# SUPREME COURT OF YUKON

Citation: *R v Pumphrey*, 2015 YKSC 19

Date: 20150504
S.C. No. 14-AP014
Registry: Whitehorse

Between:

**REGINA**

Appellant

And

**IAN CAMERON PUMPHREY**

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

| | |
|---|---|
| Karen Wenckebach | Counsel for the Appellant |
| Ian Cameron Pumphrey | Appearing on his own behalf |

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] This is a Crown appeal from the dismissal of a charge of using an electronic device while operating a motor vehicle on a highway, contrary to s. 210.1(2) of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153 (the "*MVA*"). The respondent, Ian Pumphrey, admitted at the trial that he received a call on his cellular telephone while driving. He pulled his vehicle over, answered the phone and then put the phone in speaker mode. Mr. Pumphrey then placed the phone between his left shoulder and his tilted head and proceeded to drive in that fashion while continuing to speak on the phone. He was

observed by an RCMP officer driving through an intersection while talking on the telephone in that manner. The RCMP officer stopped Mr. Pumphrey shortly after making this observation, and went to speak to him in his vehicle. Mr. Pumphrey told the officer that he had been operating a cell phone in the hands-free mode. Nevertheless, the officer issued Mr. Pumphrey a ticket under the *Summary Convictions Act*, R.S.Y. 2002, c. 210, as amended by S.Y. 2008, c. 9 ( the "*SCA*"), for the above-noted offence.

[2] The trial took place on December 16, 2014 in the Territorial Court. Mr. Pumphrey acted on his own behalf. After hearing the evidence and the submissions of the Crown and the accused, the trial judge adjourned the case in order to further review the law. He gave his judgment by oral reasons on January 13, 2015, dismissing the charge. The trial judge said that he dismissed "on the basis of the uncertainty of the law as it presently exists in the Yukon". However, he also appears to have had a reasonable doubt about whether Mr. Pumphrey's conduct fell within an exception under the *MVA*, which allows a person to make "hands-free use" of a cell phone while operating a motor vehicle on a highway.

**ISSUES**

[3] There are three issues on this appeal:

1) Did the trial judge fail to interpret the meaning of the exception for "hands-free use" under s. 210.1(3) of the *MVA*?

2) In addition, or in the alternative, did the trial judge err in his application of the facts to the exception?

3) Is Mr. Pumphrey entitled to costs?

**THE LEGISLATION**

[4] Section 210.1 of the *MVA* is entitled “Use of electronic devices” and provides as follows:

> *Use of electronic devices*
>
> 210.1(1) In this section
>
> "electronic device" means
>
> (a) a device (other than a permitted device) that is either or both of
>
> (i) a cellular telephone or another device that includes a telephone function, and
>
> (ii) a device that is capable of transmitting or receiving electronic mail or other text-based messages, and
>
> (b) a prescribed electronic device;
>
> "permitted device" means a device that is prescribed for the purposes of this definition;
>
> "permitted user" means
>
> (a) a peace officer,
>
> (b) a member of a fire department or fire brigade,
>
> (c) an emergency medical responder, and
>
> (d) a prescribed permitted user;
>
> "use", in respect of an electronic device, means doing any one or more of the following
>
> (a) holding the electronic device in a position in which it may be used;
>
> (b) operating any function of the electronic device;

> (c) communicating by means of the electronic device; and
>
> (d) engaging in any prescribed use of the electronic device.
>
> (2) Except as provided in subsections (3) and (4), no person shall use an electronic device while operating a motor vehicle on a highway.
>
> (3) Despite subsection (2)
>
> (a) if an electronic device is configured and equipped to allow hands-free use in a telephone function, a fully licensed driver who is operating a motor vehicle on a highway may, subject to any conditions or requirements imposed by regulation, use the electronic device in that manner; and
>
> (b) a person who is operating a motor vehicle may use an electronic device if the motor vehicle is lawfully and safely parked and is not impeding traffic.
>
> (4) Subsection (2) does not apply to
>
> (a) the use of an electronic device by a permitted user in the course of carrying out their powers, duties or functions; or
> (b) the use of an electronic device of a prescribed class or type by a person who uses it while engaged in a prescribed activity or as otherwise allowed by regulation.

