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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY EDDIE WEIR AND THE CHARTERED INSTITUTE OF ARCHITECTURAL TECHNOLOGISTS FOR JUDICIAL REVIEW

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David Dunlop KC and Matthew Corkey (instructed by DWF Law) for the applicants
Philip McAteer (instructed by Carson McDowell) for the respondent
Philip McEvoy (instructed by Cleaver Fulton Rankin) for the notice party

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HUMPHREYS J

Introduction

[1] The first named applicant is a Chartered Architectural Technologist ("CAT") and the current President of the Chartered Institute of Architectural Technologists ("CIAT"), which is the second named applicant. CATs are construction industry professionals concerned in the science, discipline and practice of building design. They are competent and qualified to carry out a whole range of responsibilities, including building design, contract administration, realisation and completion.

[2] CIAT was founded in 1965 and granted a Royal Charter in July 2005. The Charter provides that the objects of CIAT shall be:

(i) To promote, for the benefit of society, the science and practice of architectural technology;

(ii) To facilitate the development and integration of technology into architecture and the construction industry;

(iii) To uphold and advance the standards of education, competence, practice and conduct of its members.

[3] CIAT serves as the representative body for CATs and imposes mandatory CPD and professional indemnity insurance requirements on its members, as well as acting as regulator through enforcement of its Code of Conduct.

[4] Those individuals who are qualified to practise as CATs are entitled to use the designation MCIAT or FCIAT (representing member and fellow respectively) in order to signify membership of CIAT.

[5] CATs are to be distinguished from architects, a profession that enjoys particular protection under the Architects Act 1997. The term 'architect' can only be used by a person who is on the Register of Architects, which is maintained by the Architects Registration Board ("ARB").

Background

[6] By this application for judicial review, the applicants challenge a decision made by the respondent, the Education Authority ("EA"), to exclude CATs from acting as economic operators in the role of lead consultant on a Dynamic Shortlisting System ("DSS") for managed services.

[7] Leave was granted by Scoffield J on limited grounds and he extended the time for bringing the application pursuant to Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980. He found that both applicants had sufficient interest to bring the proceedings but left open the question of whether the decision under challenge was amenable to judicial review.

[8] As the application is now constituted, it is alleged that the decision was unlawful as it contravened the Northern Ireland Public Procurement Policy ("NIPPP"') and that the respondent fettered its discretion by failing to consider the inclusion of CATs as lead consultants. It is also contended that the decision was irrational in the *Wednesbury* sense.

The dynamic shortlisting system for managed services

[9] Prior to the launch of the DSS, the EA engaged with Royal Society of Ulster Architects ("RSUA"), which is the notice party to this application.

[10] The EA invited applications in order to establish a list of managed services consultants for a variety of construction related projects within the education sector. The DSS established thereby would only apply to individual contracts below the EU threshold for public procurement competitions. Once on the list, the economic operators would be randomly rotated and expressions of interest then sought. A maximum of six economic operators would then be invited to tender for the individual project. The DSS is to be maintained for a period of ten years and applicants could seek inclusion on the list at any time.

[11] The Memorandum of Information ("MOI") for the DSS competition makes it clear, at para 7.3, that the consultant must have, within its team, an architect. As such, only architects could act as lead consultants.

[12] The MOI also provides that the services to be delivered will include the following:

- Obtain Planning Permission.
- Obtain Building Control Approval.
- Prepare Tender Documentation for the appointment of a contractor.
- Manage the NEC3 ECC contract for the duration of the project.
- Carry out assessments in relation to the appointment of a contractor.

[13] The applicants state that all the roles fall within the professional competence and qualification of CATs.

The Northern Ireland Public Procurement Policy

[14] The MOI identifies that the Public Contracts Regulations 2015 ("PCR 2015") do not apply to the DSS competition but that it is subject to the NIPPP as referred to in CPD Procurement Guidance Note ("PGN") 05/12.

[15] The PGN states:

> "Within Northern Ireland, there is also a requirement on all bodies subject to NIPPP to comply with the 12 Procurement Principles contained within the policy. These include the principles of transparency and competitive supply."

[16] The 12 Principles include the following:

> "Competitive Supply: procurement should be carried out by competition unless there are convincing reasons to the contrary.
>
> Fair Dealing: suppliers should be treated fairly and without unfair discrimination, including protection of commercial confidentiality where required. Public bodies should not impose unnecessary burdens or constraints on suppliers or potential suppliers.
>
> Informed decision-making: public bodies need to base decisions on accurate information and to monitor requirements to ensure they are being met.

