Neutral citation [2011] CAT 34

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1120/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

21 October 2011

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
ANN KELLY
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) QUARMBY CONSTRUCTION COMPANY LIMITED**

**(2) ST JAMES SECURITIES HOLDINGS LIMITED**

Appellants

- v -

**OFFICE OF FAIR TRADING**

Respondent

Heard at Victoria House on 3 October 2011

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**RULING (COSTS)**

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## APPEARANCES

Dr. Mark Friston (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared for the Appellants.

Miss Kelyn Bacon (instructed by the General Counsel, Office of Fair Trading) appeared for the Respondent.

## I. INTRODUCTION

1. By its judgment of 15 April 2011 ([2011] CAT 11) ("the Judgment"), the Tribunal disposed of the Appellants' appeal against a decision by the OFT fining them for breaches 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 pursued a large number of grounds of appeal, five of which challenged the OFT's findings of liability for the infringements[1] and fifteen of which challenged the amount of the fine that the OFT had imposed.[2] These are summarised at paragraphs 5 and 141 of the Judgment.

3. In the Judgment, the Tribunal rejected each of the Appellants' five grounds of appeal on liability, but upheld certain of the Appellants' grounds of appeal on penalty, such that the original penalty of £881,749 imposed on the Appellants for Infringements 6, 214 and 233 was reduced to £213,750.

4. By an application dated 8 July 2011, the Appellants applied for an award of 60% of their costs ("the Application"). The OFT filed written submissions in relation to the Application on 22 July 2011, and the Appellants filed a written reply on 4 August 2011.

5. The Appellants requested an oral hearing of the Application. Noting the OFT's objection, the Tribunal acceded to the Appellants' request, and listed a hearing of the Application on 3 October 2011, at which the parties made further submissions.

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[1] These included a preliminary issue on liability, by which the Appellants submitted that they should have been excluded from the scope of the investigation.

[2] The Appellants' Notice of Appeal contained 14 separate grounds of appeal on penalty. The Appellants subsequently raised a further ground of appeal (on the basis of information disclosed to them in the course of appeal) regarding the allocation of turnover relating to mixed-use projects. For convenience, the Tribunal grouped the grounds of appeal into ten main areas of challenge in the Judgment.

## II. THE PARTIES' SUBMISSIONS

6. The Appellants submitted that they had achieved an overall "win", due to the significant reduction in the penalty imposed on them. Although the Appellants accepted that they lost "a not insignificant part of their appeal, namely, that relating to liability for the fine", they submitted that it would not be appropriate to disallow all of the costs of that part of the appeal, given that a significant part of those costs would have been incurred as a result of the Tribunal needing to "read into the facts and to understand the issues in full for the purpose of the appeal on quantum".[3] As regards the Appellants' penalty appeal, the Appellants submitted that the issues on which they were unsuccessful were minor, and were best categorised as "arguments" rather than issues. The figure of 60% was said to be derived from a word count of the Appellants' written submissions, adjusted for the "read-in" factor referred to above.

7. The Appellants opposed the OFT's suggestion that there should be no order for costs. Dr. Friston, for the Appellants, described the particular analytical approach that, in his submission, the Tribunal should follow when considering the Application. First, the Tribunal should ask itself a "binary" question, namely "Has the appeal been allowed?". If the answer to that question is "yes", the Tribunal should make an issues-based costs award, whereby the Appellants are deprived of the costs of those grounds of appeal in relation to which they were unsuccessful. Ordering the Appellants to pay the costs of those grounds, by contrast, or to "net off" the parties' respective successes on different issues, would only be appropriate if the case could be considered to be "suitably exceptional" (see, for example, *Summit Property Limited v. Pitmans* [2001] EWCA Civ 2020, at paragraph 17), and there was nothing to suggest that this was such a case.

8. The Appellants submitted further that:

   (a) The OFT is not entitled to protection from costs merely because it is a public body, whereas the Appellants should be entitled to such protection under the application of the ordinary principles of costs law. Further, parties would be unable to countenance appeals (given difficulties of funding) if the

[3] Appellants' application for costs at paragraph 31.

regime was such that they would not ordinarily be awarded costs even if successful.

(b) The costs claimed by the Appellants are not disproportionate, in particular given the complexity of the issues, extensive evidence, and the need to consider the transcripts of the 24 other appeals. Further, they submitted that it was not possible to properly consider the issue of proportionality, other than in the context of a detailed assessment.

