Neutral citation [2011] CAT 43

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1120/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

19 December 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

RULING (PERMISSION TO APPEAL)

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 ("the Decision"). This ruling should be read together with the Judgment, which contains the background to this matter.

2. On 21 October 2011, the Tribunal handed down its ruling ([2011] CAT 34) in connection with the Appellants' application for the award of a proportion of its costs ("the Costs Ruling"), having informed the parties of its decision as regards costs at the hearing of the Appellants' application on 3 October 2011.

3. On 21 November 2011, the Appellants applied for permission to appeal the Costs Ruling ("the Application"). The OFT filed observations in relation to the Application on 2 December 2011. We have carefully considered these submissions. For the reasons set out below, our unanimous decision is that permission should be refused on all of the proposed grounds set out in the Application.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

4. The Application appears to raise four proposed grounds of appeal, namely that: (i) the Tribunal erred in law in determining the "winner" of the appeal; (ii) the Tribunal wrongly concluded that the Appellants were not "winners" and then failed to make an issues-based cost award consequent on that finding; (iii) alternatively, the Tribunal incorrectly exercised its discretion as to the costs relating to the "issues" in the appeal; and (iv) the Tribunal acted inconsistently with other comparable cases. We shall deal with each proposed ground in turn.

Error of law in determining the winner of the appeal

5. The Appellants submitted, at paragraph 29 of the Application, that "the question of who had 'won' was simply a question of whether the appeal had

been allowed". In the Appellants' submission, whenever this question is answered affirmatively, the Tribunal must proceed to make an issues-based cost award in favour of an appellant. In support of this proposition, the Appellants refer to the case of *Fox v. Foundation Piling Ltd* [2011] EWCA Civ 790 at paragraph 46.

6. There is little, if any, support for the Appellants' proposition in the authority cited, which concerned the question of over-optimistic offers under Part 36 CPR. In any event, in the Costs Ruling the Tribunal applied the very test advocated by the Appellants as a starting point for an award of costs (paragraphs 14 to 18 of the Application). Applying settled case law, the Tribunal sought to determine whether any party could fairly be identified as the "winner" in these proceedings (paragraph 15 of the Costs Ruling).

7. In our judgment, however, the test of a "win" cannot be determined purely on the basis of a mechanical and simplistic question as to whether a penalty imposed by the OFT is reduced on appeal. As the Tribunal noted at paragraph 9 of its ruling on costs in *Durkan Holdings Limited & Ors v. Office of Fair Trading* [2011] CAT 17:

> "…We do not consider that, wherever the final result of an appeal is that the penalty is reduced or even substantially reduced, costs must necessarily be awarded against the other side. That is certainly a factor that can be taken into account. However, where, as in this case, there were a number of entirely discrete challenges to different parts of the decision, the Tribunal may also have regard to the respective successes and failures of the parties and the time and resources devoted to each challenge."

8. In the present case the Tribunal concluded, in light of the Appellants' comprehensive failure in their wide-ranging liability challenge, and failure in respect of eight out of fifteen grounds of appeal on penalty, that neither party could be described as a "winner", and that the Tribunal should make no order as to costs. At paragraphs 16 to 20 of the Costs Ruling, the Tribunal went on to consider whether it would have arrived at any other conclusion in light of other specific submissions made by the parties. The Tribunal concluded (at

paragraph 21 of the Costs Ruling) that the appropriate outcome in all the circumstances was to make no order as to costs.

9. This approach reveals no error of law by the Tribunal, which is afforded a broad discretion in relation to the payment of costs under rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) ("the Tribunal Rules"), as acknowledged by the Appellants in paragraph 12 of the Application.

Error in concluding that the Appellants were not "winners" and failure to make an issues-based costs award consequent on that finding

10. This ground of challenge appears to relate to the exercise by the Tribunal of its discretion under rule 55 of the Tribunal Rules, in particular in its application of the starting point to the circumstances of the case.

