Neutral citation [2016] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1262/5/7/16 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

7 October 2016

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

AGENTS' MUTUAL LIMITED

Claimant

-v-

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)

Defendant

JUDGMENT (COSTS MANAGEMENT II)

Introduction

1. On 14 September 2016, I made an order pursuant to rule 53(2)(m) of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules") for costs management in these proceedings before this Tribunal (the "CAT") brought against Gascoigne Halman Ltd ("Gascoigne Halman"). This order (the "Costs Management Order") covered also a separate set of proceedings between the same Claimant and Moginie James Ltd ("Moginie James") which, pursuant to my order at a previous CMC on 26 July 2016 and by consent, is being heard together with the action against Gascoigne Halman.

2. The Costs Management Order was made in the course of a CMC held in both actions, on the application of the Claimant for costs management directions. Moginie James did not oppose costs management of the proceedings against it, but Gascoigne Halman resisted the application (save for agreeing to provide a costs budget in the form of Precedent H). My reasons for directing costs management by analogy with the provisions in Part 3 of the Civil Procedure Rules ("CPR") are set out in a brief unreserved judgment delivered in the course of the CMC: [2016] CAT 15. After a short adjournment following the conclusion of the argument on costs management and delivery of that judgment, Mr Harris QC on behalf of Gascoigne Halman drew to the Tribunal's attention a matter omitted from both his skeleton argument and oral submissions, as I shall explain below, as a result of which I gave it liberty to apply, if so advised, by 19 September 2016 to review the relevant part of the Costs Management Order.

3. Gascoigne Halman made such an application to vary the Costs Management Order by letter from its solicitors ("Quinn Emanuel") dated 19 September 2016. The initial evidence in support, in the form of a witness statement by Mr Bronfentrinker, the partner with conduct of the action (Mr Bronfentrinker's 4th witness statement), was not served with the application but the following day, 20 September. The Claimant's submissions opposing that application, supported by a brief witness statement from Ms Lesley Farrell, the partner at its solicitors ("Eversheds") with conduct of the action (Ms Farrell's 3rd witness statement), were sent on 22 September. There followed a flurry of further

evidence: i.e. a 5th witness statement by Mr Bronfentrinker, along with short witness statements by Ms Kate Vernon and Mr Julian Kelbrick, for Gascoigne Halman, all made on 23 September; and a 4th witness statement by Ms Farrell, along with a short witness statement by Mr Ian Springett, for the Claimant, both made on 27 September.

4. Considering that the purpose of costs management is to contain costs, the costs incurred in the argument concerning costs management are of some concern. It would clearly have been disproportionate to hold a further hearing to determine this matter and neither side requested that. I accordingly decided the application on the papers and by order made on 30 September I dismissed Gascoigne Halman's application. This judgment sets out my reasons.

Background

5. In order to understand how this matter arose, it is necessary to set out the procedural background to the present action and the Moginie James action, which both started in the Chancery Division of the High Court, and explain how they now come before this Tribunal.

6. The Claimant established and operates an online property portal called "OnTheMarket" ("OTM") through which estate agents can advertise properties available for sale or rental, with a view to attracting purchasers or tenants. As its name suggests, the Claimant is a mutual limited company which is said to be run in the interests of its members who are all estate agents. Both Gascoigne Halman and Moginie James are estate agents that became members of the Claimant. OTM was launched with a view to breaking into what its founding members regarded as a duopolistic online property portal market, dominated by Rightmove and Zoopla/PrimeLocation. One of the rules of OTM incorporated in the agreement which joining members entered into is the so-called 'one other portal' or 'OOP' rule: this provides that a member may list its properties on only one other portal, and no more. Hence a member may list its properties on Rightmove, for example, or on Zoopla, but cannot do so on both.

7. In about February 2016, the Claimant became aware that Gascoigne Halman was listing properties on both Rightmove and Zoopla, in breach of the OOP

rule. The Claimant commenced proceedings against Gascoigne Halman in the Chancery Division on 17 February 2016 and sought an urgent interim injunction. That application came before Asplin J on 23 February, where it was resolved by an interim undertaking by Gascoigne Halman in effect to abide by the OOP rule, on the basis of the usual form of cross-undertaking by the Claimant. By consent, the judge stayed the proceedings for two months to enable ADR, and ordered that the matter be relisted on the first available date after 23 April 2016 for further directions.

