



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1427/5/7/21

BETWEEN:

BELLE LINGERIE LIMITED

Claimant

- v -

(1) WACOAL EMEA LTD
(2) WACOAL EUROPE LTD

Defendants

ORDER

UPON the Tribunal's Order made on 14 March 2022 directing that the claim shall be subject to costs management (the "CMC Directions Order")

AND UPON the Tribunal's Ruling issued on 24 May 2022 approving a costs budget for the parties in these proceedings ([2022] CAT 24) (the "Costs Budget Ruling")

AND UPON reading the application made by letter from the solicitor for the Claimant dated 27 July 2022 for an increase in the allowed future costs in respect of the Claimant's economic and industry experts' costs (the "Expert Costs Application")

AND UPON considering the response from the Defendants' solicitors on 2 August 2022 and the reply from the Claimant's solicitor on 4 August 2022 in respect of the Expert Costs Application

IT IS ORDERED THAT:

1. The Claimant's Expert Costs Application is granted. Annex 1 to the Costs Budget Ruling is varied as follows:
 - (a) the Claimant's allowed future costs in respect of the Economists Expert Reports item of the costs budget is increased to £74,500; and
 - (b) the Claimant's allowed future costs in respect of the Industry Expert Reports item is increased to £19,000.

REASONS

1. In the Costs Budget Ruling the Tribunal approved the parties' respective future costs for expert evidence as follows:

Item	Claimant's Costs Allowed	Defendants' Costs Allowed
Industry Expert Reports	£17,000	£18,200
Economists Expert Reports	£44,500	£82,000

2. At [59] of the Costs Budget Ruling, the Tribunal noted its concern that the parties seemingly had a significant difference of opinion as to the relevant scope and extent of the economic expert evidence, and directed that the economic experts should meet on a preliminary basis to consider and seek to agree a list of the relevant issues that their reports need to cover. At [63] and [79], the Tribunal expressed its concern that the Claimant had underestimated its costs in relation to the economic expert's evidence. The Tribunal also considered that the Defendants' "upper end" estimate was too high and significantly reduced it in the costs budget that was approved (at [63] to [64]).
3. The Tribunal gave both parties permission to apply to vary their respective costs budgets and/or make submissions in relation to the costs budget of the other party in relation to: (1) economic experts' fees once the preliminary meeting has taken place, and the scope of economic evidence on the list of issues has been resolved; (2) industry expert reports; and (3) any variation relating to the estimate of costs for the trial

consequential on (1) and (2) (at [103]). Paragraph 104 of the Costs Budget Ruling made clear that both parties are entitled to apply to vary their costs budgets in the event of a significant development in the litigation.

4. By letter dated 19 May 2022 and in advance of the formal publication of the Costs Budget Ruling, the Tribunal directed a timetable relating to the preliminary meeting between the parties' economic experts (Costs Budget Ruling at [60] to [63]). The Tribunal directed that: (1) the parties' respective economic experts should meet by 8 June 2022 to consider and seek to agree a list of relevant issues that their reports need to cover, and (2) that an agreed list of issues (or document setting out areas of disagreement) be filed with the Tribunal by 4pm on 15 June 2022. The Tribunal also directed that: "(3) any application to vary the parties' costs budgets as a result of (1) and (2) ... should be filed and served by 4pm on 27 June 2022."
5. By letter dated 27 July 2022 from its solicitor, the Claimant has applied for an increase in its costs budget for expert evidence. It says it does not do so pursuant to paragraph (3) of the Tribunal's 19 May letter because the increase in costs is not a direct result of the work involved in complying with paragraphs (1) and (2) of that letter. Instead, the Claimant suggests that the Expert Costs Application is made pursuant to [103] of the Costs Budget Ruling.
6. The Claimant seeks to increase the approved costs budget by £30,000 in relation to its economic expert report, and by £2,000 in relation to its industry expert report. The Defendants do not object to the latter (although they object to what the Claimant has said about the reason it is required). The Tribunal will permit what is a small increase in relation to the Claimant's industry expert report. The Defendants object to the former, and the remainder of this Reasoned Order relates to the costs of the Claimant's economic expert report.
7. The Claimant maintains it is necessary to increase its costs budget because, in summary: (1) the Claimant has limited financial resources, and its costs budget was initially prepared for the purposes of the Claimant's fast track procedure application and on the assumption that that application would succeed (which it did not: see paragraph 5 of the CMC Directions Order and the Tribunal's Ruling dated 23 May 2022 ([2022] CAT 22)); (2) at the subsequent costs and case management conference on 5 May 2022 (the

