Neutral citation [2011] CAT 30

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1178/5/7/11

Victoria House
Bloomsbury Place
London WC1A 2EB

14 October 2011

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

2 TRAVEL GROUP PLC (IN LIQUIDATION)

Claimant

-v-

CARDIFF CITY TRANSPORT SERVICES LIMITED

Defendant

Heard at Victoria House on 26 September 2011

RULING (SECURITY FOR COSTS)

APPEARANCES

Mr. Michael Bowsher QC (instructed by Addleshaw Goddard LLP) and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared for the Claimant.

Mr. Colin West (instructed by Burges Salmon LLP) appeared for the Defendant.

Mr. Huw Francis appeared in person on behalf of the claimants in cases 1175/5/7/11, 1176/5/7/11 and 1177/5/7/11.

I. INTRODUCTION

1. The Claimant in this action, together with the claimants in cases 1175/5/7/11, 1176/5/7/11 and 1177/5/7/11 ("the Shareholder Claimants"), seeks damages from the Defendant pursuant to section 47A of the Competition Act 1998 ("the Act"). The claims follow on from a decision taken by the Office of Fair Trading ("OFT") on 18 November 2008 (CA98/01/2008 – Abuse of a dominant position by Cardiff Bus; Case CE/5281/04) ("the Decision"). In the Decision, the OFT found that, between 19 April 2004 and 18 February 2005, the Defendant (trading as Cardiff Bus) infringed the prohibition imposed by section 18(1) of the Act ("the Chapter II prohibition") by engaging in predatory conduct against the Claimant which amounted to an abuse of its dominant position in the relevant markets.

2. The Claimant claims that it suffered loss and damage by virtue of the abusive conduct of the Defendant, and seeks damages under various heads from the Defendant, including lost profits, loss of a capital asset, wasted staff and management time, exemplary damages, and loss of certain commercial opportunities. The Claimant claims a sum within an approximate range of £34 million to £50 million, depending on whether the losses are calculated as at the date when the Claimant entered into liquidation, or as at the date on which the claim was issued, together with interest.

3. This ruling concerns an application for security for costs made by the Defendant against the Claimant. By its application of 27 July 2011 ("the Application"), the Defendant applied for an order for security for costs against the Claimant in the sum of £1,130,614, to be paid into court in two tranches. The Claimant filed written submissions in relation to the Application on 19 August 2011, and both the Defendant and the Claimant filed further written submissions on 22 September 2011. The Application was heard on 26 September 2011, and I am grateful to counsel for their helpful written and oral submissions.

4. It should also be noted, by way of introduction, that the Claimant's claim is funded by a conditional fee arrangement ("CFA") (which provides for a success fee), and

an after-the-event ("ATE") insurance policy provided by QBE Insurance (Europe) Limited ("QBE").

II. THE LEGAL FRAMEWORK

5. The Defendant seeks an order for security for costs pursuant to rule 45 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372), which provides as follows:

> "**45. Security for costs**
>
> (1) A defendant to a claim for damages may by request under this rule seek security for his costs of the proceedings.
>
> (2) A request for security for costs must be supported by written evidence.
>
> (3) Where the Tribunal makes an order for security for costs, it shall -
>
> (a) determine the amount of security; and
>
> (b) direct -
>
> (i) the manner in which, and
>
> (ii) the time within which the security must be given.
>
> (4) The Tribunal may make an order for security for costs under this rule if -
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) one or more of the conditions in paragraph 5 applies.
>
> (5) The conditions are -
>
> (a) the claimant is an individual -
>
> (i) who is ordinarily resident out of the jurisdiction; and
>
> (ii) is not a person against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation, as defined by section 1(1) of the Civil Jurisdiction and Judgments Act 1982[6];
>
> (b) the claimant is a company or other incorporated body –
>
> (i) which is ordinarily resident out of the jurisdiction; and
>
> (ii) is not a body against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation;

> (c) the claimant is an undertaking (whether or not it is an incorporated body, and whether or not it is incorporated inside or outside the United Kingdom) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
>
> (d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;
>
> (e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;
>
> (f) the claimant is acting as a nominal claimant, other than under section 47B of the 1998 Act, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;
>
> (g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

6. This is only the second time that the Tribunal has ruled on a contested application for security for costs. In *BCL Old Co & Ors v. Aventis SA & Ors* [2005] CAT 2, a section 47A damages action that followed on from the European Commission's 2001 *Vitamins* cartel decision, the Tribunal considered an application by two of the defendants for security for costs against the claimants. At paragraph 27 of its judgment, the Tribunal set out the circumstances to which the Tribunal will have regard when considering whether it is just to order security for costs:

> "(a) Whether it appears that the application is made in order to stifle a genuine claim, or would have that effect whether or not that is the intention behind the Defendant's application;
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> (b) The stage of the proceedings at which the application is made and the amount of costs which the Claimant has incurred to the date of the application;
>
> (c) The Claimant's financial position, whether it is impecunious and if so why it is impecunious and particularly, whether the impecuniosity can be attributed to the Defendant's infringement;
>
> (d) The likely outcome of the proceedings and the relative strengths of the parties' cases, if that can be discerned without prolonged examination or voluminous evidence;
>
> (e) Any admissions by the Defendant, open offers or the like, but the Defendant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution; and
>
> (f) The provisions of Rule 55 of the Tribunal's Rules as to orders for costs."

7. The parties both referred in their submissions to the decision in *Keary Developments Ltd v. Tarmac Construction Ltd* [1995] 3 All E.R. 534, and agreed

that the principles set out in the judgment of Peter Gibson LJ were also relevant in the consideration of an application for security for costs. He said:

> "1. As was established by this court in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
>
> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see *Okotcha v Voest Alpine Intertrading GmbH* [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see *Pearson v Naydler* [1977] 3 All ER 531 at 536-537, [1977] 1 WLR 899 at 906 per Megarry V-C).
>
> 3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see *Farrer v Lacy, Hartland & Co* (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see *Pearson v Naydler* [1977] All ER 531 at 537, [1977] 1 WLR 899 at 906).
>
> 4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see *Porzelack KG v Porzelack* (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.
>
> 5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see *Roburn Construction Ltd v William Irwin (South) & Co Ltd* [1991] BCC 726).
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> 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can

properly be inferred without direct evidence (see *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyd's Rep 27).

…

7. The lateness of the application for security is a circumstance which can properly be taken into account (see The Supreme Court Practice 1993 vol 1, para 23/1-3/28). But what weight, if any, this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred."

III. THE PARTIES' SUBMISSIONS

8. The Defendant submitted that an order for security for costs was appropriate, for the following reasons:

(a) There is reason to believe that the Claimant will be unable to pay the Defendant's costs, if ordered to do so, on the basis that it is insolvent and has limited (if any) assets available to meet any liability for costs that it may be ordered to pay to the Defendant. Further, although the Claimant's ATE insurance policy *might* potentially provide a fund of up to £1 million from which the Defendant might recover its costs, the Claimant has refused to disclose a copy of the policy, such that the Defendant cannot determine the level of security afforded by the policy, and whether the Defendant could be given a direct right to enforce the policy. Such a policy does not, in any event, provide security equivalent to a payment into court.

(b) The Claimant's impecuniosity cannot be attributed to the Defendant's infringement. It is not credible to suggest that the Claimant's failure to achieve modest profits on certain very marginal "in-fill" bus routes in Cardiff resulted in the demise of what would otherwise have been a very successful multi-million pound business. Rather, even prior to the infringement, the Claimant was loss-making, its current liabilities were consistently more than double its current assets, it suffered from chronic shortages of working capital, and was also suffering serious operational problems across its South Wales business as a whole. The Defendant referred to the outline of its case on this issue at paragraphs 35 to 42 of the defence.

(c) The Claimant has not put forward sufficient evidence to demonstrate that an order for security for costs will stifle the claim. To the extent that the claim genuinely has a reasonable chance of success, the Claimant should be able to find a financial backer, whether from one of its former directors or shareholders, or from a professional litigation funder. Mr. West, who appeared for the Defendant, emphasised the principle, set out at paragraph 6 of the quote from *Keary Developments* above, that it is for the Claimant to put up evidence not only as to its own means, but also as to its ability to raise funds from backers or other affiliated persons or companies. In his submission, the relevant evidence submitted by the Claimant, in the form of a witness statement from Mr. Aldred (of the Claimant's solicitors), fails to show that the Claimant is unable to raise funds from elsewhere. Nor has Mr. Aldred stated definitively whether or not it would be possible for the Claimant to secure a further bond in favour of the Defendant from QBE.

