Case No: C3/2011/3355

Neutral Citation Number: [2012] EWCA Civ 1552
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(LORD CARLISLE OF BERRIEW QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 18th October 2012

Before:

LORD JUSTICE LAWS
LORD JUSTICE LLOYD
and
LORD JUSTICE JACKSON

- -

Between:

QUARMBY CONSTRUCTION CO LIMITED

Appellant

- and -

OFFICE OF FAIR TRADING

Respondent

- -

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Mr Mark Friston and **Mr Adam Aldred** (instructed by Addleshaw Goddard) appeared on behalf of the **Appellant**.

Miss Kelyn Bacon and **Mr Philip Woolfe** (instructed by General Counsel's Office) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Lloyd:

1. This is an appeal against an order as regards costs made by the Competition Appeal Tribunal on 21 October 2011. This followed an appeal by the appellants against a finding by the Office of Fair Trading that the appellants had infringed the Chapter 1 prohibition in Section 2(1) of the Competition Act 1998 and imposing for the three infringements that they found to have been committed a penalty of £881,749. The appeal contested both the finding of infringements and the amount of the penalty. It was unsuccessful in the challenge to the finding of infringements but the penalty was reduced substantially to £213,750.

2. The ruling which is challenged on this appeal is that of the Competition Appeal Tribunal which made no order as to costs of the appeal to it. With permission to appeal granted by Rimer LJ on limited grounds, the appellants appeal against that order, arguing that the correct order should have been that the OFT should have been ordered to pay up to 60 per cent of the appellants' costs of the appeal.

3. As before the tribunal on costs, the appellants were represented by Mr Friston and Mr Aldred; the OFT was represented by Ms Kelyn Bacon and, in addition before us, by Mr Philip Woolfe. I should say that the tribunal for this appeal consisted of Lord Carlile of Berriew QC, Ann Kelly and David Summers OBE; for reference, their decision on the substance of the appeal is found at [2011] CAT 11 and on costs [2011] CAT 34.

4. The case before the tribunal was one of a large number of cases arising from an investigation by the OFT into the practice of cover pricing in the construction industry. This is a practice whereby – and I describe it extremely briefly -- on an invitation to tender for building works a company which does not want to win the contract agrees with one or more others who do to put in a high tender so that the others' tenders will be seen in a more favourable light. Plainly this would be a breach of the Chapter 1 Prohibition. It was very widespread in the construction industry. The OFT's investigation led to more than 100 undertakings being found to have infringed the prohibition and subjected to penalties.

5. Those rulings led to 25 appeals to the tribunal, some on penalty alone but six of them on liability and penalty. The appeals were managed by the tribunal in a proactive way with different panels being set up for different groups of appeals. The penalty only appeals were heard in three groups and the liability and penalty appeals were heard separately. There were strict time limits imposed for the hearings: half a day was allowed in each case for penalty and more time was allowed for disputes as to liability depending on the extent of the issues. In the present case a day-and-a-half was allowed for the liability argument, plus half a day for penalty, giving two days in all. The hearing before the tribunal took place on 6 and 7 July 2010 and the judgment, which turned out to be one of nine judgments by different panels, was given on 15 April 2011.

6. In its judgment on the substantive appeal in this case the tribunal dealt in turn with five different points relied on as going to the question of infringement or no, either in relation to the whole finding or as regards one or more of the three particular infringements which had been found by the OFT to have been committed. If successful, some of those challenges would have led to no liability at all for any penalty, others to liability only on a more limited basis. Each was rejected by the tribunal.

