Neutral citation [2014] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1218/6/8/13

16 January 2014

Before:

MARCUS SMITH Q.C.
(Chairman)
WILLIAM ALLAN
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

BMI HEALTHCARE LIMITED

Applicant

- and -

COMPETITION COMMISSION

Respondent

RULING (COSTS)

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1. This ruling, which adopts the same terms and abbreviations as used in the Tribunal's judgment of 2 October 2013 in *BMI Healthcare Limited v Competition Commission* ([2013] CAT 24) ("the Judgment"), deals with an application by BMI for its costs.

2. Pursuant to the timetable established by the Tribunal in its order of 14 November 2013, BMI's application for costs was filed on 18 November 2013. The Commission's response to BMI's application was filed on 25 November 2013. BMI filed a reply on 2 December 2013.

THE PARTIES' SUBMISSIONS

3. BMI seeks an order that the Commission pay BMI's costs of and occasioned by the proceedings, in the sum of £293,001.88 (inclusive of VAT[1]). BMI seeks a summary assessment of costs. Were the Tribunal minded to order a detailed assessment of costs, BMI seeks an interim payment within 14 days of 50% of the amount claimed.

4. BMI submits that it is entitled to all of its costs for the following reasons:

   (1) BMI's application succeeded and BMI achieved the relief that it sought, the Tribunal having rejected, in "trenchant terms", the Commission's defence of the application.

   (2) BMI was unable to vindicate its rights other than by applying to the Tribunal, having been unsuccessful in its efforts to address the matter directly with the Commission.

   (3) In addition to compensating BMI for its losses, an order that the Commission pay BMI's costs would "help to deter the Commission from taking, adhering to and defending such a fundamentally flawed decision again in the future" (paragraph 3(4) of BMI's application for costs).

   (4) The costs incurred by BMI are reasonable. In particular, BMI was justified in using City solicitors in relation to specialist proceedings of this

[1] In a letter sent to the Registrar on 13 December 2013, BMI confirmed that it was not in a position to recover, as input tax pursuant to section 24 of the Value Added Tax Act 1994, VAT on legal costs and disbursements.

nature, and the case was subject to unusual expedition, which inevitably increased BMI's costs at a time when other lawyers were engaged on other aspects of the Commission's investigation. Further, whilst BMI's counsel were prepared to deal with the application at the hearing on 20 September 2013, the Commission's attitude led to the proceedings being more detailed and complicated than they might otherwise have been.

(5) BMI assumed the lead role as between the three applicants.

5. The Commission accepts that the Tribunal should make a costs award in BMI's favour, but submits that the costs claimed by BMI were exorbitant, given the length of the proceedings and the limited volume of material. In particular, the Commission submits that:

(1) All the relevant circumstances must be considered when making an award of costs, including success or failure on particular issues, whether the costs were proportionately and reasonably incurred and were proportionate and reasonable in amount, and having regard to the importance of the matter to the parties, the complexity of the matter and the time spent on the case.

(2) BMI did not prevail on every issue. In particular, although the Tribunal ruled that various aspects of the disclosure room arrangements were unlawful, it found that the Commission was entitled to protect the relevant information by way of a disclosure room (paragraph 49 of the Judgment). The Tribunal also rejected BMI's arguments made in relation to the "adviser disqualification" requirement (paragraphs 76 to 78 of the Judgment).

(3) The level of costs claimed by BMI is excessive and disproportionate, given that its Notice of Application was not long or complex, and the proceedings were limited to points of principle only, with few documents in issue. A total of 1.5 days were spent in court and the proceedings lasted little more than two weeks in total.

(4) The amount claimed by BMI is four and a half times greater (adjusting for VAT) than the costs incurred by the Commission in defending three applications.

6. The Commission also directed certain submissions to the proportionality of specific elements of BMI's claim, including the time spent by individual solicitors and counsel on certain aspects of the proceedings, and certain aspects of the disbursements claimed. The Commission submitted that the Tribunal should make an award in the sum of £84,000, which is approximately twice the Commission's costs of the proceedings, adjusting for VAT.

7. In its reply submissions, BMI reiterated that it had obtained what it sought through its application and that the Commission was wrong to belittle BMI's success by identifying small issues on which the Tribunal allegedly did not adopt every aspect of BMI's submissions. On the "adviser disqualification" issue, BMI submits that the Tribunal did not reject its arguments on this issue outright, and that only a very small proportion of BMI's costs related to this issue in any event.

8. BMI submitted further that the Commission's own costs were not an appropriate comparator, and that the Commission's general and specific arguments on proportionality should be rejected. This was a complex case, as evidenced by the length of the Tribunal's judgment. Given the Tribunal's emphasis on a short oral procedure, the length of the hearing is not a good indicator of the complexity of the matter, and considerable work was undertaken prior to the filing of BMI's Notice of Application, and also following delivery of the Judgment in connection with the terms on which the disclosure room would be re-opened.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

9. Rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) provides broadly that the Tribunal may at its discretion 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. In determining how much the party is required to pay, Rule 55 provides that the Tribunal may take account of the conduct of all

parties in relation to the proceedings. Rule 55 has been recognised as affording the Tribunal a "wide and general discretion" as regards costs (*Quarmby Construction Company Limited v Office of Fair Trading* [2012] EWCA Civ 1552 at [12]).

