Neutral citation [2015] CAT 4

Case Nos.: 1233/4/12/14
1235/4/12/14

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

2 March 2015

THE HONOURABLE MR JUSTICE ROTH
(President)

BETWEEN:

GROUPE EUROTUNNEL S.A.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.
DFDS A/S

Interveners

AND BETWEEN:

SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

GROUPE EUROTUNNEL S.A.
DFDS A/S

Interveners

RULING (EXTENSION OF TIME)

Introduction

1. On 9 January 2015, the Tribunal handed down its judgment dismissing these two applications for judicial review: [2015] CAT 1 ("the Judgment"). I shall refer to the parties by the same abbreviations as are used in the Judgment. This ruling concerns an application for extension of time made on behalf of the CMA for the making of an application for its costs as against Eurotunnel and the SCOP, the applicants in the substantive judicial review applications.

The application for an extension

2. In a letter dated 9 January 2015, sent by the Tribunal to the solicitors representing all four parties and copied to the CMA, the parties were told that the President had directed that any applications for costs be filed and served by 5pm on 9 February 2015. In accordance with the Tribunal's usual practice, this letter together with three copies of the Judgment was made available to the representatives of all the parties attending the handing down hearing. The CMA attended that hearing and thus received the letter by hand, but since no separate representative of the Treasury Solicitor's Department ("the Treasury Solicitor"), who acted for the CMA, attended that hearing, the letter and accompanying copies of the Judgment were sent to it by post.

3. The parties were accordingly given a month to make any application for costs.

4. No application was received in accordance with this direction. On 16 February 2015, Pinsent Masons LLP, the solicitors to Eurotunnel, wrote to the Tribunal observing that the time for making any such application had expired. That letter was duly copied to the representatives of the other parties (save for DFDS, which was purely an intervener).

5. Prompted by that letter, on 18 February 2015, Mr Oliver Gilman of the Treasury Solicitor wrote to the Tribunal, stating:

> "I refer to the Tribunal's letter dated 09 January 2015 and the requirement to make any applications for costs by 09 February. I regret that due to a clerical error, this letter was not brought to my attention upon return from annual leave. It was only upon receipt of the letter from Pinsent Masons yesterday that I became aware of the deadline."

The letter proceeded to ask that the Tribunal make an order for costs in favour of the CMA as the successful party.

6. Although not expressed in clear terms as an application for an extension of time, I think that it is appropriate to treat Mr Gilman's letter as making such an application. However, as the grounds there given for seeking an extension were extremely sparse, to say the least, the Tribunal wrote on 23 February to the Treasury Solicitors asking for a full explanation of the basis on which the Tribunal's direction had not been complied with, pointing out that the letter of 9 January setting out the direction had been marked for the attention of three named individuals at the Treasury Solicitor and was also separately addressed to a member of the CMA's Litigation Unit.

7. This elicited a much fuller response from Mr Gilman, dated 25 February 2015, in which he states that he was the lead lawyer with conduct of this case, and that on his return from annual leave on 13 January he concentrated on "the most urgent matters, namely the content of the Judgment and any outstanding consequential matters." He says that the Tribunal's letter of 9 January, which had been received on 12 January, was mistakenly filed without full consideration being given to it, and apologises for this mistake. He also says that both he and the CMA were expecting the issue of costs to be dealt with "at the anticipated hand down hearing, which in the event did not take place." Since the Judgment had already been handed down, as stated above, at a brief hearing on 9 January, I can only assume that this is a reference to a separate hearing concerning the request made by the SCOP for interim measures pending its application for permission to appeal. That request was listed for hearing on 22 January, but on 16 January the Tribunal informed the parties that it had decided to refuse the SCOP's application for permission to appeal for reasons that would be given the following week. The SCOP then decided not to pursue its request for interim measures before the

Tribunal and the further hearing was accordingly vacated (and the Tribunal's ruling refusing permission to appeal was issued on 20 January).

8. Mr Gilman also refers to the fact that the Treasury Solicitor had been engaged in negotiations on behalf of the CMA seeking to agree costs with Eurotunnel and the SCOP, and in that regard refers to his letter dated 20 January to the solicitors to Eurotunnel and the SCOP stating that the CMA will be asking the Tribunal to award costs in its favour and requesting agreement to an award of an interim payment of £80,000. Although Mr Gilman states that that letter was copied to the Tribunal at the time, and the letter indeed states that it is being so copied, the Treasury Solicitor now accepts that it was not in fact copied to the Tribunal.