8. On 23 March 2016, the Claimant received a letter from Moginie James's solicitors claiming on its behalf recission of the membership agreement on the grounds of misrepresentation. While investigating those allegations, the Claimant discovered that Moginie James had breached the OOP rule by listing its properties on more than one competing portal. Following an exchange of correspondence, the Claimant commenced proceedings in the Chancery Division in April 2016 against Moginie James and in that action similarly sought an interim injunction. The matter came before Arnold J where, as in the Gascoigne Halman case, the question of interim relief was dealt with by way of undertakings. However, the order of Arnold J, sealed on 19 April 2016, also directed an expedited trial, and set the dates for all steps to trial. His order included the provision that:

> "There be a costs management CMC listed before the Master on the first open date after 27 May 2015, time estimate 1.5 hours."

9. In accordance with Arnold J's order, Moginie James served a Defence and Counterclaim on 5 May 2016. The Defence set out alleged misrepresentations by the Claimant and also alleged breaches by the Claimant of the OTM membership agreement, which it claimed entitled it to rescind the agreement, and as a result of which it counterclaimed for restitution of fees paid and damages. But it also alleged, at paras 40-42 of its Defence, that the OOP rule contravened the Chapter I prohibition in sect. 2 of the Competition Act 1998 (the "CA 1998") so that either the whole membership agreement or the OOP rule specifically was void and unenforceable.

10. In the meantime, the stay of the Gascoigne Halman action had come to an end. On 20 May 2016, Gascoigne Halman served its Defence. The main thrust of the Defence was to allege that the OOP rule was in breach of the Chapter I prohibition under the CA 1998, but it also alleged that certain other provisions of the OTM agreement were anti-competitive so as to infringe the Chapter I prohibition and further alleged a distinct violation in the form of a collective boycott of Zoopla/PrimeLocation. In addition, it alleged that the Claimant was in repudiatory breach of the OTM agreement such that Gascoigne Halman was entitled to terminate its membership. It is unnecessary for present purposes to describe the various allegations advanced in more detail, but it is fair to say that whereas in the Moginie James case the non-competition defences play a major role, in the Gascoigne Halman case they appear very subsidiary to the competition law allegations. On 24 May 2016, Gascoigne Halman issued an application for discharge of its undertaking, an expedited trial, transfer of the competition issues in its case to the CAT and "case management directions."

11. The next day, 25 May 2016, in the Moginie James case the costs and case management conference ("CCMC") ordered by Arnold J was held before Master Matthews. He granted relief to the Claimant for its failure to have filed a costs budget in accordance with CPR rule 3.13 (which requires the filing of a costs budget no later than 21 days before the first CMC), gave directions for further pleadings, experts reports, etc, and ordered that the CCMC be adjourned to a date not earlier than 14 days after the determination of the application in the Gascoigne Halman case for transfer to the CAT, with costs budgets to be exchanged no later than 7 days prior to that adjourned CCMC.

12. That was the background to the listing of a joint hearing in both actions before Sir Kenneth Parker, sitting as a High Court judge, in the Chancery Division on 5 July. Not long beforehand, Gascoigne Halman issued an application for discharge of its undertaking and security for costs; the Claimant issued an application for an interim injunction against Gascoigne Halman and another for permission to amend its Particulars of Claim; and Moginie James issued an application for security for costs.

The order of Sir Kenneth Parker

13. There were accordingly an array of matters to be addressed in the hearing before Sir Kenneth Parker, which stretched into a second day. It is unnecessary for the purpose of this ruling to set out what happened with most of them: their determination is apparent from Sir Kenneth Parker's order (the "Parker Order"). What is relevant is that, by consent, he ordered (a) that both cases be assigned to a judge who is also a designated chairman of the CAT (the "Allocated Judge"); (b) the transfer of the competition issues (as defined) in both actions to the CAT under The Section 16 Enterprise Act 2002 Regulations 2015, to be heard by a tribunal chaired by the Allocated Judge; and (c) that the parties liaise with each other and the CAT Registry to seek a listing of a first CMC in the CAT by 27 July 2016.

14. Further, the Parker Order provided, by consent, that in the Moginie James action the trial listing under the order of Arnold J be vacated and the order of Master Matthews be suspended pending review by the Allocated Judge at the CAT CMC, and then stated as follows:

> **"Costs Management**
>
> 20. The requirements for costs management under CPR 3.13 be dispensed with in Claims in Claim HC-2016-000513 (i.e. the Gascoigne Halman Claim).
>
> 21. The Costs Management conference ordered by Master Matthews in Claim HC-2015-001149 [the Moginie James claim] in paragraph 7 of his order dated 25 May 2016 do take place before the Allocated Judge not earlier than 14 days after the CAT CMC."

