Neutral citation [2007] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case No:1058/2/4/06

Victoria House
Bloomsbury Place
London WC1A 2EB

4 April 2007

Before:

Marion Simmons QC (Chairman)
Ann Kelly
Michael Blair QC

Sitting as a Tribunal in England and Wales

BETWEEN:

INDEPENDENT WATER COMPANY LIMITED

Appellant

supported by

ALBION WATER LIMITED

Intervener

-v-

WATER SERVICES REGULATION AUTHORITY

Respondent

supported by

BRISTOL WATER Plc

Intervener

Mr Edward Mercer (of Messrs Taylor Wessing) represented the appellant.

Mr George Peretz and Miss Valentina Sloane (instructed by Head of Legal Services, Ofwat) represented the respondent.

JUDGMENT

Background

1. By a judgment dated 26 January 2007, [2007] CAT 6, the Tribunal unanimously decided that the appeal by Independent Water Company Limited ("IWC") was inadmissible in that the Water Services Regulation Authority (the "Authority") had not made a decision falling within the jurisdiction of the Tribunal. The Tribunal also held that the appeal in relation to interim measures was not contained in the notice of appeal and that there were no exceptional circumstances such as to justify permission to amend the Notice of Appeal under Rule 11 of the Competition Appeal Tribunal Rules 2003, SI 2003 No. 1372 ("the Tribunal Rules").

2. On 23 March 2006 an application for a "pre-emptive costs order" was made by IWC. The application was for an order that the Authority should pay IWC's costs of the appeal on a "come what may – win or lose" basis.

3. On 9 May 2006 IWC made a new application in which it sought protection form any award of costs which might be made against it in relation to the hearing on admissibility. In the event, that application was not heard at the hearing on 9 June 2006 as, by that stage, all relevant costs had been incurred.

4. By an application dated 2 February 2007, the Authority applies for its reasonable costs of defending the appeal, together with its costs of dealing with IWC's unsuccessful applications for protective costs orders, such costs to be subject to detailed assessment by the Tribunal if not agreed.

5. In its submissions dated 9 February 2007, IWC opposes the Authority's application for costs and invites the Tribunal to order that each of the parties should bear its own costs.

6. The Tribunal has dealt with this application on the basis of the written submissions made by the parties.

The Authority's submissions

7. The Authority submits that its costs are as follows:

George Peretz	121.25 hours at £100 an hour	£12,125
Valentina Sloane	76.5 hours at £80 per hour	£ 6,120
Plus VAT		£ 3,192.88
Sub-total		£21,437.88
Internal legal costs	39.35 hours	£ 2,418
Total costs incurred		**£23,855.88**

Of these costs the Authority submits that the following costs (which exclude VAT) are attributable to the costs applications by IWC:

George Peretz	14.25 hours at £100 per hour	£ 1,425
Valentina Sloane	11 hours at £80 per hour	£ 880

The Authority does not claim any internal legal costs in respect of the costs applications by IWC.

8. The Authority submits that the Tribunal has a wide discretion to award costs pursuant to rule 55 of the Tribunal's Rules. While there is no general or rigid rule to the effect that losing parties should normally be liable for the other side's costs, the Authority submits that the Tribunal has developed the practice of awarding costs to the successful party in admissibility decisions and refers to the following: *BetterCare Group Limited v Director General of Fair Trading*, transcript of hearing for final judgment of 1 August 2002; *Freeserve.com PLC v Director General of Telecommunications*, judgment on costs [2003] CAT 6; *Pernod-Ricard SA and Campbell Distillers Limited v Office of Fair Trading* ruling (disposal of proceedings and costs) [2005] CAT 9; *Claymore Dairies Limited and Arla Foods UK PLC v Office of Fair Trading*, judgment on expenses [2005] CAT 33. The

Authority submits that in those cases, the Tribunal considered it material that the losing party has lost on all its principal arguments (see, for example, *Claymore* at paragraph 36) and that the outcome of the admissibility hearing was foreseeable in the light of the Tribunal's case law (see, for example, *Freeserve* at pages 9-10 and. *Claymore* at paragraph 37).

