Neutral citation: [2003] CAT 21

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1005/1/1/01
Case No. 1009/1/1/02

New Court
Carey Street
London WC2A 3BZ

18 September 2003

Before:

SIR CHRISTOPHER BELLAMY (The President)
PROFESSOR ANDREW BAIN OBE
PATRICIA S QUIGLEY WS

Sitting as a tribunal in Scotland

BETWEEN:

ABERDEEN JOURNALS LIMITED

Applicant

and

THE OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

Supported by

ABERDEEN INDEPENDENT LIMITED

Intervener

Messrs Herbert Smith represented the applicant

The Director of Legal Services, Office of Fair Trading represented the respondent

Messrs Shoosmiths represented the intervener

JUDGMENT (Costs)

Introduction

1. On 23 June 2003 the Tribunal dismissed the appeal lodged on 18 November 2002 in case No. 1009/1/1/02 by Aberdeen Journals Limited ("Aberdeen Journals") under section 46 of the Competition Act 1998 ("the 1998 Act") against the decision of the Office of Fair Trading[1] ("the OFT") dated 16 September 2002 that Aberdeen Journals had abused its dominant position in the market for the supply of advertising space in free and paid-for local newspapers in the Aberdeen area contrary to the Chapter II prohibition. However, we reduced the penalty imposed on Aberdeen Journals from £1,328,060 to £1,000,000: see [2003] CAT 11.

2. At the hearing on 23 June 2003, we agreed that the question of costs should be dealt with by way of written application. The costs to be dealt with included not only the costs of the appeal disposed of on 23 June 2003 ("the second appeal") but also the costs incurred in Aberdeen Journals' earlier appeal in case No. 1005/1/1/01 lodged on 14 September 2001 against the first decision of the OFT in this matter dated 16 July 2001 ("the first appeal"). The result of the first appeal was that the Tribunal, in its judgment of 19 March 2002, [2003] CAT 4, set aside the OFT's decision of 16 July 2001, remitted the question of market definition to the Director, and reserved the costs.

Applications and arguments made by the parties

3. By letters of 1 July 2003 the OFT and Messrs Herbert Smith, solicitors for Aberdeen Journals, each informed the Tribunal that they had agreed that neither party would make an application for costs against the other with regard to the first and second appeals.

4. On 3 July 2003, an application for costs was filed by Shoosmiths, solicitors for Aberdeen Independent Limited ("Aberdeen Independent"), the intervener in this matter. Aberdeen Journals opposed that application by letter of 10 July 2003. By letters of 15 August and 22 August 2003, Aberdeen Journals and Aberdeen Independent, respectively, made further submissions on costs having regard to the fact that in this case the Tribunal is sitting as a Tribunal in Scotland.

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[1] Since 1 April 2003 the OFT has assumed the functions previously carried out by the Director General of Fair Trading, pursuant to the Enterprise Act 2002. In this judgment we refer to the OFT although the decisions in question were adopted by the Director General of Fair Trading.

Arguments of the parties

5. Aberdeen Independent requests that its costs of both the first and second appeals should be paid in full by Aberdeen Journals, on the grounds that the case which Aberdeen Independent supported through its intervention has been entirely successful. In particular, contends Aberdeen Independent, the evidence and submissions that it has made have undoubtedly assisted the Tribunal in reaching its decisions, not least the evidence from Mr Keith Barwell and Mr Eric Farquharson on key matters at issue. Aberdeen Independent has, moreover, incurred substantial losses due to the predatory conduct of Aberdeen Journals.

6. Aberdeen Independent points to the wide discretion of the Tribunal in dealing with costs under Rule 26(2) of the Competition Commission Appeal Tribunal Rules 2000, S.I. 2000 No. 261 ("the 2000 Rules")[2]. That discretion extends to interveners: see *The Institute of Independent Insurance Brokers v the Director General of Fair Trading* [2002] CAT 2, [2002] CompAR 141 ("*GISC*: *costs*"), where the Tribunal expressly followed Article 87 of the Rules of the Court of First Instance of the European Communities ("CFI"). Reliance is placed on Case T-65/96 *Kish Glass & Co v Commission* [2001] ECR II-3261 ("*Kish*") where the CFI itself applied Article 87 to award a successful intervener its costs against a losing appellant.