“CCMC”), the Claimant was aware that its economic expert costs might need to rise and that the Defendants were seeking to introduce effects-based arguments, but the Claimant had limited resources and had agreed a budget with its expert as a fixed fee for a particular scope of work and so did not seek to increase the economic expert report amount in its costs budget; (3) the main focus of the claim is (in the Claimant’s view) hardcore object breaches of competition law for which no or limited economic evidence is needed; (4) the scope of the economic expert evidence has now been clarified and addressing the issues has required additional work; (5) the Defendants’ expert has made various requests for information and data which the Claimant and its expert have had to prepare; and (6) the Claimant’s expert’s consideration of the effects case has been more extensive than previously envisaged. The Claimant seeks an increase in the approved budget for its costs of the economic expert’s report of £30,000 excluding VAT, which would increase the total to £74,500.

8. The Defendant objects on the basis (in summary) that: (1) it was (or ought to have been) clear since at least the first case management conference on 14 March 2022 that the economic evidence was more extensive than the Claimant envisaged and would need to address the effects case; (2) nonetheless, the Claimant chose not to increase its costs budget for the purposes of the subsequent CCMC; (3) the Claimant was aware of the Tribunal’s view that it had underestimated its costs relating to economic expert evidence; (4) the Claimant has awarded its staff a bonus (said to total £25,000), and therefore did have resources available to it by reference to which it could have increased the funding for its economic expert evidence; (5) the extent of the issues requiring economic expert evidence has been clear since the Tribunal’s CMC Directions Order; and (6) the Expert Costs Application is not being made pursuant to [103] of the Costs Budget Ruling, nor is it made in response to a significant development in the litigation (Costs Budget Ruling at [104]). It is said that the Claimant has simply realised that its figure is too low.
9. I am satisfied that the Expert Costs Application does not comply with [103] of the Costs Budget Ruling in the sense that it was not made strictly in accordance with the timetable set out in the Tribunal’s letter of 19 May 2022. That timetable envisaged that once the issues for expert economic evidence were agreed, either side could apply to vary their respective costs budgets to reflect its scope (this is also clear from [61] of the Costs Budget Ruling). The Tribunal’s letter made clear that such an application needed to be

made by 4pm on 27 June 2022: by which point all parties would have a better idea of the costs likely to be incurred. More particularly (and contrary to what the Claimant suggests) paragraph (3) of the Tribunal's 19 May letter was not confined to seeking an increase in the budget arising solely from the costs of the economic experts' attendance at the preliminary meeting and their preparation of the agreed document setting out the parameters for expert evidence. The 19 May letter and [103] of the Costs Budget Ruling do not provide separate 'gateways' to seek an increase in the costs budget.

10. However, I do not think it therefore follows that the Claimant is only entitled to seek an increase in its costs budget now if it can show that there has been a significant development in the litigation. I consider it is open to the Tribunal to consider the Claimant's Expert Costs Application in accordance with [103] of the Costs Budget Ruling, even though made out of time, if it considers it appropriate to do so. That is the basis upon which I will proceed.
11. We are now at the point where everyone is of the view that the Claimant's costs of its economic expert, as reflected in the costs budget, are significantly underestimated. I also consider that the Claimant could have realised this sooner. However, the Defendants do not suggest that they have suffered any prejudice as a result of this application to increase the costs budget being made late. Further, subject to the point to which I refer in paragraph 12 below, the Defendants do not dispute that the increased costs have been or will be incurred or that (but for this application being made late) they would be properly included in the Claimant's costs budget. Whilst the timetable was not strictly followed, the Expert Costs Application is being made essentially for the reasons it was envisaged it might be necessary: because the work has proved more extensive than the Claimant anticipated. I do not think that the fact that the Claimant granted a bonus to its employees (as to which the Claimant explained the position in its reply dated 4 August 2022) takes matters any further forward. I will, therefore, permit an increase to the economic expert report element of the Claimant's costs budget.
12. The Defendants submit that if the Tribunal is minded to increase the costs budget, it should consider the appropriateness of the sum sought, given that the Claimant's expert is a sole practitioner who will therefore have been undertaking some work more suitable for a junior economist. However, I simply do not have sufficient information to determine whether that is right, or (for example) whether or not other costs savings have

been made, perhaps because he is a sole practitioner, which need to be taken into account when compared to the Defendants' expert. As they stand the Claimant's budgeted costs for the economic expert report are still lower than the Defendants' corresponding costs. With the increase sought, the Claimant's costs will be £7,500 less than the Defendants'. I will increase the economic expert report element of the Claimant's costs budget by the amount sought.

Bridget Lucas QC

Chair of the Competition Appeal Tribunal

Made: 10 August 2022

Drawn: 10 August 2022