Upper Tribunal
(Immigration and Asylum Chamber)

MSM and others (wasted costs, effect of s.29(4)) [2016] UKUT 00062 (IAC)

THE IMMIGRATION ACTS

Heard at FIELD HOUSE **Decision & Reasons Promulgated**

On 15 October 2015

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Before

UPPER TRIBUNAL JUDGE DAWSON

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MSM (1)

SUMAN THAPA (2)

SANTOSH GURUNG (3)

PAUL GURUNG (4)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT (1) & (2)

ENTRY CLEARANCE OFFICER – NEW DELHI (3) & (4)

Respondents

Representation :

For the 1 st Appellant: Mr Adam Tear, instructed by Duncan Lewis Sols

For Mr S Chelvan and Ms V Hutton: Mr D Stacy,

instructed by Clyde & Co

For the 2 nd to 4 th Appellants: No appearance

For the Respondents: Ms D J Rhee, instructed by Government Legal Dept

Section 29(4) of the Tribunals, Courts and Enforcement Act 2007 results in the Upper Tribunal having powers in relation to the making of wasted costs orders (as defined in section 29(5)) which are not subject to the limitations in s.29(3) or r.10 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

DECISION AND REASONS

ON ISSUE OF JURISDICTION

INTRODUCTION

1.
The question we are required to answer in these proceedings is whether the Upper Tribunal acting in its appellate capacity has power, pursuant to Section 29 of the Tribunals, Courts & Enforcement Act 2007 ("the 2007 Act") or otherwise, to make a costs order in proceedings that began in the First-tier Tribunal (Immigration and Asylum Chamber) prior to the commencement on 20 October 2014 of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 ("the FtT 2014 Rules"). Both members of the Tribunal have substantially contributed to this decision.

2.
The case involving the first named Appellant (referenced as [2015] UKUT 413) concerns an appeal by a national of Somalia, which began life in the First-tier Tribunal in response to a decision of the First Respondent ("the Secretary of State") dated 2 January 2014, refusing an application for asylum. This appeal was dismissed by the First-tier Tribunal on 18 March 2014. Permission to appeal to the Upper Tribunal was subsequently granted and the determination of the First-tier Tribunal was set aside following a hearing on 29 May 2014. After hearings on 24 March and 28 April 2015 the Upper Tribunal remade the decision allowing the First Appellant's appeal.

3.
The circumstances giving rise to the adjournment of the hearing on 24 March led to an application by the Secretary of State for a wasted costs order. It is the contention of the First Appellant's solicitors and his counsel (who are separately represented) that:

(i)
The Upper Tribunal does not have power to make an order for wasted costs in the instant proceedings.

(ii)
If the Upper Tribunal does have such power, then an order should not be made because (a) the application for a wasted costs order was made out of time and there has been no 'formal' application to extend time and, in any event, (b) the circumstances of the case are such that it is not appropriate to make such an order.

4.
Proceedings IA/13403/2012 (the Second Appellant herein); OA/09812/2012 and OA/09851/2012 (the Third and Fourth Appellants' herein) relate to appeals brought by nationals of Nepal.

5.
The Second Appellant's appeal against a decision made on 29 May 2012 refusing him indefinite leave to remain was dismissed by the First-tier Tribunal on 18 February 2013. In a decision of the 9 May 2013 the Upper Tribunal found no error of law in the First-tier Tribunal's determination. However, the Second Appellant pursued an appeal to the Court of Appeal, which subsequently remitted the matter to the Upper Tribunal. By way of a decision of the 18 September 2014 the Upper Tribunal allowed the Second Appellant's appeal as a consequence of a concession made by the Secretary of State. Thereafter the Second Appellant made an application "for costs under r.10(3) and r.10(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008" in which it was submitted that it was unreasonable

of the Secretary of State to delay making the concession until the day of the hearing before the Upper Tribunal.

