Neutral citation [2014] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1229/6/12/14

9 July 2014

Before:

THE HONOURABLE MR JUSTICE SALES
(Chairman)
CLARE POTTER
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

HCA INTERNATIONAL LIMITED

Applicant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

-and-

AXA PPP HEALTHCARE LIMITED
THE LONDON CLINIC
BUPA INSURANCE LIMITED

Interveners

RULING (APPLICATION TO ADMIT EVIDENCE)

A P P E A R A N C E S

Ms Dinah Rose QC, Mr Josh Holmes and Ms Jessica Boyd (instructed by Nabarro LLP) appeared on behalf of the Applicant.

Ms Kassie Smith QC and Mr Rob Williams (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Ms Ronit Kreisberger (instructed by Eversheds LLP) appeared for The London Clinic.

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1. This ruling addresses the application by HCA International Limited ("HCA") to adduce expert evidence in the form of a report by an economist, Dr Nicola Mazzarotto, dated 30 May 2014, on an application for review under section 179 of the Enterprise Act 2002 (the "Act") to challenge a decision of the Competition and Markets Authority (the "CMA", which has taken over relevant functions previously carried out by the Competition Commission) requiring, among other things, HCA to divest itself of some of the private hospitals it owns.

2. The legal approach to be applied to an application for review under section 179 of the Act is that appropriate to judicial review. The admission of expert evidence in judicial review proceedings is exceptional. The conventional grounds for fresh evidence to be admitted in such proceedings are those set out in *R v Secretary of State for the Environment, ex p. Powis* [1981] 1 WLR 584. There is an extension explained in *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, if expert evidence is required to assist the court to understand an issue it has to determine. The Tribunal has applied these principles and has been slow to allow in expert evidence on a section 179 challenge: see *BAA Ltd v Competition Commission* [2012] CAT 3, paras. [79] to [81], as follows:

> "79. Finally under this heading, we briefly explain why we dismissed BAA's application to adduce the new expert evidence. In doing so, we simply applied the conventional approach in judicial review proceedings as laid down in *R v Secretary of State for the Environment, ex p. Powis* [1981] 1 WLR 584, 595-597. The new evidence did not fall into any of the categories identified there of material which will be admitted as evidence on a judicial review: it was not evidence to show what material was before the CC, nor was it relevant to any jurisdictional question affecting the CC, nor was it relevant to any allegation that the actions of the CC were tainted by misconduct. Mr Green submitted that it was evidence which should be admitted to enable the Tribunal to carry out its review function properly, relying on the modest adjustment to the *Powis* categories which Collins J was prepared to accept in *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, at [23]-[25]. Unlike in *Lynch*, we were not at all persuaded that we needed to see the expert reports in order to understand the submissions made by Mr Green under Ground (4).

> 80. We also make this general point. In our view, attempts to introduce detailed technical expert evidence in reviews under section 179 of the Act should be strongly discouraged and disallowed other than in very clear cases. Otherwise, there is an obvious danger that costs will be wastefully multiplied with no significant benefit for the speedy and efficient dispute resolution procedure which is supposed to be provided for by a section 179 review, as with judicial review generally. That is what happened here. Because BAA obtained the (no doubt expensive) report of its expert and sought to adduce it, the CC felt obliged to go to the expense and trouble of instructing an expert of its own to produce a report to be adduced in answer. In the event, neither report was admitted into evidence. On the other hand, were expert evidence to be admitted on the hearing of a review under section 179, there would be a real danger that time and effort would be expended in argument upon it which does not on proper analysis advance the legal arguments in the case, but operates rather as a distraction from them (and argument about expert reports is likely to be inconclusive as well, in the absence of the contending experts being called to give oral evidence and be cross-examined, which is not in the ordinary course a procedure appropriate in proceedings which are intended to be determined by reference to judicial review principles).
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> 81. The Competition Appeal Tribunal Rules 2003 can be read as suggesting that expert reports may be expected to be adduced in evidence: see Rule 8(6)(b) (which provides that there shall "as far as practicable" be annexed to the notice of appeal "a copy of every document on which the appellant relies including the written statements of all witnesses of fact, or expert witnesses, if any") and Rule 25 (which provides that, inter alia, Part II of the Rules, which includes Rule 8, applies to proceedings under section 179). But this is because the main body of the Rules, and Part II in particular, is concerned with the Tribunal's appellate jurisdiction, in relation to which expert and other evidence will not infrequently be admissible and relied upon, and provisions which make sense in that context are then simply applied across to reviews under section 179 by cross-reference in Rule 25."

