

**EUROPEAN BANK FOR RECONSTRUCTION AND
DEVELOPMENT**

ADMINISTRATIVE TRIBUNAL

Appellant v EBRD (Respondent)

FURTHER DECISION ON COSTS AND JUDGMENT

ADMINISTRATIVE TRIBUNAL

President:

Professor Roy Lewis

Assessors:

Frank Ryan, Manager, Business Information Centre

Dilek Macit, Director, Consultancy Services Unit

Secretariat:

Cecilia Russell and Lucie Newman.

Pursuant to section 6.01 of the Grievance and Appeals Procedures (“the GAP”) the President of the Tribunal consulted the Assessors by telephone conference on 25 April 2007.

FURTHER DECISION ON COSTS

- (1) The Appellant’s legal costs from 13 February to 19 April 2007, set out in the revised schedule of costs dated 19 April 2007, are “reasonable legal costs” within the meaning of section 9.06 of the GAP.**
- (2) Pursuant to section 9.06 of the GAP, the Respondent is ordered to reimburse the Appellant for 75% of the legal costs incurred from 13 February to 19 April 2007 set out in the revised schedule referred to in the previous paragraph.**

**Professor Roy Lewis
President
Administrative Tribunal
26 April 2007**

JUDGMENT

CLARIFICATION OF ISSUES FOR DETERMINATION

1. This Decision and Judgment concerns the Appellant's costs incurred in the period from 13 February to 19 April 2007.
2. By an email dated 17 April 2007 the Respondent indicated that it would not be pursuing an application for a wasted costs order. It follows that there are just 2 issues for consideration. First, whether the Appellant's costs incurred from 13 February to 19 April 2007 are "reasonable legal costs" within the meaning of section 9.06 of the GAP. Second, whether the Appellant's costs in this period should, pursuant to section 9.06, be fully reimbursed by the Respondent or whether only a proportion of them should be reimbursed by the Respondent.
3. For the avoidance of doubt, once the present issues are determined, the Tribunal does not intend to entertain any further applications in respect of costs. This Decision and Judgment will bring the proceedings in this case to a close.
4. The Respondent's email of 17 April made it clear that it was content for the Tribunal to deal with the issues defined above without the Respondent making any further submissions. By letter and email dated 19 April it was confirmed on behalf of the Appellant that he too was content for the Tribunal to deal with these issues without any further submissions, save for the point that the Tribunal was asked to take account of the fact that the Appellant had not claimed interest on the costs that he had paid to date.

REVISED SCHEDULE OF COSTS

5. The Tribunal has had the benefit of a revised schedule of the Appellant's legal costs dated 19 April. This set out the Appellant's legal costs as follows:

- (1) Costs to 12 February 2007. This repeated the contents of the Appellant's amended schedule of costs dated 22 February 2007. This had indicated total billed fees to 12 February 2007 of £145,758 (inclusive of VAT) plus total unbilled fees to 12 February (exclusive of counsel's fees) of £6,196-50 (exclusive of VAT). As will be described below, these costs were in fact the subject of an earlier decision by the Tribunal.
- (2) Costs from 13 February to 7 March. This repeated the contents of the Appellant's additional schedule of costs dated 13 March 2007. This indicated total unbilled fees up to 7 March (a) in respect of Beachcroft LLP of £19,545-50 (exclusive of VAT) plus disbursements of £63-85, and (b) in respect of counsel of £15,686-26 (inclusive of VAT).
- (3) Costs from 8 March to 19 April, which had not been included in any previous schedule of costs. This section of the revised schedule indicated total unbilled fees from 8 March to 19 April (a) in respect of Beachcroft LLP of £4,320-60 (exclusive of VAT) and (b) in respect of counsel of £1,586-25 (inclusive of VAT).

THE ADMINISTRATIVE TRIBUNAL'S FIRST DECISION ON COSTS

6. The Tribunal issued a Decision on Remedy and Judgment dated 4 April 2007. As part of the Decision, the following was determined in respect of costs. First, the Appellant's legal costs up to 12 February 2007, set out in the amended schedule of costs dated 22 February 2007, were "reasonable legal costs" within the meaning of section 9.06 of the GAP. Second, pursuant to section 9.06 of the GAP, the Respondent was ordered to reimburse the Appellant for all the legal costs set out in the amended schedule. Third, the question of costs from 13 February 2007 onwards was to be dealt with in the way outlined in the Judgment.

REASONABLENESS OF APPELLANT'S COSTS FROM 13 FEBRUARY TO 19 APRIL

7. In the light of various written comments produced by the parties, and without prejudice to the issue of apportionment, the Tribunal's Judgment of 4 April contained certain conclusions that were relevant to the issue of the reasonableness of the

Appellant's costs incurred from 13 February to 7 March. The Tribunal concluded that there was no sustainable challenge to the costs set out in the additional costs schedule of 13 March, as clarified in the Appellant's letter of 22 March, as regards the number of hours expended and the actual amounts of money to be billed. For the avoidance of doubt, the Tribunal rejected objections raised by the Respondent about the reasonableness of the Appellant's costs on grounds such as whether it was justifiable to involve a partner or whether the costs attributable to Appellant's counsel were proportionate compared with the liability hearing.