15. Formally, no judge has been allocated to these cases in the Chancery Division, a matter that can be determined only by the Chancellor. However, given the urgency of the matter and in the spirit of the Parker Order, I heard the first CMC in the CAT following transfer, as President of the CAT sitting also as a judge of the Chancery Division so as to deal also with pending applications for security for costs, and I have been dealing with further matters in these cases since.

Costs management rules

16. Pursuant to CPR rule 3.12, the costs management regime applies to both the Gascoigne Halman action and the Moginie James action in the High Court, unless the court otherwise orders.

17. CPR rule 3.13(1) provides, insofar as relevant:

> "(1) Unless the court otherwise orders, all parties … must file and exchange budgets –
>
> …
>
> (b) …, not later than 21 days before the first case management conference.
>
> (2) In the event that a party files and exchanges a budget under paragraph (1), all other parties … must file an agreed budget discussion report no later than 7 days before the first case management conference."

18. The CPR obviously do not apply in the CAT. The CAT Rules provide, in rule 53:

> "(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.
>
> (2) The Tribunal may give directions –
>
> …
>
> (m) for the costs management of proceedings, including for the provision of such schedules of incurred and estimated costs as the Tribunal thinks fit;…"

The hearings in the CAT

19. Following the transfer of the competition issues, I held a CMC in both actions on 27 July 2016. At that hearing and in the resulting order, the trial of the competition issues was fixed to commence on 3 February 2017 and directions for various matters (further pleadings, disclosure, expert and other evidence,

etc) up to trial were given. I also gave directions for a further hearing to determine pending applications concerning security for costs. In addition, at that hearing leading counsel for the Claimant stated that it was intending to make by 15 August an application for a costs management order. The order of 27 July accordingly provided (at para 22) that the Claimant was to file any further application relating to costs by 15 August 2016.

20. There was correspondence between Quinn Emanuel and Eversheds in early August regarding the applications for security for costs, in which Eversheds pressed Quinn Emanuel to serve an updated costs budget on behalf of Gascoigne Halman, which Quinn Emanuel resisted. In their letter of 1 August 2016, Quinn Emanuel wrote:

> "As set out in previous correspondence we do not consider that our client is obligated to file and serve an updated cost budget as the proceedings before the Tribunal are not subject to any formal costs budgeting. This is reflected in the fact that no order was made at the CMC requiring our client to file any sort of costs budget with the Tribunal. Nevertheless, as stated in our letter of 20 July 2016, we have prepared an updated budget estimate, and this is enclosed."

21. The reply from Eversheds dated 3 August, while mostly concerned with the issue of security for costs, significantly included the following passage:

> "We note your comment that you do not consider that your client is obligated to file and serve an updated cost budget as the proceedings before the Competition Appeal Tribunal are not subject to any formal costs budgeting and no order was made at the CMC requiring your client to file any sort of costs budget with the Tribunal. Whilst we acknowledge that your client has not (yet) been ordered to file a costs budget by the Tribunal, we do not understand how our client could be expected to respond to your client's security for costs application *nor how our client could make the appropriate application to the CAT in relation to costs management* without a detailed and updated estimate of your client's costs… [emphasis added]."

22. In the end, on 15 August and pursuant to the 27 July order, the Claimant issued an application for an order that:

> "The parties file and serve, on a monthly basis detailed schedules of all costs incurred in the proceedings to the date of the schedule and detailed costs budgets for all anticipated costs of the proceedings up to and including the trial of the Competition Issues."

23. Having been served with the Application, Quinn Emanuel wrote the same day to the Tribunal, stating:

> "The Claimant's application will be resisted by GHL for reasons that will be set out in full in response to the application."

24. Prior to the hearing on 14 September, the parties in the usual way filed detailed skeleton arguments. The skeleton signed by leading and junior counsel for Gascoigne Halman addressed the Claimant's application for costs management, stating:

> "13. C has not explained why such a burdensome order is necessary, particularly taking account of the expedited nature of the proceedings, nor even what would be done with the information.
>
> 14. GHL submits that such an order would be pointless, wasteful and counter-productive:…"

There followed five sub-paragraphs to para 14, expanding on why such an order was not merited or appropriate. But there was no suggestion that it was not open to the Claimant to seek such an order, either because of the terms of the Parker Order or because the parties had agreed to dispense with costs management before the CAT.

