[2014] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1227/4/12/14

30 July 2014

Before:

THE HONOURABLE MR JUSTICE SALES
(Chairman)
CLARE POTTER
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

B E T W E E N:

A. C. NIELSEN COMPANY LIMITED

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

INFORMATION RESOURCES, INC.

Intervener

RULING (COSTS AND USE OF DISCLOSED DOCUMENTS)

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1. This Ruling adopts the same terms and abbreviations as used in the Tribunal's Order of 4 July 2014 ([2014] CAT 8, the "Reasoned Order"). By that Order, the Tribunal quashed the OFT's decision of 13 December 2013 entitled "Completed acquisition by Information Resources, Inc. of Aztec Group" and referred the matter to the CMA to make a new decision pursuant to section 22(1) of the Enterprise Act 2002.

2. This Ruling addresses two outstanding points of contention between the parties: (i) costs; and (ii) the use of documents disclosed in these proceedings.

COSTS

3. The background to the Tribunal's decision to remit this matter to the CMA is set out in the Reasoned Order. By way of brief overview for the purposes of determining the costs issue, after Nielsen filed its application for review of the OFT's Decision, IRi provided further relevant information to the OFT's successor body, the CMA. In light of this new information, Nielsen amended its Notice of Application to add Ground 5. The CMA conceded Ground 5, in the main, and the parties asked the Tribunal to quash the Decision and remit the matter to the CMA.

4. IRi has agreed to bear the costs of both Nielsen and the CMA arising directly in relation to Ground 5 of Nielsen's Notice of Application, as amended. The issue to be decided here therefore relates only to the costs of Nielsen's remaining grounds of challenge, as set out in the original Notice of Application filed on 17 April 2014 ("Grounds 1 – 4"). As the Reasoned Order makes clear, the Tribunal heard no argument on Grounds 1 – 4 and has made no decision one way or the other on the merits of those grounds of challenge.

The parties' submissions

5. The parties' positions in relation to the costs of Grounds 1 – 4 are summarised below:

   (a) Nielsen applies for its costs of Grounds 1 – 4 from either the CMA or IRi.

   (b) The CMA contends that there should be no order as to costs (beyond those arising from Ground 5). In the event that the Tribunal agrees that Nielsen

should be awarded its costs, the CMA advances the alternative position that IRi should pay both Nielsen's and the CMA's costs of Grounds 1 - 4.

(c) IRi contends that there should be no order as to costs (beyond those arising from Ground 5). It opposes Nielsen's application for costs, as well as the CMA's alternative position in which it seeks its costs from IRi.

6. Nielsen submits that it should be awarded its costs of Grounds 1 – 4 for the following main reasons:

(a) Nielsen obtained the entirety of the relief it sought in these proceedings. That is, the setting aside of the Decision and the remission of the matter to the CMA. It was, therefore, the successful party. The successful party in a judicial review would usually be entitled to its costs of the claim as a whole.

(b) The fact that the CMA's concession is arguably attributable to IRi does not mean Nielsen must bear its own costs. The CMA had a responsibility to investigate properly and Nielsen should not be penalised for bringing an action it was right to bring.

(c) The disclosure of the new information which led to Ground 5 also undermined the CMA's position in relation to Grounds 1 – 3. If Nielsen had not brought the action, the new information which led to Ground 5 would never have come to light.

7. The CMA opposes Nielsen's application for costs for the following main reasons:

(a) In inviting the Tribunal to quash and remit the matter to the CMA, the CMA acted as a responsible regulator. It should not be penalised for acting in such a manner.

(b) Nielsen did not succeed in full. It did not obtain the relief it sought, other than in an over-simplistic sense. Nielsen sought the quashing of the decision on Grounds 1 – 4 and reconsideration compatibly with the Tribunal's judgment on those grounds. The concession under Ground 5 does not entail any acceptance of Grounds 1 – 4.

(c) The CMA's concession flows from the discovery that the Decision was based on materially inaccurate information supplied by the merger parties. In the

circumstances, there is no good reason why the public purse should bear Nielsen's costs.

8. IRi contends that there should be no order as to costs in relation to Grounds 1 – 4 and, in particular, argues that it should not be ordered to pay Nielsen's costs for the following main reasons:

   (a) There is no general costs rule that means Nielsen is entitled to all its costs.

