Neutral citation [2005] CAT 31

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1049/4/1/05

Victoria House
Bloomsbury Place
London WC1A 2EB

8 September 2005

Before:

Sir Christopher Bellamy (President)
Professor Paul Stoneman
Mr Graham Mather

Sitting as a Tribunal in England and Wales

BETWEEN:

UNICHEM LIMITED

Applicant

-v-

THE OFFICE OF FAIR TRADING

Respondent

supported by

PHOENIX HEALTHCARE DISTRIBUTION LIMITED

Intervener

Nicholas Green QC and Maya Lester (instructed by Allen & Overy LLP) represented the Applicant

Peter Roth QC and Daniel Beard (instructed by the Treasury Solicitor) represented the Respondent

Kelyn Bacon (instructed by CMS Cameron McKenna) represented the Intervener

JUDGMENT: COSTS

1. On 1 April 2005, the Tribunal granted an application under section 120 of the Enterprise Act 2002 (the "Act") made by UniChem Limited ("UniChem") on 19 January 2004, to set aside a decision (the "Decision") by the Office of Fair Trading (the "OFT"), under section 33 of the Act not to make a reference to the Competition Commission of the anticipated acquisition by Phoenix Healthcare Distribution Limited ("Phoenix") of East Anglian Pharmaceuticals Limited ("EAP"). The application was the second application which has been made to the Tribunal under section 120 of the Act, the first being an application brought by IBA Health Limited which was granted by the Tribunal on 12 December 2003, *IBA Health Limited v Office of Fair Trading* [2003] CAT 27.

2. On 19 April 2005, UniChem lodged with the Tribunal an application for an order, under Rule 55 of the Competition Appeal Tribunal Rules (SI 2003 no. 1372) that the OFT pay 85-90% of the costs incurred by it in respect of its application for review of the OFT's Decision and that the intervener, Phoenix pay 10-15% of such costs. According to UniChem's revised statement of costs, its total costs were £365,084.17.

The parties' submissions

3. UniChem submits that the principles to be applied in determining costs applications of this kind are set out in the Tribunal's judgment in *IBA Health: (Costs)* [2004] CAT 6. According to UniChem, there are no explicit rules as to costs before the Tribunal and the Tribunal has a broad discretion, to be exercised in the particular circumstances of each case. UniChem identifies the following factors to be relevant to the exercise of the Tribunal's discretion: (i) success; (ii) how much the applicant has succeeded on the basis of new material only available subsequent to the Decision; (iii) the relevance of submissions; and (iv) the reasonableness of an applicant's conduct.

4. UniChem submits that it succeeded in all material parts of its case, that its conduct was reasonable throughout and that its resources were devoted to submitting concise evidence on relevant issues. In particular, UniChem considers that the Tribunal accepted its consistent, central argument that the question of UniChem's ability to exercise a competitive constraint on the merged entity was a material issue in the

Decision, that the evidence on which the OFT relied was inadequate to support its conclusions and that UniChem should have been given an opportunity to comment. UniChem succeeded in convincing the Tribunal that the Decision should therefore be overturned.

5. Furthermore, to a very significant extent, UniChem considers that its success was based on new material introduced after the Decision, including the lengthy witness statements prepared by the OFT and submitted to the Tribunal in support of the OFT's defence and the issues letters and internal assessments disclosed by the OFT during the course of the procedure before the Tribunal. Any change of emphasis in UniChem's case can be attributed to the fact that UniChem had not previously been given access to this material and to the tight timescales involved. The only ground of review set out in UniChem's notice of application which was not pursued by UniChem at the hearing related to the significance of the OFT's previous decisions, and even this ground was not fully abandoned.

6. UniChem considers that its costs were necessary and proportionate in successfully quashing the OFT's Decision. UniChem submits that approximately 15% of its total costs were incurred in dealing with the issues raised by Phoenix' intervention.

