



Neutral Citation [2009] CAT 31

Case No: 1109/6/8/09

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

26 November 2009

Before :

THE HONOURABLE MR JUSTICE BRIGGS
PROFESSOR PAUL STONEMAN
DR VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BARCLAYS BANK PLC

Applicant

-supported by-

LLOYDS BANKING GROUP PLC
SHOP DIRECT GROUP FINANCIAL
SERVICES LTD

Interveners

-v -

COMPETITION COMMISSION

Respondent

-supported by-

FINANCIAL SERVICES AUTHORITY

Intervener

RULING ON PAPER SUBMISSIONS

INTRODUCTION

1. In this Ruling we deal with two matters, arising from our judgment handed down on 16th October 2009 [2009] CAT 27 (“the Main Judgment”). The first relates to the form of order which we should make, to give effect to our decision in the Main Judgment. The second relates to costs of the proceedings. The parties have invited us to decide these matters on written submissions, without a hearing. The ruling which follows is our unanimous decision.

FORM OF ORDER

2. At the conclusion of the Main Judgment we said that we proposed to quash the Commission’s decision to impose the POSP as part of its remedies package, and remit that question to the Commission for reconsideration in accordance with the principles set out in that judgment. Barclays and the Commission have since agreed to invite us to direct the Commission to reconsider the decision to impose the POSP in accordance with the principles set out in particular paragraphs of the Main Judgment, namely paragraphs 111 to 116 on “Timescale”, paragraphs 128 to 141 regarding loss of convenience, paragraphs 156 to 163 on “The Commission’s modelling took no account of costs”, paragraphs 166 to 167 on “The modelling took no account of adverse consequences of its remedies package” and paragraphs 171 to 175 on “Elasticity of demand”.
3. By contrast, both Lloyds and Shop Direct have invited us to make the simpler form of order, whereby the Commission is directed to make a new decision in

accordance with the principles set out in the Main Judgment generally. In written submissions, the Commission has stated that if the order were in the more specific form agreed with Barclays, the Commission would be able to undertake its reconsideration of the question whether to impose the POSP within six months from the date of the order, whereas if it were framed in the more general terms contended for by the interveners, the process of reconsideration might take up to eighteen months.

4. The fact that the primary parties to these proceedings, Barclays and the Commission, are in agreement that our order should be framed in such a specific way, and that, if it is, the Commission might be able to undertake its reconsideration more quickly than it would otherwise, are both factors of real weight in favour of acceding to their joint invitation to do so. Furthermore, the paragraphs of our Main Judgment selected for that purpose undoubtedly do contain the central part of our reasoning for quashing the decision to impose the POSP. We have however come to the conclusion that it would be wrong to express our order in that restricted manner. Our reasons follow.
5. First and foremost, the specific paragraphs referred to in the draft order proposed by Barclays and the Commission do not by any means express the whole of the principles by which we consider that the Commission should be guided. The relevant principles include, for example, our conclusions as to the applicable law governing the Commission's tasks, in paragraphs 9 to 21 of the Main Judgment. More fundamentally, our Main Judgment is to be read and understood as a whole, rather than in a series of isolated sections.

6. Secondly, we are concerned that by limiting the applicable principles relevant to a reconsideration by the Commission of the decision whether to impose the POSP to those set out in the identified paragraphs, we might accidentally lend weight to an assumption that, in a reconsideration carried out some time after the Commission's original Report, the Commission need only review those particular aspects of its reasoning in respect of which we have upheld Barclays' challenge. As is pointed out by the interveners, a reconsideration carried out some time after the original decision might properly be assisted by reference to more recent developments in the relevant markets. The question whether or not such matters would necessarily have to be taken into account is not something about which we have heard argument, and we express no view at all, one way or the other, about it. Nonetheless, if we were to confine the principles relevant to the Commission's reconsideration to those set out in the identified paragraphs of our Main Judgment, an erroneous impression that we had, *sub silentio*, concluded that no other matters need to be taken into account might thereby be accidentally created.
7. It is not the task of the Tribunal as presently constituted for the purpose of Barclays' application to enter into the question what the Commission should now take into account in a reconsideration of its decision, beyond those principles identified in the Main Judgment read as a whole. It is for the Commission to decide upon the proper scope of its reconsideration of the question whether to impose the POSP, provided that, in doing so, it takes into account the principles set out in the Main Judgment.