9. Ms Rebekah Black, the Assistant Director of the Litigation Unit at the CMA to whom the 9 January letter from the Tribunal had been personally copied, also wrote to the Tribunal on 25 February 2015. She states that the Tribunal's letter of 9 January was separated from the Judgment by staff and was filed without the deadline having been noted. She says that in the usual course of events, correspondence from the Tribunal is emailed by the Treasury Solicitor to the CMA litigation lawyers but that did not happen on this occasion. Ms Black adds that the correspondence that took place between the parties regarding the SCOP's proposed interim measures may have diverted attention away from the deadline for costs set out in the Tribunal's letter of 9 January.

The parties' submissions

10. Mr Gilman in his letter of 25 February 2015, submits that to refuse an extension of time and thereby preclude the CMA from recovering its costs would not be commensurate with the overriding objective under the CPR. Ms Black in her letter refers to the Tribunal's grant of an extension of time for an application for costs in *Ryanair v Competition Commission* [2012] CAT 29, and submits that costs issues are not necessarily as pressing as the substantive issues in merger proceedings. The CMA has subsequently urged that to refuse an extension and thereby disallow the CMA its costs would be disproportionate.

11. Both Eurotunnel and the SCOP have written by their solicitors to oppose the application for an extension. SCOP's solicitors had already drawn attention to the contrast with the facts that led to an extension in the *Ryanair* case, where the Tribunal had found that there was a good explanation for missing the relevant deadline by just one day. For both Eurotunnel and the SCOP it is stressed that neither the CMA nor its solicitors are able to provide any good reason why the Tribunal's deadline was missed in the present case, and that the application for an extension was itself made nine days after the deadline expired. The SCOP refers to the decision of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795, and the strict approach taken to adherence to time limits when faced with requests for extensions of time for appeals to the Tribunal, referring to *Fish Holdings Ltd v OFT* [2009] CAT 34 and *OFT v Somerfield Stores Ltd* [2014] EWCA Civ 400. Responding to the suggestion that an application for costs is not time critical, the solicitors to the SCOP (whose comments are endorsed on behalf of Eurotunnel) state:

> "… where parties are seeking to resolve questions of costs and to avoid the need for an application to the Tribunal (and associated cost), there is necessarily time sensitivity, because the parties will be seeking to reach agreement within the stated deadline. The deadline accordingly incentivises the parties to make sensible proposals before the period expires."

Accordingly, to grant the extension here sought would "set an inappropriate precedent for the future by disincentivising the resolution of matters within the time frame ordered by the Tribunal".

12. Both the SCOP's solicitors and the CMA make reference in general terms to the 'without prejudice' negotiations being conducted prior to the expiry of the deadline, but they characterise the nature of those negotiations rather differently.

The principles

13. The judgment of the Court of Appeal in *Mitchell* concerned the failure to file a costs budget in time in accordance with the recently introduced rules for costs. It also concerned relief under CPR 3.9(1) from sanctions set out in the costs

budgeting rules. The Court there said that where the non-compliance with a rule, practice direction or court order was other than insignificant, the burden is on the defaulting party to persuade the court to grant relief. The Court stated, at [41]:

> "… mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. … This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

14. The judgment in *Mitchell* generated considerable concern, and the Court of Appeal clarified its guidance more recently in *Denton v TH White Ltd and ors* [2014] EWCA Civ 906, [2014] 1 WLR 3926. *Denton* is addressed directly to the application of the relief from sanctions rule in CPR 3.9(1). However, while stating that the guidance given at para 41 of *Mitchell* remains substantially sound, the judgment of the Master of the Rolls and Vos LJ stresses that in every case the court should consider all the circumstances so as to enable it to deal justly with the application. Thus it is not the position that unless a default can be characterised as trivial or there is a good reason for it, an application for an extension or relief from sanction must be refused. In that regard, the judgment emphasised the passage from the 18th Implementation Lecture on Sir Rupert Jackson's reforms which stated:

> "the relationship between justice and procedure has changed … not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case."

While stressing that the courts should not slip back into the old culture of readily tolerating non-compliance, and that a need to decide the issue on the merits is not the pre-eminent consideration, the judgment makes clear that under the CPR, post-Jackson, a more nuanced approach is required.