7. The OFT's primary submission is that, in light of the principles set out by the Tribunal in *IBA Health: (Costs)*, no costs order should be made in this case. The OFT submits that if the Tribunal's discretion to award costs is used too readily in cases under section 120 of the Act this may jeopardise the proper functioning of the merger control system provided for in statute.

8. Furthermore, the OFT submits that in its judgment the Tribunal referred to the fact that the OFT had carried out a full investigation, carefully and professionally, and agreed with many of the OFT's findings. The considerations involved in the remission of the case to the OFT were finely balanced.

9. According to the OFT, the applicant either did not pursue, or did not succeed, on a number of the issues raised in its application. The OFT submits that the applicant succeeded on only very limited grounds and surmises that a very large part of the

preparation time and cost incurred by the applicant must be attributed to matters upon which the applicant was not successful. In particular, according to the OFT, the evidence produced and relied on by the appellant given by Mr Baker and Mr Johnson attempted, in part, to revise or amend evidence already given to the OFT.

10. The OFT submits that if, contrary to its primary submissions, an order for costs is made, that order should be limited to no more than 25% of the appellant's reasonable costs.

11. The OFT submits that, in any event, the costs claimed by the applicant in relation to a two day hearing of a judicial review application are excessive. The OFT considers, in particular that: (i) excessive time appears to be charged by the applicant's solicitors and that the hourly rates involved are significantly higher than the guideline summary assessment rate for the City of London; (ii) counsels' fees claimed are significantly higher than those incurred by the OFT; and (iii) the fees charged by RBB Economics are excessive and a bill for 150 hours of work by RBB is hard to justify given that they were well versed in the background to the case, having submitted several reports to the OFT. The OFT itself only incurred approximately £95,000 of costs in defending the application, which included the preparation of a long and detailed witness statement.

12. For its part, Phoenix broadly agrees with UniChem's statement of the Tribunal's approach to costs, based on *IBA Health: (Costs).* It considers however that the judgment of the Court of Appeal in *Clarke v Devon County Council,* [2005] EWCA Civ 266, adds further weight to the suggestion that the Tribunal should take into account, in making a costs order, the extent to which the appellant succeeded on specific issues. Phoenix also considers that the Tribunal's jurisdiction to award costs against interveners should be exercised with caution, particularly so as to not deter small companies from intervening in cases before the Tribunal. On the basis of these principles, Phoenix considers that no order for costs should be made in this case. In particular, Phoenix submits that UniChem substantially changed its case between the notice of application and its oral submissions and was only partially successful in relations to those parts of its case which it did pursue. In relation to many of the points argued by UniChem, the Tribunal found that the conclusions of the OFT were either correct or within the bounds of reasonableness. Phoenix also considers that to award

costs against Phoenix, which was the only party able to provide primary factual information on a number of issues in the proceedings, would deter intervention in future merger cases by the merging parties. Phoenix endeavoured not to repeat the submissions made by the OFT in its submissions. If any costs order is made against it, it should be no more than 5-10% of UniChem's costs.

The Tribunal's analysis

13. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Competition Appeal Tribunal Rules SI 2003 No. 1372 (the "Tribunal's Rules") which provides as follows:

> "55. (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales …
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
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> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) or may direct that it be assessed by the President, a chairman or the Registrar or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court …"

14. The Tribunal has considered one previous application for costs following an application for review under section 120 of the 2002 Act, in the case of *IBA Health*. In that case the Tribunal quashed the OFT's decision and awarded the applicant the costs of its application to be paid 82.5% by the OFT and 17.5% by the parties seeking to merge who had intervened before the Tribunal.

15. The Tribunal made clear in *IBA Health: (Costs)* that whether costs will be awarded in a case will depend on the particular circumstances of that case. A number of different factors will be taken into account in assessing whether costs should be awarded:

> "39. In cases under the 2002 Act where it is the OFT which is unsuccessful we consider that, as in the case of appeals under the 1998 Act, there can be no general principle that if the OFT loses it should be liable to pay costs to a

private party only if it has been guilty of a manifest error or unreasonable behaviour.

