Neutral citation [2011] CAT 32

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1117/1/1/09
1134/1/1/09
1135/1/1/09
1138/1/1/09
1139/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

21 October 2011

Before:

VIVIEN ROSE
(Chairman)
SHEILA HEWITT
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) GF TOMLINSON GROUP LIMITED
(2) GF TOMLINSON BUILDING LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) G&J SEDDON LIMITED
(2) SEDDON GROUP LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) INTERCLASS HOLDINGS LIMITED
(2) INTERCLASS PLC

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

APOLLO PROPERTY SERVICES GROUP LTD

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

GALLIFORD TRY PLC

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

RULING (COSTS)

Introduction

1. On 24 March 2011 the Tribunal handed down judgment in six appeals brought by Tomlinson, Seddon, Interclass, Sol, Apollo and Galliford Try ([2011] CAT 7: the "Judgment"). The appeals resulted in a substantial reduction in the penalties imposed by the OFT in the Decision. All the appellants whose appeals were disposed of by the Judgment, except Sol, have now applied for orders that the OFT should pay their costs in full, or in the alternative, pay a substantial proportion of their costs pursuant to rule 55(2) of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372) (the "Tribunal Rules"). The background to these appeals was set out in the Judgment and the terms defined there have the same meaning in this ruling, save that in this ruling we refer to the five appellants now seeking their costs simply as the "Appellants".

2. Each Appellant submitted a summary cost schedule. The schedules indicate that the total costs claimed, consisting in the main of solicitors' charges, counsel's fees and disbursements, are as follows (figures exclude VAT):

   (a) Galliford Try claims a total of £364,810.73;

   (b) Apollo claims a total of £168,402.81;

   (c) Seddon claims a total of £53,696.88;

   (d) Interclass claims a total of £39,218.70;

   (e) Tomlinson claims a total of £93,968; this sum does not include the costs attributable to the mistake made in the calculation of the turnover in one relevant market (see paragraphs 244 to 254 of the Judgment).

3. The OFT has resisted these applications submitting that the Tribunal should make no order as to costs or, in the alternative, should order only a small lump sum in favour of each of the Appellants. None of the parties requested an oral hearing and in the circumstances of this case the Tribunal does not consider that an oral hearing is necessary or desirable.

4. Rule 55 of the Tribunal Rules provides that the Tribunal may make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of proceedings. In determining how much the party is required to pay, rule 55 provides that the Tribunal may take account of the conduct of all parties in relation to the proceedings. As was stated in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the Tribunal has a necessarily wide discretion on the question of costs. That discretion can be affected by one or more of a range of factors, whose weight will vary according to the particular facts.

The starting point in principle

5. All the Appellants argued that the starting point should be that costs follow the event and that since the Tribunal substantially reduced the total fines imposed on each of them they can be regarded as the "winner". The OFT argued that the starting point should be that costs lie where they fall. The OFT referred us to a number of earlier decisions of the Tribunal, in particular *Institute of Independent Insurance Brokers v DGFT* [2002] CAT 2, para 54; *Napp Pharmaceutical Holdings Ltd v DGFT* [2002] CAT 3, para 23; *Aberdeen Journals Ltd v OFT* [2003] CAT 21, para 20; and *Argos* v *OFT* [2005] CAT 15, para 9. The OFT drew the conclusion from these cases that, absent unreasonable conduct in the litigation or a decision being made in bad faith by the OFT, the Tribunal should refrain from making awards of costs against an unsuccessful party.

6. As a matter of principle we agree with the Appellants that the starting point in appeals against a decision under the Competition Act 1998 should be that the successful party recovers its costs. As the Tribunal stated in *The Racehorse Association and Others v OFT* [2006] CAT 1 (applying principles set out in the *Institute of Independent Insurance Brokers* case), the appropriate starting point is that an appellant who can fairly be identified as a "winner" should receive an award of costs, but will not necessarily be entitled to recover all his costs. Such an appellant may in particular be deprived of those costs which are referable to issues on which he has failed, or which were not germane to the Tribunal's decision, or

which involved unnecessary prolixity or duplication. There may also be a partial or total disallowance of costs by reason of any unreasonable conduct on his part.

7. The OFT relies on the judgment of the Divisional Court in *Bradford Metropolitan District Council v Booth* [2000] EWHC Admin 444. In that case the Council had been ordered to pay the costs of Mr Booth's successful challenge to the Council's refusal to renew his vehicle operator's licence. On an appeal by way of case stated, the Divisional Court allowed the Council's appeal. Lord Bingham, who gave the principal judgment, referred to the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.

