Neutral citation [2011] CAT 37

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1124/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

3 November 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
MARCUS SMITH QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

NORTH MIDLAND CONSTRUCTION plc

Appellant

- v -

OFFICE OF FAIR TRADING

Respondent

JUDGMENT ON COSTS

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1. On 9 July 2010, the Tribunal heard an appeal by North Midland Construction plc ("North Midland") against an infringement decision (the "Decision") by the Office of Fair Trading (the "OFT"). The Decision found that North Midland had committed two infringements of the Chapter I prohibition (collectively, the "Infringements" and, respectively, "Infringement 46" and "Infringement 190"), and imposed penalities in respect of the Infringements. North Midland's appeal against the OFT's findings was based on the following grounds:

   (1) As regards Infringement 46 only, that the OFT had adduced insufficient evidence of the facts alleged by the OFT to satisfy the burden of proof. North Midland did not maintain a similar argument in respect of Infringement 190.

   (2) As regards both Infringements, that neither infringement decision satisfied the requirement of appreciability in the Chapter I prohibition, contained in subsection 2(1) of the Competition Act 1998 (the "1998 Act").

   (3) As regards Infringement 190, that the penalty imposed by the OFT was excessive and unlawful. North Midland did not appeal in respect of the penalty imposed by the OFT in respect of Infringement 46.

2. In a judgment handed down on 27 April 2011 (the "Judgment"), the Tribunal:

   (1) Allowed North Midland's appeal against the OFT's finding of liability in respect of Infringement 46 (see paragraphs 14-34 of the Judgment).

   (2) Rejected North Midland's argument that the requirement of appreciability was not satisfied (see paragraphs 35-63 of the Judgment). Accordingly, North Midland's appeal against liability in respect of Infringement 190 failed.

   (3) Allowed North Midland's appeal against the penalty in respect of Infringement 190 to the extent that the penalty was reduced from £1,516,613 to £300,000 (see paragraphs 64-111 of the Judgment).

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

4. North Midland now seeks an order that the OFT pay its costs. This is opposed by the OFT, which contends that no order as to costs should be made. The Tribunal has received written submissions from both North Midland and the OFT on the question of costs (dated 9 June 2011 from North Midland; 30 June 2011 from the OFT; and 18 July 2011 from North Midland). Neither of the parties has requested an oral hearing in respect of this question of costs, and the Tribunal does not consider an oral hearing to be necessary.

5. Rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372, the "Tribunal Rules") provides as follows:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the [Senior Courts] of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.
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> (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 [Senior Courts] or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session."

6. Rule 55 thus confers a broad discretion on the Tribunal as regards the question of costs. The OFT contended that this discretion should be exercised in favour of making no order as to costs, for the following reasons:

(1) In contrast to the approach in ordinary civil proceedings, where CPR Part 44.3(2) provides for a general (but derogable) rule that the unsuccessful party will be ordered to pay the costs of the successful party, Rule 55 contains no such explicit guidance. There is, therefore, no fixed starting point for the exercise of the Rule 55 discretion.

(2) The OFT sought to draw a distinction between appeals under the 1998 Act in relation to liability, and appeals under the 1998 Act in relation

to penalty. In the former case, the OFT accepted that "the Tribunal's starting point will often be that a successful appellant who can fairly be identified as a "winner" is entitled to recover his costs" (paragraph 13 of the OFT's 30 June 2011 submissions). In the latter case, the OFT contended that the approach in penalty appeals was different. The OFT submitted that the Tribunal should have regard to the fact that the Tribunal and the OFT are part of a single system of competition law enforcement, and that there should not be an undue burden on the OFT and the wider public purse where the OFT has taken decisions conscientiously and in good faith. Penalty decisions are integral to the proper functioning of the competition regime, and that regime might be jeopardised were the OFT to be discouraged from taking appropriate penalty decisions by fear of exposure to undue financial prejudice as a result of an appeal. Furthermore, an adverse costs order would reduce the OFT's resources available to investigate and pursue infringements of the competition rules, which would ultimately be to the detriment of consumers. Accordingly, the OFT contended that "the starting point in a penalty only appeal should be that costs should lie where they fall", and that "the Tribunal should refrain from making awards of costs against the OFT unless there are compelling reasons to do so" (paragraph 24 of the OFT's 30 June 2011 submissions on costs).

(3) In a case such as this, which was a "mixed" case, containing both liability and penalty appeals, the OFT said that the Tribunal had "an opportunity to consider the appropriate approach in relation to appeals which raise both liability and penalty issues and to ensure that its approach is as fair and balanced as possible" (paragraph 18 of the OFT's 30 June 2011 submissions). It was the OFT's contention that, in "mixed" cases, the proper approach was that costs should lie where they fell, unless there were compelling reasons to make a different order.

(4) In this case, *pace* the OFT, there were no such compelling reasons. In this regard, the OFT made four points.

(i) North Midland had lost on some issues – notably on the question of whether the requirement of appreciability had been satisfied.

(ii) The OFT's conduct in respect of both the liability and the penalty issues could not in any way be regarded as having been in bad faith, unfair or unreasonable.

(iii) The Tribunal should take account of the fact that – had the penalty issues been case-managed as the OFT had suggested, on a test case basis – substantial costs would have been saved.

(iv) North Midland's costs should be compared with the similar case of *AH Willis & Sons Ltd v OFT* [2011] CAT 13, where AH Willis' costs amounted to just under £33,000. The OFT contended that AH Willis' costs should inform the level of costs recoverable by North Midland.