> Transparency: public bodies should ensure that there is openness and clarity on procurement policy and its delivery."

[17] In the context of procurement competitions above threshold, Regulation 18 of the PCR 2015 states:

> "(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
>
> (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.
>
> (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

[18] Insofar as selection criteria are concerned, Regulation 58 of the PCR 2015 permits such criteria to be used provided they relate to either:

(i) The tenderer's suitability to pursue a professional activity;

(ii) Its economic and financial standing; or

(iii) Its technical and professional ability.

Pre-proceedings correspondence

[19] When challenged in relation to the requirement that the lead consultant be an architect rather than any other discipline, Mr McCarroll of EA replied on 9 July 2020:

> "As a client we have the greatest respect for both the professional role of the architect and the architectural technologist, however whilst there is an overlap in training, qualification and experience the two roles are not equivalent for the following reasons:
>
> (1) Architects are the only design professionals which are regulated by the law. This provides the highest level of compliance with a prescribed set of legally established standards.

(2) The training of an architect and architectural technologist is not identical. The course content, the relative emphasis of different aspects of design and the duration of training are all different.

(3) The assessment process to become qualified as an architect and architectural technologist is significantly different. The examination process, the coursework assessment and regulation of these processes by the governing body all vary substantially.

(4) The requirement to be an architect for this type of work is the standard approach across public sector COPEs in Northern Ireland."

[20] This prompted a series of further questions to the EA which were contained in letters from CIAT dated 30 July 2020 and reiterated on 23 September 2020. Neither of these merited a response. The key questions asked were:

(i) Why CATs were excluded from the DSS;

(ii) How the respondent (and other COPEs) had reached the decision to work only with architects in this type of work; and

(iii) What competencies the respondent felt CATs were lacking for the purposes of this competition.

[21] The applicants also pursued an FOI request seeking any relevant documents in relation to the decision making process, methodology and evidence relating to the decision to include architects and exclude CATs from the lead consultant role. The respondent has stated that no such documents exist.

The respondent's evidence

[22] The EA is itself a Centre of Procurement Expertise ("COPE"). Its Senior Category Manager for Minor Works Procurement, Damian McCarroll, has sworn two affidavits. In these, he deposes to the fact that he is a Quantity Surveyor, a construction professional of many years' experience who is well versed in project management and fully aware of the distinction between architects and CATs.

[23] His evidence is that:

(i) Architects "sit at the pinnacle of building design";

(ii) Architects focus on the visual and layout aspects of a project whilst CATs emphasis is on the technology of how buildings are constructed;

(iii) Architectural practices, including those on the DSS, generally employ both professions;

(iv) In the DSS projects, architects lead the design team by initiating the overall concept whilst CATs assist them in developing this;

(v) For projects of the size, scale and complexity of those in the DSS, it is typical that an architect will lead the design team;

(vi) Architects are the only design professionals whose title is protected by legislation and this "ensures the highest standards within the profession are consistently maintained for the benefit of the public";

(vii) Architects undergo a lengthier period of education and training than CATs;

(viii) Overall, architects are the most suitably qualified to lead the design of projects of this nature.

[24] The construction requirements of the EA range across a variety of types from major capital projects, through complex and semi-complex minor works to straightforward minor works. The first category will generally be above threshold and require a full PCR 2015 procurement process. Complex minor works will usually involve construction cost of over £250,000 and design cost of over £20,000 and these will be procured using the DSS. Semi-complex minor works will require a partial design team, usually not requiring the services of an architect. Straightforward minor works do not require any external input and are resourced entirely from the EA's own internal staff.

[25] At a meeting on 30 September 2019, the EA's senior procurement team decided that the DSS was the model best suited to the organisation's needs. It was also agreed that the make up of the consultant teams should involve an architect as lead consultant. Mr McCarroll states:

> "The structure of the consultant team was decided upon based on the scale, scope and complexity of the type of projects to be designed…{it} was determined with full knowledge of the relative skills, qualifications of architects and architectural technologists and all other design disciplines."

[26] The point is also made that there are many other building design professionals, who could claim the relevant competence, but who are not within the category of permissible lead consultant.

[27] Following the decision made on 30 September 2019, the process of engagement with RSUA began, with the aim of stimulating interest and attracting applicants.

[28] The court also has the benefit of evidence from Glenda Hall, the Head of the EA's Minor Capital Delivery service and one of the other individuals involved in the decision made on 30 September 2019. She is herself an architect with over 25 years' experience of design work, contract administration and project management.