9. The OFT submitted that the Tribunal should make no order as to costs in this case. This was because the Appellants comprehensively failed on all of their grounds of appeal on liability and, in respect of penalty, ran a plethora of unsuccessful arguments which wasted much of the Tribunal's and the parties' time:

(a) As regards liability, the OFT submitted that the Appellants' grounds of appeal raised detailed questions of the appreciation of evidence and complex questions of law, and required the bulk of the attention given by the parties and the Tribunal to this appeal, occupying approximately 50 out of 80 pages of the Judgment, and a day and a half of the two day hearing.

(b) As regards penalty, the OFT submitted that, whilst the Appellants' penalty was ultimately reduced by the Tribunal, the parties had approximately equal success on the legal and factual issues specifically raised by each of them.

10. Miss Bacon, for the OFT, referred to the Tribunal's decision, in *Durkan Holdings Limited & Ors v Office of Fair Trading* [2011] CAT 17, to make no order for costs, where the Tribunal had regard to the respective successes and failures of the parties, and the time and resources devoted to each issue. In her submission, in circumstances where no clear "winner" can be identified, the appropriate order, as in *Durkan*, is to make no order for costs, and indeed the extent of the Appellants' failure is greater than in *Durkan*. Dr. Friston, for the Appellants, submitted that the Tribunal would be committing an error if it decided to follow *Durkan* merely because it was a comparable case and stressed that each case fell to be decided on its own facts.

11. Miss Bacon submitted in the alternative that, even if the Appellants could be considered winners, it was necessary to take account of the fact that they lost on the majority of the issues. Although, in her submission, there were grounds on which the case could be considered as "suitably exceptional", such that the Appellants could be ordered to pay the OFT's costs in relation to unsuccessful grounds, the most appropriate approach to costs in this case is to consider matters in the round. She submitted that, given that the successful parts of the Appellants' appeal were overwhelmingly outweighed by the unsuccessful parts, the correct approach was, in any event, to make no order for costs.

12. The OFT pointed to other relevant considerations in support of its contention that there should be no order for costs in this case:

    (a) The public policy objectives of the competition law enforcement regime, and the need to ensure that there is no undue burden on the OFT and the wider public purse by reason of the OFT taking decisions conscientiously and in good faith.

    (b) The implications of the appeal procedure adopted in respect of penalty issues, and the fact that 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.

    (c) The excessiveness of the Appellants' costs claim, which incorporates a "success fee" pursuant to a conditional fee arrangement, and the expensive and wasteful manner in which the Appellants chose to conduct their litigation.

## III. THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

13. 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."

14. 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.

15. The relevant starting point in relation to the Application is to consider whether any party can fairly be identified as a "winner" (see, in particular, *The Racecourse Association v. Office of Fair Trading* [2006] CAT 1 at paragraph 10). In our view, neither party can be considered a winner in this case, such that the outcome cannot be described as "binary" in the manner proposed by Dr. Friston. Whilst the Appellants succeeded in obtaining an overall reduction to the level of their fine, their appeal on liability was entirely unsuccessful and the Tribunal rejected at least half, if not the majority, of the Appellants' submissions on penalty:

    (a) The Tribunal accepted the Appellants' submissions regarding the incorrect choice of year at Step 1, the starting point percentage at Step 1, the OFT's selection of a maximum fine threshold, the proportionality of the fine given current economic conditions, chilling effect, uncertainty regarding the legality of cover pricing and the justice of the overall penalty.

    (b) However, the Tribunal rejected the Appellants' submissions regarding the segmentation of the private housing market, the alleged arbitrary selection of infringements, the failure to differentiate on grounds of culpability, the exclusion of turnover relating to negotiated tenders, the exclusion of intra-group turnover, the exclusion of certain turnover relating to mixed-use projects, the lack of director involvement, and prompt termination.

16. The just outcome, in the circumstances, is to make no order as to costs. Even if the Tribunal had been able to conclude that the Appellants could fairly be described as overall "winners", we would still have needed to consider the extent of the Appellants' success in relation to the multiplicity of issues raised in their Notice of Appeal, and the amount of work and time that was reasonably expended by the parties and the Tribunal in addressing these issues.

17. In that regard, it is evident that the Appellants' grounds of appeal on liability occupied a very substantial part of the parties' written and oral submissions, and required detailed consideration of the relevant contemporaneous evidence, and the cross-examination of three witnesses. Although this can only provide a rough approximation in any particular case, it is also clear that the majority of the Judgment is concerned with issues of liability.

