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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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APPEAL FROM THE CHARITY TRIBUNAL FOR NORTHERN IRELAND

BETWEEN:

TREVOR McKEE

Appellant;

and

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent.

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McBRIDE J

Application

[1] The appellant seeks permission to appeal against the decision of the Charity Tribunal for Northern Ireland ("the tribunal") dated 10 February 2017 whereby it refused to extend time for the appellant's application ("the substantive appeal"). The appellant's substantive appeal is against a decision of the Charity Commission ("the respondent") dated 3 May 2013, whereby the respondent decided to open a statutory inquiry into Lough Neagh Rescue ("the charity"). In the event that this court grants permission to appeal, the appellant requests that this court extends time for appeal.

[2] The appellant acted as a litigant in person with the assistance of a McKenzie friend. The respondent was represented by Philip McAteer of counsel. The Attorney General for Northern Ireland took no active part in the proceedings but by letter to the Court dated 9 June 2017 stated that it was his view in light of all the circumstances, "the interests of justice point in favour of a tribunal reinstating the original application". I am grateful to all parties for their detailed submissions and skeleton arguments.

[3] On the day of hearing, the appellant, made a belated application for a Protected Costs Order. He then indicated he did not wish to pursue this application after the

respondent indicated it required time to consider its response to such an application and may seek an adjournment.

Background

[4] The following chronology is relevant to the application herein:-

(a) On 3 May 2013 the respondent instituted an inquiry ("the statutory inquiry") pursuant to section 22 of the Charities Act (Northern Ireland) 2008 ("the 2008 Act") into the charity. The appellant was at that time a trustee of the charity.

(b) On 8 May 2013 the appellant, in his personal capacity, purportedly on behalf of the charity, in accordance with the provisions of Schedule 3 Part 4 of the 2008 Act, submitted an application to the tribunal for review of the respondent's decision to institute the statutory inquiry.

(c) On 2 July 2013 the tribunal struck out the appellant's application and at paragraph 22 of its written statement of reasons stated:- "the tribunal unanimously concludes that the applicant does not have standing to bring an application". The tribunal failed to advise the appellant of his right of appeal.

(d) On 25 August 2015 the appellant was removed as a trustee. His appeal against his removal was unsuccessful.

(e) The statutory inquiry was closed on 20 January 2015 and the respondent published its report into the inquiry.

(f) On 17 December 2015 Horner J in *AGNI v The Charity Commission* [2015] NI Ch 18 ruled that "a single trustee does have the necessary standing to seek a review under Schedule 3 of the 2008 Act of a decision by the Commission to hold a statutory inquiry". This decision was upheld on appeal.

(g) On 22 December 2015 the appellant submitted an application for review of the respondent's decision dated 3 May 2013 and requested the tribunal to extend time, as his application was outside the statutory time limit of 42 days.

(h) On 3 February 2016 the tribunal stayed the application pending the outcome of the appeal of Horner J's decision to the Court of Appeal.

(i) On 10 February 2017 the tribunal refused to extend time for the appellant to make his substantive appeal.

(j) On 13 March 2017 the tribunal refused to grant the appellant permission to appeal its decision dated 10 February 2017, to the High Court.

Relevant statutory scheme

[5] Schedule 3 paragraph 3 to the 2008 Act provides that a decision by the Charity Commission to open a statutory inquiry pursuant to Section 22 of the 2008 Act is "a reviewable matter". Under Schedule 3 paragraph 4 to the 2008 Act an application may be made to the tribunal for the review of a reviewable matter and in accordance with Schedule 3 Part 4(5) the tribunal may:-

> "(a) dismiss the application, or
>
> (b) if it allows the application, exercise any power mentioned in the entry in column 3 of the Table which corresponds to the entry in column 1 which relates to the reviewable matter".

[6] According to the Table, in respect of a decision of the Commission to institute an inquiry under Section 22 with regard to a particular institution the tribunal has:-

> "Power to direct the Commission to end the inquiry".

