



Neutral citation [2006] CAT 5

IN THE COMPETITION
APPEAL TRIBUNAL

Case: 1008/2/1/02

Victoria House
Bloomsbury Place
London WC1A 2EB

27 March 2006

Before:

Sir Christopher Bellamy (President)
Mr. Peter Clayton
Mr. Peter Grant-Hutchison

Sitting as a Tribunal in Scotland

BETWEEN:

(1) CLAYMORE DAIRIES LIMITED
(2) ARLA FOODS UK PLC
(formerly Express Dairies PLC)

Applicants

-v-

OFFICE OF FAIR TRADING

Respondent

-supported by-

(1) ROBERT WISEMAN DAIRIES PLC
(2) ROBERT WISEMAN AND SONS LTD

Interveners

Mr. David Farrer QC and Mr. James Flynn QC (instructed by Herbert Smith) appeared for the interveners, and Herbert Smith.

Mr. Jon Turner and Mr. George Peretz (instructed by the Treasury Solicitor) appeared for the respondent.

Mr. Ben Tidswell (of Ashurst) appeared for the applicants.

ORDER ON EXPENSES

ARISING FROM THE TRIBUNAL'S JUDGMENT OF 17 FEBRUARY 2006

1. On 17 February 2006 the Tribunal gave judgment on a discrete issue which arose in this matter: see [2006] CAT 3, *Guidance on conduct concerning withdrawal*. Applications for expenses arising out of this aspect of the proceedings were made by the OFT and Claymore/Express¹ on 24 February 2006, to which Wiseman replied on 3 March 2006.
2. The OFT seeks expenses in the sum of £24,538.33 incurred, it is submitted, in preparing for and appearing at the hearing of this matter on 17 January 2006. The OFT submits that since this expense was incurred as a result of the conduct of Wiseman's representatives, there should be an order for expenses in the OFT's favour under Rule 26(2) of the Competition Commission Appeal Tribunal Rules 2000 (SI 2000/261). The OFT considers that it is unclear whether the Tribunal would have jurisdiction to make an order for expenses against Herbert Smith, as distinct from Wiseman, but considers that the appropriate course would be to make an order against Wiseman in any event.
3. Claymore/Express seek expenses in the sum of £35,385.01. That sum is subdivided into £20,180.51 in respect of fees and disbursements by Ashurst, acting for Claymore/Express in these proceedings, and £15,204.50 plus VAT in respect of fees and disbursements incurred by Browne Jacobson, including the fees of counsel instructed by the latter. The expenses incurred by Browne Jacobson relate largely to the events in July 2003, when that firm was instructed to give separate advice to Claymore/Express in relation to the meeting of 26 June 2003. It is submitted by Claymore/Express that none of the expenses claimed have been previously claimed in the proceedings; that the Tribunal should make an order for expenses against Wiseman but that, if necessary, the Tribunal would have jurisdiction to make an order against Herbert Smith, see *Persaud v. Persaud* [2003] EWCA Civ 394, at [19]; and that the Tribunal should exercise its discretion to make an order, given notably that Ashurst on behalf of Claymore/Express, acted properly and correctly throughout.
4. Wiseman submits that there should be no order as to expenses, notably on the grounds that a large part of the Tribunal's judgment was dedicated to giving general guidance on how such situations should be handled in the future; that there was no guidance previously available; that the Tribunal had not found misconduct, or referred the matter

¹ Express is now Arla Foods UK plc

to another body; and that it was not a matter where a party had ‘won’ or ‘lost’. In addition, it is submitted that there would be no basis for making an order against Herbert Smith, as distinct from Wiseman; that the expenses incurred by Express/Claymore are not properly recoverable in any event; and that the Tribunal did not find the OFT’s assistance on Scots law to have been helpful. Finally, Wiseman draws attention, in the alternative, to various items of expenses which it is submitted are disproportionate and/or unreasonably claimed by the OFT or Claymore/Express, as the case may be. Wiseman notes an apparent overlap with expenses already claimed in the main proceedings, and considers the hours claimed to be excessive. According to Wiseman, if there were to be an order for expenses, the matter of assessment should be remitted to the Auditor of the Court of Session.