7. The tribunal then turned at paragraph 141 of its judgment to the question of penalty. The tribunal accepted, most significantly in terms of numbers, that the OFT had used for its calculations the turnover in the wrong year; that is to say in the latest available year instead of in the year preceding the date of infringement. It also accepted that the starting point percentage which had been taken at 5 per cent was too high and should have been 3.5 per cent. It upheld a criticism on the part of the appellants that the OFT's approach was incorrect to the question of whether the maximum fine threshold was too high. It also accepted as valid the criticism that the OFT should have had greater regard to the low margins prevalent in the construction industry. Overall, the tribunal accepted that the penalty in this case was disproportionate; its own assessment led to a reduction in the penalty, as I have said, to less than 25 per cent of the amount fixed by the OFT, the largest element in that reduction deriving from the use of the turnover for the wrong year.

8. However, the tribunal rejected several of the appellants' arguments addressed in relation to penalty. In the analysis and presentation adopted by the tribunal in its reasoning on penalty, it had refined 15 distinct grounds of appeal down to about 10. It rejected half of those while accepting those that I have already mentioned.

9. Inasmuch as the penalty was reduced by more than 75 per cent, more than £660,000, the appeal could be regarded as a success on the part of the appellants. In that the appellants remained the subject of a finding of liability for three chapter 1 infringements and a penalty of over £200,000, the success was heavily qualified.

10. As regards costs, the issue was argued not only by way of written submissions, as is usually the case before the tribunal, but at an oral hearing, which the tribunal regretted having allowed, as it said at paragraph 23 of its ruling. The appellants contended that the starting point should be that they had won the appeal, albeit not on liability and not on all points as regards penalty. They sought an order that they recover up to 60 per cent of their costs, obviously assessed in the proper fashion, whereas the OFT argued that there ought to be no order for costs.

11. The tribunal's powers as regards costs are set out in Rule 55 of the Competition Appeal Tribunal Rules 2003. Sub-rule (2) is the only one that I need to read. It is as follows:

> make any order it thinks fit in relation to the

12. The tribunal has stated that it has a necessarily wide discretion as regards costs and it is plain that a rule in the terms that I have just read does give the tribunal a wide and general discretion in that matter. It has stated that it will consider all relevant circumstances of each case to ensure that the particular case is dealt with justly.

13. Here the tribunal took as the starting point the question whether either party could fairly be called the winner. Its answer was that neither side could. This was because, despite the substantial reduction of the penalty, the attack on liability failed and at least half of the submissions on penalty failed. In its decision on costs at paragraph 15, the tribunal started by considering whether any party could fairly be identified as the winner and went on immediately in the same sentence to say:

> "In our view, neither party can be considered a winner in this case, such that the outcome cannot be described as ‘binary’ in the manner proposed by Mr Friston."

14. It went on:

> "Whilst the Appellants succeeded in obtaining an overall reduction to the level of their fine, their appeal on ability was entirely unsuccessful and the Tribunal rejected at least half, if not the majority, of the Appellants’ submissions on penalty."

15. At paragraph 16 it went on to say this:

> "The just outcome, in those circumstances, is to make no order as to costs. Even if the Tribunal had been able to conclude that the Appellants could fairly be described as overall “winners”, we would still have needed to consider the extent of the Appellants’ success in relation to the multiplicity of issues raised in their Notice of Appeal, and the amount of work and time that was reasonably expended by the parties and the Tribunal in addressing these issues."

16. It went on at paragraph 17 as follows:

> "In that regard, it is evident that the Appellants' grounds of appeal on liability occupied a very substantial part of the parties' written and oral submissions, and required detailed consideration of the relevant contemporaneous evidence, and the cross-examination of three witnesses. Although this can only provide a rough approximation in any particular case, it is also clear that the majority of the Judgment is concerned with issues of liability."

17. In relation to the arguments on penalty, after noting the main point, which was the substitution of pre-infringement turnover in place of pre-decision turnover, and noting that that had the major consequence in terms of the substantial reduction of the penalty and was the key cause of what they called a disproportionate outcome in the OFT's penalty calculation, the tribunal went on to say this:

> "Whilst the Appellants were successful in relation to other specific arguments, including as regards the starting point percentage, the maximum fine threshold, and the OFT's failure to take account of the inherent features of the industry, a large amount of time was spent considering other unsuccessful arguments, some of which we considered to be very bad points. The Appellants cannot escape this conclusion by arguing, as they did here, that we should not raise certain 'arguments' to the level of 'issues'."