10. As the Tribunal noted at paragraph 21 of its ruling on costs in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the "appropriate starting point in section 120 [of the 2002 Act] applications [is] that a successful party would normally obtain a costs award in its favour". The Tribunal also recognised at paragraph 19 that it is "axiomatic that all such starting points are just that... and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly." Although that case concerned applications for review under section 120 of the 2002 Act, we consider that the Tribunal's conclusions are of equal relevance to applications under section 179.

11. The parties to the present proceedings are agreed that BMI is the successful party, and that it should receive a costs award in its favour. However, they have been unable to reach an accommodation in respect of costs, given the Commission's view that the amount claimed in costs is disproportionate to the level of BMI's success, and the work undertaken in connection with the application.

12. Having carefully considered the parties' submissions and all the relevant circumstances of the case, including the conduct of the parties, we agree with the Commission that the amount claimed by BMI is disproportionate.

13. As counsel for BMI accepted, the issues in the case were not particularly complex (see the transcript of the hearing on 20 September 2013 at page 14). By the time of the main hearing, BMI's submissions were limited to two issues of principle, namely (1) whether the Commission was wrong to limit the information available to BMI's advisers when formulating BMI's response to the Commission's provisional findings and (2) whether the Commission was wrong to impose the "adviser disqualification" requirement on those who were

given access to the disclosure room (see the transcript of the hearing on 2 October 2013 at page 3). BMI prevailed on the first of these issues, but not the second, which was held by the Tribunal to be a context-sensitive issue. This was also a case limited to judicial review grounds only.

14. Although we consider that the Commission was wrong to defend its decision in relation to the operation of the disclosure room, which was clearly inadequate for its established purpose, it is also true that BMI's original application was unclear as regards the relief sought by BMI (see the transcript of the hearing on 20 September 2013 at page 1). This mismatch of expectations may have hampered the parties' ability to achieve a resolution of the matter without troubling the Tribunal.

15. Moreover, we consider that the Commission, as a responsible regulator, will take on board the implications of the Judgment, and does not require added incentivisation to do so in the form of a costs order.

16. The primary position of both BMI and the Commission was that we should make a summary assessment of costs, albeit in two differing sums. We agree that a summary assessment is appropriate in this case.

17. As noted above, BMI seeks a sum of £293,001.88 (inclusive of VAT). This is made up of £98,100 in counsel's fees and a further £194,901.88 of solicitors' fees and disbursements. We note BMI's submission that the instruction of a separate team of solicitors (from those working on other aspects of the Commission's investigation) and the expedited proceedings increased its costs. We also accept that BMI played a certain role in coordinating the submissions of the three applicants. However, we find that BMI's claim is disproportionate to the nature, length and complexity of these proceedings in a number of respects, especially when it is coupled with the substantial amount of work undertaken by counsel: we have in mind, particularly, the number of individual solicitors (six, plus two trainee solicitors), the total number of hours claimed (388.3 hours) and the hourly rates claimed in respect of at least some of the solicitors. It is inherent in the nature of a summary assessment that the scale of any disproportionality cannot be computed with precision: indeed, any attempt

to do so in that context would be wholly self-defeating. Nonetheless, we have kept the broad scale of those factors in mind when reaching our final conclusion.

18. The Commission pointed us to the approach followed by the Tribunal in its ruling on costs in *Tesco Plc v Competition Commission* [2009] CAT 26 where the Tribunal observed, at paragraph 46, that "the amount incurred by the Commission in defending Tesco's challenge provides us with a useful benchmark for the costs that it would be fair and proportionate in all the circumstances for the Commission to pay to Tesco in respect of the substantive issues". Accordingly, in that case, the Tribunal calculated the costs to be awarded to the successful applicant by reference to the Commission's costs, plus an appropriate uplift to reflect certain cost advantages available to the Commission, and adjustment to take account of unsuccessful arguments advanced by Tesco. We regard this as helpful in reaching our own conclusion, in particular given that here, as in *Tesco*, there is a striking disparity between BMI's costs and those of the Commission, such as to have some bearing on whether BMI's costs are proportionate.

19. The Commission's costs of responding to the three applications in these proceedings, adjusted for work undertaken by an internal lawyer within the Commission, came to approximately £35,000 (excluding VAT and representing approximately 92 hours). This is a relatively low figure, given the nature of the proceedings before us and, although we will take this sum as the starting point for our calculation, we will also bear in mind that it is a relatively low figure when adding an uplift to reflect the cost advantages available to the Commission (as identified in *Tesco* at paragraph 43).

20. The Commission has suggested that an appropriate uplift in this case would be achieved by doubling the amount of the Commission's costs and to adjust for VAT. That would result in an order that the Commission pay BMI a total of £84,000. Taking into account, in particular, the level of the Commission's own costs, the urgency of BMI's application (recognising that urgent applications involve additional costs over-and-above less urgent applications), the fact that BMI was ready and able to argue the application at the hearing on 20 September

2013 and having regard to the broad scale of the disproportionality in BMI's claim noted in paragraph 17 above, we consider that the appropriate order is that the Commission pay BMI a total of £125,000, such sum to be deemed inclusive of any costs incurred by the parties in connection with the present application for costs.

ORDER

21. For the above reasons the Tribunal unanimously orders that the Commission pay BMI a total of £125,000 in respect of its costs, such payment to be made within 28 days of the date of this ruling.

Marcus Smith Q.C. William Allan Margot Daly

Charles Dhanowa O.B.E., Q.C. (Hon)
Registrar Date: 16 January 2014