[5] Although s. 210.1(3)(a) refers to “any conditions or requirements imposed by regulation” I am advised by the parties that no regulations pertinent to the facts of this appeal have been enacted by the Yukon Government. No particular explanation has been provided for this by Crown counsel, other than a general indication that the enactment of related regulations is a matter involving competing policy concerns. However, there was no application to adduce fresh evidence on this appeal to explain this inaction any further.

**ANALYSIS**

***1. Did the trial judge fail to interpret s. 210(3)(a) of the MVA?***

[6] The trial judge properly identified that the potential application of the exception for hands-free use in this subsection was the central issue in the trial. At para. 5 of his reasons, cited as 2015 YKTC 2, he stated: “The big question in this case has to do with the concept of hands-free use.” The trial judge then went on to examine three cases from Ontario relating to the issue; two were from the Ontario Court of Appeal (*R. v. Kazemi*, 2013 ONCA 585, and *R. v. Pizzurro*, 2013 ONCA 584) and one was from the Ontario Court of Justice (*R. v. Whalen*, 2014 ONCJ 233).

[7] *Whalen*, in my view, has many similarities to the case at bar. There, M.J. Epstein J. was sitting on an appeal from a conviction by a Justice of the Peace on a charge of driving with a hand-held communication device, contrary to s. 78.1(1) of the Ontario *Highway Traffic Act*, R.S.O. 1990, c. H.8. That provision creates a general prohibition against using an electronic communication device while driving a motor vehicle on a highway, in much the same way as s. 210.1(2) of the Yukon *MVA*, quoted above. The Ontario provision states:

> No person shall drive a motor vehicle on a highway while holding or using a hand-held wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages.

[8] The Ontario *Highway Traffic Act* also includes an exception to the above prohibition allowing a person to drive while using a device in “hands-free mode”, again very similar to the exception in s. 210.1(3)(a) of the Yukon *MVA*. The Ontario provision states:

> (3) Despite subsections (1) and (2), a person may drive a motor vehicle on a highway while using a device described in those subsections in hands-free mode.

[9] The facts in *Whalen* are also very similar to the case at bar. This was recognized by the trial judge at para. 13 of his reasons, where he quoted in part from para. 2 of *Whalen*:

> 2 The facts are not in dispute. On August 20, 2013 an officer of the Waterloo Regional Police Service was conducting cell phone enforcement in the City of Cambridge when he observed the Appellant operating her motor vehicle in the curb lane approaching his position. Her head was tilted significantly to her right and there was a cell phone between her right ear and shoulder. Her lips were moving and she appeared to be talking into the phone. Both hands were on the steering wheel. The officer followed the Appellant and when he stopped her vehicle the cell phone was on the passenger side front seat of her vehicle. The issue is whether or not the Appellant was in contravention of s. 78.1(1) of the *Highway Traffic Act* when positioning the phone as she did in a manner that left both of her hands on the steering wheel.

[10] At paras. 14, 15 and 16 of his reasons, the trial judge recognized that one difference between *Whalen* and the case at bar is that Ontario has enacted a regulation regarding the exceptional use of handheld devices in hands-free mode. Section 14 of *Ontario Regulation 366/09* provides:

> Hand-Held Devices
> Exemption for pressing buttons
> 14. (1) A person may drive a motor vehicle on a highway while pressing a button on a hand-held wireless communication device to make, answer or end a cell phone call or to transmit or receive voice communication on a two-way radio if the device is placed securely in or mounted to the motor vehicle so that it does not move while the vehicle is in motion and the driver can see it at a quick glance and easily reach it without adjusting his or her driving position. [O. Reg. 366/09, s. 14(1)]

> (2) A person may drive a motor vehicle on a highway while pressing a button on a device that is worn on his or her head or hung over or placed inside his or her ear or is attached to his or her clothing and is linked to a hand-held wireless communication device to make, answer or end a cell phone call or to transmit or receive voice communication on a two-way radio or a hand microphone or portable radio. [O. Reg. 366/09, s. 14(2)]

The trial judge observed, at paras. 16 and 19, that the Ontario government has, through this regulation, recognized the importance of having the hands-free device placed securely in or mounted to the motor vehicle.