8. Finally, we have found it difficult to understand what lack of clarity there is in the Main Judgment, read as a whole, that would lead to the result that the reconsideration necessitated by the quashing of the decision to impose the POSP could take up to three times longer than it would do, if the order was made in the form which the Commission and Barclays suggest. If the reason for the extra time requirement is because that the Commission would, upon a reconsideration pursuant to the order in its proposed form, be entitled to ignore all potentially relevant matters other than those specified in the identified paragraphs, then this confirms our view that an order in the form for which Barclays and the Commission propose might be thought, wrongly, to justify a narrower scope of reconsideration than might otherwise be appropriate.
9. For those reasons, we adhere to our original view that the order should be substantially in the form set out in the first sentence of paragraph 181 of the Main Judgment.

COSTS

10. The principles applicable to the exercise of the Tribunal's broad discretion as to costs on an application made pursuant to section 179(1) of the Enterprise Act 2002 have been the subject of a recent and detailed analysis by the Tribunal in Tesco plc v. Competition Commission [2009] CAT 26, at least so far as they relate to the position as between Barclays and the Commission. We have not, in the written submissions upon which we have been invited to proceed, identified any suggestion that the relevant principles have not therein been correctly described, and we propose to follow them without further elucidation.

Costs as between Barclays and the Commission

11. In the present case, Barclays submits that the Commission should pay two thirds of its costs, to be assessed if not agreed, whereas the Commission submits that there should be no order for costs, as between itself and Barclays. It is common ground that Barclays has been only partly successful, both in terms of the relief obtained, and by reference to the four specific grounds of its application. There is however a dispute as to the extent to which its success has only been partial. Implicit in Barclays' concession that it should obtain only a proportion of its costs, and in the Commission's rival submission, is an invitation to the Tribunal to apply, at least to some extent, an issue based approach.
12. It is in our view clear that Barclays achieved the primary objective for which it made its application, namely the quashing of the decision to impose the POSP. Nonetheless, it did so upon much narrower grounds than those advanced, and its failure to persuade the Tribunal that there was anything wrong with the Commission's market analysis and findings as to the AEC, means that the scope for further review by the Commission is, on any view, much less than Barclays no doubt wished. There can be no doubt that a hearing at which Barclays had advanced evidence and submissions directed solely to the points upon which it succeeded would have been a much shorter and less expensive event.
13. In our view, the Commission's submission that there should be no order as to costs fails to recognise Barclays' success in achieving its primary objective, and that there should therefore be some order for costs in Barclays' favour.

Furthermore, we think it preferable if possible to reflect Barclays' lack of success simply in a proportionate reduction of its costs entitlement, rather than in the combination of such a reduction, and an order that it pay a proportion of the Commission's costs.

14. In our view, the appropriate order is that Barclays should obtain payment by the Commission of half its costs, including its costs of dealing with the relief issues. This by no means reflects a view that it has only been half successful. On the contrary, on a spectrum which has at one end payment of the Commission's costs and at the other end, payment of Barclays' costs, the order which we propose reflects our view that Barclays has done substantially better than that. Nonetheless, its submission that it should be paid two thirds of its costs, and the Commission be left to pay the whole of its own costs would, in our view, give insufficient weight to the substantial areas in respect of which Barclays failed.
15. Turning to quantification, this is, like the Tesco case, another instance of a large disparity between the costs incurred by the Applicant, and by the Commission. Barclays' grand total is said to be approximately £790,000 plus VAT, whereas the Commission's grand total is approximately £225,000 plus VAT.
16. In the Tesco case the Tribunal decided to assess the successful applicant's recoverable costs by reference to the Commission's costs, with an uplift to reflect the probability that the respondent to an application of this kind may have an easier task than the applicant. Nonetheless, the Tribunal expressly

disclaimed any suggestion that such an approach would necessarily be appropriate in other cases.

17. In the present case, Barclays has sought to defend its much higher expenditure (by comparison with that of the Commission) not only by reference to the probable economies available naturally to a respondent, but also by reference to the supposed disparity in purchasing power (in relation to legal services) of the Government, by comparison with a private litigant, even one as substantial as Barclays.
18. We consider that there may be something in Barclays' point about purchasing power, not least because the Commission has obtained the services of the Treasury Solicitors rather than a private firm, and because of the very large disparity between the respective counsel's fees incurred on each side. It does not therefore necessarily follow that Barclays' higher expenditure was either unreasonable or disproportionate.
19. Nonetheless, we do not consider ourselves to have the experience which would qualify us to make a reliable assessment of Barclays' reasonable and proportionate costs of conducting this litigation, at least by comparison with the assessment which would be made by a Costs Judge. While we acknowledge that an order for assessment by a Costs Judge risks involving the parties in significant further time and expense in connection with this litigation, the experience of the Chairman at least is that assessment proceedings are very frequently compromised at minimal expense, in particular where they occur between sensible litigants and sophisticated legal teams, as in the present case.

