Neutral Citation Number: [2019] EWHC 684 (Admin)

Cases No: 1032/2015 & 1034/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2019

Before :

MR JUSTICE MOSTYN

- -

Between:

WESTERN SAHARAN CAMPAIGN UK

Claimant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendant

-and-

THE SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

Interested Party

and between:

WESTERN SAHARAN CAMPAIGN UK ("WSC")

Claimant

-and-

THE SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Interested Party

- -
- -

Kieron Beal QC & Conor McCarthy (instructed by **Leigh Day**) for the **Claimant**
Brian Kennelly QC & Paul Luckhurst (instructed by **Government Legal Department**) for the **Defendants**

Hearing date: 14 March 2019

- -

Approved Judgment

Mr Justice Mostyn:

1. This is my judgment on certain issues of costs at the conclusion of this long-running, complex, piece of litigation. Although there was a minor dispute about the terms of one of the declarations to be made by the court that controversy was resolved during the hearing before me, leaving only the issues of costs.

2. The claimant will receive the sum of £66,000 towards its costs for the period up to 27 April 2016. That figure was fixed by a protective costs order made by Mr Justice Walker on 15 May 2015. It was the quid pro quo for the claimant's liability for the defendants' costs, should the claimant have lost, being capped at a much lower figure. It is the maximum sum that the claimant can be awarded for the costs incurred in that period. Although on a quantum meruit basis the claimant's costs in that period would be valued in a higher amount they are, of course, stuck with that figure.

3. The claimant argues that the sum of £66,000 is exclusive of VAT. The defendants disagree. Plainly, the sum does not include VAT. All the figures as to the likely costs placed before Mr Justice Walker (such as hourly charging rates) were quoted without VAT. Mr Justice Walker did his calculations on that footing. The accidental omission of a reference to the figures being exclusive of VAT is something that could, and perhaps should, have been corrected under the slip rule (CPR 40.12).

4. The claimant seeks that it be awarded its costs since 27 April 2016 to be assessed on the standard basis, if not agreed. It does not seek an order for a payment on account. These costs amount to just under £100,000 (excluding VAT). They have been largely, but not exclusively, incurred in the preparation and argument of the issue referred to the Court of Justice of the European Union which I explain below. The defendants resist this application on two grounds. First, they say that the terms of the order made by Mr Justice Walker prevent such an award being made. Second, they say that it would be unprincipled, and unprecedented, for them to be mulcted in costs in respect of proceedings in the CJEU in which they were not the true defendants, and where they did not participate.

5. The background to this case is set out in the judgment of Mr Justice Blake in *R (on the application of Western Sahara Campaign UK) v HM Revenue and Customs* [2015] EWHC 2898 (Admin)[1]. I set out the opening paragraphs of that judgment:

> "1. The claimant is an independent voluntary organisation founded in 1984 with the aim of supporting the recognition of the right of the Saharawi people of Western Sahara to self-determination and independence and to raise awareness of the unlawful occupation of the Western Sahara. It brings two related claims against each defendant pursuant to permission granted by Walker J on 23 April 2015.
>
> 2. Both claims contend that each defendant is acting unlawfully by applying provisions of EU law to matters within their jurisdiction. The Commissioners for Her Majesty's Revenue and Customs (HMRC) are the defendants in the first

[1] www.bailii.org/ew/cases/EWHC/Admin/2015/2898.html

> application where what is challenged is the preferential tariff given on import to the United Kingdom of goods that are classified as being of Moroccan origin but in fact originate from the territory of Western Sahara. The second challenge is brought against the Secretary of State for the Environment and Rural Affairs (DEFRA) in respect of the intended application of the EU-Morocco Fisheries Partnership Agreement to policy formation relating to fishing in the territorial waters of Western Sahara.
>
> 3. Both decisions challenge acts of the European Union in making agreements with Morocco with respect to customs tariffs and fisheries that do not distinguish between goods and activities arising in the sovereign territory of Morocco and the territory of Western Sahara over which Morocco has exercised jurisdiction, in whole or in part, since November 1975. The claimant contends that Morocco has annexed the territory of Western Sahara and claims it as part of its sovereign territory despite decisions of the United Nations and the International Court of Justice (ICJ) that the people of Western Sahara have the right to self determination. Accordingly it is said that Morocco's occupation is in breach of the principles of international law and the Charter of the United Nations.
>
> 4. It is common ground that only the Court of Justice of the European Union (CJEU) has competence to determine the legality of the disputed EU measures. The claimant therefore seeks a reference for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU). The defendants oppose such a reference primarily because they submit that the issues raised by the claimant are matters of public international law that the CJEU will decline to adjudicate on in the present circumstances and the claims should accordingly be dismissed."

6. Notwithstanding spirited opposition by the defendants, Mr Justice Blake granted the reference. Having given his broad indications, he left it to counsel to agree the terms of the order for reference; but full agreement was not possible and there was a yet further hearing to finalise it. He referred four questions to the CJEU. The first two questions concerned the Association Agreement between the EU and Morocco made on 18 March 2000. The first question asked whether the agreement extended to goods produced in the Western Sahara. If the answer to that was yes, the second question challenged the validity of the agreement. The third question asked whether the Fisheries Partnership Agreement between the EU and Morocco made in 2013 was valid having regard to the (non) extent to which it benefited the Sarahawi people. The fourth question asked whether the claimant had standing to challenge the validity of EU legislation.

