



**IN THE FIRST-TIER TRIBUNAL
(CHARITY)**

Case No. CA/2008/0001

GENERAL REGULATORY CHAMBER

Appellant: NAGENDRAM SEEVARATNAM

**Respondent: THE CHARITY COMMISSION FOR
ENGLAND AND WALES**

Intervening Party: HM ATTORNEY GENERAL

TRIBUNAL'S RULING ON COSTS

1. Background

- 1.1 This is the Tribunal's ruling as to costs, made further to its decision of 13 October 2009. In its order of the same date, the Tribunal invited the parties' written representations as to the exercise of its costs jurisdiction under rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, ("the Rules"), for the reasons set out in Section 7 of the decision notice. The Tribunal subsequently extended the time for the parties to file representations, by further orders dated 2 and 23 November 2009. The parties have now made written representations as follows: the Appellant dated 3 November and 24 November 2009; the Respondent dated 13 November 2009.
- 1.2 In the Respondent's representations, there is reference to certain respects in which the Respondent disagrees with the Tribunal's decision. The Tribunal has considered these representations and concluded that there are no grounds for correcting its decision under rule 40 of the Rules or for setting aside its decision under rule 41 of the Rules. In the Appellant's submissions, his counsel invites the Tribunal to clarify its ruling of 13 October in one respect, if appropriate. The Tribunal has considered this request but concludes that it has no power to clarify or add to its earlier decision.

- 1.3 The parties may apply to the Tribunal for permission to appeal to the Upper Tribunal against the decision of 13 October and against this Ruling on costs. If they wish to do so, they must cite an alleged error of law made by the Tribunal, pursuant to rule 42(5) of the Rules. The Tribunal notes that if it receives an application for permission to appeal, it must first consider whether to review its own decision, in accordance with rule 43 and rule 44 of the Rules.
- 1.4 The Tribunal has already extended the time period for the parties to apply for permission to appeal against the decision of 13 October, with the intention that it should run concurrently with the time period for applying for permission to appeal against the Tribunal's ruling on costs. Having considered the applicable time limits further, the Tribunal now directs that the time for applying for permission to appeal against the 13 October decision and against this ruling shall, pursuant to rule 42(2) of the Rules, be 28 days from the date appearing at the end of this ruling.

2. The Tribunal's Jurisdiction as to Costs

- 2.1 Rule 10 (1) (c) of the Rules provides that the Tribunal may make an order in respect of costs where the Charity Commission is the Respondent and a decision, direction or order of the Charity Commission is the subject of the proceedings, if the Tribunal considers that the decision, direction or order was unreasonable.
- 2.2 Rules 10 (2) and (3) of the Rules provide that the Tribunal may make such an order on its own initiative or on receiving an application. In this case, the Tribunal invited representations because it was considering making a costs order against the Respondent on its own initiative. The Tribunal specifically invited the Respondent to make representations, as required by rule 10 (5) (a) of the Rules.
- 2.3 The Tribunal invited the parties' representations as to the appropriate exercise of its power to award costs and as to the appropriate basis for any assessment of costs. The Tribunal's decision of 13 October clearly indicated that it was considering exercising its power to award costs under Rule 10 (1) (c) of the Rules and not any other power. It also clearly indicated that it was considering making such an order of its own initiative, rather than on the basis of an application.
- 2.4 The Tribunal has now received uninvited representations from both parties as to the exercise of its separate costs jurisdiction under rule 10 (1) (b) of the Rules. The Tribunal did not invite such representations because it was not considering making an order under rule 10 (1) (b) on its own initiative. The Tribunal has not subsequently received an application from either party complying with rule 10 (3) in respect of a costs application under rule 10(1)(b) of the Rules. The Tribunal is not persuaded that it should now consider awarding costs of its own initiative under the separate power conferred by rule 10 (1) (b) of the Rules. Accordingly, it has not considered the parties' submissions in respect of a costs order under rule 10 (1) (b) of the Rules.
- 2.5 Rule 10 (6) of the Rules provides that the amount of costs to be paid pursuant to an order under rule 10 (1) (c) may be ascertained by (a) summary assessment by the Tribunal; (b) agreement of a specified sum by the parties; (c) detailed assessment if not agreed. If the costs are to be assessed under

(c) then rule 10 (7) of the Rules provides that a party may apply to the County Court in England and Wales for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on an indemnity basis.