9. The Authority cites *Aquavitae (UK) Limited v Director General of Water Services* [2003] CAT 23 as an exception to the Tribunal's practice and submits that in that case the Tribunal considered the following factors material: Aquavitae's argument failed "by a narrow margin" and due to the "exceptional circumstances" prevailing in the case (paragraph 22); that the Tribunal could understand why, in the circumstances of that case, Aquavitae should feel a sense of grievance that its complaint had not been considered on the merits, as the Director had said it would (paragraphs 23-24); and that there was from the outset a degree of ambiguity about the meaning and status of the Director's letters, which was resolved only by the process of disclosure during the course of the proceedings (paragraph 25). In the Authority's submission it was in the light of those factors that the Tribunal considered it reasonable for Aquavitae to come to the Tribunal to have the status of the Director's letters investigated and the ambiguities resolved.

10. The Authority further submits that, while the Tribunal commented in *Aquavitae* that potential new entrants which do not appear to command substantial financial resources, are liable to be deterred from bringing appeals if the Tribunal were regularly to order that such appellants should normally be liable for the Director's costs as well as their own (paragraph 31), that cannot sensibly be extended into a rule that impecunious appellants should be entitled to bring plainly inadmissible or otherwise unfounded appeals risk-free, at the expense, ultimately, of taxpayers or, in this case, of the consumers of water and sewerage services. The Authority submits that this is particularly so where the appellant is not a public interest body such as (to take examples that have occurred in this Tribunal) a consumer representative body or environmental organisation, but is rather a private company with a commercial interest in bringing the action.

11. The Authority submits that this is a case in which the Authority was wholly successful in its arguments and in which it was foreseeable that the appeal would be dismissed as inadmissible. The Authority submits that it was plain from the correspondence available to IWC at the time of lodging the appeal that the Authority had abstained from expressing a view, one way or the other, on the question whether there had been an infringement of the Chapter II prohibition. The Authority submits that that correspondence was clear and detailed in the explanations given to IWC and that no disclosure was necessary in the proceedings in order to elucidate that correspondence. The Authority refers to the Tribunal's observations at paragraph 178 of the judgment that this case was "clearly distinguishable" from *Claymore*.

12. The Authority submits that it would be contrary to the public interest for an asymmetrical practice to develop whereby the regulator does not recover its costs if successful, but must pay the other side's costs if unsuccessful.

13. The Authority submits that it made strenuous efforts to avoid substantial legal costs (on all sides) from being wasted in an ill-founded appeal. It refers to its letter dated 19 January 2006, written three days after the Notice of Appeal was served, to the Tribunal and to IWC in which it pointed out that the appeal was inadmissible and that IWC's challenge should properly be brought by way of judicial review. In that letter the Authority explained in considerable detail the relevant case law on admissibility and its application to the correspondence in this case. The letter drew to IWC's attention that proceeding with the appeal "would involve a waste of public money and of the resources of the Director and his staff".

14. The Authority submits that at the inception of the proceedings IWC was plainly put on notice of the points that would be taken against it and had at that point an essentially "costs free" opportunity to seek to withdraw the proceedings and (if it so wished) to pursue its aims by alternative means. The Authority submits that IWC could at that stage have sought to bring judicial review proceedings, confident in the knowledge that the Authority would not be suggesting that it should have brought proceedings in this Tribunal. Despite this opportunity, the Authority submits that IWC, with the knowledge of the possible costs consequences of its

decision, elected to continue the present proceedings, and moreover continued to do so after the point at which it became represented by solicitors with expertise in the relevant law and able to give it specialist legal advice on the strength of its case. The Authority submits that it is evident from its application for a pre-emptive costs order (on 23 March 2006), and by asking that the Authority pay IWC's costs whatever the outcome, and then for a protective costs order (on 9 May 2006), seeking protection from an award of costs which might be made against it in relation to the hearing on admissibility, that IWC was fully aware of the potential costs consequences of its decision.

15. The Authority submits that there is an important public interest, that should be recognised through the mechanism of the Tribunal's costs jurisdiction, in prospective parties making efforts to avoid unnecessary litigation and in deterring unmeritorious appeals, particularly where the appellant has been put on notice at an early stage that its appeal is unfounded and is well aware of the risk it faces in costs if it proceeds. The Authority submits that it would be contrary to the public interest for appellants to be effectively entitled to bring unmeritorious appeals risk-free, at a cost to public resources (whether ultimately "borne by the taxpayer or, as in this case, the consumers of water and sewerage services") which cannot be dismissed as negligible.