15. However, the CPR do not apply directly in this Tribunal. The position is set out in the Tribunal's Guide to Proceedings ("the Guide"), which constitute a practice direction under rule 68(2) of the Competition Tribunal Rules 2003 ("the Tribunal Rules"):

> "3.1 The Rules are based on the same general philosophy as the CPR and pursue the same overriding objective of enabling the Tribunal to deal with cases justly, in particular by ensuring that the parties are on an equal footing, that expense is saved, and that appeals are dealt with expeditiously and fairly.
>
> 3.2 To achieve this objective in the particular context of the 1998 Act, the Rules are modelled partly on the CPR and partly on the Rules of Procedure of the Court of First Instance of the European Communities (CFI),[1] which deal with appeals in the competition cases arising under Articles [101] and [102] of the Treaty. A central feature of both the CPR and the Rules of Procedure of the CFI is case management by the court.
>
> 3.3 However, it should be borne in mind that the Tribunal's Rules are different in various respects. Parties should not assume that the CPR or the Rules of Procedure of the CFI apply to a particular procedure issue."

16. In that regard, it is appropriate to refer to the position adopted by the Upper Tribunal (Tax and Chancery Chamber) to extensions of time for an application for costs. Rule 10(6) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that an application for costs following a Tribunal decision must be made within a month of release of the decision. In *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC), the Tribunal had to determine an application made by HMRC six calendar (and four working) days outside this time limit. In addressing HMRC's application for an extension of time in which to apply for their costs, Judge Colin Bishopp referred to the practice of the Tax and Chancery Chamber of the Upper Tribunal to look to the CPR for assistance on matters about which the Tribunal's own rules are silent, but noted that as they do not directly apply the CPR offer no more than a guide.

17. In his judgment, Judge Bishopp observed that in the CPR both the provision on relief from sanctions and the overriding objective set out in rule 1.1 had been amended post-Jackson, with the express purpose of ensuring that time limits and similar requirements were enforced more strictly by the courts. Hence the

[1] Now the General Court.

overriding objective was amended with effect from 1 April 2013 to include the following provision:

> "(f) enforcing compliance with rules, practice direction and orders."

An equivalent provision was incorporated in the revised CPR 3.9.

18. Judge Bishopp pointed out that the Upper Tribunal rules had not so far been similarly amended, and continued, at [18]-[19]:

> "It does not seem to me that it is open to a tribunal judge to anticipate a decision which might never be taken and apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in relation to extensions of time should continue to apply. In addition, the changes to the CPR were announced in advance;…. I do not think it is appropriate to introduce significant changes in practice without warning.
>
> In my judgment therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which it has applied hitherto, as it was described by Morgan J in *Data Select*."

19. That is a reference to the judgment in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), [2012] STC 2195, where Morgan J held that when a court or tribunal is asked to extend a time limit, it should as a general rule consider the following questions: (1) what is the purpose of the time limit; (2) how long was the delay; (3) is there a good explanation for the delay; (4) what will be the consequences for the parties of an extension of time; and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions. He held that it is also appropriate to consider the overriding objective under the CPR and the matters listed in CPR rule 3.9.

20. Although Judge Bishopp in the *Leeds City Council* case was differing from the decision of another judge of the Upper Tribunal, who had applied the *Mitchell* approach, his judgment was followed by Rose J in a subsequent ruling of the Upper Tribunal on an application to extend time: *HMRC v Apollo Fuels Ltd* (2014) FTC/42/2013.

21. It is perhaps pertinent to note the reasons for delay in *Leeds City Council*, as summarised by the judge:

> "The matter was being handled by a solicitor whose experience was in criminal cases but who moved about 18 months before the relevant events into civil work. Her unchallenged statement explained that she was still in the process of gaining familiarity with civil procedure, and was in addition rather over-worked. She was not aware of the time limit for lodging an application of costs, but as soon as she realised that the time limit had expired she made an application, accompanied by a request for an extension of time."

22. In the *Apollo Fuels* case, the delay was considerably longer, but the defaulting party was the private respondent, whose advisers explained that they had never brought an appeal in the Upper Tribunal before and that as HMRC were pursuing an appeal in the Court of Appeal they had assumed that they should await the decision of the Court of Appeal before dealing with the costs of the Upper Tribunal hearing.

23. In both those cases, applying the *Data Select* criteria, the judges granted an extension of time.

24. I consider that the approach of Judge Bishopp and Rose J in the Upper Tribunal to the CPR is of equal relevance to this Tribunal. The Guide makes express reference to the overriding objective set out in the CPR in the form that they had prior to what may conveniently be described as the Jackson amendments. Essentially for the reasons set out by Judge Bishopp, I do not think it would be appropriate, without more, simply to apply the approach set out in *Mitchell* and *Denton* to proceedings in this Tribunal.

