

Advocate for the Respondent: A M Ozanne
Advocate for the First Intervener: R G Shepherd

Cases, texts and statutes referred to:-

1. The Regulation of Utilities (Bailiwick of Guernsey) Law 2001.
2. Re Elgindata Limited (No. 2) [1992] 1 WLR 1207.
3. Bolton Metropolitan District Council v Secretary of State for the Environment [1995] 1WLR 1176 at 1178G.

Introduction

1. This decision follows my judgment of 24 May 2007 on the reference (“the Reference”) to the Royal Court by the Utilities Appeals Tribunal (“UAT”) under Section 17 of the Regulation of Utilities (Bailiwick of Guernsey) Law 2001 (the “RoU Law”).
2. Cable and Wireless Guernsey Limited (“CWGL”) had sought to institute an Appeal (“the Appeal”) to the UAT against the decision of the Director General of the Office of Utility Regulation (“OUR”) to award a 3G Licence within the Bailiwick to Guernsey Airtel Limited (“GAL”) and to refuse the application of CWGL for a 3G Licence. CWGL did not commence the Appeal within the statutory period and in the Reference, I decided that the UAT did not have the power to extend the period of fourteen days within which an appeal had to be instituted under Section 15 for the RoU Law. I concluded that the Appeal was a nullity and/or otherwise incapable of proceeding to determination by the UAT.

The Cost Applications

3. The applications before me concern the costs of the Appeal and the costs of the Reference, each of which I will have to consider separately.
4. CWGL are applying for Orders that:-
 - i) The OUR shall pay CWGL its costs of and incidental to the Reference on a recoverable basis or on such other basis as I may determine.
 - ii) If I have the jurisdiction to make an Order in respect of the Appeal, that the OUR shall pay CWGL its costs of and incidental to the Appeal on a recoverable basis or on such other basis as I may determine.
5. The OUR seek Orders that:-
 - i) CWGL pay its costs of and incidental to the Reference on a recoverable basis or on such other basis as I may determine.

- ii) OUR's costs of and incidental to the Appeal be paid by CWGL on a recoverable basis or such other basis that I may determine.
6. GAL seeks an Order that CWGL pay its costs of and incidental to the Reference on a recoverable basis or such other basis as I may determine.
7. Initially, CWGL and GAL were each seeking an Order that the UAT also be liable to pay their costs on a joint and several basis. Prior to the hearing, each of them decided not to pursue any claim against the UAT whose Advocate therefore did not appear at the hearing but remained available to assist the Court if required (which was not necessary).

The Costs of the Reference

8. Advocate Ozanne, on behalf of the OUR, has helpfully drawn my attention to a decision of the English Court of Appeal which set out the principles applicable to determining questions of costs. In *re Elgindata Limited (No. 2) [1992] 1 WLR 1207* Nourse L. J. said at page 1214 A:-

“The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) the general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs.”

9. Before applying those principles to this case, I need to make some observations about the UAT and the Utilities Appeals Panel (“UAP”).
10. The Reference to the Royal Court was made by the UAT under Section 17 of the RoU Law having been prompted to do so by GAL. The UAT instructed Advocate Davies who helpfully put the matter before the Court with appropriate supporting factual evidence and documentation. Having done so, the UAT adopted a neutral stance, but Advocate Davies has remained available to assist the Court. The UAT is not seeking any Costs Order and none of the other parties are seeking any costs against the UAT. Their reason for not doing so is apparently that they have concluded I would not have power to make an order against the UAP or the UAT. That is because; firstly I found the UAT was not validly constituted; and secondly the legal basis for both the UAP and the UAT has been repealed by the Regulation of Utilities (Bailiwick of Guernsey) (Amendment) Ordinance 2007. The saving in Article 17 of that Ordinance for extant appeals would not apply in this case because of my finding that the Appeal was not validly instituted.

11. CWGL appears to have considered whether costs could be recovered against a third party, namely the individual members of the UAT, but has decided not to make any such application. I have not been told whether CWGL, or any other party, considered applying for costs against the Department for Commerce and Employment. (The decision of the Director General of the OUR not to follow the procedure envisaged in the legislation and instead to forward the appeal summons direct to the Department which I criticised in my Judgment was, according to the Director General, made on the instructions of the Department).
12. On the Reference, it is OUR and GAL who may consider themselves the successful parties. I have to decide whether to disallow their costs because of circumstances which would justify a departure from the normal order that costs follow the event.
13. Advocate Hay argues, on behalf of CWGL, that it acted at all times in good faith and in accordance with directions issued by the UAT. He says it would be unjust to penalise CWGL in costs for having followed what now turns out to be an *ultra vires* decision of the UAT. CWGL criticises the UAT for its failure to take legal advice to ensure it was acting within its powers. I fully accept that CWGL acted in good faith at all times. It must feel very aggrieved that it has been denied the opportunity to appeal the OUR's decision on its 3G licence application. However, in considering the costs for the Reference, the conduct of the parties in relation to the Reference is relevant but I can not have much regard to matters that occurred in the conduct of the Appeal.
14. A further argument advanced by CWGL is that the OUR should not be allowed its costs against CWGL, especially in the light of a change in the position of the OUR. In a letter dated 14 September 2006 the OUR said that the UAT had no discretion to extend time but nevertheless it indicated it "*will not raise any objection to any appeal being instituted within twenty-eight days*". I found CWGL's argument to be initially attractive. However, on further reflection I am not persuaded. Firstly, the 14 September letter was not seen by CWGL until 13 February 2007 so, CWGL cannot claim to have relied upon the contents of the letter. Secondly, when the letter was written, it is highly unlikely the OUR had in mind the possibility of a reference to the Court. I find it difficult to construe the letter as an undertaking that the OUR would remain neutral on the Reference. In any event, I do not consider it would have been appropriate for the OUR to remain neutral on the Reference. Indeed, I am grateful to Advocate Ozanne for the submissions she made on its behalf.
15. CWGL also argue that it should not be ordered to pay the costs of both GAL and OUR. At most, only one set of costs should be awarded against it. CWGL relies upon principles set out by the House of Lords in *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1WLR 1176 at 1178G concerning the costs on a planning appeal. The Secretary of State can expect to recover his costs if he successfully defends an appeal, but the House of Lords held that a developer would not

normally be allowed his separate costs, unless he is defending a separate issue. I do not regard that as an analogous situation. In my view, both the OUR and GAL were proper parties to the Reference. Indeed, I believe that at a very early stage GAL should have received copies of the letters in which an extension of time was discussed. That is because CWGL was seeking the revocation of GAL's 3G licence and hence GAL would have been a proper and necessary party to the Appeal. So, I can see no bar to both GAL and the OUR recovering their separate costs of the Reference from CWGL.

Costs of the Appeal

16. CWGL has questioned whether the Royal Court has the power to make any Order in respect of the costs of the Appeal. At the moment, I will assume that I do have such power.
17. The Appeal was never argued to a conclusion and as a result of my findings on the Reference, it will never proceed. Consequently, neither party has been successful on the merits of the Appeal. CWGL has not had the opportunity of arguing a substantive case and the OUR has been unable to defend its decision.
18. I have looked at all the circumstances of the case before deciding where the burden of costs should fall. I have reminded myself of the criticisms I made of both parties and do not propose to restate those criticisms here. In the light of those criticisms it would not be fair if either CWGL or the OUR had to pay the costs incurred by the other in connection with the Appeal. So, I make no Order in respect of the costs of the Appeal.
19. I therefore do not need to decide whether I have the power to make an Order in respect of the Appeal costs but I make the comment that this is a very unusual situation. It is not surprising that the Royal Court has no statutory power to make an Order in respect of an appeal which was not validly commenced, in circumstances where the UAT had not been validly constituted and in the absence of a first instance decision from the UAT as to who should pay the costs,. It is therefore more than probable that Counsel are correct when they say I have no such statutory power.
20. If it was necessary for me to decide whether I do have the power, I would be looking at the inherent jurisdiction of the Royal Court. The Court has wide inherent powers. I would be very reluctant to find that the Court does not have the power under its inherent jurisdiction to make costs Orders in respect of the Appeal but I do not need to reach a conclusion as I have decided that I would make no Order even if I had the power to do so.

Conclusion

21. I order CWGL to pay to GAL and the OUR their costs of and incidental to the Reference on the recoverable basis. I make no order in respect of the costs of the Appeal.