[29] Ms Hall states that her experience has given her an intimate understanding of the relative skills of the different construction disciplines and how they relate to the requirements of particular projects. She has engaged and worked with CATs both externally and within the EA's own team.

[30] She also deposes to the content of the meeting of 30 September 2019 when it was unanimously agreed that the DSS approach was the most appropriate for the requirements of the EA in light of the anticipated type of works. In relation to the role of lead consultant, Ms Hall states:

> "Architects are best placed to lead the entire project team, with Architectural Technologists working as part of the team. Architects are the most suitably qualified to lead the overall conceptual design of the project and lead the integration of all other design disciplines."

[31] This was a decision made, on her evidence, after due consideration by the team tasked with establishing and addressing the needs of the organisation. Having reflected on the matter again in light of the evidence adduced by the applicants, Ms Hall remains of the view that this was the correct decision.

The evidence of the notice party

[32] Donal MacRandal, architect and President of the RSUA, has sworn two affidavits in support of the respondent's position. He is the principal architect in the Department of Finance and therefore has extensive experience in public procurement.

[33] He seeks to emphasise the distinctions between architects and CATs in terms of training, regulation and practice. He stresses that architects have a deep theoretical understanding of the design of buildings whilst, in general CATs are more practically focussed. He agrees with Mr McCarroll's assessment that they sit at the pinnacle of building design. Architect led design teams have historically been a feature of educational design procurement, reflecting the ability of the professional to co-ordinate the whole overall design.

The applicants' response

[34] The applicants criticise the respondent for failing to understand or articulate the differences between the respective professions and more generally for its "ex post facto justification for its decision to exclude CATs from the role of lead consultant."

[35] The point is made that the EA will permit CATs to fulfil the role of principal designer but not that of lead consultant, a situation described as 'incongruous.' It is noteworthy that regulation 11 of the Construction (Design and Management) Regulations (NI) 2016 defines the role of the 'principal designer' as being to ensure, insofar as is possible, that a project is carried out without risks to health and safety. There is therefore a significant difference in the roles played by a principal designer and that of a lead consultant concerned in the overall design of the project.

[36] At para 30 of his second affidavit, Mr Weir makes an unsubstantiated allegation of bias against both Ms Hall and Mr MacRandal which seemingly derives from their professional qualification and standing as architects. This allegation did not form part of the grounds of the judicial review challenge and ought not to have appeared in affidavit evidence.

[37] Mr Weir entirely rejects the contention advanced by the respondent's witnesses that the scale, scope and complexity of the works called off from the DSS are such that only an architect could lead the design process. In support of this contention, he references a range of large-scale complex construction projects which were led by CATs.

[38] In terms of professional regulation, the case is made that a similar level of protection to the public is achieved through CIAT's Royal Charter as is the case through the statutory regime concerning architects. Equally, it is contended that whilst the education and professional training of the two professions may be different, there is no explanation as to why this would justify differential treatment in relation to the role of lead consultant in this DSS.

The evidence of Ian Salisbury

[39] In support of their case, the applicants sought to adduce an affidavit from Ian Salisbury, a Chartered Architect based in England. On inquiry from the court, it was confirmed that Mr Salisbury was a witness of fact and was not acting as an expert witness, albeit that he makes specific reference to his experience as an expert witness in his affidavit.

[40] Despite this unambiguous position on the evidence of Mr Salisbury, his affidavit is replete with statements of opinion. By way of example:

(i) He describes the respondent's position as being "demonstrative of a deep ignorance of both the history of the architectural profession and how other professionals in the built environment industry are regulated";

(ii) The respondent's averment in relation to the compliance of architects with legally established standards represents "a meaningless platitude";

(iii) The respondent's view that an architect as lead consultant ensures a higher quality of work is "entirely misconceived" or alternatively it is "illusory, ignores the reality of the Architects Act, or both";

(iv) The respondent's position is infected by "bias…engendered through the statutory monopoly ascribed to the title 'architect'… there is no rational justification for same";

(v) The reasons offered by the respondent are "arbitrary and not sustainable in fact" and based on an "outdated and romantic notion";

(vi) He concludes his evidence, without irony, by accusing the RSUA of being "pretentious and misleading" by "erecting a Potemkin village around the supposed primacy of the membership."

[41] The privilege of giving evidence of opinion in the common law courts is limited to those individuals whose expertise is such that their evidence can assist the decision maker in drawing the appropriate inferences and conclusions from the facts of any given dispute. The admission of such evidence is subject to strict judicial control to ensure compliance with the essential principles of independence, objectivity and reliability.

