



Neutral citation [2011] CAT 40

IN THE COMPETITION
APPEAL TRIBUNAL

Cases No: 1115/1/1/09
1126/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

1 December 2011

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
ANN KELLY
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

CREST NICHOLSON PLC

Appellant

- v -

OFFICE OF FAIR TRADING

Respondent

ISG PEARCE LIMITED

Appellant

- v -

OFFICE OF FAIR TRADING

Respondent

RULING (COSTS)

I. INTRODUCTION

1. By its judgment of 15 April 2011 ([2011] CAT 10) (“the Judgment”), the Tribunal disposed of the Appellants’ appeals against a decision by the OFT fining them jointly for a single breach of the Chapter I prohibition of the Competition Act 1998. This ruling adopts the same abbreviations and terminology as, and should be read with, the Judgment, which contains the background to this matter.
2. The Appellants’ grounds of appeal are summarised at paragraphs 7 and 8 of the Judgment. In the Judgment, the Tribunal rejected ISG Pearce’s appeal on liability but upheld certain of the Appellants’ grounds of appeal on penalty, such that the original penalty of £5,188,846 imposed on the Appellants for Infringement 75 was reduced to £950,000.
3. The Appellants have applied for their costs in these proceedings. By an application dated 22 June 2011, Crest Nicholson applied for an award of its costs in the sum of £147,832.18. By an application dated 30 June 2011, ISG Pearce applied for an award of two thirds of its costs in the sum of £323,633.33. The OFT filed a response to the Appellants’ costs applications on 14 July 2011. Crest Nicholson and ISG Pearce filed replies to the OFT’s submissions on 19 July 2011 and 21 July 2011 respectively.

II. THE PARTIES’ SUBMISSIONS

4. Crest Nicholson submitted that it had been entirely successful in relation to all four of its grounds of appeal on penalty, being grounds that Crest Nicholson had raised consistently throughout the OFT’s administrative procedure and in its separate challenge in the Administrative Court in respect of the FTO. Crest Nicholson submitted that there were no good reasons why Crest Nicholson should not be awarded its costs, and that Crest Nicholson had conducted itself efficiently in these proceedings and had incurred a reasonable level of costs.
5. ISG Pearce submitted that the Judgment demonstrated that the OFT’s approach to setting penalties in the Decision had been fundamentally flawed, and that the OFT had

made significant errors of policy and judgment that had had a dramatic and particularly acute consequence for the Appellants. The Tribunal's significant reduction to the fine demonstrated that ISG Pearce was right to bring an appeal against the Decision and the level of penalty imposed on it. ISG Pearce submitted that its unsuccessful grounds of appeal (on liability and in relation to one ground of appeal on penalty) did not occupy the parties or the Tribunal for any significant length of time. In particular, ISG Pearce submitted that its submissions on liability amounted to no more than half a day's oral hearing, with no factual witnesses, and submissions on a very narrow legal point. ISG Pearce submitted that it was therefore appropriate to reduce the total costs sought by it by one third to reflect the OFT's success in defending ISG Pearce's appeal on liability. ISG Pearce also sought to distinguish its position from that of the Appellants in relation to the Tribunal's costs ruling in *Durkan Holdings Limited & Ors v Office of Fair Trading* ([2011] CAT 17). According to ISG Pearce, the Appellants in that case were only successful on one of their three grounds of appeal on penalty, and made extensive submissions on liability, requiring detailed consideration of documents, witness cross-examination, and lengthy legal submissions.

6. The OFT submitted that the Tribunal should make no order for costs in these appeals or, in the alternative, that only a small sum should be recoverable. The OFT made the following general submissions in relation to the Appellants' costs applications, as follows:

(a) The decisive factor in the exercise of the Tribunal's discretion should be the public policy objectives of the competition law enforcement regime and the role of the OFT within that regime. Whilst previous cases demonstrate the Tribunal's concern that some degree of costs protection should be afforded to appellants in order that they should not be deterred from testing penalty decisions, it is important that no undue burden should be placed on the OFT (and the public purse) by reason of it taking decisions conscientiously and in good faith. Further, the OFT should not be discouraged from taking and enforcing decisions for fear of exposure to undue financial prejudice, and any costs order against the OFT will necessarily result in a reduction in the resources to investigate future infringements.

