IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1615/5/7/23

BETWEEN:

UP AND RUNNING (UK) LIMITED

Claimant

- v -

DECKERS UK LIMITED

Defendant

REASONED ORDER (COSTS CAP)

UPON the Order of the Chair made on 1 December 2023 and drawn on 4 December 2023, ordering that the part of the claim alleging that the Chapter I prohibition has been breached shall be subject to the fast-track procedure pursuant to Rule 58 of the Competition Appeal Tribunal Rules 2015 (the "Rules")

AND UPON hearing submissions from the Claimant and counsel for the Defendant at the Case Management Conference held on 18 January 2024

AND UPON the Tribunal's Ruling dated 6 February 2024 [2024] CAT 9 (the "Ruling") ordering that these proceedings remain subject to the fast-track procedure

AND UPON considering the letters dated 12 February 2024 from the Claimant and the solicitors for the Defendant on the appropriate amount of the cost cap to be imposed under Rule 58(2)(b)

IT IS ORDERED THAT:

1. The amount of recoverable costs in these proceedings is to be capped at £150,000.

REASONS:

2. The background to these proceedings is set out in the Ruling, in which I ordered a split trial, with Trial 1 to consider liability, injunctive relief and causation, and I confirmed the allocation of these proceedings to the Tribunal's fast-track procedure. As part of that procedure, I am now required to consider the level at which recoverable costs should be capped (see Rule 58(2)(b)).

3. The Claimant is unrepresented in these proceedings, and as long as that position continues it is only the Defendant that is likely to be affected by a cap on recoverable costs[1].

4. The Claimant submits that the recoverable costs should be capped at £100,000. I understand the basis for this is that the Claimant would expect to be able to meet an award of costs at this level, but not if the award were materially higher.

5. The Defendant submits that the cap should be £250,000. This is despite the Defendant estimating that its costs are likely to exceed its current estimate of £546,000, which was filed on 8 January 2024 and anticipated a four day trial (in line with the trial window now allocated to Trial 1). The Defendant submits that its costs estimate is not unreasonable[2], but advances the £250,000 figure in the spirit of compromise.

6. In those circumstances, and in the absence of any corresponding estimate from the Claimant, it is perhaps less important scrutinise the Defendant's costs budget in great detail. From a reasonably high level review, I have identified items which I consider to be excessive.

---

[1] The Claimant may of course incur disbursements which could be recoverable in the event it succeeds, but I do not anticipate those to be at a level which might engage any cap I am likely to set.

[2] The Defendant refers in support of this to the exercise carried out to scrutinise costs in *Belle Lingerie Limited v Wacoal EMEA Ltd & Anor* [2022] CAT 24. That (as the Defendant acknowledges), was not a case allocated to the fast-track procedure.

7. For example, the budget includes £70,000 for expert evidence, in circumstances where no permission to file expert evidence has yet been given and I have expressed scepticism about the need for any extensive expert evidence. I also note that the cost budget contemplates a team of four lawyers (one partner, one senior associate, one junior associate and one trainee) working on the matter at the Defendant's solicitors, in addition to counsel. This seems a large team for this type of litigation, as well as the amount in issue, which might reasonably require a smaller team. I also take the view (as set out in the Ruling) that the case is less complicated than the Defendant suggests and it is now subject to a split trial regime in which the issues for Trial 1 are reasonably contained.

8. I expect that a reasonable estimate of the recoverable costs of the Defendant ought to be materially less than £546,000, although I doubt that it is likely to be as low as the £250,000 offered by the Defendant as a cap. A figure somewhere between £350,000 and £450,000 seems likely to be more appropriate.

9. The reasonableness of the parties' estimates is of course not the only factor to take into account in setting a costs cap. As Roth J noted in *Socrates Training Limited v The Law Society of England and Wales* [2016] CAT 10, the fast-track procedure reflects important policy objectives concerning the access of small and medium enterprises to justice:

> "3. The policy behind the FTP was explained in the Government White Paper of January 2013, Private Actions in Competition Law (see paragraph 4.22 and following). It is a procedure particularly designed to help small and medium sized enterprises ("SMEs") to obtain access to justice in an appropriate case. That reflects a view widely expressed in the prior consultation that the cost and complexity of competition actions deter smaller companies from pursuing their rights, particularly as regards injunctive relief. I believe that it is inherent in a claim where the main remedy is an injunction that the opportunities for outside funding are more limited, since the successful outcome will not produce a large sum of damages from which the funder may be rewarded."

