Neutral citation [2011] CAT 38

IN THE COMPETITION APPEAL TRIBUNAL

Cases No: 1125/1/1/09
1130/1/1/09
1131/1/1/09
1136/1/1/09
1137/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

17 November 2011

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
RICHARD PROSSER OBE
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BARRETT ESTATE SERVICES LIMITED
(2) FRANCIS CONSTRUCTION LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) RENEW HOLDINGS PLC
(2) ALLENBUILD LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) ROBERT WOODHEAD (HOLDINGS) LIMITED
(2) ROBERT WOODHEAD LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) JH HALLAM (R&J) LIMITED
(2) JH HALLAM (CONTRACTS) LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

HOBSON AND PORTER LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

RULING (COSTS)

I. INTRODUCTION

1. By its judgment of 15 April 2011 ([2011] CAT 9) ("the Judgment"), the Tribunal disposed of six appeals against a decision by the OFT imposing fines for breaches of the Chapter I prohibition of the Competition Act 1998. The Judgment sets out the background to these appeals, and this ruling adopts the same abbreviations and terminology as the Judgment, save that references to "the Appellants" in this ruling are to Francis, Renew, Woodhead, JHH and Hobson & Porter.[1]

2. Each of the Appellants challenged the penalty imposed on them by the OFT in the Decision. The arguments advanced by the Appellants are summarised at paragraph 9 of the Judgment. The Tribunal upheld certain of the Appellants' grounds of appeal on penalty, such that the penalties originally imposed on the Appellants by the OFT were significantly reduced, as set out at paragraph 213 of the Judgment.

3. The Appellants have now applied for their costs of these proceedings in the following amounts (in each case, excluding VAT):

   (a) By its application dated 28 April 2011, Francis claims a total of £64,951.17.

   (b) By its application dated 3 June 2011, Renew claims a total of £245,542.84.

   (c) By its application dated 3 June 2011, Woodhead claims a total of £53,523.09.

   (d) By its application dated 21 June 2011, JHH claims a total of £52,773.78.

   (e) By its application dated 21 June 2011, Hobson & Porter claims a total of £51,236.11.

II. THE PARTIES' SUBMISSIONS

4. Francis, JHH and Hobson & Porter, who were all represented by the same counsel, Mr. Robertson QC, in the main appeal and in these costs applications, made identical

[1] GAJ went into administration on 27 January 2011 and did not make any application for costs.

submissions on costs. Each submitted that it was entitled to its costs, as it could be identified as a "winner" in these proceedings. These Appellants made the following further general submissions:

(a) That the OFT's approach to calculating penalties in this case had been found to be wrong as a matter of principle (for example, as regards the use of Pre-Decision Turnover), demonstrating that these appeals were a matter of general public interest.

(b) That the OFT's concerns regarding the potential strain on public finances of any adverse costs order could not be decisive, but rather the Tribunal's power to award costs was itself a "counterbalancing element" against the OFT's use of "draconian" administrative powers in this case, which caused these parties to incur irrecoverable costs.

(c) That they had acted reasonably and with economy throughout the appeal process, in particular through their common representation by the same counsel as seven other appellants.

5. Renew and Woodhead also shared common counsel, Mr. George Peretz, in the main appeal and made similar submissions as regards costs. Each submitted that its appeal had succeeded on the basis that the Tribunal found that the OFT's approach to the setting of penalties in the Decision was fundamentally flawed. As regards these companies' specific submissions:

(a) Renew submitted that the fundamental flaw in the OFT's approach was demonstrated by the fact that the Tribunal found for Renew in relation to two of its three grounds of appeal (the OFT's chosen year of turnover at Step 1 and the application of the MDT). As regards its third (unsuccessful) ground of appeal (discriminatory treatment of Renew by addressing the Decision to it and imposing a penalty on it), this arose out of the OFT's admitted mistake, and did not occupy the parties or the Tribunal for any significant length of time, and should not justify any reduction in Renew's costs.

(b) Woodhead submitted that the Tribunal had upheld its challenge to the OFT's use of Pre-Decision Turnover, and to the excessive and disproportionate nature of the overall penalty. It submitted further that the fact that the Tribunal decided to increase the provisional penalty resulting from the application of Steps 1 and 2 of the penalty calculation at Step 3 does not justify any reduction in the Appellants' costs, given that the Tribunal had regard to Woodhead's submissions on proportionality as part of its overall reassessment of the penalty.

6. We have had the benefit of reading the judgments of the Tribunal in relation to the costs claims made by other appellants in respect of successful penalty-only appeals against the Decision, in *GF Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 32 and *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 33. As the OFT made near-identical submissions in those cases in connection with the general principles that should apply in relation to these costs applications (see, in particular, paragraphs 7 and 9 of *GF Tomlinson* and paragraphs 10 to 11 of *Kier*), we do not repeat these here, but we have taken these into account, together with the OFT's specific submissions in relation to the five separate applications.