[11] The trial judge referred to the purpose of the Ontario legislature in enacting its legislation. At para. 18 of his reasons, citing *Whalen*, he quoted the Ontario Minister of Transportation from a Hansard excerpt dated November 20, 2008, as follows:

> We are simply asking drivers not to use hand-held wireless communication and electronic entertainment devices while driving. The use of hands-free wireless communications devices, such as an earpiece or Bluetooth set up to work with your cellphone or BlackBerry, will still be allowed. GPS units mounted on a dashboard will still be permitted.

[12] The trial judge further found helpful Epstein J.'s discussion in *Whalen* about the definition of "holding", at para. 13 of that decision:

> 13 The *Canadian Oxford Dictionary*, second edition, 2004 defines "hold" as:
>
> Keep fast; grasp (esp. in the hands or arms).
>
> It would appear by this definition that containing in the hands is but one method of "holding". In common parlance a violin is "held" under the chin and a cello between the knees. Items are "held" against the body by an arm. One "holds" the thong portion of a flip-flop sandal between one's toes. I am satisfied that the definition of "holding" is sufficiently broad as to conclude that the Appellant was "holding" the cell phone between her ear and shoulder.

[13] At para. 24 of his reasons, the trial judge accepted this reasoning and made a finding of fact that Mr. Pumphrey was “holding” his cell phone when he was observed by the RCMP officer:

> 24 Clearly, Mr. Pumphrey was holding it - not with his hands, but between his shoulder and his head.

[14] However, in my view, the more relevant analysis in *Whalen* is found at para. 17, where Epstein J. concludes that the exception for using a device in “hands-free mode” does not simply mean without using hands:

> 17 The issue then becomes whether the Appellant is exempt from liability by virtue of s. 78.1(3) which permits a person driving a motor vehicle to use a cell phone "in hands-free mode". It is my view that "hands-free mode" in this age of digital technology does not simply mean "without hands". Rather, the term refers to a manufacturer's designed adaptation which permits the cell phone to be used without being held by the operator… (my emphasis)

[15] In my view, the trial judge ignored this passage from *Whalen* and also failed to expressly distinguish the case.

[16] Mr. Pumphrey attempted to distinguish *Whalen* on the basis that the Ontario legislation includes a regulation on hands-free usage, which the Yukon does not have. I do not find this to be a sufficient reason to disregard *Whalen*. Epstein J.’s conclusion in para. 17, which I just quoted, was reached before any consideration of the regulations. It was only after he reached that conclusion that he went further and stated that his interpretation “is consistent with” the regulations, as well as the legislature’s purpose in enacting the legislation as a whole (paras. 18 and 19).

[17] In addition to his reference to the regulations in Ontario, the trial judge noted, at para. 20, that there are similar regulations in British Columbia which give rise to an exemption if the hands-free device is “securely fixed to the motor vehicle.”

[18] By contrast, the trial judge lamented the fact that the Yukon government has not yet chosen to enact any relevant regulations to clarify what it meant by “hands-free use” in the exception in s. 210.1(3)(a) of the *MVA*. At paras. 36, 37, 38 and 40, he stated:

> 36 The Yukon Government, for whatever reason, has chosen not to bring in any regulations and leave the drivers in a state of uncertainty. This is particularly concerning to me because it was stated in subsection (3): "...if the device is configured and equipped to allow hands-free use..." -- i.e., in this particular instance, speaker mode -- "...a fully licensed driver who is operating a motor vehicle on a highway may, subject to any conditions or requirements imposed by regulations..."
>
> 37 The Yukon Government has decided not to bring about any regulations. To bring about regulations in this field would be very easy; they do not need to reinvent the wheel. There are many jurisdictions that have these regulations. The Yukon Government has decided not to bring in any regulations. The Territorial Crown Attorney was not aware of any. I searched for regulations and, yes, we do have some regulations, Regulations 88.1 and 88.2, dealing with two-way radios and emergency responses, but nothing that I could find in the Regulations to talk about the importance of having a cell phone in speaker mode firmly attached to your motor vehicle dashboard such as they not only discussed but, more importantly, implemented in the Province of Ontario and also in the Province of British Columbia.
>
> 38 My job as a judge is to interpret the laws in a sensible way, but it is not to fill in gaps that can easily be filled in by the Legislature or by the Cabinet….
>
> …
>
> 40 The Cabinet would be well advised to clarify this situation by bringing in appropriate regulations in due course….

