Neutral citation [2013] CAT 16 Case No.: 1166/5/7/10

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

31 July 2013

Before:

THE HON. MRS JUSTICE ROSE
(Chairman)
TIM COWEN
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

B E T W E E N:

ALBION WATER LIMITED

Claimant

- v -

DŴR CYMRU CYFYNGEDIG

Defendant

RULING (COSTS)

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1. On 28 March 2013, we handed down judgment ([2013] CAT 6, 'the Judgment') in this claim for damages brought by Albion pursuant to section 47A of Competition Act 1998. Appendix I to the Judgment is a glossary and we use those terms in this Ruling.

2. Albion's claim for damages comprised three heads of claim. The first two were claims for compensatory damages for loss of profit and loss of opportunity in relation to the supply of water to, respectively, Shotton Paper and Corus Shotton. Thirdly, Albion claimed that Dŵr Cymru's conduct in the lead up to, and in offering, the First Access Price fell within the class of conduct which the case law says justifies the imposition of an award of exemplary damages (see Judgment, paragraphs 3 and 4). For the reasons given in the Judgment, we unanimously awarded Albion:

   (a) £1,694,343.50 in respect of the Shotton Paper claim (see Judgment, paragraphs 186 to 189);

   (b) £160,149.66 in respect of the Corus claim (see Judgment, paragraphs 222 and 223); and

   (c) interest on those sums (see Judgment, paragraphs 225 to 228).

   We decided that the exemplary damages claim failed and dismissed it in its entirety (see Judgment, paragraph 366).

3. On 23 April 2012, in one of the many interlocutory rulings in this case ([2012] CAT 10), we recorded that Albion had applied for both third-party litigation funding and after-the-event insurance ('ATE insurance'). There we indicated that we expected Albion's solicitors to continue to pursue that application and that Albion would comply with the terms of the insurance if the application was successful. On 31 August 2012 Albion informed the Tribunal and Dŵr Cymru that it had secured both third-party litigation funding and ATE insurance.

4. Albion now seeks an order for:

   (a) costs amounting to £494,338.20;

(b) disbursements (including counsel's fees) of £792,095.99; and

(c) the ATE insurance premium (including ATE insurance premium tax), which is now payable, of £1,621,663.26.

In total, therefore, Albion seeks an order for costs amounting to £2,908,097.45. Those costs relate to both the compensatory claims and the exemplary damages claim. Albion has not provided us with a breakdown of the costs incurred in respect of the different heads of claim.

5. The Tribunal's costs jurisdiction is set out in rule 55(2) of the Tribunal's Rules:

> 'The Tribunal may at its discretion ... at any stage of the proceedings 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 the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.'

6. In relation to the costs of the two compensatory claims, Albion submits that the Tribunal decided the majority of disputed points in its favour and that it scored a clear overall victory. In *The Racecourse Association & Ors v Office of Fair Trading* [2006] CAT 1, the Tribunal held that 'the starting point is that a successful appellant who can fairly be identified as a "winner" is entitled to recover his costs' (paragraph 10) and Albion argues that there is no reason to depart from that starting point.

7. Albion also submits that its lack of success in relation to the exemplary damages claim does not alter the 'overall finding' that Albion won, having sought and recovered substantial damages. The amount of damages awarded significantly exceeded Dŵr Cymru's best without prejudice offer of £175,000 to settle the entire claim, i.e. both the compensatory and exemplary damages claims. Albion refers also to paragraph 287 of the Judgment, where we concluded 'with some hesitation' that Dŵr Cymru's complete failure to engage in any meaningful way at a senior level with the question of how to work out a common carriage price was not sufficient to discharge the stringent test for exemplary damages and submits. This wording, it is said, indicates that Albion's claim for exemplary damages could not be described as speculative or ill-founded. Finally, Albion argues that, given the manner in which Dŵr Cymru presented its defence to the exemplary damages claim, Albion is still entitled to its costs of bringing that claim.

8. Dŵr Cymru has also filed a costs application. Perhaps unsurprisingly, Dŵr Cymru submits that an issues-based costs order is appropriate. Dŵr Cymru seeks its costs of defending the exemplary damages claim on the basis that it was wholly successful in defending that part of the claim. Those costs amount to £694,067.45, of which £327,410.15 was disbursements (including counsel's fees).

