THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 56 OF 2012

BETWEEN	**AXIS INTERNATIONAL LTD.**	**PLAINTIFF**
AND	**THE CIVIL AVIATION AUTHORITY OF THE CAYMAN ISLANDS (CAACI)**	**1ST DEFENDANT**
AND	**CAYMAN ISLANDS HELICOPTERS LTD. (CIHL)**	**2ND DEFENDANT**

IN CHAMBERS
THE 6TH NOVEMBER 2014
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: **Mr. Brook-Smith (appearing via Skype video link) instructed by Ms. Kirsten Houghton of Campbells for the Plaintiff**

Mr. Lowe QC instructed by Mr. George Giglioli for the 2nd Defendant

The 1st Defendant not appearing or being represented.

Cost of Judicial Review proceedings - whether regulated party entitled to costs although the regulator is the primary respondent

RULING

1. In this matter Judicial Review proceedings were taken by the Plaintiff Axis against the decision of the CAACI by which the CAACI granted certification for the operation of a heliport by the second defendant CIHL.

2. At first instance Axis was successful but the decision of this Court was set aside on appeal at the instance both of the CAACI and CIHL.

3. The declarations by this Court that the certification of the heliport was *Wednesbury* unreasonable and that the heliport was unsafe, were overruled.

4. The CAACI and CIHL were both successful in their application for costs of the appeal and the CAACI was further awarded its costs of the entire proceedings, including at first instance. However, on the basis that Axis wished to object to an award of costs to CIHL in respect of the proceedings, the Court of Appeal ordered that such arguments be taken before this Court, granted CIHL's costs of the appeal only and adjourned the matter of the costs of the first instance proceedings to this Court.

5. Hence this application.

6. On behalf of CIHL, the primary thrust of Mr. Lowe QC's argument is, of course, that it is for the unsuccessful party to show that some different approach other than the usual that costs follow the event (and so will be awarded to the successful party), should be adopted on the facts of the particular case. This is trite principle but recent authority to that effect was nonetheless cited: *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347 per Dyson J. at p356-6 as approved by Clarke LJ in *Regina (Davey) Aylesbury Vale District Council v Practice Notes [2008] 1 WLR 878.*

7. Here Mr. Brook-Smith QC says that a different approach should indeed be taken by analogy with high judicial authority that has been developed in the case law on cost awards in relation to planning applications.

8. The apogee of the case authorities on this point is that to be found in the House of Lords' decision in *Bolton v Sec. of State for the Environment* [1995] 1 WLR 1176.

9. In *Bolton*, their Lordships were concerned to provide guidance on the question of the appointment of the award of costs for multiple representation in planning appeals coming before the Courts and especially those which proceed all the way up to the House of Lords itself. They felt it desirable to say something about such cases where all too often numerous parties were being represented, including often by leading counsel, yet there was no significant difference between the arguments of those who argued for the Secretary of State (who decided planning matters) and those who opposed his decision.

10. That was notably often the case where a decision of the Secretary of State in favour of the developer was challenged by the Local Authority, and the Secretary of State successfully defended his decision.

11. The practice which had developed of regarding the developer as having a separate interest which he was entitled to protect and so entitled to incur significant costs on appeal at the Local Authority's expense, was doubted by their Lordships. They proceeded to lay down the proper approach in such cases and at p.1178 para E-H of the reported judgment, the following passages appear, those which, by analogy with a planning case, I am urged by Mr. Brook-Smith to adopt here by concluding that CIHL should not be granted a separate award of costs when the CAACI has been granted its costs:

> *"What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and*

longstanding, must never be allowed to harden into a rule. But the following propositions may be supported.

(1) The Secretary of State, when successful in defending his decision, will normally be entitled to the whole of his costs. He should not be required to share his award of costs by apportionment, whether by agreement with other parties, or by further order of the court. In so far as the Court of Appeal in the Wychavon District Council case may have encouraged or sanctioned such a course, I would respectfully disagree.

(2) The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.

(3) A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords, by which time the issues should have crystallised, and the extent to which there are indeed separate interests should have been clarified.

(4) ....”

12. First, I should note my acceptance that that dicta is suitable for adoption as guidance for the approach to the award of costs in Judicial Review proceedings which review the decisions and decision-making processes of a regulatory authority like the CAACI.

13. Accordingly, the regulated party will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard; that is to say an issue not to be covered by counsel for the regulator (here the CAACI); or unless he has an interest which requires separate representation. The mere fact that he is the regulated party will not of itself justify a second set of costs in every case.

14. The question whether CIHL met that threshold test, is an issue which would have presented me with some difficulty in this case, had the Court of Appeal not already resolved it – as I regard its decision to award CIHL its costs of the appeal – to have done in effect.