3. The decision went on appeal, where these observations did not attract any adverse comment: [2012] EWCA Civ 1077. The approach was adopted and applied in *Lafarge Tarmac Holdings Ltd v CMA* [2014] CAT 5.

4. There are strong reasons which support this approach, as touched on in the judgment quoted above:

   (a) If expert evidence is admitted in relation to matters which ought to be the subject of submissions, it creates a costly waste of time and money and may give rise to confusion and a loss of proper focus at the hearing. Opposing parties will feel driven to adduce their own expert evidence and everyone

may feel driven to try to cross-examine the opposing expert witnesses, for otherwise will it not be said that their evidence was unchallenged? And how else can the Tribunal assess their conflicting evidence?

(b) The relevant decisions of the CMA involve technical issues in questions of evaluative assessment of economic evidence which is within the remit of the CMA and for which it has particular expertise. As noted, section 179 proceedings are review proceedings, not an appeal on the merits. In relation to decisions of this character taken by a body of this kind, the well established legal approach is that a substantial degree of discretion or significant margin of appreciation is allowed in relation to expert assessments made by the CMA. This reinforces the review function of the Tribunal and emphasises how far removed from a merits appeal these kinds of proceeding are. In our view, the Tribunal is rightly resistant to attempts by any party to try to convert this review jurisdiction in this context into something resembling an appeal on the merits.

(c) The Tribunal is well equipped to assess the relevant factual matters in a section 179 case without needing assistance from expert witnesses. The Tribunal is a body which itself has technical expertise and an ability to understand technical economic points without external assistance, not least because one of the members on the panel to determine the present case is an expert economist. The sort of situation in which technical assistance is required under the *Lynch* principle is not likely to be a common one in this Tribunal.

5. The overarching question is whether the admission of Dr Mazzarotto's expert report would be of significant value to assist the Tribunal in the determination of this case, bearing in mind the context outlined above, the proper caution to be exercised by the Tribunal when asked to admit expert evidence on a section 179 challenge, and having regard to the usual factors to be borne in mind under rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372 / 2003) ("to secure the just, expeditious and economical conduct of the proceedings") and by analogy with the overriding objective in Part 1 of the Civil Procedure Rules – namely, seeking to

ensure that the parties are on an equal footing; the desirability of minimising the cost of securing justice; dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues and to the financial position of each party; ensuring that the case is dealt with expeditiously and fairly, allotting to it an appropriate share of the Tribunal's resources while taking into account the need to allot resources to other cases; and the desirability of enforcing compliance with rules, practice directions and orders.

6. In our view, there is nothing about the expert report which leads to the conclusion that the Tribunal would be assisted by or that the just determination of the case requires its admission. There are, moreover, several matters specific to this case which point strongly against its being helpful and against its admission:

(i) Dr Mazzarotto is not coming to these proceedings as a fresh and transparently independent expert. As he says in his report (see para. 1.2.3), he acts as HCA's economic adviser. He has acted for HCA throughout the Competition Commission's inquiry, making representations on HCA's behalf to support the conclusions it was seeking to persuade the Competition Commission and CMA to adopt. His current report has more than a flavour of a disappointed advocate seeking to re-argue points on which his submissions have not been accepted. He is more involved in the dispute and less dispassionate than one would expect or wish an independent expert to be.

(ii) The instructions he was given to prepare his report did not brief him clearly regarding the difference between an appeal on the merits and the approach to be adopted under judicial review principles; see paras 1.2.1 to 1.2.3 of the report. In para. 1.2.3, Dr Mazzarotto says, "I have been asked to provide an independent assessment of certain aspects of the CC's/CMA's economic analysis. I have been instructed to provide my expert opinion on … [he then sets out a number of matters corresponding to HCA's grounds of complaint]". His report accordingly is one replete with expressions of his own opinions on these matters, based on the available data, as would be appropriate on a merits appeal

but which is not helpful under the judicial review principles which fall to be applied in these proceedings. He does not demonstrate any awareness of the distinct questions which the Tribunal will have to address in determining the section 179 proceedings, such as whether a regulator could reasonably hold particular views or reach particular conclusions (as distinct from whether Dr Mazzarotto himself agrees with those views or conclusions).

