Neutral citation [2005] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1032/1/1/04

Victoria House
Bloomsbury Place
London WC1A 2EB

20 April 2005

Before:

Marion Simmons QC (Chairman)
Dr Arthur Pryor CB
Mr David Summers

BETWEEN:

APEX ASPHALT AND PAVING CO LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

Mr Daniel Beard (instructed by Messrs Wright Hassall) appeared for the appellant.

Mr Tim Ward (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the respondent.

JUDGMENT (Interest and costs)

I INTRODUCTION

1. We handed down judgment in this appeal on 24 February 2005 (see [2005] CAT 4) ("the judgment"). In that judgment we dismissed Apex's appeal against OFT decision CA98/1/2004 of 16 March 2004 ("the Decision").

2. In the Decision the OFT concluded that various roofing contractors, including Apex, had infringed the prohibition ("the Chapter I prohibition") contained in section 2(1) of the Competition Act 1998 ("the Act") by colluding in relation to the making of tender bids for flat roofing contracts in the West Midlands. Nine contractors were found to have been involved in various discrete individual agreements or concerted practices each of which had as its object or effect the fixing of prices in the market for the supply of repair, maintenance and improvement services for flat roofs. Penalties were assessed by the OFT against all of those contractors.

3. Apex was found to have participated in such collusive tendering in relation to two of such tender bids. One was for re-roofing works to Frankley Community High School and Harborne Hill School ("the FHH Contracts"); the other was for re-roofing and associated building works in relation to two sets of schools: Hob Green and Wollescote Schools, and Christchurch and Church of the Ascension Schools ("the Dudley Contracts"). Apex was fined £35,922.80.

II SUMMARY OF THE TRIBUNAL'S DECISION

4. Apex appealed against the OFT's findings of infringement and imposition of a penalty on four bases:

> "(1) In respect of the FHH Contracts:
>
> There was not strong and compelling evidence that there was either an unlawful agreement or a concerted practice between Briggs and Apex in relation to the FHH Contracts.
>
> (2) In respect of the Dudley Contracts:

(a) The Respondent was not entitled to impose a fine on Apex in respect of the infringement in circumstances where it had not indicated in its Rule 14 Notice that it proposed to take any action in respect of the alleged infringement;

(b) Further and in any event, on the evidence relied upon by the Respondent there was not strong and compelling evidence that there was either an unlawful agreement or a concerted practice between Apex and Howard Evans (and others) in relation to the Dudley Contracts.

(3) Alternatively, the Respondent has failed adequately to set out the reasons for its Decision in respect of either the FHH and/or Dudley Contracts.

(4) Further and in any event, in respect of the level of the fine imposed, the Respondent failed to take into account the absence of any impact upon consumers of the infringements found and in doing so imposed too great a fine upon Apex."

5. On 15 June 2004 Apex was granted permission to amend its Notice of Appeal to enable it to submit that the OFT had made no adjustment to the level of the penalty in accordance with Step 2 of the *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, March 2000) ("the *Guidance as to Penalty*") to reflect the fact that the duration of the infringement was less than a year. Apex submitted that the OFT should have made explicit recognition of the fact that the alleged infringements in this case lasted only 56 and 22 days respectively.

6. Our principal reasons for dismissing the appeal were as follows:

(a) Apex was not caused any prejudice by the OFT omitting from the Rule 14 Notice that it proposed to take action in respect of the alleged infringement by Apex in relation to the Dudley Contracts. Accordingly, notwithstanding the omission in the Rule 14 Notice the OFT was entitled to impose a penalty on Apex in relation to the Dudley Contracts;

(b) The elements of a concerted practice contrary to the Chapter I prohibition were made out in respect of Apex in relation to both the FHH Contracts and the Dudley Contracts;

(c) The reasons set out in the Decision sufficiently informed Apex of the factual and legal basis for the Decision and were sufficient to enable Apex to understand the basis for the Decision;

(d) The level of the penalty imposed by the OFT was appropriate having regard to the impact upon consumers, and the duration, of the infringements found.

III THE PARTIES' SUBMISSIONS AS TO INTEREST AND COSTS

7. By letter dated 28 February 2005 the Tribunal invited the parties to make submissions on (i) whether, and if so to what extent, interest should be awarded on the penalty, and (ii) costs. The Tribunal indicated in that letter that subject to any application for an oral hearing the Tribunal intended to decide these issues on the basis of written submissions. Neither party considered that an oral hearing was necessary.

The OFT's submissions

- *Interest*

8. The OFT seeks interest on the amount of the penalty at 1% above base rate from the date specified in the Decision for the payment of the penalty, namely 21 May 2004.

9. The OFT refers to Rule 56(1) of the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) ("the 2003 Tribunal Rules"), which provides jurisdiction to award interest from the date upon which the application to the Tribunal is made. Apex's application was made on 14 May 2004 but, following the approach set out in the Tribunal's decision in *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 13 ("*Aberdeen Journals: Interest*"), the OFT seeks interest only from 21 May 2004.