9. Dŵr Cymru also submits that Albion's success in relation to its compensatory claims was in fact only a partial, not a complete, success, since the amount of damages awarded was lower than the sum pleaded by Albion. Furthermore, Dŵr Cymru says that it was successful in some of its arguments on the compensatory claims; for example, in relation to indexation of the common carriage price. Dŵr Cymru contends that it is, therefore, fair and appropriate to reduce the amount of costs that Albion is entitled to recover in relation to the compensatory claims.

10. Dŵr Cymru is highly critical of Albion for not providing a costs schedule broken down by issue with costs apportioned to either the compensatory or exemplary damages claims. In the absence of that breakdown, Dŵr Cymru states that its best estimate, which it describes as an 'educated' guess, is that approximately 75% of Albion's costs relate to the exemplary damages claim. Albion should, Dŵr Cymru says, recover only an appropriate proportion of the 25% of its costs that related to the compensatory claims. If Dŵr Cymru's costs of defending the exemplary damages claim (a little under £700,000) are deducted from the costs to which Albion is entitled to claim for the compensatory heads (that is 25% of £2,908,097.45) the result would be a payment from Dŵr Cymru of a little over £27,000.

11. We will address the question of the ATE insurance premium, and the parties' positions on it, separately at the end of this ruling.

The compensatory claims

12. So far as the costs of Albion's compensatory claims are concerned, we have no hesitation in awarding Albion all of its costs. Although Albion did not succeed on every point argued, it was the clear winner on this part of the case. A party is not required to succeed on every single point at issue in a case before a claim can be regarded a success. As Gloster J, as she then was, held in *HLB Kidsons (A Firm) v Lloyds Underwriters* [2007] EWHC 2699 (Comm), at paragraph 11:

‘There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at paragraph 35: “the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues”. Likewise in *Travellers' Casualty* (*supra*), Clarke J said at paragraph 12:

> “If the successful Claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point.”’

13. Dŵr Cymru is correct, for example, that Albion’s primary submission in relation to indexation of the common carriage price (i.e. that no provisions for indexation would have been agreed between the parties) was not accepted, nor, however, was Dŵr Cymru’s argument that the parties would have agreed to indexation on the basis of RPI. Rather the Tribunal accepted Albion’s submission, made in the alternative, that PPI was the correct indexation measure. Furthermore, Dŵr Cymru introduced a number arguments, which Albion was of course required to respond to, in which we found very little merit.

14. Dŵr Cymru offered Albion only £175,000 in full and final settlement of the whole claim. That offer was made on 23 August 2012, less than two months before the final hearing commenced; in other words at a time when the case was fairly advanced and Dŵr Cymru could be in no doubt as to the detail of Albion’s claim.

15. In *Fox v Foundation Piling Limited* [2011] EWCA Civ 790, Jackson LJ (with whom Ward and Moore-Bick LJJ agreed) noted, in a personal injury case, that where the claimant has a strong case on liability but quantum is inflated, the defendant's remedy is to make a modest without prejudice offer. If the defendant fails to make a sufficient offer at the first opportunity, it cannot expect to secure costs protection. A similar principle applies here by analogy. Indeed, Jackson LJ’s observation seems, with respect, to be all the more pertinent in the context of a follow-on damages claim where the infringement has already been established, and the only questions are those of causation and quantum. Where, in those circumstances, a defendant fails to make a sufficient offer in settlement, it is even harder to see why that defendant should secure, or is deserving of, costs protection.

16. Dŵr Cymru also contended that Albion’s success was to be viewed as partial because it recovered less than it had claimed in relation to each of the compensatory claims. We note

that, although Albion recovered less than its maximum pleaded claim in respect of each of the Shotton Paper and Corus claims, it had pleaded a range of figures. In relation to the Shotton Paper claim, we awarded a sum that fell more or less in the middle of Albion's range (£3,450,426 to £303,207; see Albion's skeleton argument, paragraph 54). As to the Corus claim, Albion did recover a sum lower than its pleaded claim (the range for the Corus claim was £266,551 to £182,722; see Albion's skeleton argument, paragraph 131). Against this must be set, first, the fact that Dŵr Cymru's primary case in relation to both claims was that Albion was entitled to no damages at all and that the claims should be dismissed in their entirety and, secondly, the low settlement offer made by Dŵr Cymru. When those factors are taken into account, it seems to us clear that Albion is the successful party.