7. In support of its application, Aberdeen Independent has filed statements of costs for the first and second appeals amounting to £72,030.88 and £28,989.70 respectively, and totalling £101,020.58. Aberdeen Independent seeks summary assessment of these costs or, in default, a substantial interim payment of £60,000 pending detailed assessment. Aberdeen Independent asks the Tribunal to assess the costs summarily, and argues that the complexity of the case would justify an hourly rate higher than that normally allowed by the Auditor of the Court of Session.

8. In response, Aberdeen Journals argues that Aberdeen Independent's reliance on *Kish* is misplaced as the rules governing awards of costs by the CFI differ from Rule 26(2), which gives the Tribunal wide discretion. Aberdeen Journals submits that the general position of interveners is that the costs of intervention should lie where they fall (citing *GISC: costs* at [78] and *Freeserve.com v Director General of Telecommunications* [2003] CAT 6,

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[2] Since Aberdeen Journals' notices of appeal in both the first and second appeals were filed prior to 20 June 2003, the rules set out in S.I. 2000 No. 261 continue to apply to this matter: see Rule 69 of the Competition Appeal Tribunal Rules 2003, S.I. 2003 No. 1372.

("*Freeserve*: *costs*") at page 11, line 30). Moreover, Aberdeen Journals notes the Tribunal's comment in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 3 [2002] CompAR 160: ("*Napp: interest and costs*") that the Tribunal will lean against making costs orders against unsuccessful appellants unless there are "exceptional circumstances".

9. Aberdeen Journals contends that there are no exceptional circumstances in the present case which should lead the Tribunal to move away from the general principles regarding the position of an unsuccessful appellant or of an intervener. According to Aberdeen Journals, Aberdeen Independent's intervention added no value to the first or second appeal. On the other hand, it was clearly in Aberdeen Independent's interests to intervene, and the work which it undertook in relation to market definition and the conduct of Aberdeen Journals was not wasted as it will be of general value to Aberdeen Independent in the future. The intervener caused Aberdeen Journals to incur additional costs. Finally, Aberdeen Independent cannot claim that its intervention was "entirely successful" as it supported the market definition in the OFT's first decision, which was set aside and remitted by the Tribunal. No order for costs should therefore be made in relation to the intervener.

10. In the alternative, Aberdeen Journals contends that the amount of costs claimed by Aberdeen Independent should be significantly reduced. Work undertaken in relation to the question of market definition in the first appeal should be disregarded as Aberdeen Independent was not successful on this issue. In the absence of an itemised schedule of costs, Aberdeen Journals contends that the costs of the first appeal should be reduced by 50%. Aberdeen Journals notes the Tribunal's comment that the CFI will typically award costs on taxation which amount to only 25 to 50% of the sum originally claimed: see *GISC: costs* at [46]. Aberdeen Journals requests that any taxation of the intervener's costs should be undertaken on the same basis.

11. Finally, Aberdeen Journals submits that Aberdeen Independent has not presented its costs in the format required by the Auditor of the Court of Session and has claimed an excessive hourly rate. The Auditor would be likely to tax down any costs claimed by about one third.

The Tribunal's jurisdiction and previous decisions on costs

12. Rule 26 of the 2000 Rules states:

> "26. – (1) For the purposes of these rules "costs" means–
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> (a) if the proceedings are taking place before a tribunal in England and Wales, costs and expenses recoverable in proceedings before the Supreme Court of England and Wales;
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> (b) if the proceedings are taking place before a tribunal in Scotland, costs and expenses recoverable in proceedings before the Court of Session;
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> (c) if the proceedings are taking place before a tribunal in Northern Ireland, costs and expenses recoverable in proceedings before the Supreme Court of Northern Ireland.
>
> (2) The tribunal may at its discretion, 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 or Chairman 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."