[7] Section 14 of the 2008 Act provides that a party to proceedings before the tribunal may appeal` the tribunal's decision to the High Court. Such an appeal,

> "…may be brought… only on a point of law."

[8] An appeal under Section 14,

> "…may be brought only with the permission of-
> (a) the tribunal, or
> (b) if the tribunal refuses permission, the Court."

[9] The Charity Tribunal Rules (Northern Ireland) 2010 ("the Charity Tribunal Rules") set out the procedure for initiating an appeal. Rule 17 provides as follows:-

"1. An appeal … must be made by way of an appeal notice, signed, dated and filed by an appellant.

2. An appeal notice under paragraph (1) must be filed:-

> (a) if the appellant was the subject of the decision to which proceedings relate, within 42 days of the date on which notice of the Commission's decision was sent to the appellant; or
>
> (b) if the appellant was not the subject of the decision to which the proceedings relate,

within 42 days of the date on which the Commission's decision was published.

…

8. Where the time limit for making an appeal or application under paragraph (2) has expired, an appellant must include with the appeal notice a request for a direction under Rule 3 to allow the appeal or application to be made after the time limit for doing so has expired.

9. A request for a direction to extend time under paragraph (8) must include –

(a) a statement of the reasons for the delay in making the appeal or application; and

(b) any information that will assist the tribunal when it considers the matters set out in Rule 4".

[10] Rule 4 of the Charity Tribunal Rules provides as follows:-

> "Where an appellant has made a request under Rule 17(8) to the tribunal for a direction under Rule 3 to allow an appeal or application to be made after the time limit for doing so has expired, the tribunal must consider –
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> (a) What steps (if any) the Commission has taken to notify or publicise its final decision;
>
> (b) When the appellant became aware of the Commission's final decision; and
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> (c) When the appellant became aware of the right to make the appeal or application and of the time limit for making the appeal or application".

[11] Rules 35 and 36 of the Charity Tribunal Rules set out the procedure to be followed to obtain permission from the tribunal to appeal to the court. Following a request for permission to appeal the tribunal must decide whether to grant permission and must record its decision and reasons for its decision in writing. The tribunal must then notify the applicant and the other parties of its decision and the reasons for the decision in writing. If the tribunal refuses permission, the notification to the applicant must inform him of the right to seek permission to appeal from the court.

Tribunal's decision dated 10 February 2017

[12] The tribunal in a written decision dated 10 February 2017 set out its reasons for refusing to extend time for appeal. After setting out its findings of fact and the applicable legal provisions the tribunal, in summary, held as follows:-

(a) At the time the application was filed on 22 December 2015 the applicant was no longer a trustee and therefore lacked standing. This defect could not be overcome on the basis the 22 December 2015 application was a "resurrection" of the previously dismissed application.

(b) Time should not be extended because:-

i. The decision of Horner J did not change the law. At all times it was open to the appellant to bring an application within time in his capacity as a single trustee of the charity. The tribunal rejected the appellant's submission that delay arose because the tribunal had erroneously rejected his initial application and he only became aware of the fact he did have standing to make an application when Horner J delivered his judgment on 17 December 2015.

ii. No remedy was available to the appellant. Even if the appellant was successful in the substantive appeal, the only power available to the tribunal under the 2008 Act was to order the inquiry to be closed. As this had already occurred no remedy was available to the appellant.

iii. The tribunal found, as a fact, that the decision to open a Section 22 inquiry was made by the respondent and not by one of its officers.

Tribunal's decision dated 13 March 2017

[13] On 13 March 2017 the tribunal refused the appellant's application for permission to appeal to the High Court.

[14] The tribunal refused permission because it was:-

(a) Satisfied that the statutory inquiry was opened pursuant to a decision of the respondent.

(b) The application was considerably out of time.

(c) No remedy was available to the appellant even if he was successful in the substantive appeal.

(d) The appellant could have appealed the decision of the tribunal dated 2 July 2015 to strike out his first application. The tribunal found that he was a person who was "fully aware "of his right of appeal to the High Court.