IWC's costs applications

The first application for a pre-emptive costs order made on 23 March 2006

16. The Authority refers to its letter of 17 March 2006 in which the Authority pointed out that IWC had failed to provide evidence of its financial position which would be necessary to support its application and that the application went entirely against the Court of Appeal's decision in the case of *Corner House v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. At the case management conference on 6 April 2006, the Authority was prepared to deal with the application which IWC sought to make. However, despite the Authority's letter, IWC failed to produce the evidence necessary to support its application and so the hearing had to be aborted.

In that regard the Authority refers the Tribunal to lines 26-29 of page 6 of transcript of the case management conference of 6 April 2006, where the Chairman states:

> "We are still not in a position today to be able to deal with the costs application because we have not got the material on which we can be satisfied in relation to the funding. So we have not got to the first hurdle effectively to persuade us that we need to look at this and that there is not any other means of financing this."

17. The Authority submits that the first application was effectively abandoned by IWC when it made an "amended" application on 9 May 2006. The Authority submits that as the first application was not reasonably brought or pursued by IWC, there is no good reason why IWC should escape the costs consequences of the Authority having had to defend it.

18. The Authority submits that the costs of the abortive application at the 6 April case management conference should be borne by IWC in any event.

The amended application for costs made on 9 May 2006

19. The Authority refers to its written submissions filed on 26 May 2006 in which it set out why IWC's application was ill-founded and, at paragraph 34, puts IWC on notice that it was seeking its costs of having to defend the application. Since IWC did not withdraw the application, the Authority submits that it incurred time and expense preparing to deal with it at the combined admissibility and costs application hearing on 9 June 2006. In the event IWC did not pursue its application at that hearing since all relevant costs had been incurred.

20. In those circumstances the Authority submits that there is no good reason why IWC should be entitled to pursue that costs application risk free. The Authority submit that IWC could have abandoned its application prior to the hearing but chose not to do so, causing the Authority to expend public resources preparing to address it. The Authority submits that it should be able to recover these costs in accordance with the principle set out by the Court of Appeal in *Corner House.*

21. The Authority submits that, excluding VAT, its costs of dealing with both the application at the 6 April case management conference and the application at the hearing on 26 May 2006 fell below £2,500 (the sum regarded by the Court of Appeal as reasonable).

22. The Authority submits that IWC's alleged impecuniosity (which the Authority does not admit) has a bearing on the issue of enforcement, not on the Authority's entitlement to recover its costs.

IWC's submissions

23. IWC submits that the Authority's application for costs is fundamentally misconceived and that the appropriate order on costs in the instant case is that the parties should bear their own costs. In IWC's submission, this was not a case the outcome of which was foreseeable from the start, it required full argument, and the Tribunal's judgment is based on an extensive examination of a complex factual background. In that regard, IWC submits that even for the Authority the present case required extensive work reaching nearly two hundred hours by two specialist Counsel as is indicated by the schedule of costs. IWC relies on the statement of the President at the case management conference on the 20 February 2006 that "this is a matter that is going to need to be argued" (page 2 of transcript) and that it was "very important for us that both sides of the argument are fairly presented, and fully presented."

24. IWC submits that the Authority's submission that it is the settled practice of the Tribunal to award costs to the successful party in admissibility decisions is also misconceived. IWC notes that in each of the cases on which the Authority seeks to rely the relevant award of costs was against the relevant public body and not the appellant in question: *BetterCare, Freeserve, Pernod-Ricard,* and *Claymore*. In IWC's submission, separate considerations and a broader view of the public interest would be required for any award against an appellant in respect of an admissibility decision. IWC submits that there is no reason in the present case to divert from the normal considerations that those without resources should not have costs awarded

against them so as not to discourage other such appellants in future cases from appealing.

25. IWC submits that, in general, it is inappropriate for an authority to make an application for costs when the authority itself appears openly to concede, as is the present case, that any order for costs will not be enforced.

26. IWC is concerned that the Authority may be seeking to make an example of it so as to deter other potential market entrants from contesting decisions (or as in this case conduct which a potential market entrant perceived to be a decision) before the Tribunal. In any event, IWC submits that, if the Tribunal were to make an order for costs against it, there is a real risk that an adverse signal would be sent to those in the marketplace by the Authority's application for costs.

27. IWC submits that it was encouraged at the first case management conference to examine seeking a pre-emptive costs order and accordingly it should not face liability for pursuing such an application.