10. Indeed, the potential for a small enterprise to bring a claim in the Tribunal to restrain anti-competitive behaviour may be the only viable recourse that entity has in practice, given the necessary prioritisation which the Competition and Markets Authority operates under, which means that it is often unable to intervene in cases such as this. It

is therefore necessary that the Tribunal should be a viable recourse, rather than just a notional one.

11. It is also necessary that defendants are not targeted by claimants with unmeritorious claims who are seeking unfairly to use the Tribunal's processes to extract settlements. After considering the costs estimates put forward by both parties in *Socrates*, Roth J went on to say:

> "14. However, that is still an enormous potential liability to face a small company if it is to bring a case which cannot be dismissed as fanciful. In my view, the measure of cost capping under the FTP is not to be approached as a form of ex ante standard assessment. In particular, where parties are of very disparate means, it is important that those costs strike a fair balance between enabling access to justice for the claimant and providing a measure of protection to the defendant not only from unmeritorious claims but also from the burden of having to defend a claim which it is assumed for this purpose proves to be unfounded. That may mean that in some cases the amount is not the sum required to achieve justice only for the receiving party, but a limited contribution to that party's costs.
>
> 15 There is no magic formula which produces an objectively "correct" figure. I have regard to the various factors which I have mentioned, including the fact that the claimant itself is prepared to spend over £200,000 on this claim. And, as I have said, I fully recognise that this case raises some important issues of policy for the Law Society in the way that it provides commercial services."

12. I respectfully agree with Roth J's observations. It is necessary to take into account both the interests of the Claimant in obtaining access to justice and the interests of the Defendant in having a degree of protection from unmeritorious claims and the burden of defending a case for which it cannot (if successful) recover its costs. In seeking to strike that balance, the likely level of costs which might reasonably be incurred by the Defendant (and therefore the likely level of costs which may be recovered on a standard assessment) is an important reference point, but by no means the determining factor.

13. This is a case where the primary remedy sought is injunctive relief (although the Claimant has subsequently amended its claim to seek material damages).The Claimant acknowledges that it could meet a costs order for £100,000. Its most recently filed accounts (for the year ended 31 December 2022) show net current assets of £350,396 (down from £951,659 in the previous year). It is difficult to draw any significant conclusion from that about the ability of the Claimant to meet an award of costs greater than £100,000, but it is clear that the Claimant does have limited financial resources to meet six figure costs awards.

14. As far as the Defendant is concerned, it is of course limited not just by what costs it can recover in a standard assessment, but also by the ability of the Claimant to pay. It is part of the Defendant's case that the Claimant's credit position is a matter of concern (in relation to the question of the counterfactual and the entitlement of the Claimant to injunctive relief).

15. As Roth J said, there is no magic formula. In my judgment, the objective is to ensure that there remains a measure of costs sanction for the Claimant that discourages it from pursuing unmeritorious points, and in order to provide a measure of protection for the Defendant, while at the same time avoiding setting a level of exposure that forces the Claimant to withdraw the claim simply because of its limited financial resources.

16. I have therefore concluded that the correct figure at which to cap the recoverable costs in relation to Trial 1 is £150,000.

17. There is one further point which arises from the fact that the Claimant is unrepresented. The Defendant submits that the Claimant's approach to the litigation is causing unnecessary costs to be incurred. In some respects, this is an inevitable consequence of litigating against an unrepresented party, who cannot be expected to conduct matters as efficiently as an experienced practitioner before the Tribunal. It is not appropriate for such a litigant to be penalised for the fact of being unrepresented. That would be inconsistent with the policy approach I have described above, and the long traditions in the UK of access to the courts more generally.

18. It is however incumbent on both parties, at all times, to engage cooperatively and efficiently in the conduct of these proceedings to ensure that no more costs are incurred by either party than necessary. The Tribunal may make further orders regarding costs if it considers that is warranted by the behaviour of either party.

Ben Tidswell Made: 20 February 2024

Chair of the Competition Appeal Tribunal Drawn: 20 February 2024