III. THE GENERAL APPROACH TO THE AWARD OF COSTS IN THESE CASES

7. Rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003 No. 1372) ("the Tribunal Rules") provides as follows:

> "55. – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.
>
> (2) The Tribunal may at its discretion, at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session….."

8. As noted by the Tribunal at paragraphs 17 to 19 of *Merger Action Group v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the Tribunal has a necessarily wide discretion on the question of costs, and the Tribunal will consider all relevant circumstances of each case to ensure that it is dealt with justly.

9. For the reasons already clearly elucidated by the Tribunal at paragraphs 5 to 12 of *GF Tomlinson* and at paragraphs 12 to 15 of *Kier*, we reject the OFT's submission that the Tribunal should make no order as to costs in these cases. Rather, we agree with the Appellants (and with the Tribunal at paragraph 5 of *GF Tomlinson* and paragraph 8 of *Kier*) that the starting point in appeals against a decision under the Competition Act 1998 should be that the successful party recovers its costs. As regards the application of the starting point to these appeals, and the specific adjustments that should be made to reflect unsuccessful grounds of appeal, we agree with the Tribunal's conclusions at paragraph 16 of *GF Tomlinson*. The appropriate approach is to limit adjustments for unsuccessful grounds to cases where one or more grounds of challenge to the penalty was unsuccessful and where that ground has plainly generated a significant amount of work both for the relevant Appellant and for the OFT.

10. We also agree with and adopt the conclusions of the Tribunal at paragraph 19 of *GF Tomlinson*, and paragraphs 18 to 20 of *Kier*. We do not consider that the particular case management structure advocated by the Appellants, and ultimately adopted by the Tribunal, added unnecessary costs to these appeals, compared with the OFT's suggested "test case" approach.

11. We consider that these cases are suitable for summary assessment pursuant to rule 55(3) of the Tribunal Rules, given the interrelationship between the grounds of appeal raised by the Appellants, the Tribunal's familiarity with the issues raised in these appeals, and the lack of any complexity in relation to the issues. None of the Appellants requested that the cases be referred for detailed assessment.

12. We also note that the Tribunal, in both *GF Tomlinson* and *Kier*, took the view that, in light of the wide disparity in the amounts claimed in costs by the various appellants that challenged the Decision, it was appropriate to apply a cap of £200,000. Although this is only relevant in connection with one of these Appellants, Renew, we agree with the

Tribunal's view that this represents an appropriate ceiling for recoverable costs in relation to penalty-only appeals against the Decision, and that it would not be fair or proportionate for the OFT to pay more than that figure in relation to any of these appeals against the Decision.

IV. THE TRIBUNAL'S ASSESSMENT OF THE INDIVIDUAL APPLICATIONS

Francis, JHH and Hobson & Porter

13. These Appellants, who as noted above were represented by the same counsel and whose appeals were drafted in near-identical language, enjoyed a very similar degree of success in relation to their appeals.

14. As regards successful arguments, each of these Appellants was successful in contesting the OFT's use of Pre-Decision Turnover (paragraphs 19 to 25 of the Judgment). The Tribunal also accepted that the high turnover but low margin nature of the industry, together with the industry's general perceptions and motivations, were factors that should have been taken into account by the OFT in its penalty calculation (paragraphs 63 to 66, 71 and 94 of the Judgment). Although the Tribunal rejected these Appellants' submissions to the effect that a comparison should have been made with the penalties imposed on other parties in the Decision (paragraphs 77 to 78 of the Judgment), or with companies fined for health and safety or corporate manslaughter infringements (paragraph 84 of the Judgment), the Tribunal accepted that the overall proportionality of the penalty needed to be considered carefully as part of its recalculation (paragraph 79 of the Judgment). These Appellants also succeeded in their general and specific submissions as to financial hardship (see, in particular, paragraph 115 of the Judgment).

15. However, the Tribunal rejected these Appellants' submissions to the effect that the OFT's choice of infringements was arbitrary (paragraphs 30 to 32 of the Judgment), that the OFT was precluded from imposing a separate fine for each infringement (paragraphs 36 to 37 of the Judgment), and that non-tendered work should have been excluded from the turnover used by the OFT in its penalty calculation (paragraphs 52 to 53 of the Judgment). The Tribunal also rejected these Appellants' submissions that the OFT was required to demonstrate evidence of actual effects in relation to the

infringements identified in the Decision (paragraph 88 of the Judgment), and that a number of other factors had not been adequately taken into account (paragraph 125 of the Judgment).