…

42. ... Many factors may be relevant to the question of what, if any, order for costs should be made. Such factors may include whether the applicant has succeeded to a significant extent on the basis of new material introduced after the OFT's decision, whether resources have been devoted to particular issues on which the appellant has not succeeded, or which were not germane to the solution of the case, whether there is unnecessary duplication or prolixity, whether evidence adduced is of peripheral relevance, or whether, in whatever respect, the conduct of the successful party has been unreasonable: see *GISC: costs* at [60]."

16. The Tribunal recognises that there may be a danger that applications under section 120 of the 2002 Act may be used a "spoiling tactic" by third parties in merger cases who seek to gain some commercial advantage by using an application to the Tribunal as a means to delay the completion of a merger involving competitor undertakings. The Tribunal also takes into account that the OFT is often working within tight timetables when dealing with merger cases. The concern not to expose a public authority to undue financial risk in such a situation was noted by the Tribunal in *IBA Health (Costs)*:

> "40. The Tribunal also recognises, however, that the system of statutory appeals under the 2002 Act may not function properly if public authorities are not encouraged to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged: see *Bradford Metropolitan District Council v Booth* 164 JP 485 (10 May 2000), cited in *GISC*: costs at [43], [44] and [56]."

17. However, in general terms, the Tribunal considers that the application of the principles set out in *IBA Health: (Costs)* will normally result in a successful party being awarded at least a proportion of its costs in Section 120 cases.

18. In its notice of application, UniChem relied on four grounds of review:

> "Ground 1: The OFT's decision that it was not under a duty to refer the proposed merger to the CC was irrational and unjustified and/or a misconstruction or mis-application of its duty under section 33.

Ground 2: The OFT's reasons for not referring the merger to the CC were insufficient to justify the Decision, and did not dispel the serious likelihood of a substantial lessening of competition.

Ground 3: There are a number of unresolved issues of material fact outstanding. In those circumstances the OFT erred in deciding not to refer to the CC. Further, the OFT acted irrationally or unreasonably in purporting to resolve those issues in the way it did.

Ground 4: The OFT failed to take adequate account of its previous decisions, and in doing so breached its duties to act consistently, to take into account relevant considerations, to uphold legitimate expectations, and to give adequate reasons for its decisions."

19. In this particular case, although there is some force in the OFT's point that the grounds of review changed somewhat between the original notice of appeal and the case as pleaded in oral submissions before the Tribunal, UniChem necessarily had to prepare its notice of application within a strict deadline and without access to the documents subsequently disclosed by the OFT during the course of proceedings nor to the additional evidence produced by the OFT. In particular, only before the Tribunal did UniChem have the benefit of the detailed witness statement of Mr Priddis and other supporting documents which explained the procedure followed by the OFT in reaching its Decision, and the reasons for its Decision, much more fully than the Decision published on the OFT's website. The Tribunal considers that it is likely to be inevitable, in appeals brought by third parties, that the focus of the applicant's case before the Tribunal will develop over time as additional information comes to light.

20. At the hearing, UniChem relied principally on the first three of the grounds of review set out in its notice of application, in a somewhat more developed form, and on the fact that the OFT had failed to follow a proper procedure in failing to give UniChem an opportunity to comment on the issues letter and in failing to verify supposed "facts" about UniChem's business with UniChem.

21. UniChem submits that it succeeded before the Tribunal on its consistent central argument as to the quality of the evidence relied upon by the OFT to establish facts about UniChem which were material to its decision. UniChem also considers that it succeeded on both grounds 2 and 3 and that it partially succeeded on ground 1. The OFT considers that the Tribunal's decision rested only on the third ground pleaded by UniChem in its notice of application, and that even there, the Tribunal did not accept all of UniChem's points.

