained the declaration outlined at paragraph 39 above. The Applicant placed great emphasis on the nature of the declaration, which it feels is a core or key declaration.

43. The Applicant accepts that the Court did not approve the recitals or grant the declarations that it had sought in Cause 150. It submits that the costs of arguing those matters did not add much to the parties' costs in a case where attendance was required in any event to obtain the costs order in Cause 150 and the *"key"* declaration.

44. The Applicant contends that, as it obtained a significant declaration and an order for costs, it should be entitled to its reasonable costs of coming to Court, subject to a reduction which would take into account additional costs attributable to the costs in Cause 55 and to relief in Cause 150. Placing reliance on ***R (Hunt) v North Somerset Council*** [2015] 1 WLR 3575, para 19 the Applicant submits that the appropriate reduction is one-third and that the Respondent should pay two-thirds of its costs associated with the January 2023 Hearing.

45. The appellant in ***Hunt*** had learning difficulties and behavioural problems and, as a result the respondent Council was statutorily required to secure access for him to sufficient educational and recreational leisure-time activities for the improvement of his well-being. The appellant challenged the respondent Council's decision to cut its funding to the Youth Services budget for the year 2012/13. He brought a challenge against the decision of the local authority, claiming that the respondent had failed to comply with its obligations under the Education Act 1996 ("the 1996 Act") and the Equality Act 2010 ("the 2010 Act"). The appellant raised numerous issues at first instance. Although declaratory relief was raised in the claim form, no mention was made by the appellant's counsel when the judge asked for submissions on relief at the end of the hearing and before the judgment was handed down. Counsel for the appellant asked solely for a quashing order. The Administrative Court dismissed the claim on all grounds.

46. The appellant was granted limited permission to appeal to the Court of Appeal on two grounds. He argued before the Court of Appeal that (i) as the equality impact assessments, carried out in order to ensure compliance with the 2010 Act, had not been provided to the decision-maker, the respondent had failed to comply with its duty under s.149 of the 2010 Act; and (ii) as there was no evidence of consultation with qualifying young people before making the decision to cut the budget, the respondent had not complied with its duties under s. 507B(9)(b) of the 1996 Act. Again the appellant asked solely for a quashing order. The Court of Appeal agreed with the appellant on the first ground. The second ground was uncontested by the respondent and so the court assumed that the second ground was also applicable (without making a decision).

47. The Court of Appeal did not make the quashing order sought by the appellant, as the budget for the 2012/13 financial year had expired 3 months before the appeal was heard. The appellant's Counsel did not make submissions about declaratory relief and the Court of Appeal made no mention of a

declaratory order. In relation to costs, the Court of Appeal found that the appeal had *"no practical value"* and had been *"destined to fail"* and held that the respondent was the successful party who, in principle, would ordinarily be entitled to its costs. However, The Court of Appeal stated that because the respondent had argued against the grounds, rather than solely on the issue of the relief, the appellant should only pay half of the respondent's costs.

48. The Supreme Court had to decide whether the Court of Appeal was wrong to rule that the appellant, alleging that the Council had failed to discharge its consultation duties under the 1996 Act, and having due regard to the public sector equality duty, should not receive any relief at all and ordering him to pay the Council's costs. The Supreme Court unanimously allowed the appeal in relation to costs but dismissed it in relation to declaratory relief.

49. Lord Toulson stated that the judgment of the Court of Appeal itself contained a ruling that the Council had acted unlawfully and the authority of its judgment would be no greater or less by making or not making a declaration in the form of the order to the same effect. In relation to costs, Lord Toulson concluded that the Court of Appeal was wrong to treat the Council as the successful party when in fact it was only successful in the limited sense that the findings of failure came too late to do anything about. Lord Toulson ruled that the Court of Appeal's order should be set aside and substituted with an order that the appellant recover two thirds of his costs both in the High Court and in the Court of Appeal. The judgment clarifies that "success" should ordinarily depend on the substantive issues, but conduct can reduce a successful party's entitlement to costs.

