



Neutral citation [2013] CAT 10

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

Case No: 1203/6/1/12

29 May 2013

Before:

THE HONOURABLE MRS JUSTICE ROSE
(Chairman)
PETER FREEMAN CBE, QC (Hon)
STEPHEN HARRISON

Sitting as a Tribunal in England and Wales

BETWEEN:

JOHN LEWIS PLC

Applicant

- v -

OFFICE OF FAIR TRADING

Respondent

- and -

DSG RETAIL LIMITED

Intervener

RULING (COSTS)

1. This ruling, which adopts the same terms and abbreviations as used in the Tribunal's judgment of 28 March 2013 in *John Lewis plc v. Office of Fair Trading* ([2013] CAT 7) ("the Judgment"), deals with an application by Dixons for the costs of its intervention in the proceedings. For the reasons set out in this ruling, we unanimously conclude that Dixons' application fails, and that there should be no order as to costs in respect of Dixons' intervention.
2. Dixons' application is set out in a letter dated 8 May 2013, to which JLP responded on 10 May 2013. By further letters sent on 14 and 16 May 2013 respectively, Dixons and JLP confirmed that they were content for the Tribunal to rule on Dixons' application on the basis of the letter submissions already filed.

DIXONS' APPLICATION

3. Dixons points to the Tribunal's broad discretion under rule 55(2) of the Tribunal's Rules to "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 notes that this rule permits the Tribunal to "take account of the conduct of all parties in relation to the proceedings". Although Dixons notes that the Tribunal's general practice has been to make no order for costs in respect of interveners (with certain exceptions), Dixons submits that the Tribunal should depart from this practice for the following reasons:
 - (a) The Application was evidently hopeless and should not have been brought. JLP should have been aware that the Application was well out of time, as the Tribunal found that the terms of the UIL made it "abundantly clear" that the Website was essentially concerned with standalone EWs and their prices and conditions (paragraph 39 of the Judgment), and that JLP knew or ought to have known, at the latest by 24 August 2012, what the OFT had decided in this respect (paragraph 44 of the Judgment).
 - (b) As a party to the UIL, Dixons was in a different position to most interveners in proceedings before the Tribunal. This was not a case where an intervener

was simply the subject of, or otherwise interested in, a regulatory decision taken unilaterally by the OFT. Rather, the core of this case concerned the construction of the UIL and the operation of the Website. The UIL were not imposed unilaterally, but were a matter of agreement between the OFT and the Retailers, and Dixons (as the only Retailer actively participating in the Steering Group) was inextricably involved in the administration of the Website. By its Application, JLP sought changes to the terms of the UIL, and the operation of the Website, which were at odds with what the Retailers had offered, which made it inevitable and necessary that Dixons should be involved in the proceedings. Like the intervener BBCB in *Independent Media Support Limited v. Office of Communications* [2008] CAT 27 (“*IMS*”), Dixons was “particularly and directly affected” by JLP’s challenge.

(c) The manner in which JLP conducted these proceedings has caused unnecessary expense to the other parties, including Dixons. Instead of making an application to the Tribunal to extend time, which could have been determined swiftly, JLP sought to frame its substantive arguments so as to make it appear that the Application was brought in time. This meant that the time bar point could not be resolved before a substantive hearing of the Application. Further, JLP rejected reasonable compromises proposed by Dixons, including amendments to the Website which were not required by the terms of the UIL, in order to bring an end to the proceedings. By contrast, Dixons conducted its intervention in a proportionate manner, with a view to avoiding unnecessary costs, in particular by avoiding duplication of the OFT’s submissions, and through its willingness to compromise.

4. JLP submits that the Tribunal should reject Dixons’ application, in particular given the Tribunal’s general position that successful interveners should not expect to recover their costs (for example in *British Sky Broadcasting Group plc v. (1) Competition Commission (2) Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 20 (“*BSkyB*”) at [22]). JLP submits that there was no reason for the Tribunal to depart from that general position in this case by reason of Dixons’ particular circumstances, or in the light of the parties’ conduct.

THE TRIBUNAL'S CONCLUSION

5. Rule 55 of the Tribunal's Rules affords the Tribunal a "wide and general discretion" as regards costs (*Quarmby Construction Company Limited v. Office of Fair Trading* [2012] EWCA Civ 1552 at [12]). This includes, in appropriate circumstances, the power to make an order for costs in favour of an intervener. However, it is clear that the general position of the Tribunal is that the costs of an intervention should not be the subject of any specific order (*BSkyB* at [22]). As the Tribunal concluded in *Ryanair Holding plc v. Competition Commission* [2012] CAT 29 ("*Ryanair*") at [7], this general position is concerned to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties. Accordingly, there must be a good reason for departing from this general position in a particular case.
6. The Tribunal does not consider that there is any reason to depart from the general position in this case. The fact that the Tribunal has rejected certain grounds of the Application as being out of time (and found the remaining ground of challenge to be without substance) does not, of itself, entitle an intervener to its costs. The circumstance is not, in our view, any different from proceedings where a respondent, supported by intervener, has prevailed in resisting a substantive challenge to a decision. This, by itself, is not a good enough reason to depart from the Tribunal's general position as regards the costs of interveners – as the Tribunal observed in *Ryanair* at [5], the general position identified at paragraph 5 above is already premised on the intervener (or the party in support of which it intervenes) being successful. Indeed, to the extent that Dixons considered (correctly) that a time bar defence was open to the OFT, it could reasonably have expected the OFT to prevail on this point without any assistance.
7. Dixons' particular position as a party to the UIL accepted by the OFT, or through the creation and administration of the Website, does not, in the Tribunal's view, mean that Dixons is in a different position from other interveners with a strong commercial interest in the outcome of Tribunal proceedings, or that it should be awarded its costs in these proceedings. Dixons' position is not analogous with the

intervener BBCB in *IMS*. Had *IMS* prevailed in its appeal from Ofcom's decision, BBCB risked being found to have infringed EU and UK competition law. There is no suggestion that Dixons was exposed to such important consequences in the present case, in the event that JLP had prevailed in its challenge to the Website Decision.

8. As Dixons correctly identifies, the Tribunal may take account of the conduct of the parties in deciding to make an award for costs. We have considered the various matters raised by Dixons but we do not consider that any of them are sufficient to justify exposing JLP to a liability to Dixons in costs.
9. In light of our conclusions above, it is not necessary to consider Dixons' submission that an application for costs was appropriate in light of JLP's refusal to withdraw an application, made in its notice of application, that it be awarded the costs of meeting any intervention in the event that it succeeded in its challenge to the Website Decision. Nor do we need to consider whether it was appropriate for Dixons to instruct both senior and junior counsel in this matter, although we particularly appreciated the clarity and brevity of their submissions.
10. Accordingly, the Tribunal unanimously finds that Dixons' application for the costs of its intervention in these proceedings fails.

The Honourable Mrs
Justice Rose

Peter Freeman CBE,
QC (Hon)

Stephen Harrison

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 29 May 2013