8. In respect of the Appellant's costs from 8 March to 19 April, the Tribunal considers that these are of a relatively modest amount and are a true reflection of the number of hours expended and the actual amounts of money to be billed.
9. The Tribunal concludes overall that the Appellant's costs for the period from 13 February to 19 April were "reasonable legal costs" within the meaning of section 9.06 of the GAP.
10. The Tribunal now turns to the question of the apportionment, if any, of these costs as between the Appellant and Respondent.

PRINCIPLES APPLICABLE TO THE APPORTIONMENT OF COSTS

11. At the remedies hearing the main issue between the parties in respect of the costs up to 12 February 2007 was whether they were to be reimbursed by the Respondent to the Appellant in full or whether they were to be apportioned. In dealing with this question the Tribunal laid down certain principles of general applicability. These were set out at paragraphs 99-100 of the Tribunal's Judgment:

As regards the disputed interpretation of section 9.06, the Tribunal considers that even where a case has been upheld in whole or in part it is not mandatory for the Tribunal to award an appellant all his or her reasonable legal costs. This is because the word used to define the Tribunal's power is "may" rather than "must". However, for reasons that will now be explained, the Tribunal takes the view that there has to be a good and persuasive reason not to award an appellant, whose claim has been upheld in whole or in part, all of his or her reasonable legal costs. This is particularly

the case where an appellant has been upheld with respect to one or more major planks of an appeal.

The Tribunal justifies this approach as follows. First, the implicit policy of section 9.06 of the GAP, read in conjunction with section 6.03, is that there should be “equality of arms” between appellants and the Bank. This means that the Bank should not have any advantage in Tribunal proceedings simply by virtue of its inevitably greater resources compared with those of individual appellants. Second, equality of arms is, in appropriate cases, achieved through the Tribunal giving the appellant permission to have external legal assistance and exercising the power, if an appeal is upheld in whole or in part, to order the Bank to reimburse an appellant for any expenses, including reasonable legal costs. It is to be noted that even when an appeal has not succeeded, section 9.06 allows the Tribunal in defined circumstances to make a recommendation that the Bank should pay all or some of an appellant’s legal costs. Third, In the light of the policy underpinning section 9.06, there has to be a good and persuasive reason not to award appellants, who have succeeded in major parts of their claims, all their reasonable legal costs.

12. Applying these principles to the facts of the case, the Tribunal could see no good or persuasive reason why the Appellant, who had succeeded in major parts of his claim, should not be awarded all his reasonable legal costs incurred up to 12 February 2007.

APPORTIONMENT OF APPELLANT’S COSTS FROM 13 FEBRUARY TO 19 APRIL

13. In contrast to the position in relation to the costs incurred to 12 February 2007, there is a good and persuasive reason for the apportionment of the Appellant’s costs from 13 February to 19 April. This reason concerns the way in which the Appellant raised the issue of his alleged victimisation by [Employee 15]. It will be recalled that the alleged victimisation occurred at a meeting between [Employee 15] and the Appellant on Monday 19 February. However, the issue was not raised with the Tribunal and the Respondent until 17.42, that is, after the close of business on Friday 23 February with the disclosure of the Appellant’s third witness statement. This was effectively on the

eve of the remedies hearing that was scheduled to commence on Monday 26 February.

14. The criticism of the Appellant, or perhaps the criticism of his legal team, goes to the way the matter was raised and most precisely the timing. The Tribunal emphasises that it does not criticise the Appellant for raising the issue as such. On the other hand, it is to be noted that the Tribunal eventually concluded on hearing the evidence that [Employee 15] had not victimised the Appellant and that the meeting of 19 February was covered by the without prejudice rule.
15. No coherent explanation was offered as to why the matter was raised only after the close of business on the working day before the remedies hearing was due to commence. It could surely have been raised earlier – on the Wednesday, the Thursday, or earlier on the Friday. The Tribunal agrees with the Respondent’s contention that the very late disclosure of the third witness statement amounted to litigation by ambush. As a result, the Respondent was disadvantaged. In addition, a certain amount of time was wasted, particularly on 26 February.
16. In the circumstances the Tribunal considers that it is appropriate that a proportion of the Appellant’s costs from 13 February to 19 April should not be reimbursed by the Respondent. The Tribunal’s decision will be that the Respondent will be ordered to pay 75% of the Appellant’s costs in respect of this period.

Professor Roy Lewis
President
Administrative Tribunal
26 April 2007