Neutral citation [2021] CAT 23

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1380/1/12/21

19 July 2021

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chairman)
BRIDGET LUCAS QC
PROFESSOR DAVID ULPH CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BGL (HOLDINGS) LIMITED
(2) BGL GROUP LIMITED
(3) BISL LIMITED
(4) COMPARE THE MARKET LIMITED

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard remotely on 19 July 2021

RULING

APPEARANCES

Mr Daniel Beard QC and Ms Alison Berridge (instructed by Linklaters LLP and TLT LLP) appeared on behalf of the Appellants.

Mr Ben Lask and Mr Michael Armitage (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

1. We have before us an application on the part of the Competition and Markets Authority (the "CMA"), the Respondent in this appeal, to adduce additional expert evidence. The application is dated 14th July 2021 and the additional evidence that is sought to be admitted is evidence from a Mr Baker, which we will refer to as "Baker 2", because it constitutes his second expert report in these proceedings. We will refer to the parties as the "Appellants" and the "Respondent".

2. Back in March 2021, the Tribunal established a very clear timetable for the admission of expert evidence. Pursuant to that timetable Ms Ralston, the Appellants' expert, put in her second report ("Ralston 2"), a substantial report of over 100 pages, on 4th June 2021.

3. Thereafter, the experts had at least one, and no doubt more, meetings, one of which was on 15th June, which is when the process of expert meetings started. There was then envisaged, in the usual way in cases such as this, the compilation of a joint memorandum between the experts, setting out areas of agreement and disagreement. That was due to be filed on 5th July 2021, but, in fact, time for that joint memorandum was extended by the Tribunal's order with the agreement of the parties to 9th July 2021.

4. Shortly after 9th July 2021, the Respondent for the first time raised the question of a further report from Mr Baker, that is to say Baker 2. The report itself was provided to the Appellants by the Respondent on 13th July 2021 and this application, which appends in full Baker 2, is dated 14th July 2021.

5. It is clear that the rule in relation to the admission of additional expert evidence, the adduction of which is not envisaged by or laid down in a directions order, is that the overriding objective must be fulfilled. It is important that the process is conducted in a manner that is fair to all of the parties concerned. In this regard, both parties have referred us to the decision in *Generics (UK) Limited and Others v Competition and Markets Authority* ([2016] CAT 24).

6. Paragraph 4 of that decision simply sets out the trite, but very important, governing principle in Rule 4 of the Tribunal's Rules, namely that a case is to be dealt with justly and at proportionate cost. Paragraph 5, however, sets out three considerations that

ought to apply when considering the adduction of expert evidence. I will read those three considerations from paragraph 5:

> "First, the Tribunal should manage a case actively, so that expert evidence can be handled effectively and efficiently at the hearing of the appeals. The challenge for courts presented by economic evidence in competition cases has been the subject of much discussion, and it is a challenge even for a Tribunal of which one member may be a distinguished economist. Secondly, it is of great benefit for the Tribunal, and indeed all parties, if the views of the economic experts are set out in writing in advance. See also under the governing principle, Rule 4(5)(e): active case management includes planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence. Thirdly, it is necessary to avoid a potentially endless ping-pong of expert evidence where each expert puts in a further report responding to criticism in the last report of the opposing expert. It is self-evident that there is a certain tension between the second and third of those considerations."

7. It seems to us that this is a case falling rather more clearly within the third of these considerations than the second. The fact is that, in our directions order of March 2021, the games of the rule of ping-pong were clearly set out, and provision was <u>not</u> made for a rejoinder on the part of the Respondent in the form of Baker 2 or otherwise. That, of course, does not mean that the Tribunal should not consider, and consider most carefully, whether additional evidence, not envisaged in the directions order should be admitted.

8. However, it seems to us there are a number of factors which point against the adduction of further evidence in the form of Baker 2. Those points are as follows.

9. First of all, the <u>need</u> for the adduction of Baker 2 was raised extremely late by the Respondent. The Respondent did not articulate to the Appellant any need to submit further evidence in response to Ralston 2 (which was, as we say, served on the Respondent on 4th June 2021) until just over a month later, on 6th July 2021.

10. The Respondent says that it did not think it appropriate to raise the prospect of a responsive report as a mere possibility. It took time for the Respondent to assess Ralston 2, because it was a very long report. Accordingly, the Respondent waited until it was confident that further expert evidence was required, and that the Respondent was in a position to serve Baker 2 in short order.

11. Whilst we have some sympathy with this approach, it does not seem to us that Mr Baker could appropriately have engaged in the joint memorandum process without appreciating that there was material that he wanted to adduce further to his first report. It seems to us that if there is need for additional expert evidence whilst such a process is on-going, the need for that evidence must be articulated in short order, so that the issue can be dealt with procedurally before the joint memorandum is put in place.