8. In our judgment the OFT's reliance on *Booth* is misplaced. Lord Bingham does not suggest that there should be a presumption one way or another; he simply makes clear that there are particular circumstances to bear in mind where a public body or a regulator is concerned. Furthermore, the *Booth* case involved a challenge to the way a district council had discharged a statutory licensing function which constituted the performance of one of its regulatory functions. We have seen the discussion of the *Booth* case by this Tribunal in the costs ruling on *Eden Brown and Hays v Office of Fair Trading* [2011] CAT 29 ("*Hays*") and we agree with the conclusion that the *Booth* case, as analysed in *R (Perinpanathan and ors) v City of Westminster Magistrates Court* [2010] EWCA Civ 40, is not relevant here.

9. The OFT's submissions went beyond reliance on its status as a public enforcement body. It argued that an important factor in the exercise of the Tribunal's discretion should be the public policy objectives of the competition law enforcement regime of which both the OFT and the Tribunal form part. The OFT argues that the Tribunal should not risk damaging that regime by depleting the OFT's resources. Any costs order would, the OFT says, reduce the resources available to investigate infringements as costs orders are funded from the public purse.

10. We do not consider that concerns about budgetary constraints on the OFT or about any effect the depletion of its resources might have on future enforcement activities

are relevant factors for us to take into account. The OFT's position is not, in our judgment, significantly different from the many other public bodies whose decisions are subject to appeal. The discipline that results from a potential liability to pay costs in the event of a successful challenge is an important factor in the exercise of the Tribunal's discretion. Similarly, we do not consider that the submission of the Appellants that the public purse has in some way "benefited" illegitimately from the payment of fines by those addressees of the Decision who did not appeal against their penalties is a relevant factor in deciding either the starting point or the quantum of any costs order.

11. We agree with the Appellants that the fact that each of them has infringed the Chapter I prohibition and so was liable to have a fine imposed does not affect the proper starting point for the decision on costs in appeals that were limited to penalty. The decision to impose a penalty (as opposed to its quantum) was not challenged by any of these Appellants nor was it criticised by the Tribunal. An undertaking on which a fine is imposed is entitled to have that fine calculated in a proportionate manner in accordance with the Guidance as properly construed even though it has committed an infringement of the competition rules.

12. We therefore conclude that the correct starting point is that the successful party should recover its costs. This principle applies whether it is the OFT or the appellant who succeeds. The decision in *Sepia Logistics Limited (formerly Double Quick SupplyLine Ltd) v OFT* [2007] CAT 14 shows that in an appropriate case, the Tribunal will order an unsuccessful appellant to pay the OFT's reasonable costs.

The application of the starting point principle in these appeals

13. The Appellants pointed to the reductions in the fines as showing that they were the winners of their respective appeals and so are entitled to their costs. As the Tribunal stated in the costs ruling in *Durkan v OFT* [2011] CAT 17, the overall result in that sense may not reflect the parties' degree of success where some aspects of the Appellants' challenges were upheld and some were dismissed.

14. In the current appeals the identification of the "winner" is complicated by a number of factors. First, some Appellants raised grounds of appeal for which costs are now claimed but which were rejected by the Tribunal. For example Tomlinson's claim for a reduction for financial hardship was rejected by the Tribunal, as was Galliford Try's argument that one of its infringements fell outside a limitation period for which it contended. The proportion of their costs that each Appellant should receive ought to take account of the fact that the OFT should not have to pay for work done by an Appellant on unsuccessful grounds. Further, the OFT is entitled to its costs as against the relevant Appellant in respect of those issues. Rather than making cross-orders for costs, it is more convenient to make a single deduction from the costs claimed to reflect both the non-recovery of the Appellant's costs and its contribution to the OFT's costs in respect of those issues.

15. Secondly, some of the reductions in fine were the result of successful arguments raised by other Appellants on a point where the particular Appellant relied only on arguments that were unsuccessful. For example, Seddon, Interclass and Tomlinson all benefited from a reduction in fine in part because of the substitution of Infringement Year turnover figures for the Decision Year turnover figures used by the OFT. Their argument on this point – relying on Article 7 ECHR – was rejected by the Tribunal but their fines were reduced because of the successful argument raised, for example by Galliford Try, as to the proper construction of the Guidance.