25. At the outset of the hearing on 14 September, I indicated to the parties that I felt that to require Gascoigne Halman to serve revised costs budgets each month was burdensome and unproductive, and that my view was that if costs management were to be ordered it would be more appropriate to apply by analogy the regime for costs budgeting set out in the CPR. The Claimant readily adopted this suggestion, but Gascoigne Halman resisted it while acknowledging that it was more sensible than the proposal put forward by the Claimant, essentially for the reasons set out in Counsel's skeleton argument,

which Mr Harris QC expanded upon in his oral submissions. He also offered, as a form of compromise, that Gascoigne Halman would produce a costs budget in the form of Precedent H (i.e. in accordance with CPR PD 3E, para 6). I rejected that limited approach for reasons set out in the short judgment referred to above.

26. After a brief adjournment, Mr Harris referred me for the first time to para 20 of the Parker Order, which he frankly acknowledged he and those instructing him had overlooked in considering the Claimant's application. He pointed out that this provision of the Parker Order was made by consent, and argued that it precluded in terms the making of a costs management order in the CAT. He submitted that the Claimant was therefore seeking to vary the terms of a consent order, which on authority presented a high hurdle and which Gascoigne Halman would oppose. I observed that I did not see how an order of the High Court could bind the CAT and that I did not read the Parker Order as seeking to do so: it concerned costs management in the High Court. However, I said that if it represented an agreement made beforehand between the parties which ostensibly extended to the proceedings they were seeking to have heard in the CAT, I would regard that as relevant to the exercise of the CAT's discretion under rule 53(2) of the CAT Rules as to whether to order costs management.

27. Mr Maclean QC, appearing for the Claimant before me as he had before Sir Kenneth Parker, pointed to a passage in the transcript of the proceedings of 4 July 2016, which indicated that he then had pointed out to Sir Kenneth Parker the breadth of the CAT's case management powers over costs and expressly indicated that the Claimant would be keen for the CAT to exercise those powers to keep the costs proportionate. He submitted that this was clearly inconsistent with there having been any express agreement between the parties to exclude costs management before the CAT.

28. As a result, I declined to review the order I had made (which of course had not yet been drawn up) but, given that this issue had arisen unexpectedly and that the legal team of Gascoigne Halman had not had an opportunity to go through the transcript or any attendance notes they might have, I gave Gascoigne

Halman liberty to apply by 19 September to review my order. It is pursuant to that liberty that the present application was made.

Submissions and Discussion

29. Gascoigne Halman submits that the terms of the Parker Order, on proper interpretation, apply also to the proceedings in the CAT. I reject that submission. The High Court clearly has no jurisdiction to make case management directions for proceedings in the CAT. Moreover, I have no doubt that Sir Kenneth Parker was well aware of this: that emerges, if support were needed, from several of his observations during the hearing before him and it is unnecessary to lengthen this judgment by quotations from the transcript to illustrate such a basic and obvious point. I do not think that the word "Claims" in the plural in the wording of para 20 of the Parker Order, on which Gascoigne Halman sought to rely, takes the matter any further. It was also submitted that the parties had agreed to give the High Court jurisdiction to determine the approach to costs management in the CAT. However that is fundamentally misconceived: parties cannot give the High Court, or indeed the CAT, a jurisdiction which it does not possess.

30. In the alternative, Gascoigne Halman contends that there was an agreement or common understanding between the parties that there should not be no costs management at all, either in the High Court or the CAT. The proceedings before Sir Kenneth Parker went into a second day, and while the remarks by Mr Maclean in that hearing indicating an intention to seek costs management in the CAT were made on 4 July, it was asserted that negotiations took place after court that day and into the morning of the following day, which resulted in an agreement in this regard being reached on 5 July when the judge was presented with the terms of the consent order. Gascoigne Halman drew attention in its application to the passage in the transcript of the hearing on 5 July when Mr Harris took Sir Kenneth Parker to this part of the relevant draft order placed before him:

> "My Lord, the next paragraph, again uncontroversial, is that as regards the Gascoigne Halman claim the Cost Management Rules be dispensed with. That is a

fairly familiar provision. In contrast, there has already been cost management steps taken in the other claim and all parties are agreed that that should then occur at the CMC for further steps."

The third sentence is a reference to the Moginie James action and to para 21 of the Order. Although it is recorded as referring simply to "the CMC", it was clearly not intended to refer to a CMC in the CAT since para 21 expressly specifies that the case management in that action shall take place *after* the CAT CMC before the allocated judge in the High Court. The Claimants submitted that this was either a mistranscription or that Mr Harris mis-spoke. I consider that submission must be correct.

