



Neutral citation [2013] CAT 12

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1197/1/1/12
1200/1/1/12

Victoria House
Bloomsbury Place
London WC1A 2EB

6 June 2013

Before:

MARCUS SMITH, Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) SOMERFIELD STORES LIMITED
(2) CO-OPERATIVE GROUP FOOD LIMITED

Applicants

-and-

OFFICE OF FAIR TRADING

Respondent

AND BETWEEN:

(1) GALLAHER GROUP LIMITED
(2) GALLAHER LIMITED

Applicants

-and-

OFFICE OF FAIR TRADING

Respondent

RULING (PERMISSION TO APPEAL AND COSTS)

INTRODUCTION

1. By a ruling dated 27 March 2013 ([2013] CAT 5, the “Ruling”), the Tribunal decided that these applications should succeed, and that time to appeal the Decision (as that term is defined in paragraph 2 of the Ruling) should be extended for a period of 28 days from the date on which the Ruling was handed down.
2. This further ruling deals with two matters consequential upon the Ruling: permission to appeal and costs. It adopts the terms and abbreviations used in the Ruling, and should be read in the light of that Ruling.
3. None of the parties suggested that an oral hearing was necessary to determine either of these matters. Having considered the parties’ very helpful written submissions, I agree, and this further ruling has been determined on the papers alone.

PERMISSION TO APPEAL

4. The OFT’s application was made and argued on the basis that the Tribunal had committed an error of law and that the Ruling raised matters that are plainly of significant public importance. That being the case, the Tribunal applies by analogy the test contained in rule 52.3(6) of the Civil Procedure Rules: permission to appeal should only be given where the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.
5. By an application dated 19 April 2013, the OFT sought permission to appeal the Ruling. The OFT contended (in paragraph 5) that “it has a well arguable case that the approach adopted by the Tribunal erred in law. Furthermore, the considerations taken into account by the Tribunal are novel and the matters arising are plainly of significant public importance”. More specifically, the OFT contended that:
 - (1) the Ruling raised “fundamental issues” about the proper approach to rule 8(2) of the Tribunal Rules and in relation to the legal implications of the OFT entering into early resolution agreements (paragraph 2);

- (2) the Ruling raised issues of public importance and general significance as to the nature and scope of the Tribunal's power to extend time for bringing appeals, notably giving rise to concerns as to the nature, role and terms of any future early resolution agreement schemes, as well as the circumstances in which legitimate expectations might arise (paragraph 3);
 - (3) the Ruling gave rise to concerns as to the terms on which the OFT should properly concede any litigious proceedings relating to infringement decisions (paragraph 4); and
 - (4) the basis upon which the Tribunal found exceptional circumstances to exist was "a misinterpretation of that concept" (paragraph 5) and (inferentially) that this conclusion could not stand with other findings made by the Tribunal in the Ruling (paragraphs 6 and 7).
6. Gallaher and Somerfield each responded to the OFT's application in responses dated 1 May 2013, to which the OFT replied on 7 May 2013. Gallaher (but not Somerfield) submitted a short rejoinder to the OFT's reply on 9 May 2013.
 7. This is not a case where it is appropriate for the Tribunal to give permission to appeal, and I refuse permission to appeal, for the following reasons:
 - (1) In essence, the question of whether or not "exceptional circumstances" exist in any given case, is one of discretion. Granted, the circumstances in which exceptional circumstances exist must – by definition – be rare. But, although the standard that must be met for exceptional circumstances to exist is undoubtedly a very high one, the list of exceptional circumstances is not a closed one, as the Tribunal has previously emphasised (see paragraph 53(3) and (4) of the Ruling). The position is that the Tribunal must itself be "satisfied" that exceptional circumstances exist. The touchstone is the judgment of the Tribunal.
 - (2) The OFT made no criticism of the analysis, at paragraphs 40 to 54 of the Ruling, of the Tribunal's previous case law on the question of exceptional circumstances. Paragraphs 58 to 91 of the Ruling then deal with various points

advanced by Gallaher and Somerfield in support of their applications, which were rejected.

- (3) Paragraph 93 identifies the exceptional circumstances that were found to exist in the present case. Essentially, these turned on the precise form of the early resolution agreements entered into between Gallaher and Somerfield, on the one hand, and the OFT, on the other, and the inter-relationship of those agreements with the Decision, as subsequently adopted. That inter-relationship was specific to this particular case, for the reasons given in paragraph 93(3), and, indeed, only came to light as a result of the proceedings before the Tribunal in *Tobacco I*. In these unique or – at least – extremely rare circumstances, I was satisfied (for the reasons given in paragraphs 93(6) to (10)) that the circumstances were indeed “exceptional”. My conclusion was based upon the very special facts of this case.
- (4) Although this is undoubtedly a case of importance to the parties before me, it is not a case of general importance. The facts – including, in particular, the nature and terms of the Decision (which, as noted in the Ruling, was effectively a “market-wide” decision), the terms of the early resolution agreements (which are matters for individual negotiation on a case-by-case basis), the interplay between the Decision and the early resolution agreements, and the manner in which the Decision came to be successfully challenged in *Tobacco I* (which, critically, was never the subject of an “on the merits” determination by the Tribunal) – all serve to render the Ruling a “one-off”.
- (5) Moreover, for the reasons I have given, this was, in essence, a question of determining whether these very particular and singular facts gave rise to “exceptional circumstances”. Pre-eminently, this was a matter of judgment and discretion for the Tribunal. Accordingly, even assuming in the OFT’s favour that the Ruling concerned a question of law at all, I refuse permission to appeal.

