



Neutral citation [2017] CAT 22

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1262/5/7/16(T)

Victoria House
Bloomsbury Place
London WC1A 2EB

5 October 2017

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chairman)
PETER FREEMAN CBE QC (Hon)
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

AGENTS' MUTUAL LIMITED

Claimant

- v -

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)

Defendant

RULING (APPLICATION FOR PERMISSION TO APPEAL)

INTRODUCTION

1. In a Judgment dated 5 July 2017 ([2017] CAT 15, the “Judgment”), the Tribunal determined certain issues (the “Competition Issues”) that had been transferred to it from the Chancery Division of the High Court by order of Sir Kenneth Parker of 5 July 2016 (the “Transfer Order”). All other issues – the “non-Competition Issues” – remained in the Chancery Division, subject to a stay.
2. This Ruling takes the Judgment as read and adopts the terms and abbreviations used in the Judgment.
3. A case management conference (“CMC”) dealing with matters consequent upon the Judgment was held on 12 July 2017 in the Rolls Building. The Chairman sat alone in his dual capacity as Chairman of the Tribunal and Judge of the Chancery Division. At the CMC, Gascoigne Halman indicated an intention to seek permission to appeal the Judgment. The Chairman raised the question as to whether the Judgment was an appealable decision such that the Tribunal had jurisdiction to give permission to appeal. He requested that this matter be addressed in any application by Gascoigne Halman for permission to appeal the Judgment. Gascoigne Halman duly did so in its Application dated 26 July 2017. The point has also been addressed in a brief response submitted by Agents’ Mutual on 9 August 2017.
4. Pending the Tribunal’s conclusion on this point, Gascoigne Halman has requested that its Application be treated either as an application for permission to appeal under Rules 107 and 108 of the Competition Appeal Tribunal Rules 2015 (the “Tribunal Rules”) or as an application to the High Court for permission to appeal under CPR 52.3 consequent upon any order of the High Court giving effect to the Judgment (when made).
5. This Ruling determines the question of jurisdiction only: it is confined to the purely legal question of whether there is a statutory right of appeal of the Judgment from the Tribunal. It does not deal with the merits of Gascoigne Halman’s Application.

THE STATUTORY BACKGROUND

6. Under paragraph 16 of the Transfer Order, the transfer of the Competition Issues was made pursuant to Regulation 2 of the Section 16 Enterprise Act 2002 Regulations 2015 (the “2015 Regulations”). As may be apparent from their title, the 2015 Regulations were made by the Lord Chancellor in exercise of the powers conferred by section 16(1)(a) of the Enterprise Act 2002 (“EA 02”). Section 16 EA 02 provides:

“Transfers of certain proceedings to and from Tribunal

- (1) The Lord Chancellor may by regulations—
- (a) make provision enabling the court—
 - (i) to transfer to the Tribunal for its determination so much of any proceedings before the court as relates to an infringement issue; and
 - (ii) to give effect to the determination of that issue by the Tribunal; and
 - (b) make such incidental, supplementary, consequential, transitional or saving provision as the Lord Chancellor may consider appropriate.
- (2) The power to make regulations under subsection (1) is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
- (3) Rules of court may prescribe the procedure to be followed in connection with a transfer mentioned in subsection (1).
- (4) The court may transfer to the Tribunal, in accordance with rules of court, so much of any proceedings before it as relates to a claim to which section 47A of the 1998 Act applies.
- (5) Rules of court may make provision in connection with the transfer from the Tribunal to the High Court or the Court of Session of a claim made in proceedings under section 47A of the 1998 Act.
- (6) In this section—
- “the court” means—
- (a) the High Court or a county court; or
 - (b) the Court of Session or a sheriff court; and
- “infringement issue” means any question relating to whether or not an infringement of —
- (a) the Chapter I prohibition or the Chapter II prohibition; or
 - (b) Article [101 or 102] of the Treaty,
- has been or is being committed;
- but otherwise any terms used in this section and Part 1 of the 1998 Act have the same meaning as they have in that Part.”

7. Regulation 2 of the 2015 Regulations provides:

“Transfer of proceedings from the court to Competition Appeal Tribunal

Where in any proceedings before the court, there falls for determination an infringement issue¹ the court—

- (a) may by order transfer to the Tribunal for its determination so much of the proceedings as relates to the infringement issue;
- (b) may give such directions or make such order as it thinks fit to give effect to the determination of that issue by the Tribunal.”

8. Appeals from decisions of the Tribunal are governed by section 49 of the Competition Act 1998 (“CA”) which provides, insofar as material:

“49 Further appeals from the Tribunal

...

(1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—

- (a) as to the award of damages or other sum (other than a decision on costs or expenses), or
- (b) as to the grant of an injunction.

(1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses).

(1C) An appeal under subsection (1A) arising from a decision in respect of a stand-alone claim may include consideration of a point of law arising from a finding of the Tribunal as to an infringement of a prohibition listed in section 47A(2).