They then at paragraph 19 dealt with a number of specific points and again at paragraph 20, to which I need not refer, and at paragraph 21 they concluded as follows:

> "Taking all of the above considerations into account, our unanimous conclusion is that there should be no order for costs."

18. Mr Friston, for the appellants, challenges this on two main points. First of all, he argues that the tribunal erred in law in approaching the question of who had won, and wrongly failed to identify that the appellants were the winner. Secondly, having made that error, and because it made that error, he argues that the tribunal failed to exercise its discretion, or indeed, it might be said, to undertake the proper duty and function of addressing the question of success and failure on individual issues in order to make a costs-related award which, he submits, should and would have been an order in favour of the appellant for the recovery of a percentage or a proportion of its costs.

19. In his skeleton argument Mr Friston submitted that the tribunal ought to follow the general rule of the CPR see Rule 44.3(2), namely that costs follow the event. He accepts that the CPR do not apply as such to proceedings in the

tribunal and that what applies directly to proceedings in the tribunal is Rule 55(2), which I have read.

20. Nevertheless, he submitted that the general rule to which I have referred and which is now embodied in CPR 44.3(2) is a long-established principle of costs in England and Wales and should be applied by analogy and more closely than it is already to proceedings in the tribunal. He showed us a passage in a case known as The GISC Appeal, The Institute of Independent Insurance Brokers v Director General of Fair Trading [2002] CAT 2 at paragraphs 48 to 51 where Sir Christopher Bellamy, then the President of the tribunal, set out some general observations by way of general guidance as to the approach that the tribunal should adopt to issues of costs. That of course came from the very earliest days of the jurisdiction and indeed existence of the tribunal, and Sir Christopher was deliberately not laying down any firm rules. He also showed us a passage from The Racecourse Association v OFT [2006] CAT 1 at paragraphs 7 and 8, where a tribunal presided over by Rimer J summarised neatly what Sir Christopher Bellamy had said in the earlier case. It is fair to say that those observations allow an analogy to be drawn with the CPR position of costs following the event.

21. Mr Friston submitted that it should be taken as more than analogy; at any rate that is how he put it in his skeleton argument, although in his oral submissions he withdrew from that to some extent. As to that proposition, first the CAT rule is deliberately expressed in a very general way; secondly, the Civil Procedure Rules do not apply as such to the proceedings in the tribunal; and, thirdly and most importantly, the proceedings that come before the tribunal are, for all their range and variety, rarely analogous to civil litigation to which the CPR apply.

22. There are some possible exceptions, one example being the possibility of follow on actions under Sections 47A and 47B of the 1998 Act, but they are very much the exception, and in the present circumstances are rarely likely to arise. Mostly the proceedings that come before the tribunal in one way or another are regulatory in nature by way of appeals of a number of different possible kinds from a number of different regulators, and they are of a considerable variety in their nature.

23. Having regard to those factors, I would reject unhesitatingly Mr Friston's contention that the tribunal ought to adopt, in a more structured and formal way, the general rule under the CPR of costs following the event as the primary guide in relation to costs. It seems to me that the approach taken by the tribunal in general, both in the earlier cases that we have been shown and in some more recent cases we have been shown, is prudent and sensible and allows proper regard to be had to the considerable variety of the types of dispute that come before the tribunal, almost all of them by way of appeal from one regulator or another.

24. That said, the tribunal did in this case, and often does, consider whether there was a winner in the proceedings before it, and Mr Friston accepted that the tribunal had in the present case asked itself the right question in the first

sentence of paragraph 15, and so his first submission came to be that they came to an untenable answer in the second sentence of paragraph 15 by saying that neither party could be considered the winner. He submitted that, albeit that the appellants did not secure as a great a success as they had hoped for, nevertheless to have reduced the penalty by more than 75 per cent should be regarded as a substantial success and certainly a success worth having.

