THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE
BEFORE JUSTICE SIR RICHARD FIELD
IN THE MATTER OF AN APPEAL UNDER ARTICLE 37(1) OF DIFC LAW No. 1 of 2007 (THE DATA PROTECTION LAW) AND JUDICIAL REVIEW UNDER PART 42 OF THE COURT RULES

BETWEEN

THE DUBAI FINANCIAL SERVICES AUTHORITY

Appellant in CFI 051/2018
Applicant in CFI 085/2018

and

THE COMMISSIONER OF DATA PROTECTION

First Respondent in CFI 051/2018 and CFI 085/2018

ANNA WATERHOUSE

Second Respondent in CFI 051/2018
Interested party in CFI 085/2018

ORDER WITH REASONS OF JUSTICE SIR RICHARD FIELD

UPON considering the judgment herein issued on 12 August 2020 replacing the judgment issued on 1 June 2020

AND UPON considering the submissions of the Appellant (the **"DFSA"**) in CFI 051-2018 (the **"statutory appeal"**) and the Claimant in CFI-085-2018 (the **"Judicial Review"**) and the responsive submissions of the First Respondent in the statutory appeal (the **"Commissioner"**) and in the Judicial Review, as to the order as to costs that should be made in those proceedings

AND UPON the applications by the Commissioner and the Second Respondent (**"Ms Waterhouse"**) for permission to appeal the order made in consequence of the judgment issued on 12 August 2020 allowing the DFSA's appeal against the decision of the First Respondent dated 20 June 2018 (the **"Contravention Decision"**)

AND UPON considering the submissions of the Commissioner, Ms Waterhouse and the DFSA in respect of the said applications for permission to appeal

AND UPON noting that neither the DFSA nor the Commissioner seeks an order for costs in either of the proceedings against Ms Waterhouse in the statutory appeal and the Interested Party in CFI-085-2018

IT IS HEREBY ORDERED THAT:

1. There should be no order as to costs in respect of the Immediate Judgment Application.

2. Save as aforesaid, the Commissioner must pay 70% of the DFSA's costs in the statutory appeal and 100% of the DFSA's costs in the Judicial Review proceedings.

3. The applications by the Commissioner and Ms Waterhouse for permission to appeal the order made in the statutory appeal are dismissed on the ground that Court of Appeal has no jurisdiction to hear the proposed appeals.

Issued by:
Nour Hineidi
Deputy Registrar
Date of issue: 28 October 2020
At: 12pm

SCHEDULE OF REASONS

Costs

The applicable Rules of Court

1. RDC 38.6, 38.7 and 38.8 provide:

Rule 38.6

Subject to Rules 38.15 to 38.16 the Court has a discretion as to:

(1) whether costs are payable by one party to another;

(2) the amount of those costs; and

(3) when they are to be paid.

Rule 38.7

If the Court decides to make an order about costs:

(1) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(2) the Court may make a different order.

Rule 38.8

In deciding what order if any to make about costs, the Court must have regard to all the circumstances, including:

(1) the conduct of the parties;

(2) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(3) any payment into Court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not a Part 32 offer.

2. It is common ground that there should be no order as to costs on the applications for immediate judgment made by the Commissioner in the statutory appeal and the Judicial Review (the **"Immediate Judgment Application"**).

The DFSA's submissions

3. As to the remainder of the costs in the statutory appeal proceedings, whilst acknowledging that it succeeded on but one of its eight grounds of appeal (the disproportionality ground entitled "the effect of Article 17 of the Data Protection Law [the **"DPL"**]), the DFSA submits that, having succeeded overall in the appeal, the Commissioner should pay its costs on a 100% basis in both sets of proceedings. The DFSA maintains that it succeeded in part in respect of its separate Article 39 ground of appeal and the preponderance of the evidence and argument in the appeal was related to that ground and the Article 17 ground on which it succeeded. The DFSA further submits that the grounds that failed were short points that were dealt with briefly in the judgment.

4. As to the remainder of the costs of the Judicial Review proceedings which the Court did not determine having allowed the statutory appeal, the DFSA contends that it should have the costs of those proceedings because they were properly brought, the DFSA having had no alternative but to bring both sets of proceedings in order to challenge the Contravention Decision and the directions made by the Commissioner in the light of that decision. Following the Court's ruling that an appeal under Article 47 was limited to a finding that there had been a contravention of the DPL, the DFSA had no alternative but to challenge the directions made by the Commissioner in Judicial Review proceedings.