31. In his 4th witness statement in support of this application, Mr Bronenfentrinker stated that the discussions on 4-5 July were without prejudice so that he was not able to reveal the detail of those discussions. That is misconceived as a matter of law: it has long been established that if there is an issue as to whether without prejudice communications resulted in an agreement or give rise to an estoppel, such communications are admissible in evidence. See eg *Oceanbulk Shipping and Trading v TMT Asia* [2010] UKSC 44; *Phipson on Evidence* (18th edn), para 24-15. This was pointed out in the submissions for the Claimant, and in her 3rd witness statement Ms Farrell stated that she attended the hearing before Sir Kenneth Parker and was involved in the discussions between the parties, and to her knowledge there was no such agreement or common understanding.

32. It was following this that Gascoigne Halman served Mr Bronfentrinker's 5th witness statement, and the witness statement of Ms Vernon and Mr Kelbrick, to the effect that it was made clear in the negotiations that the exclusion of costs management covered also the CAT (although Mr Kelbrick as the in-house counsel responsible for Gascoigne Halman acknowledges that he did not himself actively participate in those discussions). And the Claimant then served Ms Farrell's 4th witness statement which exhibited all the without prejudice exchanges of 4-5 July, including the email exchanges between Counsel, and also a 4th witness statement from Mr Springett of the Claimant.

33. I do not regard this as a question of the honesty of one solicitor or the other.It is abundantly clear that many issues were being discussed between the court hearings on 4 and 5 July, and in reading the contemporaneous correspondence it is apparent, as one would expect, that the main focus was on Gascoigne Halman's application to discharge its undertaking and the related question of fortification of the Claimant's cross-undertaking, and also on security for costs. However, having reviewed that correspondence, I have no doubt that the recollection of Ms Farrell is to be preferred and I conclude that there was no discussion about costs management in the CAT or agreement that it would be dispensed with. I reach that conclusion for several reasons:

a. Although Mr Bronenfentrinker states in his 5th witness statement (at para 6) that Counsel for Gascoigne Halman and the Claimant exchanged drafts of an order overnight on 4 July which contained what became para 20 of the Parker Order, review of the contemporaneous communications between solicitors and Counsel shows that his recollection or information is defective in that regard. There were no such drafts overnight. A draft order was first produced on the morning of 5 July ("for discussion at court"), by leading Counsel for Moginie James, which included the provision (including the word "Claims") which became para 20 of the Parker Order, and this was adopted in a further draft produced that morning by Counsel for Gascoigne Halman.

b. It is striking that nowhere in the without prejudice exchanges and communications of 4-5 July which led to the Parker Order is there any reference to costs management, whether in the CAT or at all. It appears in the draft orders, as I have just mentioned, without discussion.

c. I have set out at paras 20 to 21 above the relevant passages from the correspondence between the parties solicitors' prior to the hearing on 14 September. Had there been such an agreement or understanding, then faced with the declared intention of the Claimant to seek costs management orders from the CAT, any competent solicitor would have reacted along the following lines: "Your client cannot do that: this would be contrary to the agreement that we reached on 5 July." However, there

is no suggestion to that effect from Quinn Emanuel in the relevant correspondence.

d. The inclusion of para 20 in the Parker Order is entirely logical. Pursuant to CPR rule 3.13, the costs management regime for a case such as this in the Chancery Division is mandatory unless excluded by court order. Para 20 refers expressly to rule 3.13, and such a provision was necessary to relieve the parties of the obligation to exchange costs budgets and file a budget discussion report *in the High Court* before the first CMC in the High Court. The corresponding para 21 of the Parker Order regarding the Moginie James action expressly addresses the need for the parties in that case to engage in costs management *in the High Court after* the CAT CMC.

e. If there had been any agreement or understanding reached with the Claimant regarding costs management in the CAT, Eversheds would have needed to get their client's instructions and approval. But in his witness statement Mr Springett explains that he would have been very concerned at any such suggestion given the escalating legal costs of Gascoigne Halman and that one of his key reasons for agreeing to the transfer of the competition issues in the case to the CAT was that it seemed likely to be more cost effective, including via the possibility of the CAT making the appropriate costs management orders. The latter point reflects what Mr Maclean said to Sir Kenneth Parker on 4 July. Since the competition issues constitute much the major part of the Gascoigne Halman case (by contrast with the Moginie James case), there would be little concern about doing away with costs management of the former case in the High Court.

34. Finally, I should make clear that even if, contrary to the above, I had found that the parties had agreed to dispense with costs management in the CAT, that would not preclude the CAT's power to make such costs management orders as it considered appropriate. Although I accept that any such agreement between the parties would be a very relevant factor to take into account, for the reasons set out above that situation does not arise in this case.

The Honourable Mr Justice Roth
President of the Competition Appeal Tribunal

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

Date: 7 October 2016