17. On that basis, it is our unanimous decision that Albion is entitled to all its costs of bringing the compensatory claims, such costs to be subject to detailed assessment by the Senior Court Cost Office on the standard basis, if not agreed.

The exemplary damages claim

18. There are two aspects to this: Dŵr Cymru's application for its costs of successfully defending this claim and Albion's claim for its costs of bringing this claim, notwithstanding that it was unsuccessful. We address Dŵr Cymru's application first.

19. The exemplary damages claim required us to examine how Dŵr Cymru went about devising the First Access Price. As recorded in the Judgment, we were hampered in this task in a number of respects, including:

    (a) the choice by Dŵr Cymru of Mr Jeffrey Williams as a witness;

    (b) the absence of any, or any adequate, record of discussions and decisions taken at LCE and Board meetings; and

    (c) the very belated disclosure – given only on day 9 of a hearing originally listed for 10 days – of plainly relevant documents, which should have been disclosed at a much earlier stage, most likely when Ofwat commenced its investigation in 2002.

20. Each of these factors, in our judgment, should be taken into account when deciding the appropriate order to be made as regards Dŵr Cymru's costs. In the Judgment we strongly

criticised the decision to put forward Mr Williams as the main witness on this part of the claim, as it quickly became apparent that he was unable to assist the Tribunal with any useful account of what had happened within Dŵr Cymru at the relevant time. In so far as Dŵr Cymru's costs on this part of the claim were incurred in preparing Mr Williams' evidence, we do not think it should be able to recover them from Albion.

21. In so far as its costs related to dealing with disclosure, we also commented in the Judgment on the almost total absence of contemporaneous documents evidencing discussions at a senior level within the company. There was no disclosure from Albion on this subject and so no costs could have been incurred by Dŵr Cymru in considering any such disclosure.

22. The only other expense for Dŵr Cymru in this respect, therefore, was the preparation of the evidence of Mr Paul Edwards and of its oral and written submissions on the point. Mr Edwards' evidence went to both the exemplary and compensatory claims, and although we accepted some of it, we also rejected much of it. Indeed, it was Mr Edwards' testimony that generated the very belated disclosure of certain documents, including the Hyder Report, which were plainly relevant to the exemplary damages claim. Those documents came to light as a result of a comment made by Mr Edwards when being cross-examined before us. When this matter came to light, another Dŵr Cymru employee, who had been in court throughout the hearing, was able to locate that Report and a number of other relevant documents overnight (see Judgment, paragraphs 276 and 277). The Hyder Report and other documents cast doubt, at the very least, on some of the other evidence Mr Edwards had given and on the correctness of some of the submissions that had been put forward by Dŵr Cymru.

23. Taking all these matters into account, we consider that there should be no order as to Dŵr Cymru's costs of defending the exemplary damages claim.

24. Turning now to Albion's application for its costs of bringing the exemplary damages claim, we note that, in response to Dŵr Cymru's request for more detail, Albion belatedly offered to provide a schedule of these particular costs. Albion has, however, suggested that the Tribunal is well placed to take its own view on the proportion of Albion's costs relating to the claim for exemplary damages. We consider that we are able to take such a view and, to avoid yet further delays and cost, we have done so. We do not accept Dŵr Cymru's submission that it should be assumed Albion expended 75% of its costs on the exemplary damages claim. Dŵr Cymru's 'educated' guess appears to be based on the fact that Albion pursued the exemplary damages

claim aggressively, set out the law relating to exemplary damages at some length in its claim form and that the quantum of exemplary damages claimed was roughly three times greater than quantum of compensatory damages claimed. It is certainly true that Albion actively pursued the exemplary damages claim and it is also true that the pleaded quantum of that claim was higher than that of the compensatory claims. In our judgment, however, these matters tell one little about the proper apportionment of costs.