6.
The proceedings by the Third and Fourth Appellants' (who are brothers) arose out of decisions of the Second Respondent dated 22 December 2011 refusing their applications to settle in the United Kingdom with their father, a Gurkha veteran. Their appeals were dismissed by the First-tier Tribunal on 21 November 2012, a decision confirmed by the Upper Tribunal on 24 May 2013. The appeals were subsequently remitted by the Court of Appeal for rehearing by the Upper Tribunal and were thereafter allowed on 8 October 2014. The Third and Fourth Appellants' solicitors made an application for costs under r.10(3) and r.10(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules"), on the basis that it was unreasonable of the Entry Clearance Officer to delay making a concession central to the outcome of the appeal until the day of the hearing.

7.
The Respondent in the proceedings involving the Third and Fourth Appellants' initially opposed the application for costs on the basis that the Upper Tribunal did not have power to make a costs order. This position was abandoned by the Respondent at the hearing before us when the Secretary of State and Entry Clearance Officer adopted, for all the appeals, the submissions as to jurisdiction set out in support of the application for wasted costs in [2015] UKUT 413.

8.
The solicitors for the Second, Third and Fourth Appellants did not have any instructions to attend the hearing before us on 15 October 2015. They indicated that they adopted the submissions advanced by the Secretary of State in [2015] UKUT 413 that the Upper Tribunal does have a jurisdiction to make an order for costs where the proceedings before the First-tier Tribunal were begun prior to 20 October 2014.

9.
We heard submissions from Ms Rhee instructed by the Government Legal Department, Mr Tear instructed by Duncan Lewis solicitors for the First Appellant and by Mr Stacy instructed by Clyde & Co on behalf of Mr Chelvin and Ms Hutton, counsel for the First Appellant in the substantive proceedings heard before the Upper Tribunal on 24 March and 27 April 2015. The parties prepared for the hearing on the basis that our consideration would be confined to that of jurisdiction.

THE LEGISLATION

10.
Section 29 of the 2007 Act provides in material part as follows:

S.29 costs or expenses

"(1) The costs of and incidental to –

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Sub-sections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in sub-section (1), the relevant Tribunal may –

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with the Tribunal Procedure Rules.

(5) In sub-section (4) "wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) […]"

11.
Rule 10 of the Upper Tribunal (Procedure Rules) 2008 (as amended) ("The Tribunal Procedure Rules") is in these terms:

"(1) The Upper Tribunal, may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal, except:

(aa)
in a national security certificate appeal, to the extent permitted by paragraph (1A);

(a)
in proceedings transferred by or on appeal from, the Tax Chamber of the First-tier Tribunal; or

(b)
to the extent and in the circumstances that the other Tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).

(1A) […]

(2)
[…]

(3)
In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except –

(a)
in judicial review proceedings;

(b)
[revoked]

(c)
under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(d)
if the Upper Tribunal considers that a party or its representatives has acted unreasonably in bringing, defending or conducting proceeding;

(e)
[…]

(f)
[…]”

12.
Rule 9 of the FtT 2014 Rules is as follows:

“9. – Orders for payment of costs and interest on costs (or, in Scotland, expenses)

(1)
If the tribunal allows an appeal, it may order a Respondent to pay by way of cost to the Appellant an amount no greater than –

(a) any fee paid under the fees order that has not been refunded; and

(b) any fee which the Appellant is or may be liable to pay under that Order.

(2)
The Tribunal may otherwise make an order in respect of costs only –

(a) under Section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings.”

13.
Rule 23A of the now repealed Asylum and Immigration Tribunal (Procedure) Rules 2005 (“AIT 2005 Rules”) provided:

“23A

(1)
Except as provided for in paragraph (2), the Tribunal may not make any order in respect of costs (or, in Scotland, expenses) pursuant to Section 29 of the Tribunals, Courts & Enforcement Act 2007, power to award costs.

(2)
If the Tribunal allows an appeal, it may order the Respondent to pay to the Appellant an amount no greater than –

(a) any fee paid under the Fees Order that has not been refunded; and

(b) any fee which the Appellant is or may be liable to pay under that Order. “

14.

Rule 23A was inserted from 15 February 2010. The power in r.9(2) of the FtT 2014 Rules is not applicable in appeals before the First-tier Tribunal coming into existence before 20 October 2014.

