



Neutral citation [2022] CAT 47

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 October 2022

Before:

THE HONOURABLE MR JUSTICE ZACAROLI
(Chair)
PAUL LOMAS
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) CHURCHILL GOWNS LIMITED**
(2) STUDENT GOWNS LIMITED

Claimants

- v -

- (1) EDE & RAVENSCROFT LIMITED**
(2) RADCLIFFE & TAYLOR LIMITED
(3) WM. NORTHAM & COMPANY LIMITED
(4) IRISH LEGAL AND ACADEMIC LIMITED

Defendants

RULING (COSTS)

A. INTRODUCTION

1. On 15 July 2022 the Tribunal issued its judgment ([2022] CAT 34) on issues of liability in respect of Churchill’s claim against E&R under section 47A of the Competition Act 1998 for loss and damage caused by alleged breaches by E&R of the Chapter I Prohibition and/or the Chapter II Prohibition (the “Judgment”). This Competition Act claim was defended by E&R, who contended in addition that the whole of Churchill’s claim was barred by the doctrine of illegality. The Tribunal’s Judgment dismissed Churchill’s claim and rejected E&R’s defence based on illegality.
2. On 29 July 2022 E&R filed submissions and supporting documents seeking an order that Churchill pay E&R’s costs of the proceedings on the standard basis, to be subject to detailed assessment if not agreed, and payment on account in the sum of £1.2 million (the “Costs Application”). In their Costs Application, E&R provided the Tribunal with two offers made to Churchill under rule 45 of the Competition Appeal Tribunal Rules 2015 (“Rule 45 Offers”),¹ first on 30 October 2020 and secondly on 13 October 2021. The expiry of the relevant period for those Rule 45 Offers was 23 November 2020 and 5 November 2021 respectively. Churchill did not accept either of the offers.
3. E&R also sought their costs in respect of a “New Allegations Application”, which they made on 30 September 2021. The Tribunal, in its Reasoned Order made on 30 November 2021, reserved the costs of that application to the First Trial.
4. The Tribunal received further written submissions from both parties in respect of the Costs Application on 12 August, 5, 16 and 30 September 2022.
5. This is the Tribunal’s unanimous Ruling on E&R’s application for costs. This Ruling uses the same abbreviations as the Judgment.

¹ Unless otherwise stated, all references to rules are to the Competition Appeal Tribunal Rules 2015.

B. COSTS OF THE CLAIM

6. E&R are the winners. Leaving aside for the moment the Rule 45 Offers, the starting point is that E&R are entitled to their costs.
7. In considering whether it is appropriate to depart from that starting point to reflect the fact that E&R lost on some issues, a distinction should be drawn between the costs of the illegality issues and the costs of the competition issues.
8. So far as the competition issues are concerned, the fact that E&R lost on the question of dominance, objective justification, analogous defences and joint and several liability is not sufficient reason to depart from the usual order. The evidence relating to the different elements of the competition claims was heavily intertwined and, while the causes of action can be broken down into discrete elements, the justice of the case is best met by a costs order that reflects the fact that Churchill failed to establish the essential elements of abuse or anti-competitive effect.
9. The illegality issues were on the other hand wholly distinct. While it was not unreasonable for E&R to raise them, it was unnecessary to do so in order to defeat the competition claims, which failed for other reasons. Moreover, we concluded that they were irrelevant legally. E&R's failure to establish that they gave rise to a defence ought to be reflected in a reduction of the costs they are entitled to recover from Churchill. The fact that E&R established one element of the claim in fraudulent misrepresentation does not alter that conclusion: the Tribunal only dealt with that issue in case the matter went further, it being unnecessary to consider it once the conclusion was reached that even if misrepresentation was established it did not operate as a defence to the competition claims and in the light of the primary finding that the competition claims failed.
10. It is then necessary to consider the impact of the Rule 45 Offers. The October 2020 offer was a valid offer. Churchill's contention that it was not a genuine offer to settle because it did not offer market change is misconceived, since the only claim in the litigation was for damages. At that stage of the proceedings,

however, only the competition issues were in play. So far as the competition issues are concerned, we can see no injustice in the consequences of the Rule 45 Offer following. We note, however, that this is of practical relevance only in relation to interest on costs as, even without the Rule 45 Offer, for the reasons set out above, E&R are entitled to their costs of the competition issues.

11. It would, however, be unjust to burden Churchill with all of the costs incurred thereafter (that is, including the illegality issues) as a consequence of not accepting the Rule 45 Offer made because they include the costs of a new and separate issue that formed no part of the case at the date that the relevant offer to settle was made.
12. However, by the time of the October 2021 offer, the illegality issues were in play. It, too, was a genuine offer to settle. Accordingly, E&R are entitled to recover their costs from the date on which that offer expired, unless it would be unjust for them to do so.
13. Churchill contend that it would be unjust to award E&R their costs of the illegality defence, essentially for the same reasons that – leaving aside the Rule 45 Offers – the general discretion as to costs should be exercised with the same result. E&R contend that far more is required to deprive them of the costs of the illegality defence, given that the threshold is injustice.
14. Neither party pointed to any authority which compelled any particular limitation on the word “unjust” in rule 49(2). We do not agree that there is any particularly high threshold to injustice, which is a broad concept. In particular, we consider that it may be unjust to visit on a party all of the other side’s costs, merely because they failed to beat a Rule 45 Offer, where those costs are increased to a significant extent by wholly distinct issues, on which the other side failed.
15. While we do not think it is unjust to require Churchill to pay all of E&R’s costs of the competition issues, notwithstanding that E&R failed on some of them, we do think it would be unjust to require Churchill to pay E&R’s costs of the illegality defence. This is not because (as Churchill contend) E&R ought to have sought determination on the point as a preliminary issue: it was equally

open to Churchill to seek to do that. It is because we consider it would be unjust to require Churchill to pay the costs of issues which were wholly separate from the issues raised by Churchill, which were raised at the instigation of E&R, on which E&R failed, and which we determined were ultimately irrelevant.