22. In our view, UniChem did succeed in its arguments under ground 3 as to the OFT's failure to sufficiently establish an issue of material fact on which it relied in coming to its decision. The OFT relied on evidence provided by Phoenix and EAP about UniChem's ability to compete but did not give UniChem an opportunity to comment directly on that evidence. The Tribunal found in its judgment:

> "176.… the central difficulty that arises in these proceedings is that the OFT purported to make findings of primary fact about the logistics and economics of UniChem's distribution system, UniChem's past pattern of success in East Anglia, and UniChem's service levels, on the basis of information supplied largely by the merging parties, without checking certain facts with UniChem or discussing with UniChem the inferences about UniChem which the OFT was minded to draw from the material supplied by the merging parties.
>
> 177. UniChem now disputes many of the facts relied on by the OFT. In our view, it is impossible to say, in the context of judicial review, that UniChem's points are not material to the OFT's reasoning in the Decision or are without substance. Nor is the Tribunal able, in the context of a review, to resolve disputed issues of fact. To adopt that approach, in our view, would be to substitute ourselves for the decision maker. It follows that we see no alternative but to remit this matter to the OFT to enable a new decision to be adopted."

23. It is not the case however, that the Tribunal agreed with all of the arguments put forward by UniChem. Ultimately, the Tribunal noted that its judgment in this case was very finely balanced:

> "176. In our view there is no doubt that the OFT conducted a full investigation in this case and considered carefully and professionally a large number of relevant issues. On many points the OFT's conclusions are either undisputed or within the bounds of reasonableness, as we show below….
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> 277. In all those circumstances, in our view the considerations before us are finely balanced indeed. The situation in which the Tribunal finds itself is that while much of the Decision is in our view soundly based, we are constrained to hold: (1) that certain material matters relied on in the Decision are insufficiently supported by the evidence; (2) as a result, we are not in a position to be satisfied that all material considerations have been taken into account; and (3) that there in any event has been a material failure of procedure.

> 278. While it is strongly arguable that the uncontested matters to which we have referred above support the conclusion that the OFT's Decision remained within the bounds of reasonableness, in our view it is difficult to overlook the contested matters of fact raised by UniChem which are material to the OFT's reasoning. In our judgment, in the final analysis, the OFT did not know enough about the reach and logistics of UniChem's network and the economics of delivery routeing to have an adequate factual basis for its Decision. In addition, we regard the OFT's omission to seek comments from UniChem on those matters, and on the other matters we have mentioned above, as being of decisive importance."

24. It does appear to the Tribunal that substantial parts of the written and oral submissions made by UniChem did not focus on those points in respect of which the Tribunal ultimately accepted UniChem's arguments. In effect, UniChem succeeded mainly on one ground (Ground 3) of the four grounds originally advanced, affecting four paragraphs out of a 50-paragraph decision. As the Tribunal said at paragraph 278 of the judgment, much of the contested Decision was soundly based: see paragraphs 273 to 276. We specifically upheld various findings by the OFT at e.g. paragraphs 189, 190, 192, 193, 203, 204 and 258-9.

25. In the circumstances of this case it appears to the Tribunal that UniChem should recover some of its costs of the application. However where an applicant has succeeded on only limited grounds, in a finely balanced case, it would not be appropriate to make an award to cover all of its costs. In our view, on a broad brush basis, UniChem should recover half its costs reasonably and proportionately incurred, as assessed, excluding the costs incurred wholly or mainly as a result of Phoenix's intervention.

26. In that regard, the OFT has also challenged the level of costs claimed by UniChem in bringing its application, which the OFT describes as "wholly excessive". While the Tribunal appreciates that it may be difficult to draw a direct comparison between the costs of bringing an application to the Tribunal and the costs incurred by a public body in defending the application, it appears to the Tribunal that the OFT's submissions as to the level of costs claimed in this case do merit further consideration.

27. While it is, necessarily, open to a company which chooses to make an application to the Tribunal to assemble a legal team and to present its case in the manner it sees fit, and to incur any costs which it considers appropriate in doing so, it does not necessarily follow that the respondent, (or indeed any other party) against whom an order for costs is made should necessarily be liable for the full extent of those costs. A successful applicant is entitled to no more than reasonable and proportionate costs.

