Neutral citation [2011] CAT 36

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1118/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

1 November 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
DR ADAM SCOTT OBE TD
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) **GMI CONSTRUCTION HOLDINGS plc**
(2) **GMI CONSTRUCTION GROUP plc**

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

JUDGMENT ON COSTS

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1. On 12 and 13 July 2010, the Tribunal heard an appeal by GMI Construction Group plc and GMI Construction Holdings plc (collectively, "GMI") against an infringement decision (the "Decision") by the Office of Fair Trading (the "OFT"). The Decision found that GMI had committed two infringements of the Chapter I prohibition (the "Infringements"), and imposed penalties in respect of those Infringements. GMI's appeal was both in respect of the OFT's findings of liability in respect of the Infringements and in respect of the overall penalty imposed by the OFT for the Infringements.

2. In a judgment handed down on 27 April 2011 (the "Judgment"), the Tribunal allowed GMI's appeal against the OFT's findings of liability in respect of both Infringements, and set those findings (and the penalties imposed in respect of them) aside (see paragraph 72 of the Judgment). Given this conclusion on the question of liability, it was unnecessary for the Tribunal to consider the grounds of appeal in relation to the penalties imposed by the OFT, and it did not do so, although the matter was fully argued before us (see paragraph 73 of the Judgment).

3. The terms and abbreviations defined in the Judgment are adopted in this judgment.

4. GMI now seeks an order requiring the OFT to pay all of GMI's costs. GMI's costs are set out in a costs schedule entitled *Summary of Costs for the Period 22 September 2009 to 10 May 2011 inclusive*, and amount to £285,649.47 (excluding VAT), broken down as follows:

   - Costs of £253,274.50, of which the lion's share is attributable to 330 hours and 36 minutes work by a senior partner (£123,975) and 663 hours and 54 minutes work by an associate (£126,141).

   - Disbursements of £32,374.97, the bulk of which is attributable to counsel's fees (£25,476.52). By a letter dated 6 June 2011, an additional £750 was added to this amount.

5. The Tribunal has received written submissions from both GMI and the OFT on the question of costs (dated 13 May 2011 from GMI; 30 June 2011 from

the OFT; and 6 July 2011 from GMI). Neither of the parties has requested an oral hearing, and the Tribunal does not consider an oral hearing to be necessary in order to determine this question of costs.

6. Rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372, the "Tribunal Rules") provides (so far as relevant) as follows:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), 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.
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> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.
>
> ..."

7. In relation to appeals under the Competition Act 1998, the Tribunal has stated that the appropriate starting point for the exercise of its discretion under Rule 55 is that an appellant who can fairly be described as a "winner" is likely to receive an award of costs, but will not necessarily be entitled to recover all of his costs. In particular, such an appellant may be deprived of those costs 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, and he may suffer a partial or total disallowance of costs by reason of any unreasonable conduct on his part: *The Racehorse Association v Office of Fair Trading* [2006] CAT 1; *Eden Brown Limited v Office of Fair Trading* [2011] CAT 29; *Kier Group plc v Office of Fair Trading* [2011] CAT 33.

8. That an appellant who can fairly be described as a "winner" ought to receive an award of costs in his favour was the essence of GMI's submission to the

Tribunal (see paragraph 5 of GMI's 13 May 2011 submissions). The OFT did not seriously seek to contest this (see paragraphs 3-4 of the OFT's 30 June 2011 submissions).

9. In this case, given the Tribunal's findings on liability, it is plain that GMI was the "winner" in the case of this appeal, and that the starting point is that GMI should be awarded its costs. However, the OFT contended that, "[w]ere the Tribunal to be minded to make a costs order against the OFT in this case, the OFT submits that in the circumstances of this case, that order should be limited", for three reasons:

   (1) First, it was suggested that costs claims needed to be kept within reasonable bounds, so as not to threaten the effectiveness of the competition law enforcement regime. It was suggested that "[t]he system of statutory appeals to the Tribunal would not be functioning properly if the OFT were discouraged from taking and enforcing decisions made whilst fulfilling its public function without fear of exposure to excessive costs claims if the decision is successfully challenged" (see paragraphs 5-9 of the OFT's 30 June 2011 submissions, and in particular paragraph 7).

   (2) Secondly, it was suggested that the Tribunal should take account of the fact that "a substantial part of GMI's costs claim related to its penalty appeal, occupying the majority of the second day of the hearing. Those costs were far higher than they would have been had the central penalty issues been decided, as the OFT suggested, on a test case basis, thereby avoiding the need for duplication of submissions in individual appeals" against the Decision.