(d) The Defendant submitted that the Application had been made in a timely fashion. The Defendant first raised the issue of security for costs in a letter to the Claimant dated 13 April 2011 (the claim having been instituted on 18 January 2011), in which it sought disclosure of the Claimant's ATE insurance policy. The correspondence on this matter continued until 19 July 2011, and the Defendant ultimately made the Application on 27 July 2011. The Defendant acted sensibly in seeking to avoid the need for an application

by seeking voluntary disclosure of the ATE insurance policy, and in making the Application following service of the defence, given that the merits are potentially relevant to the Tribunal's decision.

(e) As regards the likely outcome of the proceedings, the claim is likely to fail in large part if not entirely. In this context, Mr. West pointed to the fact that, even if the Claimant were to succeed in a claim for loss of profits, it was likely to fail on its other heads of claim, such that an ultimate costs order in favour of the Defendant was likely. He noted, too, that awards of exemplary damages at the level sought by the Claimant were rare.

(f) The considerations that led the Tribunal in *BCL Old Co* to refuse to order security do not apply in the present case. In that case, it could not reasonably be suggested that the Claimants had suffered no loss at all by reason of the cartel. Nor was there any suggestion of unreasonable or vexatious conduct by the claimants. Mr. West noted that a particular feature of *BCL Old Co* was that the defendants were using the proceedings to obtain a resolution of certain legal issues which were of interest to them in other litigation, in particular the possible availability of the passing on defence, referring to paragraph 34 of the Tribunal's judgment:

> "The Claimants and the Defendants in this action are pioneers. The Claimants bring this claim and the Defendants defend it without the benefit of any previous decision in their favour on the passing on defence. As the Defendants have indicated in the letter referred to above, it is important to them for this issue to be decided since they are at risk of future litigation by other potential claimants. Once the issue is decided in the current proceedings then the parties to future litigation would be in a better position to assess the strength of the quantum claim; the potential claimant would know the legal parameters for its quantum claim, and the potential defendant would be in a better position to assess the strength of the quantum being claimed against it. At this stage, however, it is unclear whether the Defendants have any defence to this action, and if so what is the extent of any such defence."

(g) The amount of security sought by the Defendant is appropriate, given the nature of the proceedings, and the Claimant has not disputed the reasonableness of the sums claimed. Further, were security for costs not

ordered, the Defendant has no assurance that it can recover anything from the Claimant or its insurer, if the Defendant succeeds in defending the claim.

9. The Claimant opposed the Application for the following reasons:

(a) The Claimant is in liquidation, with remaining funds of just £34,241.62 (less the costs of a recent (failed) mediation undertaken by the parties). Its legal representatives are funded on a CFA basis. Its experts are funded on a deferred payment basis, and their costs are covered by the ATE insurance policy. In the circumstances, there is no way that funds can be secured for a payment into court. Mr. Bowsher QC accepted that the Claimant should be considered as indigent and referred, in this regard, to paragraph 45 of the Tribunal's judgment in BCL Old Co:

> "Under Rule 45(3) this Tribunal has a discretion as to the amount to be ordered and must exercise that discretion on a judicial basis. In exercising that discretion this Tribunal will determine the amount of security it considers to be just having regard to all the circumstances. Where the Claimant is impecunious the Tribunal will not fix a sum which the Claimant cannot pay and which may therefore have the effect of stifling a genuine claim…"

(b) The Claimant's ATE insurance policy, which responds to the Defendant's costs up to the sum of £1 million (and in respect of which the Defendant is a named beneficiary) provides the Defendant with some measure of security. There is no reason in principle why such an ATE insurance policy could not provide some or some element of security for a defendant's costs (per *Michael Phillips Architects v. Riklin* [2010] EWHC 834 (TCC) at paragraph 18). Although the insurer QBE objects to the disclosure of the policy, and is entitled to do so (see *Arroyo & Ors v. BP Exploration Co (Columbia) Ltd* [2010] QBD, 6 May 2010), the existence of the policy clearly provides comfort to the Defendant.

(c) Any practical means of providing significant security would have the inevitable consequence of stifling the claim. In his witness statement of 22 September 2011, Mr. Aldred describes the steps taken by the Claimant to see what, if any, further security could be provided without stifling the

claim. In that statement, he refers to the possibility of the Claimant securing a further bond in favour of the Defendant; but, even if available, the provision of such a bond could stifle the claim as it would require the liquidator to expend funds which he does not appear to have, or may not be permitted to use for that purpose.

(d) The Application has been made at a late stage in the proceedings, and the Claimant has already expended considerable costs in connection with the claim (in the region of £2 million, as at 19 August 2011).