15.
Rule 9(2) was considered by the Tribunal in Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC). The head note includes the unambiguous statement at [3] as follows:

“Transitionally, Rule 9 of the 2014 Rules applies only to appeals coming into existence subsequent to the commencement date of 20 October 2014. It is of no application to appeals pre-dating this date. “

SUBMISSIONS

16.
Ms Rhee acknowledges in her skeleton argument that Upper Tribunal Rules, when read together, give rise to some doubt as to whether the Upper Tribunal has the power to make an order for wasted costs in [2015] UKUT 413, given that the appeal in the First-tier Tribunal was heard under the regime imposed by the AIT 2005 Rules. She further observes that the words “in other proceedings” in r.10(3) of the Upper Tribunal Rules appear to exclude “proceedings… on appeal from another Tribunal” (per r.10(1)) from the scope of the proceedings in which there is power to make an order for wasted costs under r.10(3).

17.
Nevertheless, Ms Rhee submits that there is a proper basis for concluding that the Upper Tribunal has jurisdiction to make an order for wasted costs pursuant to s.29(4) of the 2007 Act, irrespective of the terms of the Upper Tribunal Rules. Whilst acknowledging that s.29(3) of the 2007 Act provides that the powers of the Upper Tribunal and the First-tier Tribunal to make orders for costs are to have effect subject to the Tribunal Procedure Rules, she observes that s.29(4) goes on to make further and express provision that in any proceedings in the First-tier Tribunal or Upper Tribunal, the relevant Tribunal is empowered to disallow or order “wasted costs” – as defined by s29(5). She submits that this is not defeated by the fact that s.29(4) provides the power to make an order for “the whole of any wasted costs or any such part of them as may be determined in accordance with the Tribunal Procedure Rules ” (emphasis added) . The emphasised words do not, it is asserted, serve to qualify the existence of the powers of the Upper Tribunal but rather to specify that the amount of the costs to be awarded is to be determined in accordance with the Upper Tribunal Rules.

18.
At the hearing Ms Rhee argued that primacy must be given to the parent 2007 Act. Rule 10 must be interpreted by reference to s.29 of the 2007 Act and any ambiguity must be resolved by reference to the latter.

19.
In his written submissions on behalf of Duncan Lewis, Mr Tear argues that applying HMRC v Kenneth Colquhoun FTC/36/2010 it is clear that the Upper Tribunal, in appeals from the First-tier Tribunal, only has the cost powers that the First-tier Tribunal had in respect of the appeal before it (as per r. 10(1)). He accepts that the Upper Tribunal may have additional powers in other proceedings by virtue of the application of r.10(3), postulating in his oral submissions that such other proceedings would include matters which had been remitted to the Upper Tribunal by the Court of Appeal, as is the case with the Second to Fourth Appellants.

20.

Mr Stacy submitted that s.29(1) and s.29(2) of the 2007 Act are to be read by reference to s.29(3). Consequently, the Upper Tribunal's costs powers are dependent entirely upon the extent to which such powers are provided for in the Upper Tribunal Rules. When questioned as to the purpose of s. 29(4), he maintained that the Upper Tribunal's costs powers are by reference to the Procedure Rules and that s.29(4) is not a stand-alone power. He accepted that there had been no argument in Cancino on the issue of whether s.29(4) conferred such a stand-alone power.

21.
Mr Stacy also turned to R (LR) v FtT HESC (and Hertfordshire CC) (costs) [2013] UKUT 0294 (AAC) ("the Hertfordshire CC case") placing particular reliance on paragraph 17 thereof and the observation therein that the Immigration and Asylum Chamber had no power to make an order for costs except for a limited power requiring the state to reimburse fees recently introduced on immigration appeals, where those appeals proved to be successful.

22.
Quite correctly, Mr Stacy also drew our attention to the decision in R (on the application of Okondu and Abdussalam) v SSHD (wasted costs) IJR [2014] UKUT 377 (IAC) (Green J and UTJ Gill) in which it was concluded, at paragraph [10], that the Upper Tribunal had power "to make a wasted costs order in all proceedings whether they are in the context of judicial review or otherwise" . He sought, however, to distinguish the case on the basis that the Upper Tribunal was considering the issue of costs in the context of judicial review proceedings, submitting that the Tribunal had intended to say no more than the Upper Tribunal had power to make wasted costs orders in all proceedings falling within r.10(3), whether they are in the context of judicial review or otherwise, and not those referred to in r.10(1), which it did not give consideration to.