Grounds of appeal

[15] The appellant by his Notice of Appeal dated 9 April 2017 sets out eight grounds of appeal.

[16] Ground one seeks to appeal the tribunal's decision to refuse to extend time on the following basis:-

> "The tribunal erred in law in failing to exercise its discretion and grant the appellant's application. This is important as the matter at issue is an important public law issue. The tribunal erred in law by not finding that this deficiency in procedure led to unfairness to the appellant, sufficient to justify the tribunal allowing the application".

The other grounds set out in the notice of appeal relate to the substantive appeal.

Submissions of the appellant

[17] The appellant elaborates upon his grounds of appeal in his affidavit sworn on 30 May 2015, his skeleton argument and speaking notes. In these documents the appellant submits that the tribunal erred in law as it:-

(a) Failed to give weight to the unique circumstances of his case. He had filed a valid appeal within time. The only reason the appeal was not heard was because the tribunal incorrectly interpreted the relevant legislation and as a result erroneously struck out his appeal. As soon

as the appellant became aware of Horner J's ruling, which identified the tribunal's error, the appellant immediately initiated this appeal.

(b) Wrongly concluded the appellant had no remedy in the event he was successful in respect of the substantive appeal.

(c) Reached a decision on the substantive issue without hearing all the evidence.

(d) Reached a decision on the substantive issue which was wrong in law and in fact and consequently took an irrelevant factor into account.

(e) In the exercise of its discretion failed to apply the principles set out in *Davis v NI Carriers* [1979] NI 19. In its judgment the tribunal failed to refer to these principles and conspicuously failed to take into account the following *Davis* principles:-

(i) Whether the refusal to extend time would mean the merits of the case would not be considered

(ii) Whether the appeal raised a substantive legal issue regarding the interpretation of the 2008 Act; and

(iii) Whether the appeal raised an issue of general public importance.

Respondent's submissions

[18] The respondent submitted that whilst the judgment of the tribunal did not expressly refer to the *Davis* principles it applied these principles and did not err in law as:-

(a) The time for appeal was sped.

(b) The applicant did not have a good explanation for his delay as he could have appealed the tribunal's decision striking out his original appeal.

(c) Granting the application would divert resources from the work of the Commission.

(d) Certainty in public administration would be undermined.

(e) The tribunal could grant no remedy to the applicant even if the appeal was successful.

(f) There was no point of substance as the legal issue in contention is presently being taken in other cases and will be determined in these other cases.

Legal Test to be applied on appeal from the exercise of discretion by the Charity Tribunal

[19] In *Transport for London v O'Cathail* [2013] EWCA Civ 21 the Court of Appeal considered the approach an Employment Appeal Tribunal should take when considering an appeal from an Employment Tribunal in respect of its exercise of discretion relating to a case management issue, namely its refusal to grant a late adjournment of a full hearing.

[20] After considering the different tests applied by different courts and tribunals the Court held that when an appeal is on a point of law, from a statutory discretion entrusted to and exercised by the Employment Tribunal, the appeal court, (in that case the Employment Appeal Tribunal) could only set aside the Employment Tribunal's decision on the ground of,

> "an error of law, such as when the Employment Tribunal goes wrong in principle in its approach to the discretion, or when it makes a decision which is so wrong that no reasonable Employment Tribunal, properly directing itself, could have made it on the material before it" (paragraph [11]).

[21] Mummery LJ further held that an Employment Appeal Tribunal could not set aside the Employment Tribunal's decision simply on the basis it was 'plainly wrong' or 'wrong' and then substitute its own views. He stated at paragraphs [44]- [47] as follows:-

> "[44] In relation to case management the ET has exceptionally wide powers of managing cases brought by and against the parties who are often without the benefit of legal representation. The ET's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk v Berezovsky* [2010] EWCA Civ 1345 as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the `apparent confusion in authority' on the point …
>
> …

> [46]. Fifthly, the EAT's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the ET. That was an error of law on its part. The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.
>
> [47]. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, … there are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within a reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."