(e) The circumstances in *BCL Old Co* are indeed relevant to this case, both because it is unlikely that the Defendant will benefit from the security (given the strength of the Claimant's case), and because the case stands for the proposition that "infringers of a public law prohibition" should bear the costs risk at this stage of the proceedings, rather than "claimants in whose favour liability is, at least prima facie, established" (*BCL Old Co* at paragraph 43).

(f) As regards the merits of the claim, the Claimant has already succeeded on liability, and will plainly succeed in making very substantial recovery from the Defendant. Mr. Bowsher QC, for the Claimant, referred to certain passages from the OFT's Decision which, in his view, supported the Claimant's case on causation. Paragraph 7.235 of the Decision provides, in particular:

> "On this basis, whilst there may be a question as to 2 Travel's long term viability, the OFT considers that it is likely that Cardiff Bus' predatory conduct was a contributory factor in 2 Travel's exit from the market, potentially accelerating its exit. Given how little actual competition Cardiff Bus faced at the time and the fragmented nature of that competition (see Chapter 5), this would have reduced actual competition."

Mr. West countered that the OFT's choice of language here, in particular the use of the word "potentially", makes it clear that the OFT was not reaching a conclusion on the issue of causation.

10. Although the Shareholder Claimants are not parties to these proceedings, on the basis that their own separate claims against the Defendant are stayed pursuant to the Tribunal's Order of 21 April 2011, neither the Claimant nor the Defendant objected to Mr. Francis making certain submissions (on behalf of each of the Shareholder Claimants) in relation to the Application at the CMC. Mr. Francis briefly highlighted the financial difficulties faced by 2 Travel and the nature of the Defendant's infringement, and submitted that it would not be appropriate for the Defendant to benefit from a cash shortage that it had caused.

IV. ANALYSIS AND CONCLUSIONS

11. It is clear from rule 45(4)(a) that the Tribunal can only order security for costs where it is just to do so, having regard to all the circumstances of the case, and where one or more of the conditions set out in rule 45(5) applies. Further, in deciding whether an order for security for costs is just in the circumstances, it is necessary to carry out a balancing exercise between the potential injustice to the Claimant if it is prevented from pursuing a proper claim by an order for security, and the potential injustice to the Defendant if no security is ordered and the Defendant is ultimately unable to recover costs from the Claimant (the third principle set out by Peter Gibson LJ in *Keary Developments*, cited above). The issues considered by the Tribunal at paragraph 27 of *BCL Old Co* (also cited above) are pertinent in the context of this balancing exercise, and I have considered them in my analysis below (albeit in a slightly different order).

The Claimant's financial position, whether it is impecunious and why it is impecunious

12. On the evidence before me, the Claimant can fairly be described as impecunious, having barely any remaining funds in the liquidation, and is before the Tribunal by dint only of the particular conditional funding arrangements concluded with its legal representatives, experts and insurers. In my view, it is likely that the criteria outlined in rule 45(5)(c) are applicable here, as there is a risk in these proceedings that the Claimant will be unable to pay the Defendant's costs if ordered to do so. Although the Defendant is a named beneficiary of the Claimant's ATE insurance

policy, there is a limit to the comfort that can be derived from such a policy, in particular given that the Defendant has not been able to review its specific terms. I would note here that I do not consider that it would be appropriate to order the disclosure of such a policy, but it is likely in any event that the policy will be subject to certain exclusions which are likely to limit the comfort that may be derived by the Defendant from its existence.

13. The Claimant has also made efforts to explore other forms of security that might be provided to the Defendant, as described in Mr. Aldred's witness statement of 22 September 2011. Although I accept Mr. West's submission that Mr. Aldred does not indicate that he has exhausted *all* avenues of funding to provide security, I am satisfied that the Claimant has, for all practical purposes, taken all reasonable steps to exhaust those avenues of funding that might realistically be secured. In particular, the provision of a further bond by QBE in favour of the Defendant would require the upfront payment of a sizeable premium, and there was no suggestion that any party was prepared to pay such a premium. Accordingly, the Defendant bears a *prima facie* costs risk in these proceedings.

14. I am not currently in a position to definitively determine why the Claimant is impecunious, or whether the Claimant's impecuniosity can be solely or mainly attributed to the Defendant's infringement. These are central issues for trial, insofar as the Claimant alleges that the Defendant's predatory conduct caused it to go out of business, and the Defendant contends that the Claimant would have become insolvent, irrespective of the infringement. They can only be determined once the Tribunal has had sight of all the relevant evidence and the benefit of submissions and cross-examination of witnesses at a full hearing.