16. We recognise that one cannot dissect a Notice of Appeal or written and oral submissions too minutely and that any such adjustment inevitably is of a rough and ready nature. We agree with the Tribunal in *Hays* (paragraph 31) that counting paragraphs in the skeleton argument or pages in the transcript is not a fair way to calculate the appropriate reduction. We have therefore limited such adjustments to cases where one or more grounds of challenge to the penalty was unsuccessful and where that ground has plainly generated a significant amount of work both for the relevant Appellant and for the OFT.

Quantum of costs

17. We have considered whether we should determine the amounts that the OFT should pay or simply set out the principles, leaving the parties to negotiate their own settlement or pursue the matter for detailed assessment. One Appellant (Apollo) urged us to resist a summary assessment. We consider that we have a high degree of familiarity with how these appeals have developed and the interrelation between the grounds relied on by the different Appellants. We note that the Tribunal in *Hays* ordered the costs in those appeals to be subject to detailed assessment. However, in relation to these Appellants, the amounts claimed are more modest and the issues raised less complicated. It would be disproportionate for further costs to be incurred by sending the matter for assessment.

18. The OFT submits that, if the Tribunal is minded to make an order for costs in favour of the Appellants, the award should be something less than the total amounts claimed. The OFT asserts that the costs incurred by the Appellants were increased because of the way in which the Tribunal decided to conduct the hearings of the 25 appeals against the Decision. At a case management conference at an early stage in the appeals, the Tribunal accepted the Appellants' arguments that each appeal should have a separate short hearing rather than having a single hearing either of preliminary issues arising in a number of cases or of a "test case": see [2010] CAT 2. The OFT accepts in the light of that ruling that the Appellants were entitled to put forward separate submissions and to be separately represented. But, says the OFT, it does not follow that the OFT should be liable for the multiplication of costs caused by the hearing of the separate appeals.

19. We do not accept that the structure of the hearings of these appeals resulted in the Appellants incurring more costs than they would otherwise have done. On the contrary, the result was that the legal representatives of each Appellant had to prepare for and attend one half day hearing rather than having to prepare submissions both for a preliminary hearing and then a later hearing to deal with the issues specific to that Appellant. We do not see that there is any merit in this point.

20. The OFT drew to our attention the fact that the amount of fees claimed by the Appellants' legal representatives varies greatly. The costs estimates in these cases ranged from Interclass's claim of less than £40,000 to Galliford Try's total costs of over £365,000. The OFT submitted that the level of costs for which it could be held liable should not differ substantially from case to case and that a cap of £30,000 should applied to penalty appeal costs orders in these cases.

21. We too are struck by the variation in the amount of costs claimed. There may well be good reasons why one Appellant's claim includes almost 800 hours of work by solicitors whereas for another Appellant, the same firm of solicitors spent just over 500 hours. We recognise that the fines imposed on the different Appellants varied considerably. Each Appellant's assessment of what was at stake in pursuing its appeal and hence the scale of the legal representation they thought appropriate may also have differed. However, there should be some cap on the amount of costs payable in each case, given that at an early stage of the appeals each Appellant was allocated a half day hearing and the issues raised were, broadly speaking, of the same level of complexity for each.

22. We reject the OFT's suggestion that the lowest amount of fees charged should operate as a cap. Further, some Appellants incurred lower fees because they used the same legal representatives. The scale of their costs is not a fair benchmark for the costs of Appellants who chose different legal representation, as they were entitled to do. Taking into account all these factors we consider that a cap of £200,000 is appropriate for the costs that the OFT should have to contribute to the costs incurred by any one Appellant, having regard to the importance of the appeals for these undertakings and the complexity of the issues raised. This sum represents the maximum that an entirely successful appellant should recover from the OFT in respect of the preparation and conduct of the appeal. Any reduction to reflect unsuccessful points will be applied to that capped amount. This will ensure that the disallowance of costs for unsuccessful points affects the final amount recovered not only by those who moderated their costs but also by those who incurred higher costs and so are affected by the cap.

Tribunal's assessment of the individual applications

Galliford Try

23. Galliford Try was successful in the main ground of its appeal, namely that the OFT had misconstrued its own Guidance and should have used turnover figures from the Infringement Year rather than the Decision Year. It was also successful in its challenge to the application of the MDT in that we found that the MDT applied by the OFT resulted in a fine that was disproportionate and excessive. In our judgment Galliford Try is entitled to a proportion of its reasonable costs.