13. In *GISC*: *costs*, cited above, the Tribunal said:

> "[39] Apart from the reference, in the latter part of Rule 26(2) to "the conduct of all parties in relation to the proceedings" that Rule appears on its face to give the Tribunal an unfettered discretion as to costs, leaving it to the Tribunal to develop the relevant principles in the light of circumstances and experience."

14. In *GISC: costs* at [48] the Tribunal said:

> "In this new jurisdiction, it seems to us that we should not, at this early stage, seek to formulate rigid rules on the question of costs, but should proceed on a case by case basis, retaining flexibility to meet circumstances as they arise. By analogy with the overriding objective in civil proceedings, our principal aim must be to deal with cases justly".

15. In that case, the Tribunal awarded costs against both the Director (see [49] to [73]) and the unsuccessful intervener, a regulatory body in the insurance industry, in an appeal on a straightforward legal point by a complainant without significant financial resources whose existence was threatened by the establishment of the regulatory body in question: see [67] to [68]. As far as the intervener's costs were concerned, the Tribunal said at [77] to [80]:

> "77. The practice in the Court of First Instance under Article 87 of the CFI Rules is that a party who intervenes in support of the losing party is ordered to pay the winning party the additional costs occasioned to the latter by reason of the intervention, and vice-versa. (For an example of an intervener recovering costs against a losing appellant, see *Kish Glass*, cited above.)
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> 78. We see force in the argument that it would be in accordance with the objectives of the Act if the rule as to interveners were broadly cost-neutral. Thus, the prospect of having to pay an intervener's costs if unsuccessful (as in *Kish*) could deter some appellants. The prospect of having to pay some part of the appellant's (or even the Director's) costs could deter some interveners. In general, interventions properly managed assist the Tribunal and provide useful background information.
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> 79. That said, however, we would not wish to fetter our general discretion under Rule 26(2) to the effect that there may never be circumstances where costs orders will be made in favour of, or against, interveners.
>
> 80. As regards the present case, GISC represents substantially all major United Kingdom general insurance companies and larger insurance intermediaries. GISC supported the unsuccessful Director, and ran one supplementary argument, on the so-called "rule of reason", which the Tribunal rejected (paragraphs 260 to 267 of the judgement). Although it was, in general, helpful to the Tribunal that GISC intervened, it was in GISC's interest to do so. GISC's intervention did cause the IIB and ABTA to incur extra costs. Although the error made in this case was that of the Director, it was GISC's application to the Director which contained an application for negative clearance, which GISC pursued, which led to these proceedings in the first place. In those particular circumstances we think we should follow the practice of the Court of First Instance, and order that GISC pay the IIB and ABTA the costs occasioned to them by its intervention."

16. The Tribunal further commented on Rule 26(2) in *Napp*: *interest and costs*, cited above:

> "[22] [Rule 26(2)] gives the Tribunal a wide discretion on the question of costs, to be exercised in the particular circumstances of the case. There is no explicit rule before the Tribunal that costs follow the event, but nor is there any

rule that costs are payable only when a party has behaved unreasonably. All will depend on the particular circumstances of the case.

[23] In general, we would lean against cost orders against unsuccessful applicants in cases involving penalties unless there were particular circumstances justifying such orders. The appellant, in such cases, has already suffered the penalty, and possibly further directions, as well as having to bear its own costs. To make a further order for costs in the Director's favour may well be excessive in many cases."

A similar comment by the Tribunal is to be found in *GISC: costs* at [54].