   (b) It would be disproportionate and exceptional to make an order against IRi, as an intervener, in respect of the entirety of the costs of the main parties.

   (c) Grounds 1 – 4 do not raise issues between IRi and any party to proceedings. It would therefore be inappropriate to make IRi liable for those costs.

   (d) Nielsen has not succeeded on Grounds 1 – 4 as those grounds have not been determined. Ground 5 is unrelated to those grounds.

   (e) Ground 1 – 4 may yet come to be contested, should Nielsen challenge any subsequent decision of the CMA following remittal.

The Tribunal's analysis and conclusions

9. Rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372 / 2003) (the "Tribunal Rules") provides – in broad terms – that the Tribunal may at its discretion 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. In determining how much the party is required to pay, rule 55 provides that the Tribunal may take account of the conduct of all parties in relation to the proceedings. Rule 55 has been recognised as affording 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]).

10. The starting point in relation to applications to the Tribunal is that a successful party should normally obtain a costs award in its favour (see *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19 at [21]). However, it is equally clear that a starting point is just that and, in dealing with a case justly, the Tribunal will need to consider all the relevant circumstances of the case.

11. In the present proceedings, Nielsen is the successful party so far as Ground 5 is concerned. Beyond that, the position is less clear cut. While in one sense Nielsen achieved its primary goal in these proceedings as the Decision has been remitted, that remittal came about for reasons different from those in its Notice of Application as originally filed.

12. Having carefully considered the parties' submissions and all the relevant circumstances of the case, we consider that each party should bear its own costs in relation to Grounds 1 – 4, for the following reasons:

    (a) No party has won or lost in relation to Grounds 1 – 4. We have not considered those grounds. Therefore, we are unable to say that Nielsen was successful in relation to all its grounds of challenge such that it should be entitled to its costs in respect of those Grounds. Where the complaints made against the CMA have not been determined, it would be unfair to order it to pay Nielsen's costs.

    (b) As between Nielsen and the CMA, the provision of new information by IRi is an extraneous event unrelated to Grounds 1 – 4 which has allowed Nielsen to plead a distinct ground, Ground 5. In the context of the case as originally pleaded and in relation to the relief which has been granted, the matters giving rise to Ground 5 have rendered Grounds 1 – 4 academic at this stage. If Ground 5 had not emerged, Nielsen might have been successful on some or all of its original grounds of challenge. Equally, however, the CMA might have successfully defended itself, in which case it might have been awarded its costs of Grounds 1 – 4. The Tribunal could not reach a view on the merits under Grounds 1 - 4 without the expense and time required for argument and determination on those Grounds, which would be out of all proportion to the costs matters to be determined. The just course, therefore, is to let the costs in relation to Grounds 1 – 4 lie where they fall, and make no order in relation to them as between Nielsen and the CMA.

    (c) As to the fairness of ordering IRi to pay these costs, we note IRi's point that none of the four original grounds of review relate to the conduct of IRi. Although IRi's provision of new information to the CMA effectively

rendered the determination of Grounds 1 – 4 academic at this stage, in the context of the present claim, justice would not be best served by ordering IRi to pay the costs of an application for review in which no complaint is made about its conduct. It would be exceptional, even in an unusual case such as this, for the Tribunal to order an intervener to pay the entirety of the main parties' costs.

(d) In our assessment, the fair outcome, where Grounds 1 – 4 have been rendered academic in the present claim in this way, the merits under Grounds 1 – 4 remain undecided and there is no relevant winner, is for the costs in relation to those Grounds to lie where they fall.

13. For those reasons, in the unusual circumstances of this case, we make no order as to costs in relation to Grounds 1 – 4.

USE OF DISCLOSED DOCUMENTS

14. We are told that a significant amount of confidential information has been exchanged during the course of these proceedings. These exchanges have taken place within the confines of a confidentiality ring created by order of the Tribunal on 15 May 2014 (the "Confidentiality Ring"). Each individual within the Confidentiality Ring has undertaken to use the Confidential Information (as defined by the Confidentiality Ring) "only for the purpose of these proceedings (and for no other purpose or use)" (paragraph 2).

15. Despite the protections of the Confidentiality Ring, IRi is concerned about the use of these documents now the proceedings before the Tribunal have come to a close. IRi has therefore asked the Tribunal to direct that:

(a) 'these proceedings' came to an end when the Tribunal determined the application by remitting the Decision to the CMA; and

(b) all non-public documents disclosed by one party to another for the purposes of these proceedings should be treated in accordance with the provisions of Part 31.22 of the Civil Procedure Rules ("CPR").