[42] In *Re Mooreland and Owenvarragh Residents Association's Application* [2022] NIQB 40, I criticised the attempts by the applicant to adduce evidence from a purported expert which stepped completely outside the permissible parameters of opinion evidence. In *Re McAleenon's Application* [2022] NIQB 39, I reiterated the principles set out by Treacy J in *Re Bryson Recycling* [2014] NIQB 9 in relation to the use of expert evidence in judicial review proceedings generally. To those statements of principle should be added that it is never appropriate or permissible to seek to smuggle expert opinion evidence into a case under the guise of evidence of fact. All practitioners should be cognisant of this prohibition. Simply because no objection was taken to the evidence of Mr Salisbury at the time his affidavit was filed does not render it admissible.

[43] In this specific case, the matter does not end there. The evidence reveals that Mr Salisbury failed to disclose in his affidavit that he has a long history of dispute with the ARB which entailed his resignation from the board and ensuing litigation, seemingly precipitated by his decision to publish legal advice to the ARB on his website. Publicly available information also indicates that he acted as a McKenzie Friend to an architect appearing before the Professional Conduct Committee in which it was argued that the committee had no jurisdiction. Furthermore, he has issued some 53 FOI requests to the ARB in recent years.

[44] I stress that no blame attaches to the applicants or their representatives for these omissions. The responsibility for same attaches exclusively to Mr Salisbury who is an experienced architect, arbitrator and expert witness and who is no doubt well aware of the duty of candour in disputes of this nature. These were manifestly matters which ought to have been disclosed to the other parties and to the court in the event that reliance was sought to be placed on his evidence.

[45] I have therefore concluded that the evidence of Mr Salisbury is inadmissible and I have taken no account of it in arriving at the conclusions contained in this judgment.

The grounds for Judicial Review

(i) The failure to comply with NIPPP

[46] The NIPPP sets out a series of broad guiding principles which reflect the fundamental principles of procurement enshrined in Regulation 18 of PCR 2015.

[47] It is well established in law that a failure to follow published policy, absent good reason may be a ground for judicial review – see, for example, *R (Good Law Project) v SSHSC* [2021] EWHC 346 (Admin) at para [127]. It is recognised that some policies may leave a measure of discretion to the decision maker, in other cases good reason needs to be shown to depart from the terms of the policy.

[48] The applicants argue that, pursuant to the terms of the NIPPP, the respondent was obliged to ensure value for money and to secure open and effective competition in the creation of the rules for the DSS. The respondent chose to impose a specific requirement that only architects could be considered for the role of lead consultant, which served to narrow the field of potential tenderers for the DSS.

[49] The Court of Justice of the European Union has regularly stated that contracting authorities enjoy a discretion in relation to the technical and professional ability standards fixed by any given procurement competition - see, for example *CEI and Bellini* [1987] ECR 3347 and *Beentjes v The Netherlands* [1988] ECR 4635. Thus, whilst authorities may not use selection criteria to artificially narrow competition, they can set standards by which technical and professional ability can be measured. It is frequently the case that a particular professional qualification is required in order to qualify for inclusion in a competition for an award of a professional services contract. This is entirely permissible provided it relates and is proportionate to the subject matter of the contract.

[50] A fortiori, this discretion must also exist in below threshold procurement competitions which, by their very nature, are subject to a much lighter touch legal regime.

[51] In *Traffic Signs v Department for Regional Development* [2011] NIQB 25, a case involving an above threshold procurement, the award criteria provided that 40% of the marks were accorded to quality and 60% to price. Weatherup J accepted that this was a matter of judgment for the contracting authority but found that this was "bereft of explanation" and therefore breached the obligations of objectivity and transparency.

[52] It is important to recognise the distinction between award criteria which must relate to the tender (Regulation 67 of the PCR 2015) and selection criteria which relate to the tenderer – see *Lianakis* (C-532/06). In the case of the former, the importance of respective weightings is that they inform the decision as to the most economically advantageous tender. In the case of the instant criterion in relation to lead consultants, there can be no breach of the obligation of transparency given its clear and unambiguous effect, and, in any event, the respondent has provided an evidential basis for its decision.

[53] In *Consultant Connect v NHS Bath and North East Somerset* [2022] EWHC 2037 (TCC), Kerr J found that a procurement process was conducted in such a manner as to ensure that a particular economic operator was successful. This represented a covert competitive process with preordained result in breach of Regulation 18(2) and (3) of PCR 2015.