Analysis

5. The Tribunal’s jurisdiction to award costs in this case is governed by Rule 26 of Competition Commission Appeal Tribunal Rules 2000, although that rule is in all material respects identical to the current Rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) applicable to proceedings commenced after 20 June 2003. Rule 26, paragraphs (1) to (3), of the 2000 Rules provide:

“26. Costs

- (1) For the purposes of these rules "costs" means-
 - (a) if the proceedings are taking place before a tribunal in England and Wales, costs and expenses recoverable in proceedings before the Supreme Court of England and Wales;
 - (b) if the proceedings are taking place before a tribunal in Scotland, costs and expenses recoverable in proceedings before the Court of Session; and
 - (c) if the proceedings are taking place before a tribunal in Northern Ireland, costs and expenses recoverable in proceedings before the Supreme Court of Northern Ireland.
- (2) The tribunal may at its discretion, 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.

(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 such proportion of the costs as may be just. The tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by 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.”

6. Dealing first with the expenses incurred by the OFT, in our judgment it is appropriate in principle, in the exercise of our discretion, to award the OFT its reasonably and proportionately incurred expenses in respect of the discrete matter that formed the subject of the Tribunal’s judgment [2006] CAT 3. As appears from that judgment, at paragraph 30, in its letter of 25 November 2005 the OFT drew to the Tribunal’s attention two matters of concern arising out of the conduct of Wiseman’s representatives at the meeting of 26 June 2003. The Tribunal, at paragraphs 82 to 87 of its judgment, essentially agreed with the observations made by the OFT and concluded, at paragraph 88, that the conduct in question was not, objectively speaking, proper. In our view, having correctly raised its concerns the OFT, as a party with a particular responsibility in respect of the public interest, was fully entitled to make submissions to the Tribunal both orally and in writing, and to give the Tribunal its assistance, as the Tribunal invited it to do.
7. It is true, as Wiseman points out, that the proceedings also led to the Tribunal giving general guidance on the matters in issue, which will be relevant for the future, and that no guidance as such existed at the time. Nonetheless, in our view the matters in issue arose out of Herbert Smith’s approach, on behalf of Wiseman, to Ashurst on 26 June 2003, which led to the Tribunal’s adverse findings summarised at paragraph 88 of its judgment. In our view, at the very least, a reading of Rules 10 and 28 of the Tribunal’s 2000 Rules would have (or should have) put Wiseman’s representatives on notice that the approach being contemplated was likely to give rise to serious difficulties, in particular the difficulty identified at paragraph 86 of the Tribunal’s judgment.
8. While we fully accept that in litigation before the Tribunal the various parties concerned should be open with each other at as early a stage as possible, on the “cards

on the table” basis required in other forms of litigation, the essential problem in this case was that the pressure put on Claymore/Express to settle was accompanied by the suggestion, implicit or explicit, that certain matters could be withheld from the Tribunal, and that incomplete or possibly misleading information could be put before the Tribunal in connection with the withdrawal of the proceedings. That in our judgment is unacceptable, for the reasons given in the Tribunal’s judgment. It follows in our view that an order in favour of the OFT for expenses is appropriate.

9. As to the amount of the costs recoverable by the OFT this case, involving short written submissions and a one day hearing, is in our view suitable for summary assessment. The OFT’s fees for counsel amount to some £6,000 excluding VAT. Although two counsel, both juniors, were involved, in our view this was reasonable, given in particular that both counsel had been involved with the case throughout. It appears from the details provided that counsel was closely involved in drafting the OFT’s response to the Tribunal’s letter of 10 November 2005, as well as preparing the skeleton argument and appearing at the hearing.
10. In addition, according to the costs schedule provided by the OFT, the OFT’s in-house lawyers spent some 54 hours working on this matter, and lawyers on behalf of the Treasury Solicitor spent a further 40 hours, making over 90 hours altogether. While it is true that, as a Scottish case, points of Scots law needed to be dealt with, the OFT as a United Kingdom-wide authority ought to be in a position to deal with Scots law. We note also that the case involved very few documents, although some 34 hours is claimed by the OFT as work done on documents by its own lawyers and those of the Treasury Solicitor.
11. Our overall conclusion is that, in view of the involvement of two counsel, the additional involvement of both the OFT’s in-house team and the Treasury Solicitor team is likely to have involved duplication. We therefore reduce the OFT’s expenses, by way of summary assessment, by one third, to £16,000.
12. As regards Claymore/Express’ expenses, we consider that, had Ashurst and their clients not taken the stance they did, this matter would not have come to light, and the interests