5. In support of its claim that it should be awarded 100% of the remainder of its costs, the DFSA further submits that pursuant to RDC 38.8 (1) the Court should take into account the Commissioner's conduct of the litigation down to a case procedure meeting on 6 February 2019 before the Deputy Registrar and the issuance of the Court's ruling on the Immediate Judgment Applications. In the submission of the DFSA, this conduct created a series of procedural difficulties that made the proceedings more complex, protracted and expensive than would otherwise have been the case.

6. The conduct of the Commissioner criticised by the DFSA is as follows:

(a) The Commissioner's rejection of the opportunity provided by the DFSA's application for an internal review dated 4 July 2018 to resolve matters without the need to go to Court.

(b) The Commissioner's failure to confirm that the 30 day period in which an Article 47 appeal must be brought would not start until after the Commissioner had completed the review of the Contravention Decision requested by the DFSA; and (ii) his decision to extend the time in which Ms Waterhouse had to serve submissions on the request for a review, thereby (iii) compelling the DFSA to commence its appeal before the outcome of the review.

(c) The Commissioner's attempt on 6 August 2018 to avoid conducting the requested review on the ground that the DFSA had now started its appeal.

(d) The Commissioner's questioning in early August 2018 whether the appeal was properly on foot and his raising of a number of procedural challenges to the appeal, including the absence of leave, all of which led to a CMC in August 2018 and protracted correspondence in November and December 2018.

(e) The Commissioner's decision not to consider the substance of the review application on the ground that it was more suited for appeal or Judicial Review, which left the DFSA with no choice but to continue the proceedings to challenge the Contravention Decision.

(f) The Commissioner's objection when the DFSA commenced its Judicial Review claim notwithstanding he had stated in a letter dated 6 November 2018 that the proper process for challenge of the direction made in the Contravention Decision was an application for Judicial

Review.

(g) The Commissioner's assertion that the granting of permission to the DFSA to bring its Judicial Review claim was irregular.

(h) The Commissioner's opposition to the consolidation of the appeal and the Judicial Review proceedings.

(i) The Commissioner's application for immediate judgment in respect of aspects of the appeal and the Judicial Review before he had even filed any defence or evidence in either of the proceedings

7. The DFSA also criticises the Commissioner for not having queried the absence in the draft first judgment of any reference to his submissions served after the hearing which criticised the way in which the DFSA had approached its obligation to give discovery of documents to Ms Waterhouse. The draft judgment had been sent on a confidential basis to the parties with a request that counsel send a list of corrections and other obvious errors to the Court so that changes could be incorporated in the handed down judgment. The Commissioner first raised the absence of consideration of his post hearing submissions when he advanced it as a ground of appeal in his application for permission to appeal the first judgment. The DFSA submits that if the Commissioner had drawn to the Court's notice the failure to refer to these important submissions the Court would have dealt with them in the first approved judgment thereby avoiding the consensual withdrawal of the first judgment to allow for consideration of the overlooked submissions in the replacement judgment.

The Commissioner's submissions

8. The Commissioner's primary case is that having acted throughout in accordance with his regulatory functions under the Articles 7, 26 (2) and 33 (1) DPL, no order as to costs should be made against him in either of the proceedings. In support of this submission, he cites City of Bradford Metropolitan District Council v Booth [2000] EWHC 444 (Admin), a decision of the Divisional Court of England and Wales and Baxendale-Walker v The Law Society [2006] EWHC 643 (Admin), a decision of the Administrative Court of England and Wales.

9. In Booth, the appellant Council appealed by way of a case stated by the West Yorkshire Magistrates against an award of costs made by the magistrates following a successful appeal by the Respondent against the non-renewal by the Council of his private hire operator's licence. The Council had declined to renew the Respondent's licence on the ground that he had been in breach of a condition of the licence. On the appeal by way of a complaint to the magistrates, the magistrates found the Respondent had not breached the condition of his licence and renewed the licence. Pursuant to section 64 (1) of the Magistrates Court Act 1980, the magistrates court had power in its discretion to make such order as to costs on making the order for which the complaint is made to be paid by the defendant to the complainant as it thinks just and reasonable. It was common ground that the Council had not acted unreasonably or in bad faith.

10. Giving the judgment of the Court, Lord Bingham CJ said that the proper approach in deciding whether costs had been properly awarded under section 64 (1) could be summarised in the following three propositions:

1. Section 64 (1) confers a discretion upon a magistrates' court to make such order as to costs as it thinks just and reasonable. That provision applies both to the quantum of the costs (if any) to be paid, but also to the party (if any) which should pay them.