[19] In the result, the trial judge concluded, at para. 39, that he had no choice but to dismiss the charge because of the uncertainty of the state of this law:

> 39 The net result of this case is that I certainly have a reasonable doubt in this case. The reasonable doubt will be resolved in favour of Mr. Pumphrey, and this matter will be dismissed on the basis of the uncertainty of the law as it presently exists in the Yukon.

[20] It is this passage that the Crown takes issue with on the question of whether the trial judge simply failed to interpret the meaning of the exception in section 210.1(3)(a) of the *MVA*. With respect, I agree that nowhere in his reasons does the trial judge specifically and expressly interpret the "hands-free use" exception, other than to indicate, at para. 36 (quoted above), that a cell phone in speaker mode is a device configured and equipped to allow hands-free use.

[21] *R. v. Wonderland Gifts Ltd*. (1996), 135 D.L.R. (4$^{th}$) 632 (Nfld. C.A.) is a case that considered the obligation of courts to interpret statutes, even when the language is vague or ambiguous. The Court of Appeal recognized that although the separation of powers doctrine ordinarily leaves lawmaking to the legislature and interpretation of law to the courts, occasionally the courts may incidentally take on a lawmaking function in the very process of interpretation. At para. 25, the Court stated:

> …the very function of construing and applying legislation with which courts are invested will often involve making choices between various alternatives to which the legislative measure admits. This, in turn, will entail policy decisions and value judgments. It is here that the line between the functions become less clear and judicial interpretation transcends itself into development and formulation of policy.

[22] The Court of Appeal then returned, at para. 47, to the question of the duty to interpret legislation, even where it is uncertain and vague:

> …Interpretation is a primary duty of courts in such circumstances and presiding judges do not enjoy the luxury of shrinking from it by shifting responsibility for clarification and definition to legislators and regulators, not to mention long suffering draftspersons. Denning, L.J. in *Seaford Court Estates v. Asher* (1949) 2 K.B. 48l spoke of the judiciary's obligation when faced with legislative ambiguity in the following terms of pp. 498-9:
>
> > …. The English language is not an instrument of mathematical precision. … It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. (my emphasis)

[23] Thus, to the extent that the trial judge declined to discern the intention of the legislature in the exception under section 210.1(3)(a), he made an error of law. Accordingly, as an appellate court, I allow the appeal and set aside the dismissal (pursuant to s. 613(1)(a)(ii) of the *Criminal Code*, R.S.C. 1970, c. C-34, which applies by virtue of s. 755 of the 1970 *Code* and s. 7(2) of the *SCA*).[1]

[24] Further, given my treatment of the second issue on this appeal, i.e. whether the trial judge erred in applying the facts to the exception, I conclude that it is appropriate for this court to expressly interpret “hands-free use”. In this regard, I accept the reasoning in *Whalen* that “hands-free” does not simply mean “without hands”. Rather, I view “hands-free use” as use without being held by the operator in any fashion. I will expand upon my

[1] Section 7(2) of the *Summary Convictions Act* refers to the provisions of the *Criminal Code* in force on April 30, 1978 relating to summary conviction appeals. It was the *Criminal Code*, R.S.C. 1970, c. C-34 which was in force at that time.

reasons for this interpretation shortly, but for present purposes, given that the trial judge made a finding of fact, at para. 24 that Mr. Pumphrey was “holding” the cell phone while driving, then it is open to me to find him guilty of the offence under s. 210.1(2) of the *MVA*, and I do so.

***2. In addition, or in the alternative, did the trial judge err in his application of the facts to the exception?***

[25] As I indicated in my disposition of the first issue on this appeal, the trial judge failed to interpret “hands-free” in the context of the legislation and simply gave it a literal meaning. In my view, the correct interpretation of “hands-free use” is more broad than simply use without hands, and contemplates that a device can be used only when it is not being held by the operator in any fashion. In my respectful view, this interpretation is more consistent with the purpose of the legislation. Here, I take judicial notice of the fact that the intention of the legislature in enacting s. 210.1 of the *MVA* was to minimize the distraction of drivers by the use of electronic devices, because such distraction could lead to motor vehicle accidents causing property damage, bodily injury and even death.