25. The Tribunal Rules do not prescribe a time for making an application for costs: see rule 55. The time limit for making the application was imposed, as is the Tribunal's common practice, by way of a direction given at the time that the judgment was issued. By contrast, the cases of *Fish Holdings* and *Somerfield*, referred to by the SCOP, concern the time limit for commencing an appeal set out in rule 8(1) of the Tribunal Rules, as to which rule 8(2) specifically prescribes that the time limit cannot be extended unless the circumstances are "exceptional." That high hurdle does not apply to the application in the present case, which is governed

by rule 19(2)(i), whereby the Tribunal has a general discretion to extend any time limit "whether or not expired".

26. As matters now stand, I consider that, where not otherwise governed by a specific provision in the Tribunal Rules, it is appropriate to apply the approach set out in *Data Select*. That is subject, however, to the important observation at the conclusion of this ruling. Moreover, as under the current, stricter approach applied under the CPR, it is necessary in each case to have regard to all the circumstances so as to deal justly with the application.

The present case

27. The purpose of imposing a time limit for an application for costs is to require any party that wishes to assert a claim to costs to do so promptly, so as to achieve finality in the proceedings and to enable the other party or parties to know that after that time has expired no such claim will be made. Although the two substantive applications in these proceedings concerned a merger, the importance of time limits in the substantive phase of a merger case does not apply in the same way to a costs application after the substantive case has been decided: see the observations of Mr Marcus Smith QC, sitting as a chairman, in *Ryanair* at [9], with which I respectfully agree.

28. The delay in this case comprised nine days, which is not insignificant in the context of a one month time period. It clearly contrasts unfavourably with the one day's delay involved in the *Ryanair* case. However, I do not regard it as substantial.

29. The explanation given for the delay is unimpressive. The Treasury Solicitor has considerable experience in representing parties before this Tribunal and the CMA (in that it has assumed the role of both the Office of Fair Trading and the Competition Commission) is a regular party to such proceedings. Although I accept that the individuals involved may have expected the issue of costs to be dealt with at the anticipated hearing concerning interim measures and the application for permission to appeal, once that hearing was vacated it should therefore have been obvious that a separate application for costs would have to be

made. The Tribunal's letter of 9 January 2015 was marked for the attention of three named individuals at the Treasury Solicitor, and there is no good excuse for it being filed away without any of those individuals reading it or, if they read it, failing to pay sufficient attention to what it said. The situation here is in sharp contrast to that in *Ryanair,* where the Tribunal accepted that its letter setting out the direction as to time may never have been received by the Treasury Solicitor so that the defaulting party may have been unaware of the deadline.

30. However, considering the consequences for the parties, it is clear that if an extension is refused, the CMA as the successful party may have to bear very substantial costs which it otherwise has the prospect of recovering, whereas Eurotunnel and the SCOP, whose judicial review applications failed, stand to gain an unexpected windfall. In so saying, I am not determining the issue of costs, on which the parties may wish to make further submission, but on any view the CMA has a reasonable chance of recovering its costs. I note what the SCOP says about the effect on the negotiations regarding costs. It would be inappropriate to reach any view regarding the nature or content of those negotiations, which were conducted 'without prejudice'. But in that respect I regard the Treasury Solicitor's letter of 20 January 2015 as significant. Although it was not copied to the Tribunal (apparently by another oversight), it put Eurotunnel and the SCOP on notice that the CMA was intending to make an application to the Tribunal for its costs. Those parties therefore appreciated that the CMA was seeking to recover its costs and they, or their representatives, must have realised that when no such application to the Tribunal was made by the deadline this was an oversight.

31. Having regard to all the circumstances and the overall justice of the case, despite the lack of good explanation for the delay, I consider that it is appropriate to extend time. Since the Tribunal's approach to such an application was uncertain, I do not think that Eurotunnel and the SCOP are to be criticised for opposing it. Such costs as they incurred in opposing the CMA's application for an extension are therefore to be paid by the CMA.

32. As noted above, the SCOP has indicated that it may wish to submit observations regarding the issue of costs. Any observations on behalf of either the SCOP or

Eurotunnel must be received by 5 pm on 5 March 2015, and any observations by the CMA in reply by 5 pm on 10 March 2015. These deadlines will not be extended.

The future

33. Finally, it is appropriate to point out that the draft revised Tribunal Rules that have been issued for consultation incorporate a wholly new provision that largely follows the revised overriding objective of the CPR: see the "Governing Principles" at rule 3 of the draft revised rules.[2] In particular, draft rule 3(2)(f) mirrors CPR rule 1.1(2)(f) set out above. If that draft rule is adopted, parties should expect that the Tribunal will thereafter adopt a similar approach to that which applies in the High Court, following the guidance of the Court of Appeal in *Denton.*

The Honourable Mr Justice Roth
(President)

Charles Dhanowa OBE, QC (*Hon*)
(Registrar) Date: 2 March 2015

[2] https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review