- (b) The Tribunal should adopt a starting point in penalty-only appeals whereby costs should lie where they fall, absent a compelling reason to make an award for costs. This would be an approach analogous to that applied in respect of appeals from determinations made by OFCOM under section 192 of the Communications Act 2003 (“the 2003 Act”). The OFT submitted that no compelling reasons exist here, as although the Tribunal diverged from the approach to penalty adopted by the OFT in material respects (and in relation to matters where the correct answer was far from obvious), the Tribunal confirmed the OFT’s conclusion that the Appellants were wrongdoers deserving a penalty. Nor was the OFT’s conduct of the litigation unfair or unreasonable.
- (c) These appeals were not “win or lose” appeals on a single point, but were challenges raising a wide range of different grounds of appeal, targeted at different aspects of the Decision. The Tribunal entirely rejected ISG Pearce’s liability appeal, and a number of further arguments raised by each of the Appellants in support of certain grounds of appeal. Further, in the Judgment, the Tribunal drew heavily on the Kier Judgment, the Tomlinson Judgment and the Barrett Judgment, with the result that it did not deal specifically with a number of arguments raised by these Appellants. Accordingly, the reduction to the penalties imposed on the Appellants did not solely reflect their own success on the arguments in their appeals.
- (d) Costs could have been saved if the Appellants had supported the OFT’s suggestion that common penalty issues be decided on a “test case” basis, and there was considerable disparity both as between the amounts claimed by these Appellants, and when compared with the costs claimed by other companies that appealed the Decision. As regards the specific amounts claimed by the Appellants, the OFT noted that Crest Nicholson had claimed very substantial costs in respect of a penalty-only appeal relating to one infringement, and occupying a hearing of only half a day. The OFT submitted that the amount claimed by ISG Pearce was grossly disproportionate in the circumstances, in particular given that the appeal was run almost entirely in respect of points of law rather than on the basis of

evidence, and for which the oral argument occupied only approximately one day. The OFT pointed to the costs incurred by another appellant against the Decision, AH Willis & Sons Limited (case number 1122/1/1/09) which had claimed costs of just under £33,000, despite succeeding in its appeal on liability, unlike ISG Pearce.

7. The Appellants made the following further submissions in their replies:

- (a) As regards the OFT's arguments in relation to public policy, Crest Nicholson submitted that the OFT had misunderstood the nature of the enforcement regime, and that it is the existence of the Tribunal that ensures the scheme of enforcement under the Act is consistent with the ECHR. Access to that fundamental right would be frustrated if successful appellants were not able to recover their costs from the OFT. ISG Pearce submitted further that there was no support in the case law for the OFT's proposition that costs should only be awarded against public authorities when they have made unreasonable decisions or decisions in bad faith. Rather, the Tribunal has a discretion to award costs as it sees fit.
- (b) As regards the extent of its success, Crest Nicholson submitted that the OFT was plainly wrong to describe it as having achieved "only very partial success" when it succeeded in relation to each of its four grounds of appeal. To the extent that Crest Nicholson was unsuccessful in relation to the submissions considered at paragraph 46 of the Judgment, they represented only a very minor part of its case. As regards grounds of appeal also considered in the Kier Judgment, Tomlinson Judgment and Barrett Judgment, the Appellants both submitted that they could not refrain from advancing these grounds of appeal, as they did not know, when lodging their appeals, whether other parties would be appealing on these grounds.
- (c) Both of the Appellants rejected the OFT's suggestion that a "test case" approach to these appeals would have reduced the level of costs.

(d) As regards the proportionality of the costs claimed, Crest Nicholson submitted that it had taken steps to limit costs as far as possible, in particular by deciding not to instruct a QC in this case. The Appellants both submitted that any comparison with the costs claimed by AH Willis & Sons Limited was inappropriate. Crest Nicholson submitted that there was no rule suggesting that an award of costs be made by reference to costs incurred by a different party in a different case. ISG Pearce pointed to the fact that it was not claiming costs in respect of its unsuccessful liability challenge, and should not be penalised in relation to its application for costs in relation to its penalty appeal thereby.

III. THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

8. Rule 55(2) of the Tribunal Rules provides as follows:

“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.”

9. As noted by the Tribunal at paragraphs 17 to 19 of *Merger Action Group v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the Tribunal has a necessarily wide discretion on the question of costs, and the Tribunal will consider all relevant circumstances of each case to ensure that it is dealt with justly.

10. Before turning to the specific circumstances of each appeal, we have set out our conclusions in relation to the parties' submissions on the general approach that the Tribunal should follow when assessing costs in these appeals.