16. CPR 31.22 addresses the subsequent use of disclosed documents and completed Electronic Disclosure Questionnaires. In particular, it specifies that a document disclosed in proceedings may only be used for the purpose of the proceedings in which it is disclosed, subject to certain exceptions specified within the rule. However, the CPR does not apply to proceedings in the Tribunal, and the Tribunal Rules contain no equivalent to CPR 31.22. Nevertheless, as paragraph 3.1 of the Tribunal's Guide to Proceedings makes clear, the Tribunal Rules are based on the same general philosophy as the CPR.

17. Nielsen contests IRi's application. Nielsen relies on the fact that its lawyers included within the Confidentiality Ring will continue to advise Nielsen during the CMA's review on remittal. The same applies to IRi's lawyers. It would be impractical and artificial, argues Nielsen, for both its and IRi's lawyers to be obliged to ignore the disclosures made into the Confidentiality Ring. For that reason, while Nielsen says it agrees that documents disclosed into the Confidentiality Ring should only be used for the purposes of these proceedings, it contends that "proceedings" should include the CMA's review on remittal from the Tribunal, as well as any subsequent proceedings before the Tribunal.

18. We have considered IRi's application and Nielsen's reasons for opposing it. The CMA is unaffected by this issue so has not made substantive submissions either way. While the Confidentiality Ring already restricts the purpose for which disclosed documents may be used, we consider that there are good reasons for specifically applying a regime equivalent to that under CPR 31.22 in these proceedings. That rule makes clear when documents disclosed in proceedings may be used for purposes other than those proceedings and is well understood. Accordingly, we consider that it is appropriate to grant IRi's application for an order that CPR 31.22 applies to documents disclosed in these proceedings.

19. As to the meaning of "these proceedings", we consider that the correct interpretation of this phrase as used in the confidentiality undertaking signed by all individuals within the Confidentiality Ring is that it refers to the proceedings before the Tribunal which have now been determined by the quashing order made by the Tribunal, and does not include the process under which the CMA will now

review the case after its remittal with a view to taking a fresh decision. This is in line with the usual meaning of the phrase in the context of disclosure of documents in the course of litigation, where it is intended to limit the use of documents disclosed to the specific legal proceedings in which they are disclosed. For the avoidance of doubt, we consider that it is appropriate to make an order to this effect.

20. We are not persuaded that the lawyers involved in these proceedings who continue to act for the parties in the new process before the CMA will be unable to behave appropriately and ensure they make no use of these documents when it comes to that new process. The situation which has arisen here is one which is familiar in other legal contexts where similar limits on using information disclosed in the course of litigation are found to apply and lawyers cope perfectly well with such restrictions. The solicitors and counsel involved in the present case are responsible professionals who can be expected to have proper regard to the terms upon which they have been shown certain documents.

21. This ruling is obviously subject to the right of the CMA to treat the information it receives in accordance with its statutory functions and to any obligation of fairness or otherwise to give disclosure of material to any person in the course of its further review of the circumstances relating to IRi's acquisition of Aztec Group.

CONCLUSION

22. For the above reasons, the Tribunal unanimously orders that:

    (a) IRi bear the costs of both Nielsen and the CMA that arise directly in relation to Ground 5, as submitted in Nielsen's Annex to its Notice of Application of 27 May 2014. Such costs be determined as those arising from consideration of IRi's letter to the CMA sent on 20 May 2014 and from the aforementioned amendment to Nielsen's Notice of Application on 27 May 2014.

    (b) Save for the above, there is no order as to costs.

    (c) All documents disclosed as between Nielsen, the CMA or IRi for the purposes of this application for review be treated in accordance with the

provisions of CPR 31.22 (Subsequent use of disclosed documents and completed Electronic Documents Questionnaires), which shall be treated as applicable, mutatis mutandis, to this application for review.

(d) For the purposes of the Confidentiality Ring and this Ruling, the "proceedings" referred to are the proceedings in Case No. 1227/4/12/14 and do not include any subsequent review of the completed acquisition by IRi of Aztec Group by the CMA.

The Honourable Mr Justice Sales (Chairman) | Dermot Glynn | Clare Potter

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

Date: 30 July 2014