10. The OFT notes Rule 56(1), which provides that the Tribunal may order that interest is to be payable on the amount of any penalty at such rate as the Tribunal considers appropriate. Unless the Tribunal otherwise directs, the rate of interest shall not

exceed the rate specified in any Order made pursuant to section 44 of the Administration of Justice Act 1970.

11. The OFT refers to the Tribunal's decision on interest and costs in *Napp v Director General of Fair Trading* [2002] CAT 3 ("*Napp: Interest and costs*") where the Tribunal stated that an undertaking which obtains the automatic suspension of the obligation to pay the penalty pending an appeal to this Tribunal should not obtain any benefit from the delay inherent in the appeal process. The OFT submits that this principle applies to this case and that accordingly this is an appropriate case to award interest.

- *Costs*

12. The OFT submits that it should be awarded its costs, alternatively a proportion of its costs, of these proceedings.

13. The OFT refers to Rule 55(2) of the 2003 Tribunal Rules which gives the Tribunal a discretion to award costs and also to the jurisprudence so far of this Tribunal in *Napp: Interest and Costs*, *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 21 ("*Aberdeen Journals: Costs*") and *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2002] CAT 2 ("*GISC: Costs*"). The OFT submits that having regard to the dicta of the Tribunal in those cases, this is an appropriate case for the award of costs for the following reasons:

(a) the Appellant was not successful in respect of <u>any</u> of the grounds of appeal it pursued in this case;

(b) as a result, the penalty was upheld in its entirety; and

(c) even though this particular appeal was kept within "manageable bounds", the defence of this case has required the OFT to make significant expenditure of resources, particularly when considered against the size of the penalty.

Apex's submissions

- Interest

14. Apex made no submissions on interest.

- Costs

15. Apex submits that no cost order should be made. It refers us to the Tribunal's judgments on costs in *Napp: Interest and costs* and *Aberdeen Journals: Costs*. It submits that there is nothing to suggest that *Napp: Interest and costs* has been overruled by *Aberdeen Journals: Costs*; the effect of the latter case is simply that where appellants are diffuse in their submissions or evidence or rely on unduly wide-ranging grounds of appeal, they will not be insulated from the possibility of costs orders.

16. Apex further submits that it acted reasonably throughout and kept the appeal within manageable bounds. It referred to the focus of its challenge being directed to:

(a) the procedure followed by the OFT in relation to the Rule 14 Notice, which was at the least unorthodox; and

(b) the finding of a concerted practice in circumstances where the recipient of bidding figures had not made any bid in accordance with them, which in Apex's submission was a novel issue which had not previously been explored in domestic or European jurisprudence and which concerned the application of the term "concerted practice", the definition of which was far from clear.

17. Apex submits that this is not a case where one large company is trying to use the OFT and the appeal process to attack a competitor. It is a small company. It is quite proper that it should have available to it the avenue of appeal to test the procedure and decision making of the OFT. More generally, there are no exceptional circumstances justifying any order for costs against the appellant.

18. Apex takes issue with the OFT's submission that it had to make significant expenditure of resources when considered in the light of the size of the penalty imposed on Apex. Apex notes that sanctions involving the imposition of a penalty are "criminal" for the purpose of Article 6 ECHR, and submits that the absolute size of the penalty does not necessarily reflect its seriousness for a party and certainly did not do so in this case.

IV TRIBUNAL'S ANALYSIS

Interest

19. Paragraph 19 of Schedule 4 of the Enterprise Act 2002 is in the following terms:

> "19.–(1) Tribunal rules may make provision allowing the Tribunal to order that interest is payable on any sum awarded by the Tribunal...
> (2) That provision may include provision-
> (a) as to the circumstances in which such an order may be made;
> (b) as to the manner in which, and the periods in respect of which, interest is to be calculated and paid."

20. Rule 56 of the 2003 Tribunal Rules provides in material part as follows:

> "(1) If it imposes, confirms or varies any penalty under Part 1 of the 1998 Act, the Tribunal may, in addition, order that interest is to be payable on the amount of any such penalty from such date, not being a date earlier than the date upon which the application was made in accordance with rule 8, and at such rate, as the Tribunal considers appropriate. Unless the Tribunal otherwise directs, the rate of interest shall not exceed the rate specified in any Order made pursuant to section 44 of the Administration of Justice Act 1970. Such interest is to form part of the penalty and be recoverable as a civil debt in addition to the amount recoverable under section 36 of the 1998 Act."