of justice would have been potentially prejudiced. Accordingly, we consider that Claymore/Express are entitled in principle to an award of expenses.

13. As to the quantum of these expenses, there is first the question as to how far the sum claimed of some £15,200 excluding VAT² in relation to the work done by Browne Jacobson and counsel (Mr. Fenwick QC) instructed by them to advise in 2003 is properly recoverable. We accept that it was reasonable for Claymore/Express to be separately advised in relation to this matter. However, in our view the instruction of a separate firm of solicitors necessarily carried with it the risk of some duplication of work. The figure of some 53 hours of solicitors' charges for Browne Jacobson appears high, and we have not been supplied with counsel's fee note. In the circumstances we are doubtful whether it was necessary to incur these expenses to the extent claimed in order to reach the relatively straightforward decision that the Tribunal should be informed of what had occurred at the meeting of 26 June 2003.
14. As any additional expenses claimed by Ashurst in relation to this matter in 2003 (some £8800), it seems to us that, as Herbert Smith suggests, there is a risk of an overlap with the expenses that have already been claimed as part of the main proceedings. In addition expenses are claimed for two partners. These expenses are also in addition to the expenses claimed for the work done by Browne Jacobsen and counsel.
15. In the circumstances, we consider it appropriate, on a broad brush basis, to reduce the total expenses of some £24,000 claimed on behalf of Claymore/Express for work done in 2003 by one-half, to £12,000.
16. In addition to the expenses arising in 2003, there is a sum claimed by Ashurst in respect of their expenses in relation to this matter following the Tribunal's letter of 10 November 2005, of the order of some £11,300. As Ashurst very properly acknowledged in its letter of 23 November 2005, at that stage the question of what action should be taken was a matter for the Tribunal, not Claymore/Express. The Tribunal did not seek assistance from Claymore/Express on the issues arising. Ashurst's role at the hearing of 17 January 2006 was (again quite properly) confined to making short observations in relation to Wiseman's allegations against Express (now

² The Tribunal proceeds on the basis that the VAT claimed is not recoverable.

Arla) rather than addressing the issues with which the Tribunal was concerned. In our view, bearing in mind that the issue with which the Tribunal was dealing was primarily one of public interest, the expenses of Claymore/Express in relation to this matter in the period from 10 November 2005 onwards, should be allowable only to a modest extent. We award £3,000 in respect of the expenses claimed under this head, approximately one quarter.

17. In the result, we assess the expenses recoverable on behalf of Claymore/Express at £15,000.
18. As to whether an order for expenses in favour of the OFT should be made against Wiseman or against its representatives, we reiterate that we sit as a Tribunal in Scotland. We regret that no party has drawn our attention to the applicable Scots law on this issue. We would not accept that, as a matter of Scots law, the Tribunal would have no power to order expenses against a party's representative in an appropriate case: see e.g. Begg, *Law Agents*, p. 280 and in an admittedly different context *Stewart v. Stewart* 1984 SLT (Sh Ct) 84. However, in our judgment, we do not need to investigate the matter further, or to consider to what extent Herbert Smith is to be treated as having become a "party" to this stage of the proceedings within the meaning of Rule 26(2). In our view, it suffices for the Tribunal to make the appropriate order that the intervening party, Wiseman, pay the expenses in question.
19. Accordingly, the Tribunal orders that Wiseman pay expenses (i) to the OFT in the sum of £16,000, and (ii) to Claymore/Express in the sum of £15,000, such sums to be payable within 14 days.

Christopher Bellamy

Peter Clayton

Peter Grant-Hutchison

Charles Dhanowa
Registrar

27 March 2006