(iii) Insofar as Dr Mazzarotto makes points which would be suitable for consideration in these section 179 proceedings, such as to say that relevant matters are left out of account or irrelevant matters taken into account by the CMA, there is no good reason why HCA cannot make those points in a proper way appropriate to these proceedings, namely by way of submissions by counsel based on the facts of the case. This applies to all the paragraphs in Dr Mazzarotto's report particularly referred to by HCA (see para. 30 of its skeleton argument dated 23 June 2014: "… we refer to the following paragraphs of the Mazzarotto Report: 2.3.5; 2.3.17; 2.3.23; 2.3.27; 3.2.11-12; 3.2.25; 4.4.3") and generally.

(iv) HCA say that the Tribunal would be assisted by Dr Mazzarotto's evidence regarding the adequacy of the testing undertaken by the CMA - see para. 31 of its skeleton argument dated 23 June 2014, where this is said:

> "31. In addition to specific criticisms such as these, the Mazzarotto Report contains expert assessment of the *adequacy* of the tests undertaken by the CMA, or its reporting of those tests, including an identification of tests that the CMA ought to have undertaken as standard, but which appear to be missing from its analysis (see for instance §2.3.12). The question whether the overall analysis is consistent with the basic requirements of good economic practice is again a matter on which the Tribunal is likely to be assisted by the opinion of an expert."

But where Dr Mazzarotto gives his views about the standards to be applied, his evidence is unhelpful. He asserts a view but does not give a

basis for that view in his report. In any event, these are all points which can be made by way of submission and which the Tribunal itself is equipped to assess when evaluating the evidence.

7. HCA said this in its Notice of Application in support of its application to adduce Dr Mazzarotto's report:

> "278. The IPA [Insured Prices Analysis] (as relied on in the Final Report) was not disclosed or put to HCA or its advisers during the investigation. HCA, and Dr. Mazzarotto on its behalf, was accordingly unable to respond to it. HCA relies on this procedural unfairness as the first of its grounds. The expert report of Dr. Mazzarotto is relevant to that ground as follows:
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> a. It evidences the points which HCA would have sought to put forward to the CMA during the investigation, had it been given proper notice of the IPA;
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> b. It provides the CAT with material necessary to enable it to cure what would otherwise be a breach of Article 6 ECHR, by affording to HCA a fair hearing in the determination of its civil rights and obligations.
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> 279. HCA's second ground identifies flaws in the IPA which constitute the taking account of irrelevant considerations and/or the failure to take account of relevant considerations. As a result, the IPA was not material on which the CMA could rationally rely in support of its decision. Dr. Mazzarotto's expert report is relevant to this ground. This material could not have been put forward by HCA during the investigation because of the procedural unfairness identified under ground 1.
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> 280. HCA's fifth ground challenges the proportionality of the remedy adopted by the CMA, and its compatibility with HCA's right to property under Article 1 of the First Protocol ECHR. The determination of proportionality requires the Tribunal to make its own assessment of the material relied on by the CMA, including the IPA. The expert report of Dr. Mazzarotto is relevant to that assessment. For example, his report includes an examination of the sensitivity of the CMA's quantitative assessment, for which legal submission could provide no substitute."

8. In our view, the grounds put forward do not justify the admission of the report. As to paragraph 278(a), no expert evidence is required to show what points HCA would have sought to put forward. That is a factual matter which does not require an expression of expert opinion. Moreover, Dr Mazzarotto's report does not purport to address the issues in this way. At many points it gives details of submissions

which HCA *did* make to the Competition Commission and then makes criticisms of the Competition Commission and CMA for not accepting those submissions: see, by way of example, paras. 2.3.17-2.3.18 and paras. 2.3.20-2.3.29 of the report.