[26] I also reject an interpretation of “hands-free use” which incorporates the definition of “use” in s. 210.1(1) as including “holding the electronic device in a position in which it may be used” (my emphasis). I do so because such an interpretation could lead to absurd results inconsistent with the intention of the legislature.

[27] This was apparently recognized by the trial judge. Having just concluded that the exception did not preclude Mr. Pumphrey from having the cell phone on his shoulder in speakerphone format, he continued, at paras. 34 and 35, to state:

> 34 This is not an ideal way to use your cell phone because of potential problems. For example, you hit a bump

> in the road, the cell phone flies out from your shoulder and you wonder what is happening to it; a person would be distracted.
>
> 35 Using a cell phone in this manner I do think flies in the face of what is intended by the law…

[28] I would add two other examples where the risk of an accident is increased by holding a cell phone in the crook of one's shoulder and head. First, holding a phone in that fashion would seem to significantly impair the ability of drivers to move their heads from side to side for the purposes of scanning the roadway for other traffic, pedestrians and miscellaneous hazards, such as one does by a simple shoulder check. Second, when the driver finishes the phone call, it seems to me that there would be a natural tendency to want to grab the phone by hand and place it somewhere else in the vehicle where it is no longer a distraction. That could also easily lead to a further momentary loss of attention to the road.

[29] Mr. Pumphrey emphasized here that the trial judge made a finding of fact, at para. 4, that he was not driving in a distracted manner:

> There was no evidence of any driving irregularities or any difficulties that Mr. Pumphrey had with operating his motor vehicle at the time.

[30] I commend Mr. Pumphrey for that. However he misses the point. He is not charged with driving without due care and attention. Rather, he is charged with using an electronic device while operating a motor vehicle on a highway. It is not necessary for the Crown to prove that Mr. Pumphrey was also distracted or driving irregularly while using such a device. Further, there is no doubt that he was using such a device while driving. This was clearly found as a fact by the trial judge at para. 27 of his reasons. The only remaining question is whether the exception under s. 210.1(3)(a) applies. The trial judge

found that it did and, in my view, he made an error of law in making that finding. Accordingly, on this issue I similarly set aside the dismissal because it was wrong in law and I substitute a verdict of guilty.

[31] I am further authorized to pass a sentence in this matter (see s. 613(4)(b)(ii) of the 1970 *Criminal Code*, which applies by virtue of s. 755 of the 1970 *Code* and s. 7(2) of the *SCA*). Here, I take into account the following circumstances:

1) Mr. Pumphrey is 48 years old and has no criminal record;
2) He is gainfully employed and operates a separate business in addition to his employment;
3) He is married with two children;
4) There was no evidence of any driving irregularities or any difficulties operating his motor vehicle when observed by the RCMP officer;
5) He was cooperative with the RCMP officer when stopped, other than to assert his belief that he had done nothing wrong, as his phone was in speaker mode;
6) He attended in the Territorial Court on two separate days to defend himself during the trial;
7) He claims, and I accept, that he spent approximately 60 hours of time researching and responding to the Crown's appeal in this matter, including the preparation of a 10-page memorandum of argument and two books of authorities on the appeal proper;
8) In addition to the appeal proper, Mr. Pumphrey felt it necessary to respond to a relatively late application by the Crown (filed March 10, 2015) to

introduce new evidence in the form of Hansard transcripts. In response, Mr. Pumphrey prepared a further 10-page memorandum as well as a seven page affidavit (the Crown ultimately withdrew that application);

9) As a self-represented litigant and layperson, it is not surprising that some of Mr. Pumphrey's arguments were misguided. However, many were not and he made a genuine good faith effort to defend himself both at the trial and as the respondent on this appeal;

10) Had Mr. Pumphrey chosen to plead guilty to the original ticket charging the offence under s. 210.1(2) of the *Act*, he would only have been required to pay a relatively modest combined fine and surcharge of $287; and

11) This is a novel question of law in the Yukon, in the sense that is has not been litigated before.