12. The effect of having an application to adduce evidence not considered (by definition) by the Appellants until after the joint memorandum is put in, is that the process is effectively extended. The parties have agreed that if Baker 2 is admitted, there will have to be a further report from Ms Ralston by 24th August of this year and with further revision of the joint memorandum by 14th September 2021.

13. These are unsatisfactory extensions of a process that was intended to end on 5th July 2021, albeit extended to 9th July 2021.

14. It seems to us that the prejudice to the process is quite clear. It may very well be that the Appellants can deal with this material in the time-frame envisaged, but the fact is what should have been locked down by the middle of July is not locked down until two months later, the middle of September.

15. Given that there is a substantial hearing commencing on 1st November for three weeks, there is considerable importance in preserving the envisaged timetable, and we stress that we have in mind the importance of fairness not merely to the parties but also to the Tribunal. The Tribunal will be engaging in significant pre-reading, and it is important that the expert evidence be locked down at a point that is appropriately early, consistent with the need for fairness. Accordingly, we would need to see substantial prejudice to the Respondent before we would be prepared to permit the adduction of Baker 2.

16. We do not consider that such prejudice exists in this case, and we consider that the exclusion of Baker 2 is not unfair to the Respondent; and is more consistent with an overall fair process. It is quite clear, and Mr Beard, QC, for the Appellants, accepted this, that the mere fact that there is no response from the Respondent to Ralston 2 does not mean that propositions in Ralston 2 are accepted by the Respondent or not in issue.

Indeed, the reverse is the case. Ralston 2 is in issue, unless accepted by the Respondent. It seems to us that the absence of provision of a response to Ralston 2 from the Respondent in the procedural timetable means the propositions in Ralston 2 are denied, by the Respondent, rather than being accepted. That is the way in which this evidence will be regarded by the Tribunal.

17. Of course, it is for the Respondent to make good any points it has against Ralston 2 by way of cross-examination. That is why one has a trial an appropriate period after the production and filing of evidence.

18. Normally, advance notice of cross-examination is not given in proceedings in this country. Patent cases are an exception, where on 48 hours' notice or so it is typical to produce a cross-examination bundle, which contains materials that a witness can consider over a couple of days, so that there is no ambush, and the witness can take time to consider the points being made for purposes of cross-examination out of this material.

19. In this sort of case, where the evidence is very much econometric, the point holds good to even greater force. The fact is it is quite likely that the analysis in Ralston 2 may well be subjected to challenge by the Respondent, in terms of the production of alternative analyses which can be put to her for her comment, but which will require time for her to consider. In other words, one cannot simply pull, like a rabbit out of a hat, an analysis, and expect an expert to deal with it in the course of evidence being given from the witness box. Advance notice, simply to avoid the wasting of time, will have to be given.

20. It seems to us that that is in large part what Baker 2 is doing. It is articulating areas where the analysis of Ms Ralston is not accepted and giving advance notice of that fact. To be clear, to that extent, we see no issue in relation to Baker 2 in substance. It can be treated – albeit defective in form – as a form of advance notice.

21. Insofar as Baker 2 seeks to adduce fresh evidence, which does not exist to support points to be made in cross-examination of Ms Ralston, it seems to us that this is material that is inadmissible. It has been produced too late. The fact is that the timetable was

clear from last March, and if an application for the adduction of fresh evidence, other than by way of use in cross-examination, was to be made, then the time for making it was in the first half of June, at latest.

22. So for these reasons, we are disinclined to admit Baker 2 into the evidence and we reject the application that is made by the Respondent.

23. We want to be very clear, however, that we do not see this as in any way shutting out an appropriate cross-examination by the Respondent of Ms Ralston in due course. We have no doubt that the form of Baker 2 will change, since we are not admitting it as evidence at all. But there is ample opportunity between now and the trial for the Respondent to work out what points they want to put to Ms Ralston by way of alternative analyses, enable her to consider those workings, and she (as an expert) will then give her view on those points, having been able to consider them.

24. We hope the line between the putting of points in cross-examination and the adduction of evidence is clear, because we want a very bright line to be drawn. To the extent that the material in Baker 2 is accepted by Ms Ralston, with or without qualification, it will become her evidence as a result of the cross-examination. But there is no question of our admitting into evidence, independently of cross-examination, the material in Baker 2, which is why we have refused the application to admit that evidence today.

The Hon Mr Justice Marcus Smith Chairman Bridget Lucas QC Professor David Ulph CBE

Charles Dhanowa OBE, QC (*Hon*) Registrar Date: 19 July 2021