3. The Parties' Representations

3.1 The Appellant's counsel made representations as follows:

A. The Appropriate Exercise of the Tribunal's Power

3.2 It was submitted that the Tribunal's costs jurisdiction under both rule 10 (1) (b) and rule 10 (1) (c) was engaged by the unreasonableness of the Respondent in making its original decision and in defending the appeal.

3.3 It was further submitted that "*unreasonable*" is a common English word needing no legal definition and should not be interpreted legalistically by the Tribunal as meaning "*Wednesbury*"¹ unreasonableness and that the Tribunal's findings supported a conclusion that the decision to remove the Appellant was unreasonable, for the reasons stated in the Tribunal's decision. Furthermore, if the Respondent's officers had not behaved unreasonably, it was highly unlikely that the Respondent's Board would have made a decision to remove the Appellant.

3.4 Finally, it was submitted that in exercising its discretion to award costs the Tribunal should take into account that the Respondent's conduct breached the Appellant's human rights under Article 8 ECHR and further that the proceedings have taken a great toll on his health.

B. The Appropriate Basis for Assessment

3.5 The Appellant's counsel addressed the question of quantum of costs at length in his submissions. The Tribunal had in fact invited representations as to the appropriate basis for assessment only and not on quantum. The Tribunal has interpreted these submissions as meaning that the Appellant wishes the Tribunal to undertake its own summary assessment of costs. The Tribunal notes that the Appellant was represented pro bono for part of the proceedings but that he incurred legal costs for some other aspects of his appeal.

3.6 In response to the Respondent's submissions, the Appellant's counsel further submitted that:

- (i) If the Tribunal were minded to adopt a *Wednesbury* definition of the term "*unreasonable*" as the Respondent suggested, then the Respondent had adopted too narrow an approach to the *Wednesbury* principle in its submissions, having in particular failed to take into account the body of judicial interpretation of *Wednesbury* unreasonableness following the enactment of the Human Rights Act 1998;

¹ Associated Provincial Picture Houses Ltd v *Wednesbury* Corporation [1948] 1 KB 223

- (ii) That the Respondent was not entitled to refer the Tribunal to Hansard in the absence of an ambiguity in the Rules in the Pepper v Hart² sense.

3.7 The Respondent's counsel made representations as follows:

A. The Appropriate Exercise of the Tribunal's Power

3.8 It was submitted that the Tribunal's costs jurisdiction was not engaged in relation either to rule 10 (1) (b) or (c). The Respondent's decision to remove the Appellant was one that could reasonably have been made, notwithstanding the Tribunal's findings on particular issues, especially as the Tribunal had found misconduct and mismanagement proven on several grounds. The Tribunal's costs jurisdiction under rule 10 (1) (c) of the Rules arises if the "*decision, direction or order*" of the Respondent was unreasonable. In this case, it was the Respondent's *order* under s.18 (2) (i) of the Charities Act 1993 which was appealed and the Tribunal therefore had no jurisdiction to consider whether the Respondent had acted unreasonably towards the Appellant in its conduct prior to its making of that order. It followed, in his submission, that the Tribunal in conducting a rehearing should not concern itself with the manner in which the Respondent had reached its original decision. (He conceded, however, that the Tribunal was entitled to consider the manner in which the Respondent had reached its decision when weighing up the evidence presented to it and making findings of fact).

3.9 Counsel submitted that the Tribunal must compare the order the Respondent had made with its own findings of fact and decide whether the order should be viewed as unreasonable in the light of the Tribunal's own findings. As the Tribunal had found misconduct and mismanagement by the Appellant (although it did not go on to find that the misconduct and mis-management justified his removal) it could not now be said that the Respondent's order was unreasonable in the light of the Tribunal's findings. It follows that if the Respondent could reasonably have removed the Appellant on the grounds where misconduct and mismanagement had been established, the Tribunal should not consider whether the order made had been unreasonable in respect of the other grounds.

3.10 He submitted that the word "*unreasonable*" should be interpreted by the Tribunal in the *Wednesbury* sense, as meaning that the Respondent could not reasonably have made the order it did. He asked the Tribunal clearly to define the term "*unreasonable*" for the purposes of rule 10 (1) (c) before reaching a decision as to costs. Further, he submitted that proportionality is one aspect of reasonableness, but that notwithstanding the Tribunal's findings, the Respondent could reasonably have concluded that the removal of the Appellant was proportionate to the legitimate aim of protecting the charity's property.

3.11 Counsel argued that, in any event, the Tribunal must consider as a matter of discretion whether to award costs, because rule 10 says that the Tribunal "*may*" make such an order. The Respondent could have made an order that had been wrong (because of an error of fact or law) but that did not necessarily mean it had been unreasonable. He argued that the Tribunal

² [1993] AC 593

should exercise its discretion against making a costs order, inter alia, because the Respondent had succeeded on a number of issues and also because the Appellant's failure to give evidence (or to tender certain witnesses for cross-examination) had deprived the Tribunal of the opportunity to get at the "whole truth" of the matter.

- 3.12 He further submitted that the power of the Tribunal to award costs against the Respondent should be interpreted in a manner that is consistent with parallel costs regimes in relation to other regulatory bodies (as described in the Supreme Court Practice 2009 paragraph 44.3.8.1) and should also be balanced by the absence of a power to award costs against an unsuccessful Appellant merely because the appeal fails. The Respondent also provided the Tribunal with extracts from Hansard, reporting what was said in Parliament about the Tribunal's costs jurisdiction prior to the enactment of the Charities Act 2006, which he argued should be relied on by the Tribunal as an aid to the interpretation of its powers.

B. The Appropriate Basis for Assessment

- 3.13 The Respondent submitted that the Tribunal should first decide whether to make a costs order at all; if so, then it should consider whether the order should be on a standard or indemnity basis; then it should consider whether to undertake a summary assessment of the costs itself or to order detailed assessment by the County Court, if not agreed. The Respondent finally submitted that the Tribunal should follow the usual practice in Civil Proceedings of directing a detailed assessment in any case lasting more than a day (with reference to CPR part 44, PD para 13.2).

The Tribunal's Ruling

- 4.1 The Tribunal has considered the parties' arguments most carefully. It is grateful to both counsel for their detailed submissions, especially as this is the first time that the Tribunal has considered exercising its power to award costs under rule 10 (1) (c) of the Rules.
- 4.2 The Tribunal now concludes that it should not make a costs order against the Respondent under rule 10 (1) (c) of the Rules for the following reasons:
- (i) The Tribunal accepts the Respondent's argument that the Tribunal's power to award costs arises where the Respondent's *order* (rather than its conduct leading up to the making of the order) was unreasonable. It follows that although the Tribunal was critical of the conduct of the Respondent's inquiry in relation to the Appellant, this fact alone would not be an appropriate basis for making a costs order under rule 10 (1) (c);
 - (ii) The Tribunal has adopted the ordinary meaning of the word "*unreasonable*" for the purpose of interpreting rule 10 (1) (c) of the Rules, 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.
 - (iii) The Tribunal, having found that misconduct and mismanagement by the Appellant had been established in relation to several of the

grounds, now concludes that the Respondent's order to remove him was not unreasonable in the sense of being an irrational response to those findings. Although the Tribunal's own conclusion was that the misconduct and mismanagement it had found did not make it necessary or desirable for the Respondent to remove the Appellant in order to protect the property of the charity, it does not now take the view that the Respondent's order was unreasonable (in the sense of being an irrational response to the proven misconduct and mismanagement) in all the circumstances. Accordingly the Tribunal finds that its power to award costs under rule 10 (1) (c) is not engaged.

(iv) The Tribunal concluded that it was not assisted by the extract from Hansard provided by the Respondent in the absence of a Pepper v Hart-type ambiguity in the Rules.

4.3 In the circumstances, it is unnecessary for the Tribunal to rule on the question of the appropriate means of assessment of costs in this case.

Signed:

Date: 10 December 2009

Alison McKenna, Principal Judge

Stephen Claus, Tribunal Judge

Susan Elizabeth, Tribunal Member