16. In short, therefore, we consider the same conclusion is reached, whether under the general discretion as to costs or by reference to the Rule 45 Offers.
17. The most cost-efficient way to give effect to the above decision is to apply a percentage reduction to E&R's costs. Churchill suggest that a 50% reduction is appropriate. That, however, is premised on Churchill's contention, which we have rejected, that the reduction should take account of the competition issues on which E&R failed. It is necessarily a rough and ready process to estimate what proportion of the costs incurred by E&R related to the illegality defence. Taking into account (1) the illegality defence was only pleaded for the first time in April 2021 (albeit that it was foreshadowed from earlier that year); (2) E&R are unlikely to have incurred much expense on disclosure and witness evidence in relation to it; and (3) the proportion of written submissions, evidence at trial and oral submissions devoted to it, we think that an appropriate discount is 20%.

C. COSTS OF THE NEW ALLEGATIONS APPLICATION

18. These costs were reserved to trial. Churchill accept that they are liable to pay them. The Tribunal will therefore so order.

D. INTEREST ON COSTS

19. Rule 104 in its current form does not enable the Tribunal to award interest on costs (see *Merricks v Mastercard Incorporated and others* [2017] CAT 27 at [23], *Flynn Pharma Limited v Competition and Markets Authority* [2019] CAT 9 at [86]). However, in the present case, rule 49(2)(b) entitles E&R to interest on costs from the expiry of the relevant period unless it would be unjust. As this relates only to the costs incurred in respect of the competition issues, we do not think there is any injustice in Churchill having to pay interest on E&R's costs. Accordingly, interest will run from 23 November 2020, being the expiry

of the first Rule 45 Offer. (We do not accept, as Churchill contend, that the second Rule 45 Offer superseded the first: the first offer was never withdrawn or changed and, in any event, the same consequence would follow as from the time of the second offer, which Churchill also failed to accept).

20. E&R seek interest at the rate of 2% above base rate, on the basis that this is the rate typically ordered in commercial litigation. In fact, interest is typically awarded at a range of rates: sometimes base rate simpliciter, sometimes 1% and sometimes 2%. We consider that 1% above base rate is a fair rate.
21. E&R also seek interest on the costs awarded at the Judgments Act rate (8%) from the date of this Ruling. This point is not specifically developed in E&R's submissions, but we understand them to contend that this is the appropriate rate by analogy with the position in relation to a judgment to which that Act applies. We do not accept this. The rate applicable under the Judgments Act has been out of step with commercial interest rates for some time. We consider the fairer outcome is to apply the same rate of interest post- as pre- the Ruling.

E. PAYMENT ON ACCOUNT OF COSTS

22. E&R seek payment on account in the sum of 50% of their claimed costs. Their claimed costs are circa £2.47 million. The Tribunal has previously approved the sum of £1,258,768 in respect of E&R's budgeted costs. The sum sought on account, of £1.2 million, is therefore less than the budgeted costs.
23. Churchill suggest that (1) estimated costs approved in a costs budget should be paid on account at the rate of 90%, on the basis that the Tribunal can be confident that this amount will be recovered on assessment; and (2) the costs that were already incurred by the time of costs budgeting (in the sum of £213,950.89) should be paid on account at 60% (on the basis that on assessment 65-70% is typically recovered).
24. We prefer Churchill's approach, in circumstances where there is no explanation for the substantial excess in costs incurred by E&R over the budgeted costs. It

needs to be adjusted, however, to take account of the fact that we have ordered a 20% reduction in E&R's costs, not the 50% contended by Churchill.

25. On that approach: (1) 80% of the budgeted costs is approximately £1 million, of which 90% is £900,000; and (2) 80% of the incurred costs is approximately £171,000, of which 60% is approximately £102,000. The total is approximately £1 million. In fact, we note that a similar figure is reached if we were to follow E&R's method. Accordingly, we order that sum (£1 million) to be paid on account.

F. CONCLUSION

26. For the reasons set out in this Ruling,

IT IS ORDERED THAT:

- (1) Churchill shall pay E&R's costs of the New Allegations Application (as defined in the third recital to the Tribunal's Reasoned Order dated 30 November 2021).
- (2) Save as provided in paragraph (1) above, Churchill shall pay 80% of E&R's costs of the proceedings.
- (3) The costs provided in paragraphs (1) and (2) above shall (if not agreed) be the subject of a detailed assessment on the standard basis by a costs officer of the Senior Courts of England and Wales.
- (4) Churchill shall pay interest on the costs provided in paragraphs (1) and (2) above at a rate of 1% above the Bank of England base rate, from the date on which those costs were paid by E&R.
- (5) Within 14 days of the date of this Ruling, Churchill shall pay E&R the sum of £1,000,000 on account of the costs provided in paragraphs (1) and (2) above.

The Hon Mr Justice Zacaroli
Chair

Paul Lomas

Derek Ridyard

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 27 October 2022