17. In *Freeserve: costs*, cited above, at page 11, lines 13 to 24, the Tribunal reiterated that the treatment of costs will depend on the particular circumstances of the case:

> "… we are mindful of the dictum of Lord Lloyd of Berwick in *Bolton Metropolitan District Council v Secretary of State* [1995] 1 WLR 1176 at page 1178E where the learned Lord of Appeal said, on the question of costs, as follows,
>
> > "What is then the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and long-standing, must never be allowed to harden into a rule. "

18. In *Freeserve: costs* at page 11, line 26 to page 13, line 27, the Tribunal went on to consider the position of BT, which had intervened in support of the Director General of Telecommunications in the case. The Director's submissions had been partially, but not wholly, successful. The Tribunal said:

> "In expressing views on the position of BT [the intervener], we are not allowing the indications we are about to give to harden into a rule, but they do express our view in general on interveners in the situation of BT.
>
> The general position, as far as the Tribunal is concerned, is that the costs of an intervention will very often in justice be allowed to lie where they fall. It is true that in some cases it will be proper to make orders either in favour of or against interveners, but in our view there should be no general expectation that a successful intervener is necessarily entitled to its costs.
>
> In the specific case of a sector such as telecommunications, where there may be interveners who are likely to be regularly appearing before the Tribunal, we think the general practice is likely to be to allow the costs of the intervention to lie where they fall. We can see that if costs were awarded in every case where a complaint was brought against the dominant enterprise and there was later an unsuccessful appeal, the constant risk of having to pay the costs of the dominant enterprise could affect the balance of the system of appeal under the Act. As we said at paragraph [78] in GISC, a tribunal differently constituted, in that particular circumstance:

> "We see force in the argument that it would be in accordance with the objectives of the Act if the rule as to interveners were broadly cost neutral."
>
> In this particular case, however, it is unnecessary to further elaborate the general principle because, as with the position in respect of the main parties, BT has, as it were, been successful on some issues but unsuccessful on other issues as we have already indicated. Bearing that in mind, we think the right general order is that BT should bear its own costs, because in any event it has been partially successful and partly unsuccessful and those two elements, in our view, cancel each other out. "

Analysis

19. In this relatively new jurisdiction the Tribunal is developing its case law on the exercise of its discretion to award costs. While that discretion must be exercised judicially, we think it important to avoid rigid rules, particularly as new factual circumstances arise. We are particularly mindful of the dictum of Lord Lloyd of Berwick, cited above:

> "As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court …."

20. We note, first, that in *Napp: interest and costs* at [23] and *GISC: costs* at [54], the Tribunal said it would "lean against" costs orders against unsuccessful appellants in cases involving penalties. These comments were made in the first two cases to come before the Tribunal. However, the Tribunal's developing experience is that appeals impose a significant resource cost on the public purse in cases involving penalties. If the Tribunal does not use its costs powers to keep cases within manageable bounds, the appeal system may not function correctly. In these circumstances it may well, in the future, be appropriate to make orders for costs against unsuccessful appellants in penalty cases, depending of course on the circumstances of the particular case.

21. Turning to the position of interveners, the Tribunal's case law to date indicates that interveners may fall into various different categories. In *GISC: costs*, the unsuccessful intervener represented most of the United Kingdom insurance industry, and had promoted an agreement held to contravene the Chapter I prohibition. The intervener was ordered to pay the costs of the successful appellant, a relatively small association whose existence was threatened by the agreement in question. In *Freeserve: costs* BT, the intervener, an allegedly dominant company, did not have costs awarded in its favour, in a case where its intervention had been partially successful and partially unsuccessful.

22. The present case constitutes a different situation, which the Tribunal has not yet considered. In particular, the intervener in this case is the company which had been the victim of the abuse of dominant position found in the decision, namely predatory pricing by Aberdeen Journals, which was intended to drive the intervener out of business. In our view the following particular circumstances are relevant in the present case.

23. First, in our view it was entirely reasonable and proper for Aberdeen Independent, who was the complainant in the administrative procedure, and the target of the abuse of dominant position found to have been committed by Aberdeen Journals, to intervene in both the appeals. Secondly, Aberdeen Independent has ultimately been successful on the substantive case being made to the Tribunal. Thirdly, Aberdeen Independent's submissions were of assistance to the Tribunal, particularly on the issues of market definition and abuse, including the treatment of newspaper production costs. Fourthly, Aberdeen Independent's submissions did not, to any material extent, merely duplicate those of the Director. Fifthly, and of particular significance in the present case, a large part of Aberdeen Journal's defence consisted of a specific attack on Aberdeen Independent as an "inefficient market entrant" or "fireship". That attack culminated in what became, in effect, an attack on the integrity of Aberdeen Independent's proprietor, Mr Barwell. Aberdeen Independent necessarily had to counter these suggestions, which were entirely rejected by the Tribunal: see the Tribunal's judgment in the second appeal, at [73] to [219].