[22] Given that an appeal from the Charity Tribunal to the High Court is limited to a point of law, I believe that the correct approach for the High Court on an appeal from the exercise of discretion by the Charity Tribunal is one of review, as set out by Mummery LJ in *O'Cathail,* rather than the wider test which is applicable to appeals to the Court of Appeal from the exercise of discretion by a High Court.

[23] The High Court cannot therefore simply interfere with the tribunal's decision on the basis that it takes a different view from the tribunal or of the weight the tribunal attached to one or more of the factors it took in to account in reaching its overall value-judgment. The correct approach is that the High Court can only interfere with the Tribunal's exercise of discretion if:-

(a) There was an error of legal principle; or
(b) It made a finding of fact that no reasonable tribunal could have reached on the evidence and which had a material effect on its value judgment; or
(c) It failed to take into account a relevant matter or took into account an irrelevant one; or
(d) There is perversity in the outcome.

Test for Leave to Appeal

[24] The test for leave to appeal is "whether there is an arguable case with a reasonable prospect of success or some other compelling reason why leave should be given (see *Ewing v Times Newspapers* [2015] NICA 74 at paragraph 17).

Principles for extending time

[25] The principles for extending time were set out in *Davis v Northern Ireland Carriers* [1979] NI 19 by Lowry LCJ at page 2 as follows:-

> "1. Whether the time is sped: a court will, where the reason is a good one, look more favourably on an application made before the time is up;
>
> 2. When the time limit has expired, the extent to which the party applying is in default;
>
> 3. The effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
>
> 4. Whether a hearing on the merits has taken place or would be denied by refusing an extension;
>
> 5. Whether there is a point of substance (which in effect means a legal point of substance when dealing with cases stated) to be made which could not otherwise be put forward; and
>
> 6. Whether the point is of general, and not merely particular, significance…
>
> 7. …that the rules of court are there to be observed."

[26] Similarly in *Data Select Ltd v HMRC* [2012] UKUT 187, Morgan J in the Upper Tribunal held as follows at paragraph [34]:-

> "Although the FTT gave permission to appeal to the Upper Tribunal in the belief that there was a lack of case law on the approach to be adopted to an application for an extension of time pursuant to Section 83G(6), there was no real difference of approach between the parties before me. That is not surprising. Applications for extensions of time limits of various kinds are common place and the approach to be adopted is well established.

> As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions:-
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> 1. What is the purpose of the time limit?
>
> 2. How long was the delay?
>
> 3. Is there a good explanation for the delay?
>
> 4. What will be the consequences for the parties of an extension of time? and
>
> 5. What will be the consequences for the parties of a refusal to extend time?
>
> The court or tribunal then makes its decision in the light of the answers to those questions."

Consideration

[27] The parties agreed that the court should determine the application for permission to appeal and if granted should then determine whether to extend time. The case therefore proceeded as a "rolled up" hearing and the parties made submissions on both the application for permission to appeal and the appeal against the tribunal's refusal to extend time.

[28] In its decision dated 10 February 2017 the tribunal accepted that in principle the appellant did have standing to bring the application in question as he was a trustee of the charity. At paragraph [13] however the tribunal then found that on 25 August 2013 the appellant was prohibited from holding the office of trustee of any charity in Northern Ireland and accordingly at the time the application was "filed on 22 December 2015 the applicant was in fact barred from bringing such application at that date, since it was predicated on him being, at the time of the opening of the section 22 inquiry, a trustee of the charity".

[29] Paragraph 4 (2) of Schedule 3 to the 2008 Act sets out the persons who may seek a review of a decision to institute a statutory inquiry. They are:-

"(b) any person mentioned in the entry in column 2 of the Table."