21. In *Napp: Interest and Costs* the Tribunal stated as follows:

> "13. In our view, the basic principle applicable under [Rule 56] of the Tribunal Rules is that an undertaking which has been subject to a penalty for an infringement of the Act, which by virtue of section 46(4) of the Act obtains the automatic suspension of the obligation to pay the penalty by appealing to this Tribunal, should not obtain any benefit from the delay inherent in the appeal process. The provision as to interest on penalties to be found in that Rule is mainly there to prevent appeals being introduced merely to delay payment. It

> follows that the rate of interest should reflect the benefit derived by the appellant from the suspension of the obligation to make the penalty payment. A convenient measure of that benefit will normally be the appellant's cost of borrowing. In the Commercial Court, as we understand it, the normal rate applicable is Bank base rate plus 1%, although that presumption can be displaced. That seems to us, absent any evidence to the contrary, a reasonable yardstick to apply in most cases.
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> 14. …in our view, the power in [Rule 56] to order that interest should be applicable to the penalty is not there as a further sanction in respect of a possible continuation of the infringement, or as an indirect means of securing some kind of counterbalancing compensation. The interest rate mechanism under [Rule 56] is there primarily to deal with the fact that the penalty has not been paid…"

22. In *Aberdeen Journals: Interest* the Tribunal (sitting as a Tribunal in Scotland) stated (at p 1 ln 36 to p 2 ln 2) as follows:

> "As regards the rate of interest on the penalty, in its judgment in [*Napp: Interest and costs*]...the Tribunal held that the rate of interest should normally be 1% above bank base rate. There is no serious contest that there is an appropriate rate in this case. We think that, technically speaking, the rate in this case should be 1% above the base rate of the Bank of Scotland..."

23. The OFT in this appeal is seeking interest at 1% above base rate from 21 May 2004. Apex has not challenged this but leaves the matter to our discretion. We consider that the approach to interest taken in *Napp: Interest and costs* and *Aberdeen Journals: Interest* is also appropriate to this appeal. We therefore award interest on the penalty at 1% above base rate from 21 May 2004 until the date of payment of the penalty.

Costs

24. In *Aberdeen Journals: Costs* the OFT and Aberdeen Journals reached an agreement not to seek costs from each other. Notwithstanding that agreement, the Tribunal made the following remarks concerning costs:

> "[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 [in *Bolton Metropolitan District Council v Secretary of State* [1995] 1 WLR 1176 at page 1178E], 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."

25. We note the submission of the OFT that the defence of this case required it to make significant expenditure of resources, particularly when considered in the light of the size of the penalty. We do not consider that this submission is well founded for two particular reasons. First, as a matter of policy it would be regrettable if the Tribunal, through making costs orders against undertakings where the OFT considers that its expenditure of resources on an appeal are out of proportion to the size of the penalty, were to deter undertakings from bringing appeals. Secondly, and in the circumstances of this case, the Rule 14 Notice point only arose because the OFT failed properly to adhere to its normal procedure of issuing a supplementary Rule 14 Notice, and the penalty point arose in particular because the Decision did not explain the reason for not adjusting the level of penalty on grounds of duration.

26. We consider that an important factor in exercising our discretion as to whether to award costs is the effect which a costs order may have on an undertaking which also has to meet the impact of the penalty and its own costs. This factor may be particularly relevant in the context of small undertakings which may be deterred from bringing reasonable appeals from decisions of the OFT. In this connection a further relevant factor may be the extent of the potential costs exposure in relation to the amount of the penalty. As is recognised in the submissions of the OFT, there is an evident public interest that potential appellants should not be unduly deterred from bringing an appeal by the risk of a costs order against them.

27. In exercising our discretion as to whether to award costs it is also important to consider the circumstances of the particular case. On the one hand, Apex was not successful in respect of any of the grounds of appeal and the penalty was upheld in its entirety. On the other hand, the following points are also relevant:

(a) The OFT in this case did not adopt the normal procedure of issuing a supplementary Rule 14 Notice when it discovered that it had not stated in the Rule 14 Notice of 13 August 2003 that it intended to take action against Apex in respect of the alleged infringements concerning the Dudley Contracts. It instead relied on a telephone conversation and an exchange of e-mails. It was in our judgment legitimate for Apex to raise this matter before the Tribunal and for the Tribunal to consider the consequences flowing from the OFT's failure in this respect (see, in this connection, [104] of the judgment).

(b) Prior to the judgment, the jurisprudence of the Tribunal and Community courts on the issue of concerted practices did not include relevant case law on the issue of concerted practices in the specific context of a tendering process.

(c) The OFT stated in the Decision that no adjustment had been made to the penalty calculation to take account of the question of duration without, however, satisfactorily explaining its reason for not making any such adjustment. In affirming the Decision on this point the Tribunal explained that in the context of a tendering process the infringement had a potential continuing impact on further tendering processes by the same tenderees and that once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The OFT should in our judgment have explained this point properly in the Decision.

(d) The OFT and Apex agree that this appeal was kept within "manageable bounds", and the OFT makes no criticism of the conduct of the appeal by Apex.

28. Although in future cases it may be appropriate to make orders for costs against unsuccessful appellants in penalty cases, we consider that in the circumstances of the

present appeal the matters to which we have referred above, which are factors militating against making a costs award, outweigh the submissions of the OFT in favour of making such an award.

29. Accordingly, we have decided that the OFT and Apex should each bear its own costs of this appeal.

Marion Simmons QC Arthur Pryor David Summers

Charles Dhanowa 20 April 2005
Registrar