28. In this case UniChem has claimed for 708 hours of solicitors' time, including apparently 650 hours of preparation. The principal partner has billed a total of some 241 hours, including 157 hours on "Documents" at £454.50 per hour. According to the OFT, the City of London guideline rate is £359 per hour. An associate has billed 188 hours, including 112 hours on "Documents" at £301.50 per hour. A second associate has billed 143 hours at £279.00 per hour including 90 hours on "Documents". Other elements of solicitors' costs include a Senior Associate, trainees, and paralegals. Counsel's fees for leading and junior counsel came to some £107,000 and expert's fees some £30,000.

29. In this case: (i) only one round of formal pleadings was filed with the Tribunal; (ii) less than one month elapsed between the receipt of the notice of application and the hearing of the case; (iii) the hearing took place over only two days; (iv) no lengthy discovery of documents or complex interlocutory proceedings were involved; and (v) key members of the legal team involved and the experts who produced evidence for the Tribunal, were already familiar with the background to the case, having made previous submissions to the OFT on similar issues in this case, and indeed in previous merger cases involving EAP.

30. On an assessment of costs, in our view the questions that arise include the questions whether:

    (a) an apparent total of some 650 hours of solicitors' preparation time, in relation to a notice of application of some 25 pages, supported by annexes contained in one lever-arch file, and apparently drafted by counsel to a material extent, is reasonable and proportionate;

(b) a total of some 241 hours of partner's time, charged at a rate that is said to be above the recommended rate for the City of London, is reasonable and proportionate, both as regards time and amount;

(c) whether within preparation time, a total of some 473 hours of solicitors' time on "Documents", not further particularised, in a case which involved very few documents, is reasonable and proportionate;

(d) whether the time spent by the partner and associates involved some duplication or overlap with the work of counsel, as the OFT submits;

(e) whether counsel's fees are unreasonably high, for example when compared to the fees incurred by the respondent;

(f) whether the experts' fees are disproportionate, bearing in mind that the experts' work was apparently confined to Mr Baker's witness statement of 11 February 2005; and

(g) whether the schedule of costs relates to work done in connection with the OFT investigation, rather than in connection with the proceedings before the Tribunal, and/or whether work has been duplicated in relation to these two phases.

31. In those circumstances, and bearing in mind that the issue of costs in section 120 cases is likely to arise in the future, UniChem is invited within 28 days: (i) to supply the Tribunal with a more detailed schedule supporting the amounts claimed, identifying the dates when the work was done and the nature of the work; (ii) to make any submissions it wishes in support of the items claimed, in the light of the questions raised by the Tribunal; (iii) to indicate to the Tribunal whether it wishes the costs to be subject to assessment by the Tribunal or by a costs judge; and (iv) to indicate in more detail which part of its costs relate wholly or mainly to Phoenix's intervention. The Tribunal will thereafter invite the comments of the OFT, and if necessary hold a hearing.

32. As regards the position of Phoenix, the Tribunal considers that its intervention was helpful in clarifying the evidence in the case and the factual issues which were in dispute as between Phoenix and UniChem. When the Tribunal is requested by a third party to review the legality of a merger decision taken by the OFT it will often be the case that the merging parties are in a position to provide useful evidence to the Tribunal, and the Tribunal would not wish to deter merging parties from intervening in such circumstances. In this particular case, Phoenix's intervention was conducted in a restrained and reasonable manner and the outcome of the case and the remission of the Decision to the OFT did not result from any failing on the part of Phoenix. The Tribunal does not therefore consider that it would be appropriate to make a costs order against Phoenix in this case. The Tribunal's final order will reflect the fact that the costs to be recovered by UniChem should not include the costs incurred wholly or mainly by reason of Phoenix's intervention.

Christopher Bellamy Graham Mather Paul Stoneman

Charles Dhanowa September 2005
Registrar