20. For those reasons, we direct that the costs of Barclays which we have ordered to be paid by the Commission be assessed by a costs officer of the Supreme Court, pursuant to Rule 55(3).

Costs as between the Interveners and the Commission

21. Lloyds seeks 60% of its costs of intervening, as against the Commission. Conversely the Commission seeks an order for payment of its costs of responding to Shop Direct's intervention, which it tentatively estimates as amounting to 10% of its overall costs expenditure. The respondents to each of those applications, the Commission and Shop Direct respectively, submit that the costs of and occasioned by the interventions should lie where they fall.
22. The general approach of the Tribunal in relation to the costs of and occasioned by interventions has been one of neutrality, the underlying purpose being neither to encourage nor to discourage interventions. In terms of costs, it has therefore generally been found to be just to direct that the costs of and occasioned by interventions should lie where they fall, save where particular circumstances lead to a conclusion that justice would be served by some different order.
23. In the present case, Lloyds seeks to rely, as circumstances justifying an order for payment of a proportion of its costs by the Commission, upon the following factors: (1) that its interests were directly and seriously affected by the proposed imposition of the POSP, to the same extent as were Barclays' interests; (2) that Lloyds went to considerable effort not simply to duplicate Barclays' submissions; (3) that Lloyds' intervention was useful to the

Tribunal; (4) that in certain respects the Tribunal accepted and applied specific submissions made by Lloyds, in the Main Judgment.

24. While we accept that each of those factors fairly describes Lloyds reasons for and conduct of its intervention in these proceedings, and while we acknowledge that Lloyds' intervention was of significant assistance to us, we do not regard those factors, taken either separately or in aggregate, as calling for a departure from the Tribunal's normal approach. As to (1), it seems to us that in the context of an application of this kind, it will be common to find a number of participants in the relevant market or markets identically affected by a proposed remedy such as the POSP. To recognise that as a factor justifying an order for costs in favour of any intervening market participant with a similar interest to that of the applicant would, in our view, unduly encourage interventions, and risk imposing an unjust burden of costs on the respondent Commission.
25. While there is in theory the option of requiring one set of costs to be shared between a successful applicant and successful interveners with similar interests, that would in our view frequently be unjust to the applicant which, having undertaken the risks of a costs liability to the Commission if unsuccessful would, in having to share a single set of costs if successful, be subjected to an asymmetric balance between costs risks, and costs compensation.
26. As to (2), we would expect this to be normal reasonable conduct by interveners, with the result that (3) would also be a normal consequence. As to (4), while there may be circumstances in which the outcome of a case has

turned upon the contribution of the intervener, rather than of the applicant or respondent in the same interest, this is not in our view one of those cases. As will be apparent from the Main Judgment, the principal ground upon which the application succeeded was one advocated vigorously by Barclays, as well as by Lloyds.

27. Accordingly, we make no order as to costs as between Lloyds and the Commission.
28. The Commission seeks its costs of responding to Shop Direct's intervention principally upon the ground that, as it is alleged, Shop Direct conducted its intervention contrary to the basis upon which it had been permitted to intervene, at the Case Management Conference held on 28th April 2009 ([2009] CAT 15). There is in our view force in that submission, for reasons set out in the Main Judgment, at paragraph 176.
29. In our view however, the submission falls short of constituting a good reason for making an order for costs against Shop Direct. First, however tangential to the central issues Shop Direct's participation turned out to be, it was, in the event, on the winning side, and the Commission on the losing side. Secondly, it did not appear to us that the Commission devoted more than an insignificant part of its time and effort to dealing with Shop Direct's submissions. Thirdly, Shop Direct did raise a point in its submissions, referred to at paragraphs 177 to 179 of the Main Judgment which, although we did not think it appropriate to rule upon it, may nonetheless prove to be of assistance to the Commission when it comes to reconsider the question whether, and if so to what extent, to impose the POSP.

30. For those reasons, we make no order for costs as between the Commission and Shop Direct.

Mr Justice Briggs

Paul Stoneman

Vindelyn Smith-Hillman

Charles Dhanowa
Registrar

26 November 2009