Column 2 of the Table provides-

"The persons are –

(a) the persons who have control or management of the institution…"

[30] I find that the provisions of the 2008 Act should be interpreted to mean that persons who have control or management of the charity at the date of the decision to institute the statutory inquiry, have standing to bring a review against such a decision. This is the ordinary and natural meaning of the words used in the 2008 Act.

[31] Weatherup LJ in *Charity Commission for Northern Ireland v Attorney General for Northern Ireland* [2016] NICA 37 at paragraph [31] stated:-

> "once a section 22 inquiry has been initiated individual trustees would be powerless to take action in the Charity Tribunal against what, it is said, may be a scandalous abuse of the Commission's powers. While the interests of individual trustees are protected by the trustee's right of appeal against decisions to suspend or remove a trustee, that right of appeal only arises after the Commission has undertaken an inquiry".

In the same way, if standing were to be assessed at the date of an application to review the Commission's decision to institute a statutory inquiry, a trustee of a charity could find that by that time he has already been stuck off as a trustee consequent upon the institution of the statutory inquiry and therefore unable to seek a review. Such a trustee would therefore be left powerless to take action in what may be a case where the Commission has acted improperly or unlawfully. I am satisfied that such an interpretation does not accord with the intention of the Northern Ireland Assembly.

[32] I further note that the tribunal accepted that the appellant's right to bring an application was

"….predicated on him being, <u>at the time of the opening of the section 22 inquiry, a trustee of the charity</u>".

Notwithstanding this finding by the tribunal as to the interpretation of the 2008 Act, it then held, in contravention of its own interpretation, that the appellant lacked standing because he was not a trustee at the date of his application.

[33] For all these reasons I am satisfied the appellant has standing to bring this application and the tribunal erred in law when it held that he lacked standing.

[34] I have set out the principles upon which this court will act when hearing an appeal from the Charity Tribunal on the exercise of its discretion at some length as it is important that all parties understand that this court will not lightly interfere with decisions of the Charity Tribunal on matters within its discretion.

[35] Having considered the evidence and the arguments in this case however, I am satisfied that the tribunal erred in law and reached a decision which no reasonable tribunal could have made for the following reasons:-

[36] First, whilst the tribunal was not required to slavishly rehearse the factors set out in *Davis v NI Carriers* or the test set out in *Data Select Ltd,* I find that the tribunal in fact failed to take into account a number of relevant principles set out in these cases and therefore erred in its approach to the exercise of its discretion. In particular the tribunal failed to take into account the fact that its refusal to extend time would mean that the merits of the appellant's case would not be considered. The tribunal also failed to take into account the fact the appeal raised a point of substance which could not otherwise be put forward. The appellant is seeking to raise an issue about whether the powers of the Commission to institute a statutory inquiry were in fact delegated to a committee and whether such a committee has ever been constituted. This issue has not been raised in other on-going cases. The on-going cases raise a different legal issue namely whether the 2008 Act permits the Commission to delegate some of its functions to staff. I consider that the appellant has raised an important point of substance which should be adjudicated upon to give clarity and certainty in respect of the workings of the Commission. The tribunal further failed to take into account the fact that the points raised by the appellant are of general and not just particular significance. The question whether a committee has been properly constituted is a question of public importance as it may have an impact on the lawfulness of the actions of the Commission not only in respect of this case but in other cases. Contrary to the submissions of the respondent I consider that certainty in public administration means that there should be clarity in respect of whether the Commission has delegated its powers to a committee and if so, when and how such a committee was constituted.

[37] Secondly, I find that the tribunal took into account an irrelevant matter. The tribunal made a finding of fact in respect of an issue which lies at the heart of the substantive appeal. It did so notwithstanding the fact the tribunal had not heard all the relevant evidence and the parties had not been given an opportunity to fully address the tribunal in respect of this substantive issue. I find that the factual finding made by the tribunal was a material consideration taken into account by the tribunal in the exercise of its discretion. It was however a factor which the tribunal ought not to have taken into account and in so doing erred in the exercise of its discretion.