25. He sought to draw an analogy with the outcomes in various types of civil litigation. For example, a claimant might sue in tort and find that the defendant contests both liability, in the sense of a breach of duty of care, and quantum. The defendant may fail to resist a finding of a breach of duty but may succeed in limiting the quantum of the recoverable loss. If, for example, at first instance the defendant were held to have committed a breach of duty and held to be liable for damages of let us say £900,000, and if then the defendant were to appeal, it might challenge the finding of breach of duty without success but it might succeed in showing that the damages recoverable were no more than let us say £225,000. From the defendant's point of view, that could be seen as a substantial success. However, such an analogy to the present case is unreliable and misleading, not least because the incidence of costs in such a case in the realm of ordinary civil proceedings would be very much affected by whether there had been any, and if so what, by way of Part 36 offers either way, and if so when. Part 36 offers as such are not a feature of civil proceedings before the tribunal, and Mr Friston was not able to draw to our attention any record of any offer having been made to settle an appeal to the tribunal against a finding of infringement or penalty, and Ms Bacon for the OFT was similarly unaware of any such example. She pointed out that although, as Mr Friston told us, there had been an offer in the present case to proceed by way of early neutral evaluation as regards the particular case, and although the OFT had considered that suggestion, it concluded (as it seems to me, inevitably) that that was really an impossible way forward in the present case since this was one of 25 appeals all raising similar issues, certainly as regards penalty, and it was impossible for the OFT to settle one in practical terms, at any rate on any of the major issues that were at issue in other appeals, without prejudicing its position in the other current appeals.

26. I do not say that there is no possibility of a sensible offer being made and indeed accepted in the context of an appeal against an OFT decision if, for example, it becomes apparent that there is some mathematical error in the calculation of the penalty or if, for example, at an early stage in the appeal another CAT decision demonstrates some error in the OFT's decision which is decisive of the later appeal. But the extremely limited circumstances in which an offer may be at all relevant to CAT proceedings is one of a number of reasons why the analogy with the possible outcomes of civil litigation seems to me to be misleading.

27. Another reason why that is an unsatisfactory analogy to have drawn is that the finding of liability in a civil case is only the first stage, at any rate in tort, on the way to a judgment, proof of loss being essential in such cases. In a competition case, a finding of liability, that is to say the finding that there has

been an infringement or one or more infringements of the relevant prohibition, is or may be significant in itself, and may be significant even if there is no or only a modest penalty, because it has wider significance as regards possible other claimants and as regards the business position of the party in question.

28. Accordingly, I would reject Mr Friston's arguments by analogy with the outcome of civil claims, with or without cross-claims, in civil litigation. If the appellants had not contested liability and had appealed on penalty alone, then their success at getting the penalty reduced by 75 per cent would have represented a very different position on the range of possible outcomes of the proceedings as compared with its success in the present case. The costs incurred on each side are likely to have been substantially different. In particular the hearing would have lasted only half a day, not two days, and there would not have been the oral evidence from the three witnesses that I have mentioned. The position would have been similar to the penalty only appeals in other cases arising from the same investigation, for example Kier Group v the OFT, in which the tribunal did make orders for costs against the OFT for reasons set out in its ruling at [2011] CAT 33.