16. The Tribunal also rejected specific submissions made by JHH and Francis regarding the application of Article 7 ECHR to the OFT's use of Pre-Decision Turnover (paragraph 22 of the Judgment) and the uplift in penalty made by the OFT resulting from director involvement in the infringements (paragraph 95 of the Judgment). Further, the Tribunal rejected a specific submission by Francis to the effect that the OFT had failed to take into account its "objectively different" position (paragraphs 119 to 123 of the Judgment).

17. In the OFT's submission, these parties' unsuccessful arguments occupied as much, if not more, of their written pleadings, and time at the hearing, as their few successful arguments.

18. However, having carefully considered the amount of time that was devoted by the parties and the Tribunal in addressing unsuccessful issues in the pleadings and at the hearing, and the significance of these issues, we have concluded that it would be appropriate to apply a reduction of 15% in respect of the costs of each of JHH and Hobson & Porter, and a reduction of 20% in respect of the costs of Francis. We consider that these adjustments are fair in all the circumstances, in particular given the efficiencies generated by the instruction of common counsel, and are also broadly consistent with the approach taken by the Tribunal in *GF Tomlinson* in relation to appellants which shared the same counsel as these Appellants.

Renew and Woodhead

19. Renew and Woodhead also shared common counsel, and there was similarly some degree of overlap between their grounds of appeal.

20. As regards successful arguments raised by both Appellants, Renew and Woodhead succeeded in contesting the OFT's use of Pre-Decision Turnover (paragraphs 19 to 25 of the Judgment), although the Tribunal rejected their specific submissions regarding

consistency with the approach of the European Commission in relation to the calculation of penalties (paragraph 24 of the Judgment), and did not reach any view on Woodhead's submissions that the OFT's use of Pre-Decision Turnover breached the principle of equal treatment. Renew and Woodhead were also successful in challenging the overall proportionality of the penalty (paragraphs 79 to 81 of the Judgment), although the Tribunal rejected Woodhead's specific submissions regarding the comparison that should be drawn with the penalties imposed on parties involved in making compensation payments (paragraph 78 of the Judgment).

21. Renew and Woodhead also challenged the OFT's approach at Step 3 of the penalty calculation. The Tribunal allowed Renew's appeal in relation to the application of the MDT (see paragraphs 40 to 47 of the Judgment), although it rejected certain specific submissions advanced by Renew in relation to the OFT's approach at Step 3 (see, for example, the first sentence of paragraph 43 of the Judgment, and, to some extent, paragraph 45 of the Judgment). Although the Tribunal rejected Woodhead's submission that any penalty exceeding the OFT's chosen benchmark for minimum deterrence was disproportionate, the Tribunal concluded that the OFT had failed to apply an "overall method" to ensure that penalties were proportionate (paragraph 46 of the Judgment).

22. Renew was unsuccessful in relation to a specific ground of appeal to the effect that the OFT's decision to address the Decision to, and impose a penalty on, Renew was discriminatory and contravened the requirement of equal treatment (see paragraphs 102 to 104 of the Judgment). The Tribunal also rejected Woodhead's submissions regarding comparisons that it suggested should be drawn with the penalties imposed on other addressees of the Decision and with penalties imposed in a criminal context for serious health and safety infringements (paragraph 84 of the Judgment).

23. The OFT highlighted the disparity between the amounts claimed by Renew and Woodhead (set out at paragraph 3 above). The amount claimed by Renew is some four times greater than that claimed by Woodhead, despite these firms instructing the same counsel and solicitors. Like the OFT, we are somewhat puzzled by the substantial difference in the amounts claimed by these firms. In particular, a total of 726.71 hours were incurred in relation to Renew's appeal across a team of seven solicitors and one

partner (amounting to 90.8 days, assuming a working day of 8 hours). This seems, to us, a very high figure for a penalty-only appeal on a relatively small number of issues. However, we agree with the conclusions of the Tribunal at paragraph 25 of *Kier* that there are many possible reasons for disparities in costs, and that a £200,000 cap can be applied to bring costs down to a reasonable level.

24. We have carefully considered the amount of time that was devoted by the parties and the Tribunal in addressing unsuccessful issues in the pleadings and at the hearing, and the significance of these issues, and have concluded that it would be appropriate to apply a reduction of 10% to Woodhead's costs and 20% to Renew's costs, having first applied the cap of £200,000 described above.

25. We therefore order the OFT, within 28 days of this ruling,

    (a) to pay Francis £51,960.94;

    (b) to pay JHH £44,857.71;

    (c) to pay Hobson & Porter £43,550.69;

    (d) to pay Woodhead £48,170.78;

    (e) to pay Renew £160,000.

Lord Carlile Q.C. Richard Prosser Peter Grinyer

Charles Dhanowa
Registrar

Date: 17 November 2011