DISCUSSION

23.
We have been required to consider the application of the provisions of section 29(4) of the 2007 Act without assistance from any direct authority on the point apart from the unreported decision by the Upper Tribunal in ECO-Islamabad v Hussain (OA/16276/2013) which we refer to in a little more detail below. Despite the assertions to the contrary we have found the decisions in Colquhoun , the Hertfordshire CC case, Okondu and Cancino to be of little assistance in resolving the issue before us. Although we are grateful to the parties for their submissions, they too have only been of limited help.

24.
The Tribunal in Colquhoun gave consideration to the issue of expenses (costs) following the successful appeal by HMRC against a decision of the First-tier Tribunal dated 14 January 2010 arising out of proceedings in Scotland. HMRC applied for expenses under r.10(6) of the Upper Tribunal Rules. In coming to its conclusions, the Tribunal observed that r.10(1)(a) of those Rules gave it power to award expenses in proceedings on appeal from the Tax Chamber of the First-tier Tribunal.

25.
Mr Colquhoun had challenged the reasonableness of HMRC in instigating the appeal. In its analysis of the framework of r.10 and the varying powers therein, the Tribunal observed at [9]:

"Rule 10(3)(d) relates to the situation where the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing or defending or conducting the proceedings. That must be reference back to other proceedings ; at the beginning of Rule 10(3). This provision too,

cannot be relevant. In any event we do not consider (and it has not been suggested by HMRC) that Mr Colquhoun acted unreasonably in bringing, defending or conducting the proceedings."

26.
Thus the Tribunal had no need to consider the entirety of section 29 of the 2007 Act in order to establish whether it power to make the order sought; there was no dispute that it had jurisdiction pursuant to section 29(1) of that Act.

27.
As to the decision in Okondu , this was made in relation to an application for judicial review. Although the Tribunal cited s.29(4) of 2007 Act, no issue as to jurisdiction arose on the circumstances of the case. The statement at paragraph 11 therein that "the power to make wasted costs orders applies to all proceedings whether they are in the context of judicial review or otherwise" was obiter and, for obvious reasons, made without a detailed legal analysis of the relevant provisions.

28.
The decision in the Hertfordshire CC was concerned with the correct approach to costs in applications for judicial review of decisions of the First-tier Tribunal, heard by the Upper Tribunal. The panel comprising Sullivan LJ, the Vice President of UTIAC and UTJ Ward cautioned in paragraph 1 of its decision against attempts to apply the decision more widely than the category of case with which it was concerned.

29.
The Tribunal scrutinised the application of section 29(3) of the 2007 Act and rule 10 of the Upper Tribunal Rules, concluding at [27]:

"… while there may be unexplored issues around the interaction between s.29(4) and the rules of some of chambers, we do not feel the need to explore them here. Whatever the position is with regard to judicial review cases coming to the Upper Tribunal from such Chambers, it is also the case in relation to the far more numerous category of statutory appeals and does not appear to cause difficulty, thus we attach little weight to the point".

30.
It is clear from what it said above that: (i) the decision in the Hertfordshire CC case was not intended to give guidance save for in relation to the issue of costs in application for judicial review of decision made by the First-tier Tribunal and (ii), insofar as it did give guidance, that did not include the ambit of s.29(4) or its interaction with the Upper Tribunal Rules. For this reason we have found it to be of little assistance in resolving the jurisdictional issue before us.

31.
We next turn to the decision of the Presidents of the Upper Tribunal and First-tier Tribunal (IAC) in Cancino . This is a reported decision of the First-tier Tribunal in which the Tribunal was required to determine an application for wasted costs made by the appellant in proceedings which came into effect before 20 October 2014. At paragraph 5 of its decision the Tribunal observed:

"Judges and practitioners should be aware that rule 9 of the 2014 Rules contains the only powers to award costs exercisable by the First-tier Tribunal. Thus rule 9 establishes an exclusive regime. These powers are not amplified in any way by section 29 of the 2007 Act. This is the effect of section 29(3). However, rule 9 and section 29 co-exist. We shall elaborate on this relationship below."

32.