11. For the reasons already set out at paragraph 8 above, the Tribunal's conclusion that the Appellants were not the "winners" in these proceedings clearly falls within the bounds of reasonable judgment. Further, it is clear from paragraphs 15 to 17 of the Costs Ruling that the Tribunal did adopt an issues-based approach in arriving at its conclusion on costs, taking account of the extent of the parties' successes and failures on the issues, and the amount of work and time expended by the parties and the Tribunal in addressing these issues.

Incorrect exercise of the Tribunal's discretion

12. The Appellants' submissions under this proposed ground overlook the fact that the Tribunal had answered the starting point question (whether any party could be fairly identified as a winner) negatively. It was not necessary, therefore, for the Tribunal to examine any issue of "exceptionality", or to inquire as to the level of the OFT's costs (the OFT had not, in any event, applied for its costs).

13. The Tribunal nonetheless proceeded to outline how it would have assessed the Appellants' costs claim had it been able to conclude that the Appellants could be described as "winners" (see paragraph 16 to 20 of the Costs Ruling),

together with other specific submissions advanced by the parties, and reached the same conclusion that it should make no order as to costs.

The Tribunal acted inconsistently with other comparable cases

14. The Appellants' criticism of the Costs Ruling as being inconsistent, or "markedly out of step" (paragraph 42 of the Application) with the Tribunal's decisions on costs in relation to other appeals against the Decision is unfounded. The Costs Ruling was made by a Tribunal fully informed of the circumstances and distinguishing features of those appeals (indeed, the Chairman in this case also chaired the Tribunal panels that heard eight other appeals against the Decision).

15. Unlike those companies that appealed from the Decision on a relatively limited number of grounds, and in most cases appealed in respect of penalty only (11 of the 13 "comparator cases" put forward by the Appellants in the Application are penalty-only appeals), these Appellants advanced an extensive and indiscriminate attack on the Decision, advancing five wide-ranging grounds of appeal on liability, and a "root and branch" appeal on penalty (paragraph 141 of the Judgment).

16. The Tribunal's decision on costs in these proceedings must therefore reflect the circumstances <u>of this case</u>, described above. In this regard, we agree with the (diametrically opposing) submissions made by the Appellants' own counsel at the hearing of their costs application on 3 October 2011:

> "…the issue of deciding the instance of costs is not a matter of matching cases to other cases. It is an issue of deciding each case on its own facts in accordance with established principles and, in that regard, the Tribunal can take and must take into account decided cases but only where they articulate decided principles." (Transcript, page 30, lines 12 to 16)

17. As regards the alleged public policy concerns highlighted by the Appellants at paragraphs 44 to 47 of the Application, it is clear from the Tribunal's decided cases that genuinely successful parties that have incurred reasonable and

proportionate levels of costs have nothing to fear from the exercise by the Tribunal of its costs jurisdiction.

Conclusion

18. For the reasons set out above, the Tribunal concludes that the Application discloses no point of law in respect of which the Appellants have a real prospect of success on appeal, nor is there any other compelling reason why the appeal should be heard.

19. In particular, there is no compelling reason to allow the Appellants to protract these proceedings further by reference to extensive pleadings, in circumstances where they have already incurred total costs (leaving aside any success fee element) in excess of the penalty originally imposed by the OFT in the Decision.

20. This application may be renewed to the Court of Appeal within 14 days pursuant to CPR rule 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this Order, together with the written submissions referred to at paragraph 3 above, should be placed before the Court of Appeal.

Costs of this application

21. In its observations of 2 December 2011, the OFT sought its costs in relation to the Application. Since the OFT has succeeded in resisting the Appellants' application, it is appropriate that the OFT should be awarded its costs of the application, to be assessed if not agreed.

IT IS THEREFORE ORDERED THAT:

1. Permission to appeal be refused in respect of all of the grounds set out in the Application.

2. The Appellants pay the Respondent's costs of this application, to be assessed if not agreed.

Lord Carlile of Berriew Q.C. Ann Kelly David Summers

Charles Dhanowa
Registrar

Date: 19 December 2011