28. IWC submits that the appropriate order on costs should be that the parties should bear their own costs.

The Tribunal's Analysis

29. The Tribunal's jurisdiction to award costs is set out in Rule 55 of the Tribunal's Rules:

> " – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session, or the Supreme Court of Northern Ireland
>
> (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.
>
> (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 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) above 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 or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session".

30. Rule 55 gives the Tribunal a wide discretion as to costs. The Tribunal has stated that each case will depend on its particular facts and circumstances. The wide discretion which the Tribunal has under rule 55 is designed to enable the Tribunal to deal with cases justly.

31. The Authority submits that a practice has developed to award costs to the successful party in admissibility decisions. Although in all the cases cited by the Authority: *BetterCare*, *Freeserve*, *Pernod-Ricard*, *Claymore*, the appellant was awarded its costs, it is important to ascertain the Tribunal's reasons for these awards.

32. In *BetterCare* the Tribunal in awarding costs to the appellant stated that it did so since the appellant had to come to the Tribunal to establish that indeed there was a decision.

33. In *Freeserve* although the Director had in correspondence denied that there was an admissible decision, in the course of the proceedings it was conceded by the Director that at least in relation to one issue there was an appealable decision within the meaning of s 46 [31]. It was the Tribunal's view in that case that it was virtually inevitable that the Tribunal would come to the view that the remainder of the Director's decision in that case was an appealable decision. In those particular circumstances, which the Tribunal expressly stated were specific to the facts of that case, the Tribunal concluded that Freeserve should have its costs of the admissibility issue [32].

34. In *Pernod-Ricard*, the Tribunal stated that its view on the costs issue was that the appellant succeeded on the admissibility issue before the Tribunal and consistently with the Tribunal's judgments in *Bettercare*, and *Freeserve*, the appellant should have its costs on the part of the admissibility issue on which it succeeded [13].

35. In *Claymore* the Tribunal awarded Claymore its costs. The Tribunal expressed its reasons as follows:

> "36. …The OFT lost on all of its principal arguments. Moreover, we found, in our judgment on admissibility, that the OFT had attempted to evade the application of the Tribunal's judgment on admissibility in *BetterCare*. It was only at the hearing to determine the admissibility of the appeal that the OFT conceded, through counsel, that the reason for the Decision was that there was insufficient evidence of infringement: see *Claymore Dairies v Director General of Fair Trading (Admissibility)* [2003] CAT 3 at [128] to [131].
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> 37. As in *Freeserve*, cited above, we consider that in the light of *BetterCare* it was foreseeable that the Tribunal would come to the conclusion that the decision to close the file in relation to Claymore's complaint would be held to be an appealable decision."

36. In all the above cases the Tribunal's reason for awarding costs to the appellant was that it was foreseeable from the outset that there was an admissible decision and yet the appellant had to come to the Tribunal to establish this.

37. In *Aquavitae* the Tribunal did not award costs to the Director notwithstanding that the Tribunal held the appeal to be inadmissible. The Tribunal indicated that the appeal was reasonably brought and that it was not self evident that the appeal was inadmissible. The Tribunal had indicated in its judgment on admissibility that although ultimately successful, there was force in the arguments on admissibility presented by Aquavitae. The Tribunal had made plain in that judgment that it was only the "exceptional circumstances" of that case, namely the introduction of primary legislation, which led the Tribunal to conclude that the case closure letter was not an appealable decision. The Tribunal stated:

> "30. The Director submits, finally, that "the appeal was dismissed in its entirety and involved considerable expense and time on the part of the Director." Those expenses, if not recovered in whole or in part from Aquavitae, must be borne instead by water customers as Ofwat's costs are recovered from licensed water companies, who in turn recover those costs from customers.
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> 31. As the Tribunal's previous judgments on costs set out at paragraphs [15] to [19] above explain, there is no general rule in appeals before the Tribunal under the 1998 Act that costs should be borne by the losing party. In the Tribunal's view, such a rule would run the serious risk of frustrating the objectives of the Act by deterring appeals by smaller companies, representative bodies and consumers, as the Tribunal made clear in *GISC costs* at paragraph 54. It seems to us that these policy considerations apply in cases

such as the present. In particular it seems to us that potential new entrants to regulated sectors, such as Aquavitae, which do not appear to command substantial financial resources, are liable to be deterred from bringing appeals if the Tribunal were regularly to order that such appellants should normally be liable for the Director's costs, as well as their own, in the absence of unreasonable conduct or some other exceptional factor.

