Neutral Citation [2023] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1577/12/13/23

BETWEEN:

THE DURHAM COMPANY LIMITED (TRADING AS MAX RECYCLE)

Appellant

- v -

DURHAM COUNTY COUNCIL

Respondent

REASONED ORDER (PERMISSION TO APPEAL)

UPON hearing Counsel for the parties at a case management conference on 17 February 2023 (the "**CMC**")

AND UPON reading the parties' written submissions on whether there should be cost capping in these proceedings

AND UPON considering the Tribunal's judgment which capped the parties' costs in these proceedings ([2023] CAT 14) (the "**Judgment**")

AND UPON reading the Respondent's application for permission to appeal the Judgment filed on 5 April 2023 (the "**PTA Application**")

AND UPON the Tribunal having considered the PTA Application

IT IS ORDERED THAT:

1. The Respondent be granted permission to appeal the Judgment.

Note: The appeal is an interlocutory appeal, with a trial in early July 2023. For reasons set out below, it would be in the interests of justice for the hearing of this appeal to be expedited, and to that end the Respondent should file with the Court of Appeal an appeal bundle compliant with the rule as soon as practically possible.

REASONS

The Judgment

1. On 21 March 2023, I issued the Judgment which asymmetrically capped the parties' costs in these proceedings. The Judgment followed the CMC, at which I indicated that I was provisionally minded to impose cost capping in the proceedings in an indicative amount of £50,000. Counsel for the Respondent contended that it would not be possible fairly to resolve this question at the CMC, and suggested exchange of written submissions and a decision on the papers. The order I made at the CMC adopted this suggestion, and pursuant to that order the parties filed extensive written submissions on the question of cost capping in these proceedings.

2. The Appellant favoured the imposition of a costs-cap, whereas the Respondent (at all times, including at the CMC) opposed it. The Respondent submitted that the imposition of a costs cap would amount to an error of law because these are judicial review proceedings, and in such proceedings a costs cap is only justifiable in exceptional circumstances.

3. The Judgment imposed a cost cap of £50,000 on the Appellant and £60,000 on the Respondent as from the date of the CMC. In summary, I held that (a) the Tribunal had jurisdiction to make a costs-capping order pursuant to the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**"): see the Judgment at [7]; and (b) this jurisdiction should be exercised in these proceedings: see the Judgment at [8] to [10].

The PTA Application

4. In the PTA Application, the Respondent raised four grounds of appeal (the "**Grounds of Appeal**"):

(a) **Ground One:** The Tribunal erred in law in adopting a different starting point to costs management in applications for statutory review under section 70 of the Subsidy Control Act 2022 (the "**SCA 22**") than in judicial review proceedings in the courts in the UK, and proceedings for statutory review before the UK courts and the Tribunal.

(b) **Ground Two:** To the extent the Tribunal capped the Respondent's costs at £60,000 on the basis that this was a generous estimate of the upper limit of what would have been a reasonable and proportionate amount for the Respondent to incur, the Tribunal erred in law by imposing a cap at an irrationally low level.

(c) **Ground Three:** To the extent the Tribunal capped the Respondent's costs on any other basis, it erred in law by (a) failing to provide adequate reasons for its decision; and/or (b) precluding the Respondent, in the event it was the successful party, from recovering its reasonable and proportionate costs in circumstances where the Tribunal did not find that a protective costs order was justified in accordance with the criteria in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

(d) **Ground Four:** The Tribunal acted unfairly by determining that the costs cap should apply from 17 February 2023 in circumstances where (i) it had not invited submissions from the parties on that issue, and (ii) the effect of its decision is that almost all of the costs the Respondent has incurred on preparing its Defence and evidence and complying with its duty of candour are subject to an effective cap of £10,000 but the Appellant's equivalent pleading and evidential costs had already been incurred before that date and hence are uncapped.

5. The Respondent submitted that even if I were not persuaded that the Respondent's Grounds of Appeal have a real prospect of success for the purposes of CPR, r.52.6(1)(a), there is nonetheless a compelling reason under CPR, r.52.6(1)(b) for the Court of Appeal to hear an appeal by the Respondent in order that it can consider whether the Tribunal's general guidance in the Judgment is correct.

Disposition

6. I am not satisfied that any of the Respondent's Grounds of Appeal have a real prospect of success. The Tribunal Rules confer case management rules on the Tribunal, including as to costs management, which are not displaced by section 70(4) SCA 22. It is obviously important, subject to the need to consider individual cases on their facts (as to which see Judgment at [8(4)]), for a general approach to subsidy cases to be articulated. That is what the Judgment seeks to do.

7. The Respondent's submission that the cost cap imposed on it is insufficient is somewhat surprising given that the Respondent provided no indication as to likely future costs it would incur (and the costs it had incurred at the date of the CMC), despite my provisional indication at the CMC that both parties' costs would be capped at £50,000: see the Judgment at [5]. The Respondent had ample opportunity to raise this point in its written submission (including its further submissions in reply) but it failed to do so. As the Judgment records (at [9]), "[t]he Appellant did not resist a cap of £50,000; the Respondent did not identify a figure for any cap, but merely stated that any cap (should one be imposed at all) "should be based upon a generous estimate of the upper limit of what would be a reasonable and proportionate amount of costs to incur on the application"".

8. I am nonetheless satisfied that there is a compelling reason under CPR Rule 52.6(1)(b) for the Court of Appeal to hear this appeal. This is the first appeal under section 70 SCA 22 to come before the Tribunal. The Judgment is plainly of wider significance, given the novelty of the subsidy control regime. As noted in the Judgment at [8], the Tribunal must ensure that the jurisdiction is effective, and parties to potential subsidy review proceedings need to know, *ex ante*, what the Tribunal's general approach will be. Although that approach is not set in stone, in that each case must be considered on the facts, the parties to future subsidy control cases need to know the Tribunal's starting point. As Judgment at [8(4)] indicates, the general approach will be based on cost budgets, which was not an option open to the Tribunal on this occasion, given the time between the CMC and the trial. However, it should be noted that the Respondent on no occasion provided even an outline of a cost budget.

9. I consider the Respondent's overall challenge to the Tribunal's general approach or starting point raises a question of law. As the Supreme Court has recently held in *Competition and Markets Authority v Flynn Pharma* [2022] 1 WLR 2972 per Lady Rose JSC at [94] "even where a statutory power conferred on a court or tribunal to award costs appears to be unfettered, it is appropriate for an appellate court to lay down guidance or even rules which should apply in the absence of special circumstances" (emphasis added). In my view, it is appropriate for the Court of Appeal to hear this appeal and to determine whether the general guidance set out in the Judgment is correct.

Expedition

10. The question of expedition of the appeal is a matter for the Court of Appeal. The Respondent requested that the Tribunal defer a decision on the PTA Application until after the main hearing which has been fixed on 3 and 4 July 2023 (the "**July Hearing**"), on the basis that any such application would be moot were the Respondent to be unsuccessful and so not be in a position to recover its costs in any event. I am not willing to accede to this request. It is undesirable for these proceedings to progress without achieving clarity as soon as possible regarding the management of costs; and I am disinclined to give the Respondent an asymmetric power to choose to appeal the costs cap in the event it succeeds in the action, which the Appellant would not have were it to succeed.

11. Nothing in this Order affects the July Hearing, which will proceed as scheduled.

Sir Marcus Smith	Made: 6 April 2023
President of the Competition Appeal Tribunal	Drawn: 6 April 2023