24. For those reasons we think it is appropriate, in the present case, to exercise our discretion under Rule 26(2) to make an award of costs (or more correctly, expenses, to use the terminology of Scottish procedure) in favour of the successful intervener, Aberdeen Independent. In so doing, we follow what we understand to be the approach of the CFI in similar circumstances. We do not think Aberdeen Independent's entitlement to expenses should be affected by the fact that Aberdeen Journals and the OFT have reached an agreement not to seek expenses from each other.

25. The next question is whether the expenses awarded to Aberdeen Independent should be reduced by reason of the outcome of the first appeal. It is true that, as Aberdeen Journals points out, the OFT (and thus the Intervener) was unsuccessful in the first appeal to the extent that the matter of market definition was remitted to the Director. On the other hand, the Tribunal held that it was in the interests of justice that the matter should proceed: see the Tribunal's judgment in the first appeal, [2000] CAT 4 at [187] to [192]. In the event, the OFT took a further decision, which was upheld by the Tribunal in all respects now relevant.

The reasons for the reduction of the fine in the Tribunal's judgment in the second appeal, [2003] CAT 11 at [497] to [498], do not in our view bear on the question of what expenses should be awarded to Aberdeen Independent.

26. In our view much of the work done by Aberdeen Independent on the issue of market definition in the first appeal remained relevant to the determination of the second appeal, and was of assistance to the Tribunal. The submissions of Aberdeen Independent in the first appeal on the issue of abuse also remained relevant to the second appeal, since in the second appeal the issue of abuse was dealt with on the basis of the submissions made in the first appeal.

27. In all these circumstances, we think the correct approach is that Aberdeen Independent should have 60% of its expenses in the first appeal, plus its expenses in the second appeal.

28. On the question of the amount of expenses which should be awarded, Aberdeen Independent has submitted statements of its costs in the first and second appeal, requesting that there should be a summary assessment of costs by the Tribunal. In this case, the Tribunal is sitting as a tribunal in Scotland. According to Rule 26(1)(b) set out above, the costs are those costs and expenses which would be recoverable in proceedings before the Court of Session. As we understand it, the rules of the Court of Session do not provide a process for the summary assessment of such expenses or for an interim award.

29. We note that in *Wimpey Construction (UK) Ltd v Martin Black & Co (Wire Ropes) Ltd* 1988 SLT 637, not cited by the parties, the Court of Session, with seven judges sitting, ruled that where a party employs English solicitors to do work in connection with litigation in Scotland, it is for the Auditor of the Scottish court to decide which items of expenses are admissible in a party and party account in accordance with Scottish rules. However, it appears from that judgment that the appropriate amounts allowable may be ascertained by reference to the law and practice in England, it being at the discretion of the Auditor whether he should seek evidence in this respect.

30. In the circumstances, it seems to us that the correct course is for Aberdeen Independent's expenses to be taxed by the Auditor, in accordance with the procedure of the Court of Session. Aberdeen Independent will be entitled to 60% of the taxed amount in the first appeal, and 100% of the taxed amount in the second appeal.

Conclusions

31. On those grounds the Tribunal unanimously decides:

1. Aberdeen Journals Limited is to pay Aberdeen Independent Limited 60% of Aberdeen Independent's expenses incurred as intervening party in Case No. 1005/1/1/01 and 100% of Aberdeen Independent's expenses incurred as intervening party in Case No. 1009/1/1/02.

2. If not agreed, Aberdeen Independent's expenses as aforesaid are to be determined on taxation by the Auditor of the Court of Session, in accordance with the rules and requirements of that jurisdiction.

Christopher Bellamy Andrew Bain Patricia Quigley

Charles Dhanowa 18 September 2003
Registrar