29. Mr Friston submitted that in a case such as this the first question must be to ask whether there is a winner in the proceedings and he accepts that the tribunal asked itself that question. He goes on to say that they came to an untenable conclusion that there was no winner. He submits that the tribunal should have regarded the appellants as a winner but as having secured only a qualified win. He then submits what was incumbent on the tribunal was to consider the issues on which they had won, or perhaps more significantly the issues on which they had not won, and to consider to what extent it would be appropriate, as he accepts it would, to deduct a certain amount from the appellant's costs otherwise recoverable to take account of the points on which it had not achieved what it had set out to do. He took us though the latter part of the ruling on costs and submitted that although the tribunal had started from the right point at the beginning of paragraph 15, it had not only failed to give the right answer to that question, namely that there was no winner instead of, as he submitted, that the appellants were the winner. He also submitted that although the tribunal went on to take into account a number of undoubtedly and indisputably relevant factors, factors relevant under Rule 55(2), at no point did it formulate a proposition such as that, taking into account the various factors of success and failure and the costs of the proceedings in respect of matters which had failed as against those on which the appellants had won, it would be appropriate to come to a conclusion that the appellants should not recover any of their costs, rather than for example that they should recover some of their costs, but reduced by, as he would accept, 40 per cent or, as another party might suggest, in fact very much more than 40 per cent.

30. It is true that, although the tribunal did proceed from their starting point of no winner and that the just outcome was to make no order as to costs, the tribunal did proceed to go on to address a number of factors that would undoubtedly be relevant if one were considering the outcome on an issues-related basis. It is true that they did not say in terms that the outcome of that consideration was such that it was appropriate to reduce the appellant's costs to nil. But in

substance that is what the tribunal did say, in my view, at paragraph 21 which I have read.

31. Going back to Mr Friston's starting point, it seems to me that, looked at in the relevant regulatory context without reference to misleading analogies from civil litigation, there is very much to be said for the tribunal's view that neither side was "the winner". The appellants won by reducing the penalty substantially but the OFT won by holding the finding of infringements. The latter point was in principle the more important, both because the penalty depended on it entirely and because of a finding of infringement can be important in itself. Moreover, the issue of infringement took more time at the hearing and it is therefore likely that a greater proportion of the overall cost was attributable to it. Furthermore, given that the OFT is to be seen as the winner on this issue, and even if in principle the appellants could have been regarded as eligible for an award of some costs in their favour on penalty, I do not for my part see why the OFT could not very reasonably be regarded as entitled to an order for costs the other way in respect of the part of the proceedings that was devoted to the question of infringement or no.

32. Taking all those considerations together with the appellant's reliance on a number of arguments on penalty that failed, it seems to me that there was no error of principle, nor any misdirection in the tribunal's approach to the issue of costs and the appeal to it. To the contrary, it addressed the issues relevant to its discretion under Rule 55(2) in a proper way and came to a conclusion which cannot be said to be outside the scope of reasonable decisions in the case.

33. Mr Friston lastly in his submissions argued that if such an outcome could be regarded as a legitimate conclusion, having regard to the substantive outcome of this appeal, the law was in a profoundly unsatisfactory state because it would have been impossible for solicitors to advise their client satisfactorily as to the risks of litigation. Undoubtedly appeals of this kind can be very expensive; we saw the figures that are said to have been incurred below, and indeed large figures were at stake although they were capped as regards to the orders against the OFT in the Kier Group appeals.

34. I would accept that there is a need for a degree of certainty as to the approach which the CAT will adopt for the issue of costs. What I do not accept is that it should be regarded as unforeseeable or as an unfair or unreasonable possible outcome that, if a party seeks to challenge infringement and therefore liability as well as penalty and loses comprehensively upon infringement, that factor should not be found to balance and even possibly to outweigh any substantial success that the appellant may achieve as regards the quantum of the penalty.

35. As it seems to me, the tribunal came to an entirely legitimate and sensible conclusion in this case and I would dismiss this appeal.

Lord Justice Jackson:

36. I agree.

Lord Justice Laws:

37. I also agree. To my mind it is a perfectly straightforward case. The tribunal has applied Rule 55(ii) in accordance with the earlier case law. In deciding to make no order for costs it has not remotely exceeded the generous ambit of discretion which it enjoyed.

Order: Appeal dismissed