7. North Midland's contentions on costs can be more briefly stated. North Midland contended that it had taken a focused and specific approach to the points argued on appeal, and that it was – given the Judgment – substantially the "winner" in the appeal. For this reason, the OFT should pay all of its costs or such lesser proportion as the Tribunal should determine.

8. The OFT was right to accept that, in relation to liability appeals under the 1998 Act, 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: *Racehorse Association v Office of Fair Trading* [2006] CAT 1 (applying the principles set out in *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2002] CAT 2).

9. The question is whether the OFT is correct to say that a different approach pertains in relation to penalty appeals under the 1998 Act. In its submissions, the OFT placed reliance on the decision of the Divisional Court in *Bradford Metropolitan District Council v Booth* (2000) 164 JP 485. That decision was considered by the Tribunal in *Eden Brown Ltd v Office of Fair Trading* [2011] CAT 29 and *Kier Group plc v Office of Fair Trading* [2011] CAT 33. In the latter case, the Tribunal concluded (at paragraph 14):

> "…We do not consider that in dealing with appeals under the 1998 Act (whether against a finding of infringement or against a penalty) the Tribunal should adopt the approach which the OFT purports to derive from the *Booth* case. In our view the principles identified by the Tribunal in *The Racehorse Association* and *The Institute of Independent Insurance Brokers* decisions (above), including the starting point specified in those cases, are equally appropriate in relation to appeals such as the present [ie penalty appeals], as they are where the appeal is against a finding of infringement. We do not believe that the interests of justice or the proper functioning of the competition regime are in any way inconsistent with those principles, which allow the Tribunal a wide discretion to make a costs order which is just and proportionate in the light of the particular circumstances, and which takes due account of the extent of an appellant's success or failure in challenging the decision. To adopt a starting point that a successful appellant should receive an award of costs only where the OFT can be shown to have acted unreasonably or in bad faith would be unduly restrictive and would not serve the interests of justice or the fair administration of the competition regime. The fact that an appellant has established that a penalty is excessive and disproportionate should in our view be a central consideration for the Tribunal when the question of costs of the appeal come to be determined. 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…"

10. We agree with this statement. Accordingly, we reject the OFT's contention that the approach to be taken by the Tribunal as regards costs in penalty appeals or in mixed liability and penalty appeals differs from the approach in liability appeals. The approach in all three instances is the same, and is as stated in paragraph 8 above.

11. In the case of this appeal, we consider that North Midland was very substantially the "winner", and that the appropriate starting point is that North Midland is entitled to an award of costs from the OFT. However, this is only the starting point, and it is necessary to consider the points raised by the OFT and summarised in paragraph 6(4) above, to see if a different finishing point is called for. As to these points:

(1) It is right to say that North Midland did not succeed on every issue. It lost on the question of appreciable effect (paragraphs 35-63 of the Judgment), which was not an insignificant point. Not all of North Midland's arguments in respect of its penalty appeal were accepted by the Tribunal either (see paragraphs 98-104): a number of these were rejected also. We therefore consider that, on an issues-based approach to costs, North Midland should not be entitled to recover all of its costs. We also take into account that on the same basis the OFT would in principle itself be entitled to a cross-order for its own costs in relation to the issue in question.

(2) We agree that the OFT's conduct cannot rightly be characterized as having been in bad faith, unfair or unreasonable. However, for the reasons we have given, we do not consider that such conduct needs to be demonstrated for a costs order to be made against the OFT.

(3) The OFT suggested 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. We do not accept this argument. 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.

(4) Finally, it was suggested that North Midland's costs recovery should be compared or "benchmarked" with AH Willis' costs in *AH Willis & Sons Ltd v OFT* [2011] CAT 13. We consider that there are dangers in comparing the costs incurred by different appellants in different appeals. This is particularly so where the proposed comparator is a single case, and where both liability and penalty are in issue. We therefore reject the OFT's "comparative" approach. In paragraph 6 of its 18 July 2011 submissions, North Midland described the costs it has incurred:

> "…in order to put the level of North Midland's costs of the appeal into perspective and to allay any potential concerns that North Midland's costs are at City of London law firm levels, these are the broad brush legal costs incurred by North Midland from the drafting of the Notice of Appeal to the date of the appeal: approximately £19,000 plus VAT in solicitors' fees and £900 plus VAT in disbursements, £55,000 plus VAT in counsel's fees and £785.03 plus VAT as North Midland's share of the joint bundle."

We take it that North Midland is VAT registered and will be able to offset any VAT payable by it. On this basis, North Midland's costs are £75,685.03, which is by no means unreasonable given the issues involved in the case, and the nature and length of the hearing.

12. In short, we do not consider that there is anything in the circumstances of this case to cause our starting point that there should be an order for costs in North Midland's favour to change. On the other hand, as we have said, North Midland should not in our view recover all of its costs, but only a proportion of them. Further, rather than making a cross-order in favour of the OFT in respect of its costs of the issue on which it was successful, it is appropriate to reflect that element in arriving at the proportion of costs to be awarded to North Midland. On that basis, we have reached the conclusion that North Midland should recover 75% of its costs from the OFT.

13. Given the level of North Midland's costs, we do not consider that it would be appropriate for the costs of a detailed assessment to be incurred. Rather, we consider this to be a case where, pursuant to Rule 55(3) of the Tribunal Rules, we should order that the OFT pay to North Midland a lump sum by way of costs. Accordingly, we unanimously order that the OFT do pay to North Midland £56,764 by way of costs within 28 days of the date of this judgment.

The President Marcus Smith QC Professor Paul Stoneman

Charles Dhanowa
Registrar

Date: 3 November 2011