Neutral citation [2015] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1230/6/12/14

Victoria House
Bloomsbury Place
London WC1A 2EB

3 June 2015

Before:

THE RIGHT HONOURABLE LORD JUSTICE SALES
(Chairman)
CLARE POTTER
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

FEDERATION OF INDEPENDENT PRACTITIONER ORGANISATIONS

Applicant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (COSTS)

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1. This majority ruling of Sales LJ and Clare Potter, which adopts the same terms and abbreviations as used in the Tribunal's judgment of 29 April 2015 in *Federation of Independent Practitioner Organisations v Competition and Markets Authority* ([2015] CAT 8), deals with an application by the CMA for its costs. Dermot Glynn has prepared a dissenting ruling, which follows this ruling.

2. The CMA successfully defended the challenge brought by FIPO under section 179 of the Enterprise Act 2002. The CMA now makes a straightforward application for an order under rule 55 of the Competition Appeal Tribunal Rules 2003[1] that FIPO pay the CMA's costs of defending the proceedings. FIPO resists the making of a costs order against it, and in the alternative argues that the CMA should be awarded only a proportion of its costs (at no more than 50%).

3. Although the Tribunal has a wide discretion in relation to costs under rule 55, the starting point in these circumstances is an expectation that the losing party should pay the costs of the successful party: see *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT at [20]-[21]; *Tesco plc v Competition Commission* [2009] CAT 26; and *R v Lord Chancellor, ex p. Child Poverty Action Group* [1999] 1 WLR 347, [36]-[37] per Dyson J, referred to in *Merger Action Group* at [27]-[28]. Although there is no general *rule* to this effect, unlike in CPR Rule 44.3(2)(a), there are strong reasons relating to fairness as between the parties and the need to promote a properly disciplined approach to complex litigation why the wide discretion as to costs should be exercised in this way, absent good reason being made out to justify a departure from that approach on the facts of an individual case.

4. The importance of the Tribunal adopting a known and reasonably uniform starting point to this effect in relation to costs is reinforced by the need to keep the risk of discordant decisions within reasonable bounds: *Merger Action Group* at [17]. It is also reinforced by the need for parties before the Tribunal to understand the position with reasonable clarity when they litigate. This enables them to make informed

[1] S.I. No. 2003/1372 (as amended)

choices and to adjust their behaviour in the knowledge of what the Tribunal is likely to do when it comes to deciding issues of costs. It also helps to minimise the cost and expense which might otherwise arise if the costs discretion were regarded as unstructured and wholly at large, so that parties felt that it was advantageous or necessary for them to present and respond to wide-ranging and unstructured arguments about costs.

5. In our view, FIPO has not established any good reason why the Tribunal should depart in this case from its usual starting point and normal order to award costs to the successful party.

6. FIPO is an association which represents independent medical practitioners. It brought the present challenge in order to promote the commercial interests of its members. This is a case of ordinary litigation by a body representing persons with a very direct commercial interest in the outcome. By contrast with the position in *Merger Action Group* (see para. [38]), this is not a case of a challenge brought by persons to promote the general public interest, without reference to their own commercial self-interest or with only a very indirect and subordinate level of self-interest in the outcome. Moreover, unlike in *Merger Action Group*, FIPO has lost on all aspects of its challenge in these proceedings.

7. FIPO embarked on this litigation with knowledge of the Tribunal's approach to issues of costs. It took the risk of success or failure with its eyes open. There is no injustice in making an order that it pay the CMA's costs of defending the proceedings.

8. As a cross-check that there is no unfairness in arriving at this result, we note that this is the order which would have been made in analogous judicial review proceedings in the High Court. The Tribunal will naturally take note, as appropriate, of the approach adopted in such analogous forms of proceeding: see *Merger Action Group* at [22].

9. FIPO requests that the costs order to be made against it should be stayed pending the outcome of any appeal. We refuse that application. We do not consider that a

stay of that order would be appropriate. Where a party has lost litigation at first instance, the usual position is that there should be no stay of any part of the order made, including in relation to costs, pending the outcome of the appeal, unless solid grounds are put forward to justify a stay: see para. 52.7.1 of the Civil Procedure White Book (2015). In our view the CMA, as the winning party, should not be deprived of the fruits of its success in the litigation pending any possible appeal. The CMA is a public body subject to budgetary constraints and has a legitimate interest to receive payment at this stage without having to wait. Conversely, if an appeal is allowed and the costs order set aside, there is no question that the money will be repaid. FIPO say that it "may not be able to pursue" an appeal in the event of having to pay costs at this point, but has not put forward any evidence to show what its present funding is and what arrangements it has with its members to put it in funds. It has therefore failed to put forward solid grounds to show that it would be unable to pursue an appeal or otherwise suffer irremediable harm if required to pay the CMA's costs at first instance at this stage. We would also make the observation that it would be a matter of concern, and might well be contrary to justice, if FIPO were to pursue an appeal for its members in circumstances where it regarded itself as unable to meet costs orders in favour of CMA, whether at first instance or on appeal.

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10. I respectfully disagree with my colleagues on this matter. The issues raised by the appellants were important for patients, and for the overall working of the health service. FIPO argued for the income level of their members, but they also argued against the PMIs interfering in medical decisions, and pointed out the serious conflicts of interest to which the PMIs are subject.

11. FIPO's overall position was that the powerful market position of the PMIs and their practice of effectively deciding on the fee rates to be charged by consultants has an adverse effect on competition between consultants; this view is at the very least extremely plausible.

12. The market investigation from which this application for review arose, relating as it does to the particularly difficult healthcare markets and services, is one in which it was inevitably difficult for the CMA to reach safe conclusions within the statutory time limits. I find it hard to imagine a case in which it would be more clearly in the public interest to have the CMA's reasoning tested.

13. Parliament has given the Tribunal greater discretion with regard to costs than is open to the High Court and in my view the Tribunal should be prepared to use it in cases such as this. I feel sure that it would not be in the public interest to make FIPO pay the CMA's costs.

ORDER

14. For the above reasons, we order by majority that FIPO pay the CMA's costs of defending the application for review on the standard basis, to be assessed if not agreed.

The Rt Hon Lord Justice Sales (Chairman) | Dermot Glynn | Clare Potter

Charles Dhanowa OBE, QC (*Hon*) (Registrar) | Date: 3 June 2015