Case No: HC-2016-000513

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Between:

AGENTS' MUTUAL LIMITED

Claimant

- and –

GASCOIGNE HALMAN LIMITED

Defendant

ORDER

Amended under the "slip" rule on 12 October 2017

Before **the Honourable Mr. Justice Marcus Smith** sitting at The Rolls Building, Fetter Lane, London, EC4A 1NL, on 6 October 2017

UPON CONSIDERING:

(i) The Judgment of the Competition Appeal Tribunal of 5 July 2017, [2017] CAT 15 (the "Judgment");
(ii) The Ruling of the Competition Appeal Tribunal of 5 October 2017, [2017] CAT 22 (the "Ruling");
(iii) The Order of Mr. Justice Marcus Smith dated 5 October 2017 (the "Order");
(iv) The Defendant's application from permission to appeal the Judgment (dated 26 July 2017); and
(v) The Claimant's observations on the Defendant's application (dated 9 August 2017)

IT IS ORDERED THAT

1. Appellants' application for permission to appeal the Order is refused.

2. ~~The Appellants may, within seven days of receipt of this order, apply for a hearing at which they may renew their application for permission to appeal. Such application may be made by post to the High Court Appeal Centre, Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL quoting the above appeals reference number. Any such application must also be served on the Respondents to the appeal (that is, the above-named Claimant).~~

   The Appellants may apply for permission to appeal to the appeal court. The appeal court in this case is the Court of Appeal.

REASONS

1. This is the Defendant's application for permission to appeal against the Order, which itself gives effect to the Judgment of the Competition Appeal Tribunal (the "Tribunal") on the issues in those proceedings known as the "Competition Issues".

2. The Competition Issues were transferred to the Tribunal for determination by order of Sir Kenneth Parker of 5 July 2016. The background to this application for permission to appeal, and the reasons why it is being treated as an application to the High Court under CPR 52, rather than an application to the Tribunal, are set out in the Ruling.

3. In that Ruling the Tribunal held that there is no statutory right of appeal of the Judgment from the Tribunal. However, the effect of the Order is to render the Judgment of the Tribunal a judgment of the High Court for purposes of the Competition Issues. There is, therefore, a right to appeal the Order under CPR 52.

4. Save where otherwise stated or the context otherwise requires, this order adopts the defined terms as set out in the Judgment.

5. In accordance with CPR 52.6, permission to appeal may be given only where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard. Gascoigne Halman has not suggested that limb (b) of the test applies in this case. I have considered the matter myself, and have reached the conclusion that there is no other compelling reason for the appeal to be heard. I therefore turn to consider whether the appeal would have a real prospect of success.

6. It is worth noting at the outset that this was a factually contentious case. The significant factual dispute between the parties directly informed the competition analysis in the Judgment, and was resolved by the Tribunal against Gascoigne Halman.

7. With that general observation in mind, and having read and considered Gascoigne Halman's application, I find that none of the five grounds set out in Section B of the application has a real prospect of success. The various grounds advanced by Gascoigne Halman essentially repeat arguments raised in the course of the hearing, which were considered and rejected for the reasons set out in the Judgment.

8. The first two grounds concern aspects of the Tribunal's findings on the substance of the Competition Issues. These grounds are taken out of order by Gascoigne Halman and fail to recognise or pay regard to the analytical structure of the Judgment. I therefore deal with these grounds in the reverse order in which they appear in the application.

9. Under Ground 2, Gascoigne Halman contends that the Tribunal erred in law by adopting the wrong approach to the assessment of whether a contractual restriction amounts to an anti-competitive restriction "by object". Those sub-grounds may be summarised as follows and are considered in turn:

    (1) First, that in addressing the question whether the specific contractual restrictions in issue had the object of restricting competition, the Tribunal erred by reason of adopting the wrong starting point and the wrong framework. This betrays a misunderstanding of the structure of the Judgment and the logical sequence in which it approaches the issues in contention. The specific claim that the Tribunal

"started" from consideration of the market rather than from the words of the restriction in question is unfounded (see, for example, the statement at paragraph 179 that "[s]elf-evidently, the starting point must be the nature of the rule in question").