[54] The question in this case is whether the requirement that an economic operator hold a particular professional qualification serves to breach the requirements of competition and fair dealing set out in the NIPPP.

[55] All selection criteria serve to narrow the pool of potential tenderers in a procurement competition. That is not anti-competitive, it is merely an exercise of the contracting authority's discretion to set requirements for the participation of economic operators.

[56] On the evidence, the applicants say, the respondent failed to give any consideration to the ability of CATs to fulfil the role of lead consultant. In support of this, the various examples of the work of CATs set out in the affidavits of Mr Weir are relied upon. On this basis, it is argued that the decision maker did not take adequate steps to inform itself of the true position in the market before settling upon the rules of the competition.

[57] The problem with this analysis is that it flies in the face of the evidence of both Mr McCarroll and Ms Hall who were two of the panel members who made the decision. They both say that they have extensive experience, internally and externally, of the roles and abilities of CATs as well as the panoply of other construction professionals. They say that a conscious, informed and unanimous decision was made by the panel to establish the DSS as the model for procurement and to the fix the requirement that only architects could act as lead consultants. The applicants can

point to the lack of contemporaneous documentation to support this assertion but, in the context of judicial review proceedings, it is extremely difficult to gainsay it.

[58] Both on the evidence and as a matter of legal principle, I am satisfied that the respondent was entitled to impose the requirement that only architects could act as lead consultants. The DSS procurement proceeded on a competitive basis, albeit that only certain economic operators were eligible to apply. Whilst this will have caused narrowing of competition, there is no basis to contend that it caused an *artificial* narrowing of competition or that it breached any requirement of fair dealing, informed decision making or transparency.

Fettering of discretion

[59] The applicants argue that the policy adopted by the respondent in relation to architects only as lead consultants offends the principle in *British Oxygen-v Minister of Technology* [1971] AC 610 in that the applicants have refused to listen to a substantial argument urging a change of policy (see Lord Reid at 625).

[60] The respondent clearly has a discretion, embodied in the procurement documents, to amend the criteria for admission to the DSS. The applicants say, on the evidence, that it has closed its mind to the possibility of CATs acting as lead consultants.

[61] However, the sworn evidence before the court is that the respondent has considered the applicants' evidence and submissions as put forward in this application for judicial review but decided not to make any amendment to the DSS criteria. Each of the individuals concerned has confirmed that they:

> "…remain content that it is proper that architects should retain the role of lead consultant"

[62] In light of this incontrovertible evidence, the applicants claim in relation to fettering of discretion must fail.

Irrationality

[63] In *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014, Lord Diplock explained:

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.
>
> It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it

> has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223* , *per* Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

[64] More recently, in *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (QB), the Divisional Court stated at paragraph [100]:

> "The following principles can be gleaned from the authorities:
>
> 1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> 2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC [2005] QB 37* at para [35], per Laws LJ).
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406*).
>
> 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council (1989) 21 HLR 301* ; cited with approval by Laws LJ in (*R(Khatun) v Newham LBC* (*supra*) at para [35]).

5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*per* Laws LJ in (*R (London Borough of Southwark) v Secretary of State for Education* (*supra*) at page 323D).

6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R (Venables) v Secretary of State for the Home Department [1998] AC 407* at 466G)."

[65] The court will not conduct a merits-based review into the decisions taken around the rules of the DSS competition. It will, however, enquire into the process adopted by the respondent, including the question of whether it asked itself the right question and took reasonable steps to acquaint itself with the relevant information.

[66] Both Mr McCarroll and Ms Hall have set out their reasons and rationale for the requirement imposed in relation to lead consultants. It is perfectly understandable why a CAT or the CIAT would disagree, and disagree vehemently, with this decision. The court will not, however, substitute either their view or its own view for that of the public law decision maker.

[67] It is simply not possible to say, in light of the evidence, that no reasonable decision maker could have been satisfied that it possessed the material necessary to make the decision in question. On the contrary, the panel was made up of experienced construction professionals, familiar with the requirements of the EA and who were fully apprised of the respective roles and abilities of architects and CATs, amongst others. Once this is established, then the matter is one of professional judgment for the individuals concerned with which the court will not interfere.

[68] The applicants' complaint arises essentially from their disagreement with the substance of the respondent's decision. There is no basis to contend that there has been a breach of the *Tameside* duty or that the respondent has otherwise behaved irrationally.

Conclusion

[69] For these reasons, the applicants' application for judicial review is dismissed. I will hear the parties on the question of costs.