32. We understand the Director's concern that in the end the costs that he incurs in such appeals have to be borne in one way or another by the industry and, ultimately, its customers. However, looked at more generally, the system of regulation in the water industry, as in other regulated sectors, exists to protect a wide range of different interests, including those of the general public. In our view, the system as a whole will function more effectively if complaints can be brought and the regulator's decision can be challenged on appeal, if necessary. The costs incurred in a case such as the present are minuscule by comparison with the total revenues of the water industry taken as a whole, whereas the burden of costs falling on a small complainant, acting reasonably, if unsuccessfully, is likely to be disproportionately heavy. We have already indicated that we consider this appeal was reasonably brought albeit not ultimately successful and in the particular circumstances of this case we consider that the Director's costs of the appeal should be regarded as part of the general costs of regulation in this sector."

38. The present case is not on all fours with *Aquavitae* since in that case it was only the introduction of primary legislation which led the Tribunal to conclude that there was not an appealable decision. However in considering whether costs are to be awarded against IWC the Tribunal takes into account the remarks of the Tribunal in *Aquavitae* contained in the paragraphs we cite above.

39. There is no presumption in this Tribunal that costs follow the event. The authorities cited above illustrate the considerations which the Tribunal has taken into account in exercising its discretion as to costs in previous cases.

40. In the present case the decision of the Tribunal that there was no appealable decision was based on its analysis of all the circumstances including the detailed documentation which was adduced in evidence before the Tribunal (see Judgment [30] to [78]; [160] to [171] and [178]). The Tribunal does not consider that this was a case where it was inevitable that the Tribunal would decide that there was no appealable decision. Accordingly the Tribunal does not consider that the appeal on the issue of admissibility was unreasonably brought or that the outcome of the appeal was foreseeable from the outset.

41. In all the circumstances the Tribunal concludes that the fair and just result in relation to costs on the issue of admissibility is that each party should bear its own costs.

Interim Measures

42. The considerations as to costs relevant to IWC's attempt to appeal in respect of interim measures are different from those which are relevant to the issue of admissibility. We refer to what we wrote at paragraph 191 of the Judgment. In those circumstances the Tribunal does consider that the Authority should be awarded its reasonable costs of meeting this aspect of the appeal. We have not been given any breakdown of these costs but taking a broad brush approach we estimate that about 8% of the costs can be reasonably attributed to this aspect. In arriving at this percentage we note that two counsel were instructed and we also note the hours which they devoted to the case. Having regard to the size and complexity of this case we consider that it would be disproportionate if IWC were required to pay for the total hours which the two counsel devoted to this case. Accordingly the Tribunal awards the Authority costs in the amount of £1,600 (excluding VAT).

Protective costs orders

43. As to the costs of the Authority in respect of the application for protective costs orders the Tribunal considers that the costs of the Authority should be paid by IWC. As is recorded in the Judgment [90] to [94] the Tribunal indicated at the case management conference on 6 April 2006 its preliminary view that the evidence relating to the application for a costs order was probably incomplete and did not provide the Tribunal with the material on which it could properly consider the application of the criteria relating to this area of the law. It was agreed at that case management conference that the issue of costs was to be deferred until the hearing on admissibility. On 9 May 2006 IWC made a new application in which it sought protection from any award of costs which might be made against it in relation to the hearing on admissibility. In the event, that application was not heard at the hearing on 9 June 2006 as, by that stage, all relevant costs had been incurred. Accordingly there would not have been any purpose in such a hearing. Notwithstanding this IWC did not withdraw its application.

44. The Tribunal considers that IWC's conduct was unreasonable both in making and pursuing these applications. In those circumstances the Tribunal considers that IWC should pay the Authority's reasonable costs of these applications. The Tribunal notes that the Authority is not claiming any in-house legal costs and is only claiming counsel's fees. However the Tribunal considers that it would be disproportionate to the size and complexity of this case if IWC were required to pay for the total hours which the two counsel devoted to this issue. In those circumstances it awards costs in the amount of £1,400 (exclusive of VAT) to be paid by IWC to the Authority.

Marion Simmons QC Michael Blair QC Ann Kelly

Charles Dhanowa 4 April 2007
Registrar