18. As regards the grounds of appeal on penalty, we noted at paragraph 201 of the Judgment that the substitution of Pre-Infringement Turnover for Pre-Decision Turnover in calculating relevant turnover at Step 1 had the consequence of substantially reducing the Appellants' penalty and was, in our view, the key cause of a disproportionate outcome in the OFT's penalty calculation. The extent of any "win" on penalty must be viewed in this context. Whilst the Appellants were successful in relation to other specific arguments, including as regards the starting point percentage, the maximum fine threshold, and the OFT's failure to take account of the inherent features of the industry, a large amount of time was spent considering other unsuccessful arguments, some of which we considered to be very bad points. The Appellants cannot escape this conclusion by arguing, as they did here, that we should not raise certain "arguments" to the level of "issues".

19. We do not consider that the Appellants' suggested approach, namely using a word count of submissions, adjusted for the so-called "read-in" factor, provides an accurate view of the costs that should properly be associated with each of the grounds of appeal:

    (a) Firstly, as the OFT correctly identified, the Appellants' word count overlooks the very substantial body of evidence in this appeal, and which featured prominently, both during Mr. Clough QC's submissions on liability at the oral hearing, and in our own analysis in the Judgment.

    (b) Second, the Appellants appear to assume that, because approximately 49% of the words used in their written submissions related to penalty issues, they should be entitled to 60% of their costs (once the figure is adjusted for the "read-in" factor). However, the figure of 49% includes arguments in

relation to which the Appellants were unsuccessful, and thus does not assist the Tribunal.

20. It is appropriate briefly to examine the other submissions that have been made by the parties in support of their respective positions on costs:

(a) We were not persuaded by the OFT's submission that it should enjoy some measure of immunity from adverse costs orders as a matter of public policy. Rather, we see no reason why the OFT should not be required to pay the costs of a successful party in the appropriate circumstances. We have been affirmed in our views on this issue by the conclusions of the Tribunal in *Eden Brown Limited & Ors v. Office of Fair Trading* [2011] CAT 29 at paragraphs 9 to 18, and in *GF Tomlinson Limited & Ors v. Office of Fair Trading* [2011] CAT 32 at paragraphs 8 to 10.

(b) We disagree with the OFT's submission that the particular case management decisions taken by this Tribunal added to the costs of hearing these appeals, and are not persuaded (as we were not persuaded at the case management conference in these appeals) that the "test case" approach would have secured the just, economical and efficient conduct of the various appeals against the Decision. In this regard, we agree with the conclusions of the Tribunal in *GF Tomlinson* at paragraph 19.

(c) Although it is unnecessary, given our overall conclusion, to consider in detail the OFT's submission that the Appellants incurred an excessive amount of costs, we should mention that we were taken aback by the figure being claimed. The Appellants seek to recover the sum of £1,137,992.90, which amounts to 60% of their total costs of £1,896,654.83 (incorporating a success fee element of £891,816.17). This is a figure substantially greater than the penalty originally imposed by the OFT in the Decision. In our view, it does not befit the Appellants to rebuke the OFT for a lack of proportionality in their substantive submissions in this appeal, and then later to seek a sum of costs that it is itself clearly disproportionate.

21. Taking all of the above considerations in account, our unanimous conclusion is that there should be no order for costs.

## IV. COSTS OF THIS APPLICATION

22. Both the Appellants and the OFT applied for their costs of the Application. In our view, the OFT was successful in its central submission that there should be no order for costs. Although the OFT advanced certain written submissions with which we did not agree (see paragraphs 20(a) and 20(b) above), it was clear at the hearing that these were subsidiary to its central submission and were not pursued in any detail. We have therefore ordered that the Appellants pay the OFT's costs in connection with the Application, to be assessed if not agreed.

23. We note, lastly, that although the Tribunal decided to afford the Appellants the opportunity to be heard in connection with the Application, we were not greatly assisted by the further submissions made at the hearing, and consider that this was a matter that could have properly been decided on the papers, such that the additional costs of an oral hearing could have been avoided. We agree with the Tribunal's observation at paragraph 50 of *Eden Brown* that the Tribunal should only in the most exceptional circumstances agree to holding an additional oral hearing of an application for costs in the future.

Lord Carlile Q.C. Ann Kelly David Summers

Charles Dhanowa
Registrar

Date: 21 October 2011