Neutral citation [2005] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1033/1/1/04

Victoria House
Bloomsbury Place
London WC1A 2EB

20 April 2005

Before:

Marion Simmons QC (Chairman)
Dr Arthur Pryor CB
Mr David Summers

BETWEEN:

RICHARD W PRICE (ROOFING CONTRACTORS) LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

Mr John Price appeared for the appellant.

Mr Tim Ward (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the respondent.

JUDGMENT (Interest and costs)

I INTRODUCTION

1. We handed down judgment in this appeal on 24 February 2005 (see [2005] CAT 5) ("the judgment"). In that judgment we allowed in part Price's appeal against OFT decision CA98/1/2004 of 16 March 2004 ("the Decision").

2. In the Decision the OFT concluded that various roofing contractors, including Price, had infringed the prohibition ("the Chapter I prohibition") contained in section 2(1) of the Competition Act 1998 ("the Act") in colluding in relation to the making of tender bids for flat roofing contracts in the West Midlands. Nine contractors were found to have been involved in various discrete individual agreements or concerted practices, each of which had as its object or effect the fixing of prices in the market for the supply of repair, maintenance and improvement services for flat roofs. Penalties were assessed by the OFT against all of those contractors.

3. Price was found to have participated in such collusive tendering in relation to a tender bid for re-roofing works to the Pallasades Shopping Centre in Birmingham ("the Pallasades Contract"). Price was fined £18,000.

II SUMMARY OF THE TRIBUNAL'S DECISION

4. Price appealed against the OFT's findings of infringement and imposition of a penalty on two bases:

   (a) Price was not a party to an agreement or a concerted practice to provide a non-competitive price; and

   (b) The penalty was excessive and unjustified.

5. For the reasons given in the judgment we dismissed the appeal on infringement but allowed the appeal on penalty to the extent that we reduced

the level of the penalty imposed on Price to £9,000. Our principal reasons were:

(a) We were satisfied that the elements of a concerted practice contrary to the Chapter I prohibition were made out in respect of Price in relation to the Pallasades Contract;

(b) We were satisfied that the principle of equal treatment was not applied by the OFT when setting the penalty imposed upon Price and that a penalty of £9,000 in all the circumstances of this case was appropriate and provided an effective deterrent.

III THE PARTIES' SUBMISSIONS AS TO INTEREST AND COSTS

6. By letter dated 28 February 2005 the Tribunal invited the parties to make submissions on whether, and if so to what extent, interest should be awarded on the penalty. The Tribunal also indicated its provisional view that each party should bear its own costs. The Tribunal indicated in that letter that subject to any application for an oral hearing the Tribunal intended to decide these issues on the basis of written submissions. Neither party considered that an oral hearing was necessary.

The OFT's submissions

- *Interest*

7. The OFT seeks interest on the amount of the revised penalty at 1% above base rate from the date specified in the Decision for the payment of the penalty, namely 21 May 2004.

8. The OFT refers to Rule 56(1) of the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) ("the 2003 Tribunal Rules"), which provides jurisdiction to award interest from the date upon which the application to the Tribunal is made. Rule 56(1) provides that the Tribunal may order that interest is to be

payable on the amount of any penalty at such rate as the Tribunal considers appropriate. Unless the Tribunal otherwise directs, the rate of interest shall not exceed the rate specified in any Order made pursuant to section 44 of the Administration of Justice Act 1970.

9. The OFT refers to the Tribunal's decision on interest and costs in *Napp v Director General of Fair Trading* [2002] CAT 3 ("*Napp: Interest and costs*") where the Tribunal stated that an undertaking which obtains the automatic suspension of the obligation to pay the penalty pending an appeal to this Tribunal should not obtain any benefit from the delay inherent in the appeal process. The OFT submits that this principle applies to this case and that accordingly this is an appropriate case to award interest.

- *Costs*

10. The OFT agrees with the Tribunal's provisional view that each side should bear its own costs of the appeal.

Price's submissions

- *Interest*

11. Price accepts that interest may be payable on the amount of the penalty. It submits, however, that the benefit obtained by the appellant from the delay inherent in the appeal process should not be measured by reference to the cost of borrowing but rather by reference to deposit less deductions. Price submits that a more appropriate calculation of interest would be based on the average bank deposit rate over the last nine months (21 May 2004 to 11 March 2005), less deductions for taxes and charges.

- *Costs*

12. Price, in common with the OFT, agrees with the Tribunal's provisional view that each side should bear its own costs of the appeal.

IV TRIBUNAL'S ANALYSIS

Interest

13. Paragraph 19 of Schedule 4 of the Enterprise Act 2002 is in the following terms:

> "19.–(1) Tribunal rules may make provision allowing the Tribunal to order that interest is payable on any sum awarded by the Tribunal...
> (2) That provision may include provision-
> (a) as to the circumstances in which such an order may be made;
> (b) as to the manner in which, and the periods in respect of which, interest is to be calculated and paid."