[38] Thirdly, the tribunal erred in law in holding that, even if the appellant was successful in his substantive appeal, no remedy was available to him. The respondent submitted that the appellant had already exercised his right of appeal against being removed as a trustee and had been unsuccessful in this. In those circumstances in accordance with the powers set in Schedule 3 to the 2008 Act the appellant had no further remedy as the only power the tribunal had was to close the inquiry and this had been done already. I do not accept that the appellant's rights as a single trustee are limited to his right of appeal against the Commission's decision to remove him as a trustee. Weatherup LJ in *Charity Commission for Northern Ireland v*

Attorney General for Northern Ireland [2016] NICA 37 at paragraphs [31] and [32] sets out the broad policy grounds for granting *locus standi* to a single trustee to challenge the institution of a section 22 inquiry and said as follows:

> "[31] The Attorney General advances a broad policy ground for his wider interpretation of the power to apply for review, namely that a dominant voice should not be able to shut out what may be an oppressed or dissenting minority and that once a section 22 inquiry has been initiated individual trustees would be powerless to take action in the Charity Tribunal against what, it is said, may be a scandalous abuse of the Commission's powers. While the interests of individual trustees are protected by the trustee's right of appeal against decisions to suspend or remove a trustee, that right of appeal only arises after the Commission has undertaken an inquiry.
>
> [32] We have no reason to suppose that in this, or in any, case the Commission would abuse its powers but the exercise of the power to initiate an inquiry may impact on anyone involved in the control or management of an institution. Issues may arise in an institution by reason of different interests within the institution. Limiting the power of review to those in overall control may disadvantage others. The right of a trustee to appeal a decision to suspend or remove a trustee may come too late in the process to address that disadvantage. Reliance on an overarching supervisory role of the Attorney General to address any such disadvantage may be unwelcome in drawing that office into all such disputes …"

[39] Given the dictum of Weatherup LJ, that disadvantage may accrue to a single trustee from the institution of a statutory inquiry, I am satisfied that the tribunal has power to grant a remedy to an appellant to meet that disadvantage. I therefore find that Schedule 3 to the 2008 Act merely sets out the powers the tribunal has to make orders. It does not prevent the tribunal from making findings. I am satisfied for example, that the tribunal would be at liberty to find that a statutory inquiry was unlawfully instituted. Such an outcome would clearly constitute a remedy for the appellant. I therefore find that the tribunal erred in law in finding that the appellant would have no remedy in the event he was successful in his appeal.

[40] Fourthly, I find that the tribunal's decision that the appellant did not have a good reason for delay was one which no reasonable tribunal could have made. The appellant, an unrepresented litigant, originally lodged his application within time. This application would have been heard save for the fact the tribunal incorrectly

interpreted the legislative provisions and erroneously struck it out on the basis that he lacked standing. This error was compounded by the fact that the tribunal then failed to inform the appellant of his right of appeal. Once the appellant became aware of the tribunal's error, when Horner J delivered his judgment, the appellant immediately issued this appeal. The tribunal originally stayed the appellant's application to await the outcome of the Court of Appeal decision against Horner J's judgment thus indicating that, at that stage, the tribunal recognised the interpretation of the law as to standing was at the heart of whether the appellant could initiate a review and therefore relevant to the delay by the appellant. When the tribunal made its decision not to extend time it considered that none of these factors constituted a good reason for delay. Rather the tribunal found that the decisions of Horner J and the Court or Appeal did not change the law and therefore the appellant could have appealed its decision to strike out his original application, notwithstanding the fact he was not advised of his right to appeal. I consider, in all the circumstances, that this was an approach that no reasonable tribunal would have taken.

Conclusion

[41] I find that the tribunal erred in law in the exercise of its discretion and reached a decision which no reasonable tribunal would have made when it refused permission to appeal and refused to extend time for appeal. I therefore grant permission for leave to appeal and I grant an extension of time.

[42] I remit the case to the tribunal to hear the substantive appeal and to make any necessary case management directions in respect of the hearing.

[43] I will hear the parties in respect of costs.