2. What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event but need not think so in all cases covered by the subsection.

3. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.

11. The Court held that the justices had misdirected themselves in relying on the principle that costs follow the event and in thinking that the reference in s.64 (1) to the order being just and reasonable applied to quantum only. In the ordinary course the matter would have been referred back to the magistrates to reach a decision applying the guidance provided by the Court but since the Council were not seeking to recover the costs paid to the Respondent, the Court made no further order.

12. In Baxendale-Walker, the Law Society appealed an order made by the Solicitors Disciplinary Tribunal that it should pay 30% of the claimant's costs on the ground that one of the allegations made against the claimant to show that he had been guilty of conduct unbefitting of a solicitor had been dismissed. In the course of giving judgment allowing the appeal, Moses LJ said:

43. The question thus arises as to whether the order that the Law Society should pay a proportion of the appellant's costs and that no costs should be paid by the appellant was correct, as a matter of law. The principles, in relation to an award of costs against a disciplinary body, were not in dispute. A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged.

44. Those principles can be derived from a number of cases summarised by Jackson J. in Gorlov v Institute of Chartered Accountants [2001] EWHC Admin 220 at Part 4, paragraphs 30-35 (and see, in particular, the three principles distilled by Lord Bingham of Cornhill CJ in City of Bradford Metropolitan District Council v Booth [2000] COD 338).

45. In the instant appeal, in my view there was no basis for the order made by the Tribunal. The only ground on which it relied was that the

appellant had been successful in his defence of the first allegation. That was not a sufficient ground to order the Law Society to pay any of his costs. There was no finding that the allegation was misconceived, without foundation or born of malice or some other improper motive. In those circumstances the order was without foundation. The mere fact that resistance to the first allegation required greater expenditure in time and money was not a basis for making the Law Society pay any of the appellant's costs.

46. Further, the order is silent as to the costs consequential on the Law Society's success in relation to the second allegation. There was no basis whatever for not ordering the appellant at least to pay the costs in relation to that allegation. Yet the Tribunal is silent as to those costs.

47. Accordingly, I would rule that the Tribunal was wrong to make the order that the Law Society pay 30% of the appellant's costs. It did not identify any proper basis for doing. so.

13. The Commissioner cited an article in [2020] Irish Judicial Studies Journal, Vol 4 (1) by Ms Justice Deirdre Murphy, a Judge of the Irish High Court, and two Judicial Assistants and a Judicial Intern, in support of a submission that, where emanations of the state litigate against each other, there is a particular responsibility to act as "model litigants" and to seek to resolve outstanding issues without recourse to the Courts. The Commissioner contends that, ignoring this responsibility, the DFSA wrongly concluded that it was exempt from the operation of the DPL and made exaggerated claims as to the cost of compliance and refused to engage with the Commissioner as to the possibility of a limited search of the documents holding the relevant personal data of Ms Waterhouse. In the event, the Commissioner reduced the search that had to be undertaken to a level below that sought in Ms Waterhouse's Subject Access Request (the **"SAR"**) and drew the DFSA's attention to its right to seek a review of the Contravention Decision, only to be met by the DFSA's insistence that it need not conduct any search or, alternatively, a minimal one. In the Commissioner's view, the DFSA was a well-funded public body and would not suffer significant prejudice were it not to receive its costs.

14. The Commissioner next submits that since the DFSA succeeded in the appeal on the ground of disproportionality whereas its sole ground for rejecting the SAR - exemption under Article 39 (2) DPL - was dismissed by the Court, the DFSA ought not in justice to be awarded its costs pursuant to Article 45 (5) of the DIFC Court Law[1] .

1 "Except as provided for by any other law, the award of costs is at the discretion of the DIFC Court and may be waived in the interests of justice".

15. Finally, the Commissioner contends that the DFSA ought not to be awarded any costs because it had thrown into its case a plethora of additional grounds (the "kitchen sink") none of which had succeeded and which had taken up a large part of the parties' preparations and a large part of the hearing before the Court. In the alternative, if some order of costs was to be made in favour of the DFSA, the order should reflect the fact that the DFSA succeeded on only one of its eight grounds and should not exceed a direction to pay 50% of the DFSA's costs.

Discussion and decision

16. Article 45 (1) of the DIFC Court Law provides:

"Except as provided by any other Law, the DIFC Court may award costs in any proceedings before the DIFC Court including proceedings dismissed for want of jurisdiction."