Costs of the January 2023 Hearing – the Respondent's submissions

50. The Respondent contends that there should be no order for costs in relation to the January 2023 Hearing. The Respondent invites the Court to consider costs in the context of the large number of issues for determination raised by the Applicant at the hearing. These issues included a request that the Court should make a number of unpleaded recitals and declarations in the judicial review order. In relation to Cause 55 where limited declaratory relief had been pleaded, the Respondent was concerned as it viewed the Applicant as now unfairly seeking to have judicial comments from the Judgment *"elevated into the order with uncertain implications"* resulting in potentially serious consequences for the Contracts. Similarly in relation to Cause 150 the Respondent was concerned

that the Applicant had sought an unpleaded declaration about the interpretation of the Health Practice Regulations (2021 Revision). The Respondent highlights that as the approach taken by the Applicant was opposed it meant that there had to be a hearing to enable it challenge it.

51. The Respondent rightly highlights that wide ranging submissions were made. The Respondent states that only one of the contentious declarations sought was granted and that the Applicant should not be regarded as being the successful party. The fact that the specific declaration was characterised by the Applicant as being the *"key"* declaration does not in itself result in the Applicant being regarded as being the successful party. I accept that the Respondent wrongly states that the Applicant first stressed the importance of the declaration during its oral submissions at the January 2023 Hearing. It is clear that in earlier correspondence, the issues addressed in the declaration were always viewed as being of great significance by the Applicant. That said, the time spent addressing this declaration in both the written and oral submissions was no greater than that spent considering the applications for recitals and for the wider declaratory relief sought. The Respondent contends that it did not view this as the key declaration as it needed to resist the wider detailed submission about the other recitals and declarations being sought by the Applicant.

52. The Respondent correctly argues that the final order made by the Court cannot be said to prefer the draft order submitted by the Applicant over the draft order suggested by the Respondent.

53. In relation to costs, the Respondent points out that it suggested that there should be no order for costs made in relation to the January 2023 Hearing. It highlights that the costs issue in relation to Cause 55 only came back to Court in January 2023 as the Applicant unsuccessfully sought an order of costs in its favour. The Respondent acknowledges that it was unsuccessful in defending a claim by the Applicant for costs in in relation to Cause 150 and submits that the costs expended in relation to the two costs applications *"roughly cancel each other out"*.

54. The Respondent seeks to distinguish the case of ***Hunt*** based on the different factual context and nature of the proceedings. It submits that ***Hunt*** concerned an appeal and the appellant was awarded costs because it appealed successfully on a part of its appeal. It is submitted that the present case is not an appeal and should not be viewed as being analogous. When distinguishing the ***Hunt*** costs decision, the Respondent rightly states that, although the Applicant contends that a hearing was

necessary to enable it to obtain what it viewed as being the "key' declaration, a hearing was necessary as it opposed the large number of recitals and declarations sought by the Applicant in its draft orders which could have had serious implications and consequence for the Contracts and third parties.

Conclusion

55. If the 2023 January Hearing was required to determine the costs order in relation to Cause 150 and the one contentious declaration that were both granted to the Applicant and if the time expended at the hearing had been occupied for that purpose, then the Applicant would have a strong argument for an award of costs in its favour, whether that be proportional or full. However, where the Applicant chose the unsuccessful approach in both written and oral submissions to try to persuade the Court to make a number of newly worded declarations and recitals which required the Respondent to understandably resist at a hearing, the position is very different. The Applicant was only partly successful at the January 2013 Hearing, albeit with a contentious declaration being granted, and it was not successful when seeking a number of declarations and recitals which also had potential significant consequences. In such circumstances neither party should be viewed as being successful.

56. I have very carefully considered the written submissions made and my preliminary view has not changed. This is a case in which no order for costs should be made. The orders for costs made in the Judgment balanced each other out. The level of success and degree or lack of success for the Applicant concerning the various recitals and declarations sought do not make this a case in which it can be globally regarded as being the successful party or one which would merit a proportional costs order. Accordingly, I make no order for costs I relation to the January 2023 Hearing and in relation to the reserved costs order made at the 15 November 2022 Hearing.

The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT