



Neutral citation [2017] CAT 28

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1277/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

13 December 2017

Before:

THE HONOURABLE MRS JUSTICE ROSE
(Chairman)
DR CATHERINE BELL CB
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BALMORAL TANKS LIMITED
(2) BALMORAL GROUP HOLDINGS LIMITED

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

RULING (PERMISSION TO APPEAL AND COSTS)

1. On 6 October 2017 the Tribunal handed down judgment unanimously dismissing an appeal brought by the Appellants ([2017] CAT 23) (the “Judgment”).
2. On 27 October 2017 the Appellants applied for permission to appeal in respect of the Judgment (the “Application”). That document also set out the Appellants’ primary submissions relating to costs. We have read and fully considered the Application and the submissions on costs. We have also considered the observations submitted by the Respondent on 8 November 2017 on both issues.

PERMISSION TO APPEAL

3. Section 49 of the Competition Act 1998 provides that an appeal lies from a decision of the Tribunal to the Court of Appeal both as to the amount of any penalty imposed and on a point of law arising from any other decision of the Tribunal on an appeal against an infringement decision. In deciding whether to grant permission, the Tribunal applies the same test as the High Court applies under the Civil Procedure Rules, namely that permission to appeal may be granted where the Tribunal considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.
4. Balmoral set out five grounds in the Application, four of which relate to the appeal on liability and the fifth to the appeal against the penalty:
 - (1) It is alleged that the Tribunal erred in finding that there was no inconsistency between the CMA’s approach to the civil and criminal proceedings.
 - (2) It is alleged that the Tribunal misunderstood Balmoral’s arguments about the purpose of the June meeting and that we failed to pay proper regard to the evidence of Mr Snee and Mr Joyce on this point.

- (3) It is alleged that the Tribunal imposed a different test for the existence of an exchange of information infringement than is stipulated by the EU case law, to the Appellants' disadvantage.
 - (4) It is alleged that the Tribunal erred in assessing the "object" of the infringement.
 - (5) It is alleged that the Tribunal erred in upholding the approach of the CMA in not imposing a fine on the other parties to the Information Exchange Cartel because of the fine that had been imposed on them for the main cartel infringement.
5. We consider that the first two grounds and the fourth ground are in reality simply challenges to the factual findings that the Tribunal made for the reasons set out in the Judgment. As to the third ground, we reject the submission that that we imposed a threshold for a finding of infringement which was out of line with the test described in the case law of the European Court to which we referred in the Judgment.
6. The fifth ground which relates to the penalty reiterates points that were raised in these proceedings and which we rejected for the reasons set out in the Judgment.
7. We have therefore concluded that none of the grounds has any real prospect of success and there is no other compelling reason for granting permission to appeal. We therefore refuse permission.

COSTS

8. Rule 104 of the Competition Appeal Tribunal Rules 2015 provides that the Tribunal can make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings. Rule 104(4) provides that in making an order and determining the amount of costs, the Tribunal can take into account various factors, including the conduct of all parties in relation to the proceedings; any schedule of incurred or estimated costs filed by the

parties; whether a party has succeeded on part of its case, even if that party has not been wholly successful and whether costs were proportionately and reasonably incurred.

9. In the observations submitted on 8 November 2017, the Respondent applied for an order that the Appellants pay the Respondent's costs of the appeal such costs to be the subject of detailed assessment if not agreed. This was on the basis that the appeal had been dismissed in its entirety. The CMA has not asked us to assess the actual amount of costs.
10. As a matter of principle, we reject the Appellants' primary position that there should be no order as to costs. Their challenge before this Tribunal in relation to the Information Exchange Infringement was unsuccessful both as regards liability and as regards penalty. The Respondent is entitled to its costs.
11. The argument that Appellants put forward is that they incurred substantial costs in paying for its legal representation in relation to the criminal proceedings we describe in the Judgment and they submit that should never have been drawn in to those proceedings. The Appellants refer in their submissions to *Gibson's Settlement Trusts* [1981] Ch 1979. That decision concerned proceedings brought by trustees seeking directions from the court as to how they should implement an undertaking they had given to the settlor's children. The court dismissed the summons and ordered the costs "of and incidental to the summons" to be assessed. An issue arose about what costs were to be treated as incidental to the summons for this purpose and in particular how much of the costs of the work dealing with the dispute brewing before the actual summons was issued should be included. The judge held that the scope of costs depended on whether the proceedings when they were ultimately issued were wide enough to encompass the dispute that had generated the pre-launch work.
12. We do not consider that the *Gibson* case provides a useful analogy with the present situation and in our judgment it is not appropriate to take the criminal proceedings into account in deciding the issue of the costs of the present appeal.

13. At present, the Tribunal has not been asked to assess the actual amount of costs. If this is not otherwise agreed between the parties it will fall to be assessed in accordance with Rule 104. We see no reason why that assessment should be delayed and we refuse the application by Balmoral for stay.

The Hon. Mrs Justice Rose
Chairman

Dr Catherine Bell CB

Margot Daly

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

Date: 13 December 2017