15. I do not see how I can avoid the conclusion that in so deciding, the Court of Appeal must have been satisfied about the applicability of the test laid down in the *Bolton* case which, I am told, was specifically considered by them; viz: whether CIHL had identified a separate issue or issues on which it was entitled to be heard or had an interest which required separate representation.

16. And the fact that the issues would have crystalized before the Court of Appeal significantly down from those which had been more at large before this Court, cannot mean that CIHL's need for representation before this Court would have been less justified. Obviously the converse would have been the case and this is the

proposition accepted by the House of Lords itself in *Bolton*, where it said that a second set of costs is more likely to be awarded at first instance than on appeal.

17. Accordingly, I proceed on the basis that CIHL's participation in the proceedings at first instance was justified so as to entitle it to an award of costs.

18. But that is not the end of the matter. Mr. Brook-Smith on behalf of Axis further submits that a proportionate order for costs is all that CIHL should be entitled to in this case. In this regard in particular, he points to the time taken and attendant costs that must have been incurred in dealing with four preliminary issues in this matter before the substantive arguments were taken.

19. He submits that on all of those issues the CAACI and CIHL may be regarded as having been wholly unsuccessful and nothing that happened on the appeal affected those outcomes, save that the CAACI, in its award of costs granted in general by the Court of Appeal, will be allowed to recover the costs of the preliminary issues as well.

20. Mr. Lowe says that it would be unfair that CIHL should be treated differently on those issues or any other aspects of the costs but should be granted its costs on the same general terms as was the CAACI.

21. Mr. Brook-Smith however points to the fact that no argument as to the costs of the preliminary issues was raised with the Court of Appeal and so its decision in no way fetters the discretion of this Court in deciding on the appropriate order to make in respect of CIHL on those issues.

22. It is appropriate to note what the preliminary issues entailed. They involved four grounds of objection – joined in both by the CAACI and CIHL – to Axis' application

for Judicial Review, two of which were aimed at striking out Axis' application without a determination on the merits.

23. These two grounds of objection were that Axis had no *locus standi* to bring its application and that it was barred from doing so because of its delay.

24. The other two grounds were procedural – one going to the admissibility of expert evidence in the proceedings and the other seeking to resist the CAACI's chief witness, Mr. Dick, being submitted to cross-examination on the several affidavits which he had filed in the proceedings.

25. Axis was wholly successful on the first three of those objections and on the fourth – the question of cross-examination of Mr. Dick – although no order for his cross-examination was made; Mr. Dick was required to produce yet a further affidavit in which he was required to address the several areas of evidential concerns found to have been properly raised by Axis.

26. That being the context, it is surprising to have been informed that no apportionment of the CAACI's costs of the proceedings was sought from the Court of Appeal.

27. The preliminary objections were hotly contested and took a number of days of the time allotted for the Judicial Review proceedings before this Court. The costs of these would not be insignificant and it is, in my view, appropriate that the question whether they were justified and should be paid as costs following the event of Axis' unsuccessful application, is one that should be considered and which I now consider in relation to CIHL as a successful party.

28. In my view, even if it can be said of CIHL in terms of the authority of the *Bolton* case, that there were separate issues on which it was entitled to be heard not to be

covered by counsel for the CAACI or that it had an interest that required separate representation; neither of those propositions can be accepted in relation to the preliminary objections.

29. My reasons for this conclusion so far as the merits of those objections may be concerned, are already expressed in the ruling delivered on 17 June 2013 and these reasons are also adopted as explaining why it is that I am firmly of the view that CIHL had no justifiable basis either for joining in those objections or for supporting the raising of them by the CAACI.

30. To the extent therefore that CIHL incurred costs in doing so, then to that extent I find that CIHL will not be entitled to recover its costs.

31. In coming to this conclusion I do not seek now to apportion CIHL's quantum of recoverable costs or to make a proportionate order.

32. Rather, the effect of my order will be to require the taxation process to take account of the apportionment in ensuring that CIHL recovers none of its costs incurred in relation to arguments over the preliminary objections. There is no doubt that there is jurisdiction to make such an order, one disallowing or apportioning costs on the issue by issue basis. See FSD Cause: *A.B. Jnr. And Mdme B v M.B. A.B. and others,* judgment delivered on 14th June 2013 citing *Re Elgindata Ltd.* (No 2) [1993] 1 All E.R. 232 and *R v Immigration Board, Ex.p. Kirk Freeport Plc Ltd.* 1996 CILR Note 1.

33. Otherwise than in respect of the issues raised in the preliminary objections, CIHL will be entitled to its costs which are to be taxed if not agreed, on the standard basis.

Hon. Anthony Smellie
Chief Justice

November 6, 2014

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