14. Rule 56 of the 2003 Tribunal Rules provides in material part as follows:

> "(1) If it imposes, confirms or varies any penalty under Part 1 of the 1998 Act, the Tribunal may, in addition, order that interest is to be payable on the amount of any such penalty from such date, not being a date earlier than the date upon which the application was made in accordance with rule 8, and at such rate, as the Tribunal considers appropriate. Unless the Tribunal otherwise directs, the rate of interest shall not exceed the rate specified in any Order made pursuant to section 44 of the Administration of Justice Act 1970. Such interest is to form part of the penalty and be recoverable as a civil debt in addition to the amount recoverable under section 36 of the 1998 Act."

15. In *Napp: Interest and Costs* the Tribunal stated as follows:

> "[13] In our view, the basic principle applicable under [Rule 56] of the Tribunal Rules is that an undertaking which has been subject to a penalty for an infringement of the Act, which by virtue of section 46(4) of the Act obtains the automatic suspension of the obligation to pay the penalty by appealing to this Tribunal, should not obtain any benefit from the delay inherent in the appeal process. The provision as to interest on penalties to be found in that Rule is mainly there to prevent appeals being introduced merely to delay payment. It follows that the rate of interest should reflect the benefit derived by the appellant from the suspension of the obligation to make the penalty payment. A convenient measure of that benefit will normally be the appellant's cost of borrowing. In the Commercial Court, as we understand it, the normal rate applicable is Bank base rate plus 1%, although that

> presumption can be displaced. That seems to us, absent any evidence to the contrary, a reasonable yardstick to apply in most cases.
>
> [14] …in our view, the power in [Rule 56] to order that interest should be applicable to the penalty is not there as a further sanction in respect of a possible continuation of the infringement, or as an indirect means of securing some kind of counterbalancing compensation. The interest rate mechanism under [Rule 56] is there primarily to deal with the fact that the penalty has not been paid…"

16. In *Aberdeen Journals: Interest* the Tribunal (sitting as a Tribunal in Scotland) stated (at p 1 ln 36 to p 2 ln 2) as follows:

> "As regards the rate of interest on the penalty, in its judgment in [*Napp: Interest and costs*]...the Tribunal held that the rate of interest should normally be 1% above bank base rate. There is no serious contest that there is an appropriate rate in this case. We think that, technically speaking, the rate in this case should be 1% above the base rate of the Bank of Scotland…"

17. The OFT in this appeal is seeking interest at 1% above base rate from 21 May 2004. Price submits that the appropriate calculation of interest is by reference to deposit, less deductions.

18. We consider that the approach to interest taken in *Napp: Interest and costs* and *Aberdeen Journals: Interest* is also appropriate to this appeal.

19. As was stated in *Napp: Interest and costs*, an unsuccessful appellant should not obtain a benefit from the delay inherent in the appeal process. The provision as to interest on penalties is mainly there to prevent appeals being introduced merely to delay payment. Accordingly the rate of interest should reflect the benefit derived by an appellant from the suspension of the obligation to make the penalty payment. The principle applicable in this Tribunal in respect of interest should be contrasted with the principle applied in the courts in civil litigation where interest is awarded for being kept out of the money rather than to reflect the benefit of not paying the money.

20. Price submits that the proper starting point is the interest rate applicable to deposits as opposed to borrowing. This submission raises the issue as to whether the award of interest should represent the cost saved by the appellant in not borrowing the amount of the penalty during the appeal period or the amount which could be earned on a deposit equivalent to the amount of the penalty.

21. In civil litigation the courts' established starting point for an award of interest is the rate at which persons with the general attributes of the claimant could have borrowed the money rather than the rate at which he could have invested the money. In the commercial environment it is unrealistic to look at deposit rates since the appellant is more likely to have used the money in his business rather than to have placed it on deposit.

22. Accordingly, we do not accept Price's submission that interest should be calculated by reference to deposit rather than borrowing rates.

23. In civil litigation the courts do not look at the special position of a particular claimant, but instead apply the rate at which claimants in general can borrow money. The practice of the Commercial Court is normally to award interest at base rate plus one per cent unless evidence is adduced showing that such a rate will be unfair to one party or the other (see *Shearson Lehman Hutton Inc* v *Maclaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723). Similarly we consider that this Tribunal should not consider the special circumstances of an appellant but should instead apply a rate at which appellants generally can borrow money.

24. In *Napp: Interest and costs* this Tribunal drew an analogy from the practice of the Commercial Court and considered that, absent any evidence to the contrary, the base rate plus 1% provides a reasonable yardstick to apply in most cases. We agree with that approach.

25. We therefore award interest on the penalty at 1% above base rate from the 21 May 2004 until the date of payment of the penalty.

Costs

26. We see no reason to displace our provisional view as to costs. The parties agree that each party should bear its own costs. There shall therefore be an order to that effect.

Marion Simmons QC Arthur Pryor David Summers

Charles Dhanowa 20 April 2005
Registrar