17. In the exercise of this power the Court must have regard to all relevant matters and apply the Rules of Court that deal with the topic of costs.

18. In my judgment, in the exercise of the discretion conferred by Article 45 (1) and RDC 38.6, it is open to the Court to award costs against the Commissioner in both sets of proceedings save in respect of the costs incurred in the Immediate Judgment Applications.

19. I do not accept the Commissioner's submission that no costs should be awarded against him because he was acting in accordance with his regulatory functions under Articles 7, 26 (2) and 33 (1) of the DPL. In support of this submission, the Commissioner laid heavy stress on the observation of Moses LJ in Baxendale-Walker that "[a]bsent dishonestly or a lack of good faith, a costs order should not be made", but this goes wider than Lord Bingham's third principle in Booth which is the more authoritative pronouncement and contemplates the possibility that costs could be awarded in appropriate circumstances against a regulatory authority even though it had acted honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty.

20. Further, as pointed out by Mr Pitt-Payne QC for the DFSA in his reply submissions, Article 45(3) of the DIFC Court Law exempts the DFSA from having to pay court fees for proceedings initiated under the Regulatory Law, or DIFC Law administered by the DFSA or in the course of carrying out its regulatory functions under any other DIFC Law, but there is no similar provision in respect of the Commissioner, one of whose statutory functions is initiating proceedings for contraventions of the DPL before the Court[2] . Mr Pitt-Payne also noted that, under Article 45 (3) and Article 45 (5) of the DIFC Court Law, it is expressly provided that the Court may at its discretion award costs against the DFSA which is inconsistent with the Commissioner's submission that generally costs ought not to be awarded against a regulatory body.

2 See Article 26 (3) of the DPL and Article 46 (3) (d) of the DPL 2020.

21. It is also important to appreciate that the proceedings in Booth and Baxendale-Walker were on a small scale and the costs involved were relatively small, whereas the instant proceedings can only be described as heavy and expensive High Court litigation which has been tenaciously fought by both sides at very considerable cost. In these circumstances, I conclude that to exempt the Commissioner from any liability in costs would be contrary to what fairness and justice demands.

22. With respect to Counsel for the Commissioner, I found the article in [2020] Irish Judicial Studies Journal, Vol 4 (1) by Ms Justice Deirdre Murphy et al to add little if any weight to the Commissioner's case. The theme of the article is that the Irish High Court and Court of Appeal are swamped with litigation and complex legislation with the state being the most frequent litigant and accordingly provision should be made requiring disputes where the state is a party to be determined by alternative dispute resolution or the state should consider adopting the Australian policy of the "State as Model Litigant".

23. The DIFC Courts are busy but they are far from being swamped by litigation and complex legislation with organs or agencies of the Emirate of

Dubai and the UAE and/or the DIFC Authority or the DIFC regulatory bodies being the most frequent litigants. Unlike the situation in Ireland, therefore, there is no pressing need to oblige regulatory bodies to be limited to alternative dispute resolution procedures to resolve disputes to which they are party or to adopt the Australian policy of the "State as Model Litigant". Instead, it is for the DIFC Courts to exercise the discretion as to costs conferred by Article 45 (1) of the Court Law and RDC 38.6, having careful regard to all relevant matters including the fact that one or both parties are regulatory bodies. There may well be cases where the regulatory element is such that the Court may decide not to order costs against a regulatory party, but this is most definitely not one of them.

24. I also reject the Commissioner's submission that the Court should decline to order costs against him on the ground that proportionality was not advanced in the DFSA's rejection of the SAR or before the Commissioner when the DFSA refused to comply with the SAR. I do so because, whilst it is true that in its letter to Ms Waterhouse rejecting the SAR, the DFSA made no reference to proportionality and nor was proportionality raised in the DFSA's first round of submissions to the Commissioner, after the Commissioner had concluded that the DFSA's defence based on the Article 39 (2) exemption was not made out, he invited the DFSA to serve "clarificatory" submissions on proportionality, which it duly did (see paras 83 to 93 of the Contravention Decision), with the Commissioner finding (para 108) that the DFSA had not discharged the onus on it to establish that no search of the relevant information was warranted.

25. I accept the DFSA's submission related in paragraph 4 above that in principle it is entitled to be awarded its costs in the Judicial Review claim.