After a detailed consideration of the transitional provisions to the 2014 Rules, the operation of r.9 thereof, its relationship to s.29 (5) and s.29(6) of the 2007 Act, and the relevant costs provision in the 2005 AIT Rules, the Tribunal dismissed the appellant's application on the basis that because the proceedings had begun prior to 20 October 2014, the 2005 AIT Rules applied to it and, consequently, the First-tier Tribunal had no jurisdiction to award 'wasted costs'. It is evident that the Tribunal heard no argument on the ambit s.29(4) of the 2007 Act and inevitably this resulted in an absence of any analysis on this aspect.

33.
In ECO-Islamabad v Hussain , Upper Tribunal Judge Allen dismissed an appeal against the FtT's determination allowing an appeal against the ECO's decision refusing an application by a married partner to settle in the UK. We do not need to concern ourselves with the detail of the grounds. The respondent's representative applied for wasted costs against the ECO on the basis that it was unreasonable to seek permission to appeal in the circumstances of the case. The ECO responded with argument that there was no power to award wasted costs. After examining s.29(3) and r.10 of Procedure Rules the judge concluded that there was a power to make a wasted costs order with this analysis after observing the limitation in r.10(1)(b):

"…even if there is on the face of it no scope within Rule 10 for a wasted costs order by UT(IAC) in a statutory appeal, the point concerning the ambit of s.29(4) remains and it is relevant to note paragraph 11 of [Okondu] where the Upper Tribunal considered it to be clear from s.29 and Rule 10 that the power to make wasted costs orders applies to all proceedings whether in the context of judicial review or otherwise."

The extent of the submissions made is not clear from the decision; we note that following the hearing the Presenting Officer was given the opportunity of making submissions and although he appears to have responded, the detail of his argument is not evident.

34.
We reach these conclusions. Specific provision is made in s.29(4) of the 2007 Act as to the ambit of the Tribunal's powers (and by this we include both the First-tier Tribunal and the Upper Tribunal) in relation to wasted costs – which are thereafter defined in s.29(5).

35.
In Cusack v. London Borough of Harrow [2013] 1 WLR 2022, Lord Neuberger said of the interpretation of documents, at [58]:

"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose" .

36.
The meaning of an instrument, including an Act of Parliament, is the meaning that it would convey to a reasonable reader with the background knowledge reasonably available to the audience to whom the instrument was addressed (see Attorney-General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 at [16]).

37.
Where the words of a statutory provision when set in proper context admit of only one meaning then that is the meaning that must be given to such words. However where such words are grammatically

ambiguous, an assessment of the reasonableness of the consequences of the opposing constructions may be an aid to the correct construction (see Gartside v IRC [1968] AC 553 at 612 per Lord Reid).

38.
We have not found this decision straightforward but for the reasons that follow we are persuaded that the construction of s.29 urged by the Secretary of State is the correct one supported by a plain reading of the legislation when set in the proper context. Thus we conclude that s.29(4) results in the Upper Tribunal having powers in relation to the making of wasted costs orders (as defined in section 29(5)) which are not subject to the limitations in s.29(3) or r.10 of the Tribunal Procedure Rules. There is nothing on the face of s.29(4) which specifies that the powers granted thereby are subject any statutory or other provision, including the Tribunal Procedure Rules. We agree with Ms Rhee that the words “as may be determined in accordance with the Tribunal Procedure Rules” , found in s.29(4), do not operate to restrict the jurisdiction of the Tribunal to make an order for wasted costs, but rather relate to the amount of any such order.

39.
Section 29(3) provides in clear terms that the discretionary powers afforded by s.29(1) and s.29(2) are “ subject to Tribunal Procedure Rules” (emphasis added). If it had been the intention of Parliament to equally restrict the powers provided in s.29(4), it is inconceivable that it would not have used equally clears words to achieve such a result. Alternatively, if it was intended that s.29(4) should be subject to the Tribunal Procedure Rules, this could have been achieved by simply saying so in s.29(3) i.e. by stating that “Subsection (1), (2) and (4) have effect subject to the Tribunal Procedure Rules.” This omission is in our view significant.