The general approach to the award of costs in these cases

11. As regards the OFT's suggestion that the Tribunal should adopt a starting point whereby costs should lie where they fall unless the OFT has acted unreasonably or in bad faith, we agree with and adopt the conclusions of the Tribunal at paragraphs 5 to 12 of *GF Tomlinson Group Limited & Ors v. Office of Fair Trading* [2011] CAT 32, and

paragraphs 10 to 14 of *Kier Group Plc & Ors v. Office of Fair Trading* [2011] CAT 33. In particular, we note and agree with the Tribunal’s conclusion at paragraph 14 of *Kier*:

“To insulate the OFT in the way suggested from the costs discipline to which all public bodies are subject in the context of ordinary judicial review would not be conducive to the effective enforcement of the competition rules. That discipline is as desirable in a public law context as in private law cases: see, for example, *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347, per Dyson J (as he then was), at paragraph 37.”

12. We share the view of the Tribunal at paragraph 10 of *North Midland Construction plc v. Office of Fair Trading* [2011] CAT 37 that the appropriate starting point in relation to appeals under the 1998 Act, whether liability-only, penalty-only or mixed liability and penalty appeals, is that the successful party is entitled to an award of costs. The Tribunal will then proceed to determine whether, in the particular circumstances of the case, a different finishing point should be arrived at. The Tribunal will generally take an issues-based approach, having regard to the respective successes and failures of the parties and the time and resources devoted to each issue. Further, the Tribunal may take account of the conduct of the parties in relation to the proceedings.
13. We consider that these cases are suitable for summary assessment pursuant to rule 55(3) of the Tribunal Rules, given the interrelationship between the grounds of appeal raised by the Appellants, the Tribunal’s familiarity with the issues raised in these appeals, and the lack of any complexity in relation to the issues. Neither of the Appellants requested that the cases be referred for detailed assessment.
14. For the reasons already considered by the Tribunal at paragraph 19 of *GF Tomlinson*, and paragraphs 18 to 20 of *Kier*, we do not consider that the particular case management structure advocated by the Appellants, and ultimately adopted by the Tribunal, added unnecessary costs to these appeals.

The Crest Nicholson appeal

15. Crest Nicholson succeeded in relation to each of its four grounds of appeal on penalty:
 - (a) At paragraphs 45 to 50 of the Judgment, the Tribunal upheld Crest Nicholson’s challenge to the OFT’s use of Pre-Decision Turnover at Step 1

of the penalty calculation. The Tribunal did, however, reject Crest Nicholson's specific submissions to the effect that the OFT's practice was in breach of Article 7 ECHR and that section 60 of the 1998 Act requires the OFT to follow the European Commission's approach in relation to the calculation of a penalty (see paragraphs 48 and 49 of the Judgment).

(b) At paragraphs 53 to 55 of the Judgment, the Tribunal upheld Crest Nicholson's challenge to the MDT.

(c) At paragraphs 74 to 81 of the Judgment, the Tribunal upheld Crest Nicholson's challenge to the level of discount attributable to its admission of liability. This ground of appeal occupied the most substantial part of the parties' submissions on penalty at the hearing, and the Tribunal's reasoning on penalty in the Judgment.

(d) At paragraphs 94 and 95 of the Judgment, the Tribunal upheld Crest Nicholson's challenge to the overall proportionality of the penalty. Given its overall conclusion, the Tribunal did not consider in the Judgment each of the specific arguments advanced by Crest Nicholson in connection with this ground of appeal, for example, Crest Nicholson's submissions summarised at paragraphs 88 and 89 of the Judgment.

16. In our view, Crest Nicholson can fairly be described as a "winner" in relation to its appeal and, although the Tribunal rejected (and in some cases did not consider) certain arguments advanced by Crest Nicholson in support of its grounds of appeal, these were relatively minor issues which did not occupy the parties, or the Tribunal, for a substantial amount of time, and did not detract from their overall success on their four grounds of appeal.