7. The reference was eventually perfected and was sent to the CJEU in Luxembourg on 27 April 2016. Rather to the surprise of the claimant, the United Kingdom government, although a party to the reference, did not participate in the proceedings

before the CJEU either as a litigant, or as an intervening member state (which is the usual practice). I can well understand the claimant's surprise given the very active opposition by the defendants in this jurisdiction to the claimant's application for judicial review; to its application for protective costs order; and to its application for the reference to the CJEU. However, it has been explained to me by Mr Kennelly QC that this was no accident. The UK government was well aware of the ramifications of this case, but it left the relevant EU institutions namely the Commission and the Council, who after all were the owners (so to speak) of the relevant legislation, to take up the baton and to resist the claim. In the event the intervening parties were the Council of the European Union, the European Commission, the Spanish Government, the French Government, the Portuguese Government and the Moroccan Confederation of Agriculture and Rural Development.

8. On 21 December 2016 the CJEU in *Council v Front Polisario* [2016] EUECJ C-104/16 gave a judgment which completely answered the first two questions referred in this case. That judgment is interesting because it confirmed that Polisario had no standing to make the direct claim that it did (although over many pages the court did answer substantively the questions raised before it). This explains why the claimant in the case before me began a domestic action and then sought a reference. It is well-nigh impossible for a person or body to start a direct action in the General Court of the European Union unless they are directly and individually affected by the decision in question. This test is interpreted strictly. One might have thought that Polisario had a direct and individual interest in the agreements reached by the EU with Morocco and whether they extended to Western Sahara. But the CJEU nonetheless decided that Polisario did not have standing and that its direct application was therefore strictly inadmissible.

9. In the light of the substantive answers given in the Polisario case it was agreed by the parties in the instant case, and confirmed by Mr Justice Blake, that the first two questions which had been referred fell away. Thus, only the third and fourth questions were considered by the CJEU.

10. The hearing took place on 6 September 2017. Advocate-General Wathelet delivered his opinion on 10 January 2018, and the CJEU (Grand Chamber) gave its judgment on 27 February 2018. This was favourable to the claimant. The answer to the third question did not abrogate the fisheries agreement but, rather, interpreted it so that it did not apply to the waters off the Western Sahara. In the light of that answer the court determined that it was not necessary to answer the fourth question.

11. In paragraph 88 of its judgment the CJEU held, using its standard form of words:

> "Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable."

12. As a result of these two judgments of the CJEU the parties have agreed declarations which I am content to make. These state that neither the Association Agreement nor the Fisheries Partnership Agreement encompass either the territory of Western Sahara or the waters adjacent to it. Further there will be a declaration that HMRC erred in

law in not exercising its power to investigate and query the stated place of origin of products originating in Western Sahara and imported into the UK under the country code 'MA' in EUR.1 certificates.

13. It can therefore be seen that the claimant has been completely successful in its litigation in this jurisdiction. Therefore, it seeks to recover its costs of, and incidental to, its claim for judicial review and declaratory relief. It says that its costs in the CJEU were unquestionably incidental to its domestic claim, and these were expressly left open for decision by this court by the CJEU. It says that there is no reason why the normal rule of costs following the event should not operate in its favour and that there is clear authority that such a principle applies in judicial review/declaratory proceedings.

14. The defendant says first that para 4 of the order of Mr Justice Walker dated 8 May 2015 precludes any costs been recovered after the reference to the CJEU was perfected and dispatched to Luxembourg. The order in question reads as follows:

> "…. the defendants' liability, if any, in respect of costs incurred by the claimant in total for the period up to and including the handing down of any judgment in the substantive hearing listed pursuant to paragraph 5 below, together with any questions for a reference for a preliminary ruling to the CJEU which may be settled thereafter… shall not exceed £66,000 in total"

15. The defendants argue that the word "settled" means "adjudicated". Therefore, it is argued that all of the claimant's costs of the reference to the CJEU are encompassed by the protective costs order of £66,000. I completely disagree with this. The word "settled", in the context in which it is used plainly means "drafted and perfected".

16. The defendants next argue that it would be unprecedented and unprincipled for them to be liable for an order for the claimant's costs of the reference to CJEU in circumstances where they were not the true defendant and where they did not participate in the proceedings in Luxembourg. I disagree with the first argument. The fact that the defendant chose to allow the Commission and the Council to argue its case by proxy is to my mind neither here nor there. I do not consider it helpful or relevant for me to have to consider the extent of the interest which any intervening party is seeking to advance or defend in the proceedings before the CJEU.

17. Nor do I consider that the non-participation by the defendants has any relevance to the decision I have to make. Non-participation in proceedings is rarely, if ever, any defence to a claim for costs. It is worth pointing out that had the defendants participated in the reference proceedings to the CJEU, and had the claimant lost in those proceedings, then the claimant would have been liable, in my judgment, for the defendants' costs of the reference proceedings.

18. At the end of the day it seems to me that the decision I have to make is simple. The claimant has succeeded. It has incurred costs in achieving its success. Those costs have included the incidental expense of a reference to the CJEU. Those incidental costs are plainly claimable. They should be awarded in the claimant's favour.

19. That concludes this judgment.