(2) Second, that the Tribunal erred in seeking to weigh pro- and anti-competitive impacts of the contractual restrictions within the framework of its "object" analysis rather than under section 9 CA. Paragraph 184(5) of the Judgment is cited as an example. The assertion that the Tribunal engaged in a balancing exercise more relevant to the question of an exemption is simply not correct on the true reading of this paragraph, or any other part of the Judgment. Sub-paragraph 184(5) itself considers the relevant economic context, applying the test set out in paragraph 149(3) of the Judgment which specifies that the [evaluation] does not involve "any balancing of pro- or anti-competitive effects".

(3) Third, that the Tribunal erred in law by applying the "object" test too restrictively. This contention ignores the statement of the relevant legal principles set out at paragraphs 148-149 of the Judgment, which confirm the need for a restrictive approach.

(4) Fourth, that the Tribunal erred in law because the One Other Portal Rule is in a category of conduct that, by its very nature, restricts competition. This sub-ground appears to be a complaint about the Tribunal's application of the law to the facts of the case and does not disclose any error of law or other argument having a real prospect of success.

(5) Fifth, that the Tribunal erred in law in its findings as to the overall pro-competitive purpose of the Arrangements. As in the case of sub-ground (4) above, Gascoigne Halman appears under this sub-ground to take issue with the Tribunal's factual assessment. No error of law is disclosed; and I do not consider that a purely factual question, on which the Tribunal heard evidence over a number of days, should trouble the Court of Appeal.

(6) Sixth, that the Tribunal erred in law and/or as a matter of construction in its findings as to the duration of the One Other Portal Rule and the possibility of its being varied. Gascoigne Halman makes various assertions under this sub-ground. The claim that the Tribunal erred in law (at paragraph 195(2) of the Judgment) by dismissing the purpose of the Arrangements, namely to tip Zoopla out of the market and enable Agents' Mutual to become the "number 1" portal, amounts to a disagreement with the Tribunal's factual assessment. The other objections relate to the Tribunal's findings on variability and duration. The assertions that there has not been an agreed variation to the Arrangements, that there cannot be such a variation without Gascoigne Halman's and/or the Members' consent, and that the possibility of a unilateral variation was not raised at the hearing does not engage with the Tribunal's findings at paragraph 195(6) of the Judgment, and in particular the finding at paragraph 195(6)(v) that "Agents' Mutual was only (if at all) obliged to "seek to implement"" the One Other Portal Rule. In short, the Tribunal's analysis did not turn on an actual contractual variation. The objections under this sub-ground are therefore misconceived.

(7) Seventh, that the Tribunal erred in law in relation to duration and variability by conflating (in particular at paragraph 195 of the Judgment) its "object" and "effect" analysis. The Tribunal considered "object" and "effect" in turn in the Judgment, and in paragraph 195(2) declined to be drawn into conflating the two.

(8) Eighth, that the Tribunal erred in law by having regard to various irrelevant considerations (at paragraphs 159-160, 181 and 195(3)). None of the considerations referred to are irrelevant to the Tribunal's reasoning, but were accorded the appropriate weight by the Tribunal.

(9) Ninth, that the Tribunal erred in law at paragraph 174(6) and footnote 50 of the Judgment including by failing to have regard to and/or understand the case put to it for determination. In this sub-paragraph, the Tribunal merely observed that in a competitive market there might be pressure to pass on any reduction in agents' common costs to consumers. It is unclear how this can be said to give rise to an argument having real prospect of success on appeal.

10. In light of the above, I find that, viewed in the round, Ground 2 has no real prospect of success and permission to appeal on this ground is refused.

11. Under Ground 1, Gascoigne Halman contends that the Tribunal erred in law by failing to apply the correct legal test for objective necessity/ancillary restriction to the One Other Portal Rule. It is not clear why this has been advanced as the first ground of the application, as it could only be relevant if Gascoigne Halman were to succeed on appeal in relation to Ground 2. The Tribunal made clear (at paragraph 241) that its consideration of the question of objective necessity was made only for completeness. It was not necessary for the Tribunal to address this question in light of its conclusions that the One Other Portal Rule was not an anti-competitive restriction. As I have found that Ground 2 has no real prospect of success, permission to appeal on Ground 1 should be refused on this basis alone.

12. In any event, considering the substance of the ground, Ground 1 has no real prospect of success as the legal test applied by the Tribunal (at paragraphs 152-154) was in law correct. It is not correct to suggest that the Tribunal in some way wrongly applied the legal test of "impossibility", or confused it with the criterion of "indispensability" applied in the case of an exemption. Moreover, in relation to the Tribunal's assessment of the proportionality of the One Other Portal Rule, Gascoigne Halman appears not to have taken into account the detailed discussion in paragraphs 233-238 of the Judgment of possible alternative and less effective means of entry to the portals market in Great Britain (Northern Ireland having already been discounted as relevant in paragraph 142).

13. The third to fifth grounds of the application concern the Tribunal's assessment of various aspects of the Arrangements. Under Ground 3, Gascoigne Halman contends that the Tribunal erred in its analysis of the severability of the Bricks and Mortar Rule on the basis that as the Bricks and Mortar Rule was found by the Tribunal (at paragraph 253(4)) to have the purpose of defining the nature and scope of Agents' Mutual's business, it could not be severable. As with Ground 1, this ground could only be relevant if Gascoigne Halman were to succeed on appeal in relation to Ground 2. The Tribunal made clear (at paragraphs 276-277) that in light of its prior conclusions, it was strictly unnecessary to deal with the question of severability. As I have found that Ground 2 has no real prospect of success, permission to appeal on Ground 3 is also refused. In any

event, even on its substance, Ground 3 has no real prospect of success. The Tribunal's assessment of the purpose of the Bricks and Mortar Rule in the context of establishing whether or not it constituted a restriction "by object" is distinct from its consideration of whether the provision is contractually severable from the Arrangements.

14. Under Ground 4, Gascoigne Halman contends that the Tribunal erred by purporting to make findings of law at paragraphs 54(2)-(3), when it lacked the jurisdiction to do so or alternatively erred in law and/or infringed due process without making it clear to Gascoigne Halman that it proposed to determine the true construction and meaning of Rule 2.4.1 of the Membership Rules. This argument is without merit. The findings of the Tribunal in this regard were intrinsic to the Competition Issues. Gascoigne Halman has itself acknowledged elsewhere 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". It was expressly contended by Gascoigne Halman that the duration of the Arrangements was relevant to the competition assessment and, moreover, the question of termination was addressed at in the course of closing submissions. Gascoigne Halman argues in the alternative that the Tribunal erred in construing the relevant provisions. The Tribunal's reasoning in this regard is set out at paragraph 54 of the Judgment and I do not consider that there is a real prospect of Gascoigne Halman disturbing the Tribunal's conclusion on appeal.

15. Under Ground 5, Gascoigne Halman asserts certain errors on the Tribunal's part in its construction of the Procure Obligation. As in the case of the provisions considered under Ground 4, it was necessary to consider and determine the scope of the Procure Obligation in order to understand the potential breadth of the Arrangements. That was the only reason the Tribunal considered what was otherwise a non-Competition Issue. In this case, the Tribunal found for a broad effect; a narrower construction of the Arrangements could only adversely affect Gascoigne Halman's other grounds of appeal

16. In conclusion, none of the grounds of the appeal have a real prospect of success and permission to appeal is refused.

17. For the avoidance of doubt, it is recognised that the points of construction of the Arrangements, informing Grounds 3, 4 and 5, may be relevant to the non-Competition Issues. Nothing in either the Judgment or this order is intended to or has the effect of limiting any future appeal of the non-Competition Issues, if and when these come to be determined and permission to appeal such a determination is sought.