17. We have considered whether it would be appropriate to make a deduction to the amount of costs awarded to Crest Nicholson in respect of its costs of intervening in ISG Pearce's appeal on liability (in support of the OFT). The Tribunal's general approach in relation to interventions has been to direct that the costs of and occasioned by interventions should lie where they fall. However, the Tribunal has previously ordered

payment of a proportion of an intervener's costs, in circumstances where the intervention was helpful and carefully managed, and where the intervener was directly affected by the appeal (see paragraph 19 of *Independent Media Support Limited v. Office of Communications* [2008] CAT 27). In this case we were assisted by Crest Nicholson's observations in relation to ISG Pearce's appeal, and Miss Demetriou's submissions on this issue at the oral hearing were appropriately succinct. Crest Nicholson was also directly affected by ISG's appeal, given that Crest Nicholson would have been left solely liable for the penalty imposed by the OFT, had ISG Pearce's liability challenge succeeded. Accordingly, we have concluded that it would not be appropriate to make any deduction to the amount claimed by Crest Nicholson in this regard.

18. We therefore order the OFT to pay Crest Nicholson £147,832.18 within 28 days of the date of this ruling.

The ISG Pearce appeal

19. In relation to the grounds of appeal advanced by ISG Pearce:
 - (a) At paragraphs 24 to 36 of the Judgment, the Tribunal rejected ISG Pearce's ground of appeal on liability, namely that the OFT breached the principle of equal treatment by including ISG Pearce in the undertaking responsible for the infringement.
 - (b) At paragraphs 45 to 50 of the Judgment, the Tribunal upheld ISG Pearce's challenge to the OFT's use of Pre-Decision Turnover at Step 1 of the penalty calculation.
 - (c) At paragraphs 53 to 55 of the Judgment, the Tribunal upheld ISG Pearce's challenge to the MDT. For the reasons set out at paragraph 56 of the Judgment, the Tribunal did not consider it necessary to consider ISG Pearce's separate ground of appeal summarised at paragraph 51(c) of the Judgment.

(d) At paragraphs 82 to 83 of the Judgment, the Tribunal rejected ISG Pearce's submission that it should have benefited from the same discount afforded to Crest Nicholson for its late admission of liability.

(e) At paragraphs 94 and 95 of the Judgment, the Tribunal upheld ISG Pearce's challenge to the overall proportionality of the penalty. Given its overall conclusion, the Tribunal did not consider in the Judgment each of the specific arguments advanced by ISG Pearce in connection with this ground of appeal (see, in particular, paragraph 96 of the Judgment).

20. ISG Pearce was completely unsuccessful in its liability appeal, such that the OFT would in principle be entitled to a cross-order for its own costs in respect of this part of the appeal. Although ISG Pearce proposed that its total costs should be reduced by one third to reflect its failure on this issue, we do not consider that this sufficiently reflects the amount of time that was spent by the parties, and by the Tribunal, in addressing the liability appeal. This was clearly a "central plank" of ISG Pearce's appeal, as evidenced by the following:

(a) ISG Pearce filed substantial written submissions in support of its liability appeal. In addition to written submissions in the notice of appeal, supported by witness statements from Mr. Timothy Leigh and Mr. Brian Herring, ISG Pearce filed a separate skeleton argument on liability, and a detailed reply to Crest Nicholson's statement of intervention on liability and the evidence of Crest Nicholson's witness, Mr. Kevin Maguire.

(b) Oral submissions on liability occupied half of the hearing in this appeal.

(c) ISG's liability challenge was raised not only in these proceedings, but also throughout the OFT's investigation, notably following the sending of the OFT's supplementary statement of objections to ISG Pearce on 16 April 2009.

21. As regards the extent of ISG Pearce's success on penalty, ISG Pearce achieved a substantial overall reduction in the level of penalty imposed on it and was successful in

relation to the majority of its grounds of appeal on penalty as set out in its notice of appeal. However, this must be seen in the context of the large reduction in penalty occasioned by the Tribunal's disapplication of the MDT as originally applied by the OFT in the Decision.

22. Further, while the Tribunal was assisted by ISG Pearce's written submissions on penalty, ISG Pearce was unsuccessful in relation to an issue that occupied a not insignificant part of the time spent by the parties and the Tribunal in considering ISG Pearce's appeal, namely whether ISG Pearce should receive the benefit of the discount afforded to Crest Nicholson for that company's late admission of liability during the OFT's administrative procedure.
23. The overall amount of costs sought by ISG Pearce is, in our view, disproportionate both to the extent of its success in this appeal, and to the nature of the issues raised. We have concluded that it is appropriate to order the payment of a smaller lump sum to ISG Pearce which more accurately reflects these factors. Accordingly, we order that the OFT pays ISG Pearce £30,000 in respect of its costs within 28 days of the date of this Ruling.

Lord Carlile Q.C.

Ann Kelly

Arthur Pryor

Charles Dhanowa
Registrar

Date: 1 December 2011