26. I turn now to the question whether the costs to be awarded to the DFSA should reflect a finding that the Commissioner's conduct of the proceedings in the manner alleged by the DFSA was such as to be marked by the quantum of costs ordered to be paid. In my judgment, none of the complaints made by the DFSA of the conduct of the Commissioner after delivery of the Contravention Decision and in the subsequent litigation justifies any increase in the costs that ought to be awarded. The statutory appeal and the Judicial Review claim were the first time such proceedings were initiated in this Court and there were uncertainties as to what procedures had to be complied with. With this in mind, I do not think that the positions taken by the Commissioner in the lead up to the applications for immediate judgment warrant an additional adverse costs award. I also reject the submission that the Commissioner's failure to point out to the Court the omission to deal with his post hearing submissions when compiling a list of "obvious errors" in the draft judgment was conduct that should be reflected in the costs to be awarded. Plainly, it would have been very helpful if the Commissioner had raised the question whether the Court had overlooked his post hearing submissions, and many litigants would I think have done just that, but it is arguable that the absence of any reference in the draft judgment to these submissions did not clearly signify "an obvious error".

27. Finally, I consider whether pursuant to RDC 38.8 (2) the DFSA should be awarded less than 100% of its costs in the statutory appeal in light of the fact that it succeeded on only one of its eight grounds of appeal. In my judgment the costs to be awarded in the appeal should reflect the dismissal of seven of the grounds of appeal although I take into account in the DFSA's favour that its first ground, although it fell at the third and last fence, it nevertheless surmounted the first two fences. I also take into account the fact that much of the lengthy evidence put before the Court was relevant to the successful disproportionality ground and grounds 2 - 8 took up relatively little court time.

28. Doing the best I can to arrive at an appropriate reduction I have reached the conclusion that the Commissioner should pay 70% of the DFSA's costs of the appeal and 100% of the DFSA's costs of the Judicial Review claim.

Permission to appeal

29. The DFSA and Ms Waterhouse apply for permission to appeal the decision in the statutory appeal on four grounds pursuant to RDC 44.6.

30. The DFSA contends that the Court of Appeal has no jurisdiction to hear the proposed appeals, given that the proposed appeals are from an appeal to the CFI.

31. RDC 44.153 and 44.154 provide:

> **No Second Appeals**
>
> 44.153 No appeal lies from a decision of the Court of First Instance or the Court of Appeal on an appeal.
>
> **Reopening of Final Appeals**
>
> 44.154
>
> The Court of Appeal or the Court of First Instance will not reopen a final determination of any appeal unless:
>
> (1) it is necessary to do so in order to avoid real injustice;
>
> (2) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (3) there is no alternative effective remedy.

32. The Commissioner submits that his appeal against the decision in the statutory appeal would not be a second appeal within RDC 44.153 for the following reasons; (i) he is seeking to appeal the Court's order setting aside the Contravention Decision (the "Order") and is not appealing against the reasons given for the making of that order; (ii) the proposed appeal would be the first time that, as a party, he has been heard by the Court or any other tribunal or decision-making body since he was the decision maker and not a party in the proceedings appealed to the Court of First Instance; (iii) the statutory appeal and the Judicial Review claim were ordered to be consolidated with the result that the Order was made in consolidated proceedings where the same witness statements were relied on and the submissions advanced overlapped, including the proportionality contention and an appeal against the Judicial Review would be a first appeal.

33. In my judgment, the proposed appeals fall full square within RDC 44.154. The fact that the Commissioner was the decision maker whose

decision was appealed to the Court does not change the irrefutable fact that the CFI heard an appeal against the Contravention Decision. Nor does the consolidation of the statutory appeal with the Judicial Review claim take the case outside RDC 44.153. No decision was given on the latter claim and accordingly there is nothing resulting therefrom that can be the subject of an appeal.

34. The Commissioner contends that there is no need for him to make an application under RDC 44.154 since he is bringing a first appeal. There is therefore no application under RDC 44.154 before the Court and even if there were, I would refer it for decision to the Court of Appeal. Ms Waterhouse also makes no application under RDC 44.154.

35. I think that it is appropriate to say that, had I been of the view that the Court of Appeal had jurisdiction to hear the proposed appeals, I would have granted the applications for permission to appeal on the basis that the grounds identified therein had "a real prospect of success"[3], in the sense that they are arguable and not fanciful or merely just arguable.

3 See RDC 44.19 (1).

36. For the reasons I have given in paragraphs 29 - 35 above I refuse the Commissioner's and Ms Waterhouse's applications for permission to appeal.