9. As regards paragraph 278(b), this is unpersuasive. If the CMA is found to have acted unlawfully, the likely result will be that its decision will be quashed and the matter remitted to the CMA as the relevant expert body to continue its investigation and take the decision afresh on a proper and lawful basis. In this area of decision-making by a technically expert body like the CMA, compliance with Article 6 of the European Convention on Human Rights ("ECHR") is secured by the combination of rational decision making within legal parameters by the relevant body, following a fair procedure and subject to judicial review on usual principles before a review court such as the Tribunal. This composite approach to satisfaction of the requirements of Article 6 of the ECHR in this sort of context is well recognised: see the case law stemming from *Bryan v United Kingdom* (1996) 21 EHRR 342 and *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. For the relevant standard of review, see *BAA Ltd v Competition Commission* [2012] CAT 3, in particular at [20], and on appeal at [2012] EWCA Civ 1077. It is not necessary nor appropriate for this expert report to be admitted in the proceedings in this Tribunal to secure compliance with Article 6 since the points of substance can be made on behalf of HCA by its legal representatives and the Tribunal will be able to understand the submissions which are made.

10. As to paragraph 279, Dr Mazzarotto's report is not relevant in any requisite legal sense to this ground of challenge. The points are all available to be made by way of submission for HCA on the facts.

11. Finally, in relation to paragraph 280, the determination of proportionality requires the Tribunal to assess the proportionality of what the CMA has done having regard to the CMA's assessment of the underlying technical arguments, as the Tribunal's well-established case law makes clear. Section 179 proceedings do not involve a re-hearing on the merits. The approach is different from that on a merits appeal. Determination of proportionality is a regular feature of a section 179 challenge. It

does not lead to a requirement to adduce expert evidence to do justice between the parties: see *BAA Ltd* and *Lafarge Tarmac Holdings* (cited above).

12. The case of *Kennedy v Information Commissioner* [2013] UKSC 20; [2014] 2 WLR 808, in particular at paras [51]-[55], referred to by HCA, does not indicate any change in the approach applicable in this Tribunal dealing with the type of decisions and the context it has to deal with. As mentioned in *BAA, Lafarge Tarmac Holdings* and above, there are strong reasons why the Tribunal should not be diverted from the efficient and speedy resolution of disputes on judicial review principles by the admission of expert evidence.

13. The sensitivity analysis referred to is not a discrete part of Dr Mazzarotto's report. Sensitivity analysis in economic assessments is classically the sort of analysis which the Tribunal is equipped to assess for itself, assisted by submissions from counsel. There is no reason why the relevant figures for sensitivity purposes cannot be agreed or set out clearly and the relevant points made on them by way of submission.

14. At paragraph 23 of its skeleton argument dated 23 June 2014, HCA says:

> "23. The question of the appropriate standard of review to be adopted in this case is a legal issue of importance, which will require submissions at the hearing of the Main Application. It [*sic*] submitted that it would be wrong in principle for the Tribunal at this preliminary stage to exclude evidence which would deny to it the material necessary to apply what the Applicant submits is the appropriate level of scrutiny to the Decision."

15. However, we see nothing in the circumstances of the present case and in the contents of Dr Mazzarotto's report to take this into the exceptional category in which it would be appropriate to admit this expert evidence. In our view, the Tribunal has to take a case management decision in the circumstances of the case which it considers best calculated to achieve justice between the parties and further the overriding objective. As pointed out above, the Tribunal in its case law, based on well-established authority, has set out the relevant legal approach to be adopted in the context it deals with. In our judgment, the reference by HCA to *Kennedy v Information Commissioner* does not create any real prospect that a different

approach would now be found to apply. Exercise by the Tribunal of its case management powers according to usual principles is not required to be distorted by reason of it. The context of the *Kennedy* case was very different and the points made in the judgments were at a level of considerable abstraction, far removed from the detail of the circumstances which the Tribunal has to deal with in these proceedings. Importantly, the relevant case law of the Tribunal and the Court of Appeal has already addressed the appropriate legal approach for the Tribunal in the context of proportionality analysis as well as rationality analysis. It is, in the circumstances, unwarranted speculation by HCA that this will be found to be changed by the judgment in *Kennedy*. The prospect that HCA might ultimately make good this argument of law is - in our view - remote indeed, and not one which would justify the admission of Dr Mazzarotto's report

16. For this reason, and for the further reasons already explained, the expert report on which HCA seeks to rely will not assist the Tribunal to determine this section 179 challenge. Its admission would be an inappropriate distraction. Our clear view is that, as a matter of fair case management between the parties, the just and appropriate conclusion on HCA's application is that permission to adduce the expert report should be refused.

The Honourable Mr Justice Sales (Chairman) | Dermot Glynn | Clare Potter

Charles Dhanowa O.B.E., Q.C. (Hon)
Registrar

Date: 9 July 2014