25. On the contrary, it seems to us that Albion's costs of bringing the claim for exemplary damages will have been significantly lower than those of the compensatory claims for the following reasons: first, Albion's only witness, Dr Bryan, did not give evidence on this aspect of the claim; secondly, given that this aspect of the case focused on what Dŵr Cymru's corporate mind knew, thought and did, there was no disclosure from Albion; and, thirdly, there was a paucity of disclosure from Dŵr Cymru relevant to this part of the case and the costs of addressing those few documents, such as Board minutes and LCE papers, that were produced would have been relatively limited. There was very little evidence or submission as to the quantum of the exemplary damages claim especially, as compared with the substantial work that went into modelling and calculating the compensatory claims.

26. The main cost incurred by Albion on this part of the claim will have been drafting and presenting written and oral submissions, and the costs of preparing and conducting the cross-examination of the two relevant Dŵr Cymru witnesses. Given our assessment of Mr Williams, we agree with Albion's submission that it should recover its costs expended in relation to Mr Williams. It would be unjust in our judgment for Albion to be left to bear those costs. As to Mr Edwards' evidence, that related to both the compensatory and the exemplary damages claims, and we consider that Albion should not recover its costs of cross-examining him in relation to the latter. Mr Edwards answered the questions put to him as well as he was able to and although we did not accept all of his evidence that is not a reason to order Dŵr Cymru to pay Albion its costs in this respect. The fair order is, therefore, that Albion should be able to recover a proportion of its costs of fighting the exemplary damages claim but that it should not recover the costs of preparing submissions on that point nor for cross-examining Mr Edwards.

27. Doing the best we can, we have unanimously concluded that the right order to make is that Albion should recover 85% of its costs of the proceedings from Dŵr Cymru. The deduction of 15% reflects those costs of the exemplary damages claim which we consider that Albion should bear itself. We should make clear that we do not consider it relevant that, in the Judgment

(paragraph 287), we expressed some hesitation in rejecting the exemplary damages claim. Whether with some hesitation or without, the claim was dismissed. Nevertheless, for the reasons set out here, we consider that Albion is entitled to a portion of its costs relating to that unsuccessful claim.

The ATE insurance premium

28. Albion argues, and Dŵr Cymru did not appear to dispute, that, as a matter of principle, the ATE insurance premium was recoverable. The question, therefore, is whether the circumstances are such that Albion should in fact recover the premium, or at least a portion of it.

29. Albion is a small company with limited resources and was faced with a substantial, well-funded opponent instructing a leading firm of solicitors and three counsel. Dŵr Cymru had sought security for costs on the basis of Albion's impecuniosity. We consider that it was entirely appropriate for Albion to insure itself against its potential liability in costs if it lost the claim, both in respect of its liability to pay its own legal team's fees and to meet any order made to pay Dŵr Cymru's costs. The insurance taken out by Albion would have paid out a contribution to Albion's own expenses (capped at £400,000) and a contribution to Dŵr Cymru's costs (capped at £1,626,500).

30. Albion argues that, having succeeded on its claim to recover damages, it is entitled to recover the premium in full. Albion submits, as to the quantum of that premium, that we should not try to second-guess the level of a premium where that has been set by an insurer, experienced in assessing the financial risks to it of insuring claims. In making that submission, Albion relies on the statement of the Court of Appeal in *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 at [117] that:

> 'District judges and costs judges do not, as Lord Hoffmann observed in *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28 at [44]; [2002] 1 WLR 2000, have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence before this court shows, it is not in an insurer's interest to fix a premium at a level which will attract frequent challenges.'

31. Albion also relies on the judgment of Simon J in *Kris Motor Spares Limited v Fox Williams LLP* [2010] EWHC 1008 (QB), where the judge stated (at [44]) that, '... in a case where the issue is raised as to the size of the premium there is an evidential burden on the paying party to advance at least some material in support of the contention that the premium is unreasonable.'