COSTS

8. Each of Gallaher and Somerfield seeks their costs of making the respective applications for an extension of time under rule 8(1). Rule 55 of the Tribunal Rules provides a “wide and general discretion” in relation to costs (see *Quarmby Construction Company Limited v Office of Fair Trading* [2012] EWCA Civ 1552 at [12]), but that is a discretion which (as Gallaher very fairly pointed out in paragraph 6 of its submissions of 29 April 2013) has not been applied in the context of a contentious, but ultimately successful, application for an extension of time.
9. Of course, when considering any discretion, it is important for like cases to be treated alike, and for regard to be had to any material differences. In the case of costs, the Tribunal’s general practice – as a starting point – is that the winner is entitled to its costs, and that has been the approach of the Tribunal in a number of cases – *The Racecourse Association & Ors v Office of Fair Trading* [2006] CAT 1 and *TalkTalk Telecom Group plc v Office of Communications* [2012] CAT 15 are only two examples – albeit (as I have noted) none of these cases concerned an application for an extension of time to appeal.
10. I consider that there is a material difference between an application to extend time to appeal and other types of proceeding before the Tribunal. Whereas, in most proceedings before the Tribunal, matters can (and very often are) resolved by agreement, with resultant savings in time and costs, applications for extensions of time are not like this. As was noted in paragraph 53(1) of the Ruling, the exceptional circumstances test will not necessarily be satisfied even if an application to extend time is consented to by all interested parties.
11. Rule 8(2) of the Tribunal Rules makes this very clear: the Tribunal may not extend time unless it is satisfied that the circumstances are exceptional. Even if the OFT had consented to the applications of Gallaher and Somerfield, the success of those applications would not have been a foregone conclusion, and it cannot be said (as Gallaher does say, in paragraph 13 of its 29 April 2013 submissions) that, “[b]y refusing its consent, the OFT has forced Gallaher needlessly to incur costs”. The Tribunal had to be “satisfied” as to the existence of exceptional circumstances.

12. The fact is that the Tribunal would, in a case such as this, have been alive to the parallels between these applications and the application in *Carter* whatever the OFT might have said (see paragraph 53(6) of the Ruling). It would have been incumbent upon both Gallaher and Somerfield to persuade the Tribunal that a different conclusion to that in *Carter* was appropriate and – had their applications been made on a purely “formal basis” (e.g. “we formally apply for an extension, which the OFT does not resist”) – then those applications would, in all likelihood, have failed.
13. In short, I consider that the proper starting point in cases such as this is that – irrespective of what other parties interested in the application may say – it is incumbent upon the applicant to make clear to the Tribunal why it should exercise its rule 8 discretion in the applicant’s favour, so that the Tribunal can be satisfied that exceptional circumstances exist. Moreover, as the OFT emphasised, each of Somerfield and Gallaher had the same opportunity as the other Addressees of the Decision to appeal within time. Whilst the Tribunal concluded in the Ruling that the exceptional circumstances test set by rule 8(2) was satisfied in these circumstances, the need for Somerfield’s and Gallaher’s applications only arose as a result of their decision not to appeal in a timely fashion.
14. From this, it follows that the starting point, in cases such as this, is that the applicant should bear the cost of persuading the Tribunal that it should be satisfied that the circumstances are exceptional, and that that is so, whether application is opposed or not.
15. Accordingly, my starting point in this case is that – despite having succeeded – Gallaher and Somerfield should bear their own costs. I am fortified in the justice of this conclusion by two, additional, factors:
 - (1) First, on a number of points made to me and addressed in paragraphs 58 to 90 of the Ruling, Gallaher and Somerfield actually failed in their submissions.
 - (2) Secondly, the OFT’s opposition to the applications was entirely reasonable, and the articulation of OFT’s standpoint by Mr Beard Q.C. was one that I found extremely helpful.

16. Whilst it would be going too far to suggest that the OFT ought, in this case, to recover its costs, the costs should certainly lie where they fall. I make no order as to costs.

Marcus Smith, Q.C.

Charles Dhanowa, O.B.E.,
Q.C. (*Hon*)
Registrar

Date: 6 June 2013