Case Reference: 2250038673

TAHSIN ALAM

-v-

London Borough of Newham

(the Enforcement Authority)

This is an application by the Appellant for a review of the adjudicator's decision who refused the Appellant's claim for costs.

Mr Murray-Smith represents the Appellant. The Authority was not represented.

The first thing to be noted is that the Authority had not supplied any evidence at the appeal stage. The appeal was allowed accordingly. After the costs application was scheduled, the Authority did not respond. The Authority had not responded to the application for a review ether. The consequence of this is that I am not in possession of any evidence or document from the Authority.

Background

The Appellant had received a PCN alleging a parking contravention. Mr Murray-Smith has supplied three documents. There is a copy of the Notice to Owner dated 13 December 24. There is an undated document signed by the Appellant which Mr Murray Smith identifies as formal representations. The Appellant challenged the visibility of the signage. Finally, there is a document from the Authority dated 23 December 2024. Mr Murray Smith says that this is the Notice of Rejection (NOR).

Mr Murray-Smith submits that the NOR was non-compliant with the requirements in the Appeals Regulations in that:

- it asserted that if the payment requested was not received within the 14-day period, a Charge Certificate may be served;
- it claimed that if payment of the Charge Certificate was not made, the Respondent would pursue enforcement proceedings in the County Court and may obtain a warrant for bailiffs to enforce the debt.
- it did not provide information that the recipient had a right to appeal to the parking adjudicator and give the information as required by Regulation 6 (6)(a).

At first glance, one cannot be sure that the letter was a NOR. It was not clearly identified as an NOR as most NORs do. The document suggested that the Appellant had paid £1 towards the penalty and the Authority was pursuing a balance of £64. The letter could have been no more than a reminder for payment. All of Mr Murray-Smith's argument above would have been invalid. Then again, this could mean that the Authority had failed to respond to representations made in accordance with Regulation 5.

As the Authority had not taken the point, I will consider this application as if the letter of 23 December 2024 was intended to be an NOR.

The contents of the NOR clearly fell short of requirements under Regulation 6.

The Appellant appealed to the adjudicator on or about 24 January 2025. The Appellant, who had instructed Mr Murray Smith by the time the appeal was made, said in his Notice of Appeal that he relies on his formal representations and denies the contravention.

So not only has the Appellant chosen not to make the NOR point part of his appeal, he has in effect excluded the point from the Notice of Appeal because an NOR was not in existence when he made his formal representations.

The Authority offered no evidence on 17 February 2025, and the adjudicator allowed the appeal. The point was first raised by Mr Murray-Smith in an email to the Authority dated 20 February 2025.

The power to review a cost decision

Paragraph 13 of Schedule 1 to the Appeals Regulations makes it clear that the award of costs is discretionary and an adjudicator must not normally make an order awarding costs and expenses.

Paragraph 12 (1)(b) of Schedule 1 sets out the grounds for a review.

A combination of the two is that the legislation sets a very high bar when it comes to awards of cost, and whether such a high bar is reached is a matter for the adjudicator and seldom challengeable by way of review.

The application for costs

Mr Murray-Smith submits that his application is pursuant to Paragraph 13 (2)(b) namely that that the disputed decision was wholly unreasonable.

A disputed decision is means the decision appealed against (See paragraph 1 (2) of Schedule 1.

Mr Murray Smith submits that the disputed decision was the way in which the NOR was composed and that it was wholly unreasonable. I do not agree with either limb of this submission.

A decision is the decision to issue the NOR. Whether the Authority has issued a non-compliant NOR is not a decision, unless there is evidence that the Authority has taken a decision to issue a non-compliant NOR. There is no such evidence in this case.

The decision has to be disputed. The dispute in this case was whether the contravention occurred. The “decision” as to whether the NOR was compliant was never disputed. Mr Murray-Smith has conflated the two.

Wholly unreasonable

I do not need to make a finding as to whether there was wholly unreasonable conduct or a wholly unreasonable decision in this case, but I wish to draw attention to my decision in *Gogiel v the London Borough of Southwark (2250094583)*

“A number of tribunals have regulations containing a power to order costs where a party has conducted proceedings "unreasonably" or "wholly unreasonably".

In *Dannermann v Lanyyon Bower LLP [2017] EWCA Civ 269*, the Court held that "'conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable."

The claimant in the *Dannermann* case was described by the Court of Appeal as "barking up the wrong tree" but the Court of Appeal still says that costs should not be awarded because the claim was not unreasonable.

The *Dannermann* guidance is about unreasonableness. We deal with wholly unreasonable decisions or behaviour so arguably a higher bar than "barking up the wrong tree" applies.

In *Isabella Shipowner SA v Shagang Shipping Co Ltd [2012] EWHC 1077 (Comm)*, the Court considered a number of authorities on the distinction between "unreasonable" and "wholly unreasonable" and the true meaning of the latter concept. This is, of course, a very different context to the jurisdiction to order costs in this tribunal, but the judge, Cooke J, thought that "wholly unreasonable" was analogous to "extremely unreasonable" or "perverse" (see [44]). If this yardstick is to apply, then a "wholly unreasonable" decision by the enforcing authority means something more than an unreasonable decision. It means a decision that is at the extremes of unreasonableness.

In this case, the non-compliant NOR is an obvious error and the proceedings were withdrawn before it was pointed out by the Appellant. I am re-iterating the above because there is a trend now by parties (mainly Appellants) to claim costs simply because they are successful in an appeal. A successful appeal does not mean that the Authority must pay costs. Not every non-compliance or incorrect decision is a reason for awarding costs.

In particular, as in this case, if Appellants chose not to disclose an argument when making the appeal but then use the argument as the basis for a cost application, they may find themselves being asked whether their conduct was wholly unreasonable.

The adjudicator’s decision

The adjudicator found that the decision taken by the enforcement authority to reject the appellant's representations was made on the basis of whether or not the contravention had occurred. Omissions or defects in its notice of rejection letter were not relevant to that decision, which I am satisfied was not wholly unreasonable.

The review decision

The adjudicator was entitled to refuse the application for costs. The application is refused.