32. Dŵr Cymru takes a number of points opposing that application. First, it argues that the premium is, on its face, disproportionate to this case, whether compared to the level of Albion's other costs or to the damages actually recovered by Albion. In our view, the correct comparison is not with the costs incurred by Albion but with the costs incurred by Dŵr Cymru since those are the costs that the premium was primarily intended to cover. Dŵr Cymru has not provided a figure for its overall costs beyond the (approximately) £700,000 said to have been incurred for the exemplary damages claim. We very much doubt that the £1,626,500 covered by the insurance is more than Albion's potential liability for all of Dŵr Cymru's costs.

33. In common with many ATE insurance policies, as we understand it, the premium under this particular policy only fell due in the event that the insured, Albion, 'succeeded' on its claim. Dŵr Cymru argues that the way in which 'success' is defined in the policy, is extremely generous to Albion making it unlikely that Albion would fail to 'succeed'. We have not seen the full policy but Dŵr Cymru quotes the definition of 'success', which reads, in pertinent part:

> 'The compromise of the matter in any form beneficial to the Insured under one or more heads of claim ... whether by a Court decision or where an offer is received which the Insured's Solicitors, Counsel or We [the insurer] advise should be accepted or any other offer accepted.'

Dŵr Cymru submits that the ATE insurer's assessment of Albion's chance of 'success' within the meaning of the ATE policy, put at 61.2% (Dŵr Cymru Costs Application, paragraph 36), was unrealistically low. That is to say, according to Dŵr Cymru, the prospects of success were actually much higher. Indeed, Dŵr Cymru now contends that 'it would have been extremely surprising if [Albion] had failed to establish any loss whatsoever given the nature of the existing findings in [its] favour' (Dŵr Cymru Costs Application, paragraph 38.2).

34. It is true that the abusive nature of the First Access Price had already been established in Case 1046 but that will always be the case with follow-on damages actions; the finding of infringement is a necessary precursor to the bringing of a follow-on damages claim and yet experience shows that success is hardly assured. Dŵr Cymru marshalled a great many arguments in defence to Albion's claims, as the length of the Judgment demonstrates. It was

always Dŵr Cymru's primary position that Albion had suffered no loss at all and it forcefully pursued a number of arguments any of which would, had we accepted it, have resulted in no award at all being made to Albion. We do not accept Dŵr Cymru's position that Albion was almost certain to come away with an award of some sort. That is contrary to Dŵr Cymru's case throughout the proceedings.

35. Albion should recover the ATE premium on the same basis as it recovers its other costs, that is to say Albion is entitled to recover 85% of the premium. We apply the same 15% discount that we applied to Albion's other costs, since we consider this to be a fair deduction to reflect Albion's lack of success on the exemplary damages claim when that is balanced against the other factors we have discussed.

CONCLUSION

36. It is our unanimous decision, therefore, that Dŵr Cymru should pay 85% of Albion's costs, including the ATE insurance premium. We unanimously reject Dŵr Cymru's application for its costs of defending the exemplary damages claim and we make no order as to those costs.

37. As to the quantum of costs to be awarded, Albion has, as we have said, set out a detailed breakdown of its costs. 85% of the total costs claimed amounts to £2,471,882.81. In its lengthy submissions on costs, Dŵr Cymru did not challenge the different charges making up the overall fees but invited us to decide the principles and refer the detailed assessment to the Senior Court Costs Office. So far as the ATE premium is concerned, this is a lump sum which is not liable to be cut down on assessment bearing in mind the principles that we have described above. There is no reason why Dŵr Cymru should not be required to pay Albion 85% of that figure, that is £1,378,413.74 now by way of a payment on account. The remainder of the costs do need to be assessed by the Costs Office unless they can be agreed between the parties.

38. We therefore order that:

    (a) Dŵr Cymru pay Albion 85% of the costs incurred by Albion, such costs to be assessed on the standard basis by the Senior Court Cost Office, if not agreed;

    (b) Dŵr Cymru pay Albion, in respect of its liability under paragraph (a) above, £1,378,413.74 within 14 days of this Ruling; and

(c) Dŵr Cymru's application for costs is dismissed.

The Hon. Mrs Justice Rose | Tim Cowen | Brian Landers

Charles Dhanowa OBE,
QC (*Hon*)
Registrar

Date: 31 July 2013