24. There were a number of unsuccessful arguments that were raised by Galliford Try and which took up a significant amount of time. These were the detailed arguments relating to comparisons with other addressees of the Decision (see paragraphs 149 to 153 of the Judgment) and to Galliford Try's contention that one of the Infringements fell outside the limitation period (see paragraphs 170 to 174 of the Judgment). We consider that an adjustment of 20 per cent is appropriate to reflect the fact that the OFT should not have to pay the costs incurred relating to these issues and that the OFT would have been entitled to recover from Galliford Try its costs in relation to those matters.

25. The costs claimed by Galliford Try were substantially above the cap that we have decided should apply to these cases. We therefore apply the 20 per cent adjustment to that cap and order that the OFT pays Galliford Try £160,000 in respect of their costs within 28 days of the date of this ruling.

26. Galliford Try made an application for 60 per cent of its costs by way of an interim payment. Since we are making an order for payment rather than ordering an assessment of the costs, we do not consider that there needs to be an interim payment.

Apollo

27. Apollo succeeded in its challenge to the use of the Decision Year. The Tribunal accepted many of the points raised by Apollo about the interpretation of the Guidance, although we rejected Apollo's alternative contention that the correct year should be the year used in the corresponding EU legislation (see paragraphs 100 to 102 of the Judgment). Apollo also successfully challenged the MDT applied by the OFT but focused its arguments on the use of the proxy which did not in the event affect the level of the fine once the Infringement Year figures were substituted (see paragraphs 187 to 192). Apollo was justified in challenging the proxy given that it could not have known whether it would ultimately be relevant. We therefore have not made any adjustment to Apollo's entitlement to its costs.

28. Apollo's application for costs was below the cap so we order the OFT to pay Apollo £168,402.81 within 28 days of the date of this ruling.

Seddon, Interclass and Tomlinson

29. The appeals brought by Seddon, Interclass and Tomlinson all raised a number of issues on which the Tribunal decided in the OFT's favour. These were the challenge to the inclusion of non-tendered work in the relevant market turnover, the complaint arising from the imposition of a penalty for each of the infringements, an allegation that the infringements for which they were fined were chosen arbitrarily and the alleged discrimination by comparison with other undertakings fined in the Decision, particular with those involved in compensation payments. Further, although each of these Appellants were successful in their challenge to the use of the Decision Year turnover rather than the Infringement Year, the sole argument on which this challenge was based, namely the reliance on Article 7 of the ECHR, was rejected by the Tribunal. Seddon was successful in its challenge to the application of the MDT (the MDT had not been applied in the case of either Interclass or Tomlinson) and all three of these Appellants were successful in their general complaints about the excessive and disproportionate nature of the fine.

30. We consider that a reduction of 15 per cent in respect of the costs of each of Seddon, Interclass and Tomlinson is appropriate to reflect the time spent by the parties on these various unsuccessful points.

31. Further, a significant portion of Interclass's appeal was devoted to its claim of financial hardship – both challenging the OFT's refusal to grant it a reduction on the basis of its 2008 financial results and seeking a reduction on the basis of the 2009 financial figures which became available after the Decision was taken. The Tribunal rejected the claim based on the 2008 figures but granted a reduction of 20 per cent because of its poor financial performance in 2009. Given that the analysis of the 2008 results occupied the parties and the Tribunal for a significant time, we consider that an additional adjustment of 5 per cent is appropriate to reflect the work generated by this point, making a total disallowance of 20 per cent.

32. So far as Tomlinson is concerned, the Tribunal rejected the request to correct various mistakes that the company said it had made in the calculation of its turnover in the relevant market. Tomlinson's application for costs states that the costs claimed do not include those relating to that point. Tomlinson also asked the Tribunal to reduce their fine on the grounds of financial hardship. Since the fine ultimately proposed by the Tribunal having substituted the correct figures and applied an appropriate multiplier was considerably less than the fine imposed by the Decision, the Tribunal did not need to consider the claim for financial hardship in any detail, see paragraph 262 of the Judgment. It would not be fair in those circumstances to disallow costs relating to that issue.

33. We therefore order the OFT, within 28 days of this ruling,

    (a) to pay Seddon £45,642.35;

    (b) to pay Interclass £31,374.96; and

    (c) to pay Tomlinson £79,872.80.

Vivien Rose | Graham Mather | Sheila Hewitt

Charles Dhanowa
Registrar

Date: 21 October 2011