Neutral citation [2010] CAT 8

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1150/4/8/10

Victoria House
Bloomsbury Place
London WC1A 2EB

18 February 2010

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
MARCUS SMITH
PROFESSOR ANDREW BAIN OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

CTS EVENTIM AG

Applicant

-v-

COMPETITION COMMISSION

Respondent

-supported by-

LIVE NATION ENTERTAINMENT, INC

Intervener

REPRESENTATION:

Mr. Alastair Lindsay (instructed by Allen & Overy LLP) appeared for the Applicant.

Mr. Daniel Beard and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Mark Hoskins Q.C. (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Intervener.

Heard at Victoria House on 10 February 2010

RULING (COSTS)

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1. Pursuant to section 33(1) of the Enterprise Act 2002 ("the Act"), the Office of Fair Trading referred a proposed merger between Ticketmaster Entertainment, Inc and Live Nation, Inc to the Competition Commission ("the Commission"). In a report dated 22 December 2009, the Commission decided to give the proposed merger unconditional clearance ("the Decision"). By a Notice of Application dated 19 January 2010 ("the Notice of Application"), CTS Eventim AG ("Eventim") applied for the Commission's Decision to be reviewed by the Tribunal pursuant to section 120 of the Act.

2. Following the exchange of skeleton arguments, the Tribunal heard counsel for the parties at an oral hearing on 10 February 2010. For the reasons which are set out in the Tribunal's earlier decision in this matter ([2010] CAT 7), the parties agreed to invite the Tribunal to quash the Decision (pursuant to section 120(5)(a) of the Act) and to refer the matter back to the Commission (pursuant to section 120(5)(b) of the Act). By an order dated 11 February 2010, and for the reasons given in its earlier decision ([2010] CAT 7), the Tribunal did so. The Tribunal also ordered the Commission to pay to Eventim seventy-five percent of its costs of and occasioned by its application to review the Commission's findings, such costs to be assessed if not agreed. The Tribunal stated that its reasons would follow later in a written ruling. This is that ruling.

3. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Tribunal Rules. That rule confers on the Tribunal a discretion to make any order it thinks fit. In determining how much a party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.

4. As was stated in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the Tribunal has a necessarily wide discretion on the question of costs, and that discretion can be affected by any one or more of an almost infinite variety of factors, whose weight will vary according to the particular facts. In section 120 cases, the appropriate starting point is that a successful party will normally obtain a costs award in its favour.

5. In this case, because Eventim's Notice of Application has resulted in the Commission (with the concurrence of the merged entity, Live Nation Entertainment, Inc) agreeing to the quashing of its Decision by the Tribunal, we consider that Eventim has been the

successful party. That conclusion is not affected by the fact that we have heard no substantive argument on the grounds advanced by Eventim in its Notice of Application, and have not ruled one way or the other on these grounds. Where the parties are in agreement about the final order to be made in a claim for judicial review, it is sufficient for the court to be satisfied that the agreed order should be made, without determining the substance of the points in issue: Civil Procedure Rules Part 54 Practice Direction 54A, paragraph 17.2. Eventim's Notice of Application has resulted in the agreed quashing of the Decision, and this can only be characterised as a successful result for Eventim.

6. Accordingly, our starting point is that the Commission should pay Eventim's costs. But it was stated in the *Merger Action Group* decision that starting points are just that – the point at which the Tribunal begins the process of taking account of the specific factors arising in the individual case before it. There can be no presumption that the starting point can also be the finishing point.

7. Four factors were put forward by the Commission to suggest that, in this case, the right finishing point was that there should be no order as to costs. It was contended that:

   (1) Making a costs order against the Commission and in favour of Eventim would act as a disincentive to the Commission in acting swiftly to seek to quash its own decisions when it considered this to be appropriate. It was also suggested that the Tribunal should take into account the fact that the Commission had only conceded that some of the grounds – and by no means all – advanced in the Notice of Application were "arguable", and that this was why it had agreed to the quashing of the Decision. Had the matter proceeded to a substantive hearing, so it was contended, the Commission might have won on some or all of the points put forward by Eventim in the Notice of Application.

   (2) Eventim's efforts in seeking to protect its confidential information during the Commission's inquiry meant that, when the Commission's provisional findings were published on 8 October 2009, certain information provided to the Commission by Eventim had not been seen, and so was not commented upon, by the parties to the proposed merger. When the parties did so comment, *after* the publication of the Commission's provisional findings, the Commission reversed its finding that the proposed merger was likely to lead to a substantial

lessening of competition. It was contended by the Commission that "Eventim's conduct during the course of the inquiry significantly increased the difficulties in operating the procedure of the inquiry within the statutory timetable".