   (3) Thirdly, it was suggested that the costs claimed by GMI were in any event excessive.

   These three points are considered in turn below.

10. As to the first point, we agree that any costs award in favour of a successful appellant must be kept within reasonable bounds. However, we consider that this is a general principle that applies to <u>all</u> litigation: no party should be entitled

to recover costs unreasonably incurred, and the Tribunal Rules contain ample provision to ensure that this does not occur.

11. It was not clear from the OFT's submissions whether the OFT was contending for a special costs regime in the case of costs orders against regulators in general or the OFT in particular. If this was the OFT's contention, then we consider it to be inconsistent with the OFT's acceptance of the starting point that a "winner" should have his costs (see paragraph 8 above) and inconsistent with the approach taken in *Eden Brown Limited v Office of Fair Trading* [2011] CAT 29 and *Kier Group plc v Office of Fair Trading* [2011] CAT 33. We also note what the Court of Appeal said, in relation to the UK Border Agency, in *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895 at paragraph 60:

> "Notwithstanding the heavy workload of [the UK Border Agency], and the constraints upon its resources, there can be no special rule for government departments in this respect. Orders for costs, legitimately made, will of course add to the financial burden on the Agency. That cannot be a reason for depriving other parties, including publicly funded parties, of costs to which they are entitled...

We consider this statement to be apposite in the present case.

12. The OFT's second point was that, had the multiple appeals against the Decision been managed differently – with a test case or test cases being heard in advance of appeals in individual cases – then costs would have been saved. As the Tribunal has pointed out in *Kier Group plc v Office of Fair Trading* [2011] CAT 33, it is by no means a foregone conclusion that the ordering of preliminary issues saves time and costs; very often, the precise converse is true, and we decline to accept the OFT's submission that significant costs would have been saved had these appeals been managed differently.

13. We turn to the OFT's third point, which is that GMI's costs are, quite simply, excessive. The OFT sought to demonstrate this by adopting a comparative approach, comparing GMI"s overall costs (£285,649.47) with those of another successful appellant in a roughly similar case (where the appellant succeeded in

a liability appeal), AH Willis and Sons Limited ("Willis"). Willis' costs, in *AH Willis and Sons Limited v OFT* [2011] CAT 13 amounted to £32,702.90.

14. There are dangers in comparing the costs incurred by different appellants in different appeals: whilst there may be a deceptively clear overlap in respect of legal issues, it is quite clear from the Judgment that the Tribunal's decision in this case turned essentially on difficult questions of fact, not law, and that these factual questions were unique to this case. For this reason, we do not consider a comparative approach to be useful in this case, and prefer to consider the costs incurred by GMI without reference to other cases.

15. GMI submitted that its costs are "reasonable and proportionate" (paragraph 14 of GMI's 13 May 2011 submissions). Whilst this may be a fair comment as regards the disbursements of £33,124.97 incurred by GMI, we are concerned that this may not the case as regards other aspects of GMI's costs. Of course, we appreciate that the detail provided in GMI's *Summary of Costs* schedule is limited. Nevertheless, having regard to the information provided therein, we are concerned that the costs may be excessive, not necessarily in terms of hourly rates charged, but in terms of time spent. We accept that the mounting of this appeal must have involved a reasonable amount of additional factual investigation and legal analysis, over-and-above that performed by GMI during the course of the administrative process that preceded the Decision, which costs GMI accepts are irrecoverable (see paragraph 13 of GMI's 13 May 2011 submissions). Nevertheless, taking this into account, and assuming long (in terms of billable hours) 8 hour working days, we note that a senior partner and an associate spent a combined total of over 124 days: 41¼ days (in the case of the senior partner) and nearly 83 days (in the case of the associate) in preparing this appeal. On the face of it this seems a lot in the light of the issues in the case. We do not consider that we can say anything more about these costs given the limited information before us.

16. In these circumstances, therefore, GMI should have an order in its favour for the costs of its appeal (both as to liability and penalty) such costs to be subject to a detailed assessment on the standard basis by a costs judge of the Senior Courts,

if not agreed. We direct that this judgment on costs be placed before the costs judge for his consideration.

The President | Dr Adam Scott OBE TD | Marcus Smith QC

Charles Dhanowa
Registrar

Date: 1 November 2011