(1D) In subsection (1C) “a stand-alone claim” is a claim—

- (a) in respect of an alleged infringement of a prohibition listed in section 47A(2), and
- (b) made in proceedings under section 47A or included in collective proceedings.

(2) An appeal under this section—

- (a) except as provided by subsection (2A), may be brought by a party to the proceedings before the Tribunal or by a person who has a sufficient interest in the matter; and
- (b) requires the permission of the Tribunal or the appropriate court.

...

(3) In this section “the appropriate court” means the Court of Appeal or, in the case of an appeal from Tribunal proceedings in Scotland, the Court of Session.”

9. As section 49 CA refers in turn to decisions of the Tribunal in proceedings under section 47A CA, it is useful to set out the material provisions of that section:

“47A Proceedings before the Tribunal: claims for damages etc.

¹ “Infringement issue” has the meaning given in section 16(6) EA 02.

(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.

(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

- (a) the Chapter I prohibition,
- (b) the Chapter II prohibition,
- (c) the prohibition in Article 101(1), or
- (d) the prohibition in Article 102.

(3) The claims are—

- (a) a claim for damages;
- (b) any other claim for a sum of money;
- (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.

...”

SUBMISSIONS OF THE PARTIES

10. In its Application, Gascoigne Halman put forward three possible alternative views of the nature of the Judgment depending on the correct reading of section 16 EA 02 and of Regulation 2 of the 2015 Regulations. It has not sought in any of those alternatives to argue that there is a statutory right of appeal of the Judgment from the Tribunal. Agents’ Mutual has simply stated that “[t]here is no statutory route of appeal from the Tribunal, and permission to appeal must therefore be sought under CPR 52 against a subsequent order of the High Court giving effect to the Tribunal’s determination”.

ANALYSIS

11. It is not necessary for us to consider each of Gascoigne Halman’s alternatives in detail. We do, however, consider that the suggestion made by Gascoigne Halman that the Tribunal had no jurisdiction to make the determinations in the Judgment in the first place is wrong. In particular, we note that, contrary to what is suggested at paragraph 4b of the Application, the Tribunal has not adjudicated on a claim for breach of contract. The breach of contract claim is one of the non-Competition Issues which remain in the Chancery Division, subject to a stay. To the extent that the

Tribunal has addressed contractual issues, those issues were intrinsic to the Competition Issues. We note for completeness that this also applies to the assertion at Ground 4 of the Application that the Tribunal lacked the jurisdiction to make the findings of law at paragraphs 54(2) and (3) of the Judgment. Gascoigne Halman has itself acknowledged in the Application that “...the Tribunal may, of course, decide such ancillary questions as arise in the course of [competition law proceedings], such as on the construction of contractual clauses, applicable law, scope of restrictions etc”.

12. We consider the appropriate analogy in this case to be the determination of a preliminary issue. The effect of the Transfer Order was to transfer the Competition Issues from the High Court to the Tribunal, which the Tribunal determined as if they were preliminary issues. The unusual feature of the present case is that the preliminary issues (i.e. the Competition Issues) have been determined in the Tribunal, whilst all other issues (i.e. the non-Competition Issues) remain for determination in the Chancery Division.
13. In certain circumstances, we consider that there could be a statutory right of appeal from the Tribunal of any such determination (for example, if the preliminary issue determined arose in the context of proceedings under section 47A CA). However, the Competition Issues transferred in this case arise from a defence to a breach of contract claim. It is not, in our view, possible to construe the wording of sections 47A and 49 CA sufficiently widely to cover the circumstances of the present case.
14. Gascoigne Halman raised as an issue the fact that there is no formal order from the Tribunal against which any appeal can actually be brought. We consider that to be a bad point. It is not the case that an appeal from the Tribunal needs to proceed against an order. In contrast to the position in the High Court, where an appeal is from a judgment or order of the High Court (see section 16 of the Senior Courts Act 1981 and Vol. 2 para.9A-59.3 of the White Book 2017), an appeal from the Tribunal is from a decision of the Tribunal (see section 49 CA and Rule 107 of the Tribunal Rules). Where a decision of the Tribunal is dispositive, it is not generally the practice of the Tribunal to make a separate order. In the case of the Judgment, the dispositive section is Section N, and there is no need for any further order.

CONCLUSION

15. Accordingly, our decision is that there is no statutory right of appeal of the Judgment from the Tribunal. An order giving effect to the Judgment will be made in the High Court by the Chairman in his capacity as Judge of the High Court. Given that the non-Competition Issues remain to be determined by the High Court, such an order is in any event appropriate in the present case as the formal means by which the High Court gives effect to the determination of the Tribunal in the context of the subsequent hearing of the non-Competition Issues. The Application will be treated as an application to the High Court under CPR 52.3 for permission to appeal against the subsequent order of the High Court giving effect to the Tribunal's determination, and the substance of the Application will be determined by the Chairman in his capacity as Judge of the High Court.

The Hon Mr Justice Marcus Smith
Chairman

Peter Freeman CBE, QC
(Hon)

Brian Landers

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 5 October 2017