(3) Eventim's failure to raise its grounds for reviewing the Decision informally with the Commission before issuing its Notice of Application "significantly contributed to the costs it has incurred", according to the Commission's written submissions. Had the Commission been forewarned about Eventim's proposed challenge, so it was contended, it would have had an opportunity to do something about the matter without costs being incurred.

(4) Much of the work done by Eventim in compiling its Notice of Application would be useful to Eventim in making submissions to the Commission in respect of the new decision that the Commission must now make pursuant to the Tribunal's order, and so can be "recycled".

We consider these factors in turn below.

Disincentive to the Commission acting quickly to seek to settle appropriate cases early

8. We consider it most unlikely that the Commission, having concluded that it should consent to one of its decisions being quashed, would fail to agree to such a quashing for fear of an adverse costs order. For the Commission to take such a course would, in our view, be illogical. Seeking to defend a decision through to a substantive hearing would only serve to increase considerably the costs of all the parties involved. The Commission would – given its initial conclusion that its decision should be quashed by consent – inevitably appreciate its exposure to an adverse costs order for costs far higher than if the matter were resolved at an earlier stage by consent. In short, the starting point in section 120 cases – that a successful party will normally obtain a costs award in its favour – encourages the Commission to take a pragmatic view, and to settle appropriate cases early.

9. Where the parties are in agreement about the final order to be made in a section 120 case, there is no substantive hearing regarding the matters formerly in dispute between the parties. It is not possible for the Tribunal to take a view as to how matters would have fallen had the dispute proceeded to a substantive hearing: for the Tribunal to do so, would involve in effect trying the substantive issues purely for the purposes of a

decision on costs. That is clearly undesirable and inappropriate, and only reinforces our conclusion (in paragraph 5 above) that where a decision is quashed by the agreement of the parties, the party seeking the quashing of that decision is normally to be regarded as the successful party.

Eventim's efforts in seeking to protect its confidential information

10. We do not consider it necessary or appropriate to go into the detail of the arrangements between Eventim and the Commission during the inquiry, in which Eventim sought to protect from disclosure to third parties sensitive information confidential to it. The Commission dealt sensitively and responsibly with these concerns. The consequence was (as we have observed in paragraph 7(2) above) that certain information provided by Eventim to the Commission was only commented upon by the other interested parties *after* the Commission had published its provisional findings. That was a consequence which it was incumbent upon Commission to handle. The fact that the Commission did so in a manner that (to use the Commission's words, on which we express no view) gave rise to "a challenge based on procedural fairness considerations" that was "arguable" was a matter for the Commission, and not Eventim. We do not, therefore, consider Eventim's efforts in seeking to protect its confidential information as having any relevance to the question of costs of these proceedings.

Eventim's failure to raise its grounds for reviewing the Decision informally

11. Faced with the prospect of litigation parties should make appropriate attempts to air, and seek to resolve, their differences informally. Although the Pre-action Protocols do not directly apply to section 120 cases, responsible pre-action behaviour is an important aspect of litigation before the Competition Appeal Tribunal, as elsewhere. In this case, Eventim raised its concerns regarding the Decision informally, in a telephone call to the Commission. It would have been more appropriate to have set out Eventim's concerns regarding procedural fairness in a letter to the Commission written as soon as possible after the Decision was published on 22 December 2009. That could have been done shortly and in short order.

12. Normally, such a failure would have costs implications. However, in this case, it was not possible for the Commission to extend the time it had to consider the merger beyond 19 January 2010, and the Commission had in fact published its Decision on 22

December 2009. This left Eventim with 28 days from 22 December 2009 (which included the Christmas break) in which to file its Notice of Application. Eventim could not prudently have delayed the commencement of work on this document, given the need to file a comprehensive statement of the grounds on which the Commission's decision was being challenged and the very limited circumstances in which time for commencing proceedings can be extended. A challenge to the Decision was necessary in order to request an order of the Tribunal quashing that decision and remit the matter back to the Commission so it could adopt a new decision (for the reasons given in our earlier decision [2010] CAT 7). In these particular circumstances, we do not consider that Eventim's failure to write a "letter before action" is to be sanctioned in costs. This failure did not contribute to the costs incurred.

Recycling

13. It was not seriously contested by Eventim that the work done by Eventim in compiling its Notice of Application would be useful to Eventim in making submissions to the Commission in respect of the new decision that the Commission must now make pursuant to the Tribunal's order. Given that Eventim must now make such submissions to the Commission, and would have had to have done so if it had been asked to comment on the Commission's changed views after publication of its provisional findings, we consider that Eventim should not be able to recover all of its costs from the Commission, given that some of these costs would have been incurred in any event and would have been irrecoverable as costs. We consider that, for this reason, Eventim should only be entitled to recover seventy-five per cent of its costs, such costs to be assessed if not agreed by a Costs Judge of the Senior Courts Costs Office.

The Chairman Marcus Smith Andrew Bain

Charles Dhanowa Date: 18 February 2010
Registrar