[32] In all of these circumstances, I am satisfied that would be in Mr. Pumphrey's best interests and not contrary to the public interest that, had I the jurisdiction to do so, instead of convicting him, I would order that he be discharged absolutely pursuant to s. 730(1) of the *Code*. However, neither the *MVA* nor the *SCA* expressly incorporate by reference s. 730 of the *Code*, and I am not satisfied that I have the jurisdiction to impose an absolute discharge: see *R. v. Sztuke*, [1993] O.J. No. 3038 (Ont. C.A.); and *R. v. McGavin*, 2000 MBCA 38. By my reckoning, the minimum sentence I can impose in this situation is to convict Mr. Pumphrey under s. 210.1(2) of the *MVA* and, pursuant to s. 22.1(1)(a) of the *SCA*, suspend the passing of sentence and direct that he comply with the conditions in a probation order. The conditions will be the statutory conditions in

s. 22.1(2) of the *SCA*, and the duration of the probation order will be one (1) day. Lastly, I direct the Clerk to comply with s. 22.1(5) of the *SCA.*

***3. Is Mr. Pumphrey entitled to costs?***

[33] Mr. Pumphrey submitted that he should be entitled to costs to compensate him for his time and trouble in defending himself in this appeal. He asserted that this is a "test case".

[34] The authority to award costs on a summary conviction appeal is found in s. 758 of the 1970 *Criminal Code*, which applies by virtue of s. 7(2) of the *SCA*, and provides:

> 758. Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable. 1953-54, c. 51, s. 730.

[35] Although Mr. Pumphrey is the losing party on this appeal, the case law indicates that costs can be ordered against the Crown regardless of the outcome of the appeal. This was confirmed by the Ontario Court of Appeal in *R. v. Garcia* (2005), 195 O.A.C. 64, at para. 12. However, the Court also held that it is clear that an award of costs for or against the Crown in summary conviction appeal matters "will be the exception and not the rule" (para. 12). *Garcia* further held, at para. 22, that the mere fact that a Crown appeal raises a legal issue of general importance, whose resolution will affect other cases, cannot suffice to make the appeal an "exceptional" case justifying a costs order against the Crown. The Court stated that were that the law, costs orders would be commonplace (para. 22), and they are not. Rather, in determining whether a case is exceptional, or akin to a test case:

> 26 …the summary conviction appeal court must consider <u>both</u> the public importance of the legal issue raised on the appeal <u>and</u> the significance of the outcome of the appeal to

> the individual respondent. Where the public interest is high and the appeal has little or no significance to the particular respondent, a costs order against the Crown may be appropriate regardless of the outcome of the appeal. Where, however, there is a significant public interest in the legal issue raised on the appeal and the respondent has a significant personal interest, it is not unfair to follow the general rule and require each side to bear its own costs. (my emphasis)

[36] Section 247(1) of the *MVA* provides:

> 247(1) Except as otherwise provided in this *Act*, a person who is guilty of an offence under this *Act* or the regulations for which a penalty is not otherwise provided is liable on summary conviction to a fine of not more than $500 and in default of payment to imprisonment for a term not exceeding six months, or to imprisonment for a term not exceeding six months without the option of a fine.

[37] Thus, upon being found guilty of the offence under s. 210.1(2) of the *MVA*, Mr. Pumphrey theoretically faced a maximum penalty of a $500 fine, or imprisonment for a term of six months. In addition, he was subject to receiving three demerit points for the offence. While that is not the sentence I imposed, Mr. Pumphrey could not have known what the outcome would be coming into this appeal. In other words, I find that he had a "significant personal interest" in the outcome of the appeal, even if it was only in theory. Accordingly, I am not satisfied that that there are sufficiently exceptional circumstances here to characterize this as a true "test case": see also *R. v. Taylor*, 2007 BCCA 250, at para. 24. I decline to award costs in favour of Mr. Pumphrey.

[38] Finally, I note that the Crown has fairly refrained from asking for costs to be awarded in its favour if the appeal is successful.

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GOWER J.