The likely outcome of the proceedings and any ultimate order under rule 55

15. It would not be appropriate for me to express a firm view (nor do I feel able to) as to the likely outcome of the proceedings, or the relative strengths of the parties' cases. Although I have had sight of the claim form and the defence, and ten factual witness statements were filed by the Claimant at the CMC on 26 September 2011, expert evidence on the issue of quantification of loss has not yet been filed, and it is

not yet known which witnesses will be called for cross-examination at the hearing. Similarly, as regards any order for costs that might ultimately be made under rule 55 at the conclusion of these proceedings, it is too early to say which of the parties will ultimately prevail on costs.

The stage of the proceedings at which the Application is made and the amount of costs incurred by the Claimant to the date of the Application

16. I do not consider that the Application could reasonably have been brought at an earlier stage in the proceedings, and therefore reject the Claimant's submission that the Application has been brought too late.

17. It is evident, however, that both the Claimant and the Defendant have incurred a very considerable amount of costs to date in relation to these proceedings (said to amount to around £2 million for the Claimant at the time of the CMC, and around £800,000 for the Defendant at the time of making the Application). I revert to this issue at paragraph 23 below.

Whether it appears the Application is made in order to stifle a genuine claim, or would have that effect irrespective of the intention behind the Application

18. I am satisfied that it is not the Defendant's intention to stifle the claim. Rather, the Defendant has expressed a genuine concern regarding its potential exposure to costs in the event that it successfully defends all or part of the claim.

19. However, in my view, the award of security would very likely have the effect of stifling a genuine claim. As has been noted at paragraph 13 above, the Claimant has taken all reasonable steps to exhaust those avenues of funding that are realistically available to it, and any requirement to provide security (even if in the form of a bond, rather than a payment into court) would carry a very real risk of extinguishing these proceedings, to the extent that the Claimant's conditional funding arrangements were not sufficiently flexible to accommodate the additional sum ordered by the Tribunal.

20. It is also important to consider the relevant context of this particular claim, namely that it follows on from a finding by the OFT of an infringement of the Chapter II prohibition by the Defendant, which took the form of predatory conduct and in respect of which the OFT "identified evidence that gives rise to a strong inference that Cardiff Bus launched its white service with exclusionary intent – in other words, with the intention of diverting prospective customers away from 2 Travel and thereby forcing 2 Travel out of the market, thus protecting Cardiff Bus' dominant position" (Decision, paragraph 7.29).

21. Although I agree with the Defendant that the specific circumstances of this case are different from *BCL Old Co* (in particular as regards the defendants' interest in that case in the determination of issues relating to the passing on defence), here, as in *BCL Old Co*, the Defendant is before the Tribunal as an "infringer of a public law prohibition" (paragraph 43 of *BCL Old Co*). Further, the particular infringement in question is one which, according to the OFT, was pursued with the intention of driving the Claimant out of the market. In my view, it is therefore just that the Defendant should bear some measure of cost risk in connection with this claim.

22. I have borne in mind strongly that deterrence is not, without more, a sufficient reason for not ordering security (the second principle outlined by Peter Gibson LJ in *Keary Developments*, cited above). However, I am very concerned that making an order for security for costs would risk extinguishing a genuine claim by a company in liquidation, in circumstances where it cannot be excluded that the Tribunal might ultimately conclude that the Claimant's impecuniosity has been caused by the Defendant. I am fortified in that conclusion having regard to the findings of the OFT contained in the Decision, which are (subject to direction by the Tribunal) binding on the Tribunal (see *Enron Coal Services Ltd v. English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2).

23. I have therefore concluded, having had regard to all the circumstances of the case, that it would not be appropriate to make an order for security for costs as requested by the Defendant, and dismiss the Application accordingly. However, I would emphasise that the costs incurred by the parties to date in these proceedings have caused me great concern, and appear to be unnecessarily high for the work

undertaken to date. The parties should therefore take all necessary steps to keep their costs going forward within reasonable bounds, including instructing only those expert witnesses whose evidence is necessary. They can expect that the Tribunal will tightly manage the future conduct of these proceedings in order to keep costs within reasonable limits.

Lord Carlile of Berriew Q.C.

Charles Dhanowa
Registrar

Date: 14 October 2011