40.
The reference in s.29(4) to “ …any proceedings mentioned in subsection (1)” does not limit the effect on the Tribunal’s power to make a wasted costs order. This expression is no more than a drafting shorthand for identifying that such power exists in “all proceedings in the First-tier Tribunal” and “ in all proceedings in the Upper Tribunal” , thus negating the need for the drafter to re-state this in full.

41.
There is a distinction in the 2007 Act between costs generally and an order for wasted costs and we do not find this at all to be surprising. The existence of a wasted costs jurisdiction also has the manifest advantage of serving the interests of the Tribunal in discharging its obligations in respect of the overriding objective in r.2 of the Tribunal Procedure Rules. Despite the duty on all representatives to the Tribunal, representation can be of variable quality and in a small minority of cases falls below acceptable standards. The Tribunal is expected to operate in an informal way but that is not to say there should not be minimum standards. The wasted costs regime is not only compensatory in nature, but also punitive (see Ridehalge v Horsefield [1994] Ch 205 at 227E) – something which is not a feature of the general costs jurisdiction.

42.
In our view, it is significant that there is similarity between the language of s.29(4) and the approach taken to the jurisdiction of costs, and wasted costs, in civil proceedings; such jurisdiction being conferred by section 51 of the Senior Courts Act 1981. Section 51, in its component language and structurally, discloses no material differences to the provision conferring the costs jurisdiction on Tribunals by the 2007 Act. In Metcalf v Mardell [2003] 1 AC 120, their Lordships gave consideration to the issue of whether a wasted costs order should be imposed against counsel because of counsel's improper allegations of fraud in the absence of reasonable credible evidential material, in

circumstances in which counsel was precluded from giving a full answer to the application because of legal professional privilege. In setting out the courts costs powers, Lord Hobhouse gave his opinion as follows at [47]:

“ 47 My Lords, this appeal has raised for consideration the wasted costs jurisdiction of civil courts under section 51 of the Supreme Court Act 1981 as amended by the Courts and Legal Services Act 1990… . Section 51 is a provision dealing generally with the jurisdiction to make orders as to costs including a general power to determine by whom and to what extent costs of the proceedings are to be paid: section 51(3) . The "wasted costs" jurisdiction is supplementary and subsection (6) empowers the court both to disallow costs which have been wasted by a legal representative as between the lawyer and of any wasted costs.” (emphasis added)

43.
In Wagstaff v Colls [2003] 4 Costs L.R. 535 , the plaintiff appealed against the refusal of his application for a wasted costs order. He had made the application following the compromise of proceedings against the defendant relating to partnership assets. On appeal the court was, inter alia , required to determine whether, following the making of a Tomlin order which had stayed the proceedings, the proceedings were extant - as the first instance judge had concluded; if the proceedings were existing, whether the stay needed to be lifted to enable the plaintiff to pursue the wasted costs application. It was held that there were proceedings in existence for the purpose of invoking the jurisdiction conferred by s.51 of the Supreme Court Act 1981 (as it was then known) so that the wasted costs application could be pursued. When giving the leading judgment Ward LJ said at [49]:

“There are two further reasons which support this conclusion. There is nothing to prevent an application for a wasted costs being made and entertained after a final order has been made and perfected entering judgment for or against the claimant. That serves to emphasise the free standing nature of the application for wasted costs . There is no reason for proceedings concluded by compromise to be treated differently. Secondly, it is noticeable that in Rofa a party was added to the action which had been stayed without any need for the stay to be lifted. Again I cannot see why it should be any different here.” (emphasis added).

44.
In summary therefore we conclude that the terms of the Tribunal Procedure Rules do not restrict the power provided to the Tribunal by s.29(4) to make a wasted costs order. Such a power is a free standing one and is not caught by the restriction in s.29(3).

45.
On this basis we are satisfied that we have power to make a wasted costs order in the applications before us and we will relist these matters for consideration of whether to do so. The Secretary of State and the second, third and fourth appellants are directed to file with the Upper Tribunal and serve on the other parties within 21 days of the date of the sending out of this decision any additional submissions to be relied on. The ECO and first appellant are to have the opportunity to respond within 21 days of receipt of such further submissions. If it is the view of the parties that decisions on the applications can be made without the need for a further hearing they are invited to say so.

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Upper Tribunal Judge Dawson