Case No: HC-2016-000513

Neutral Citation Number: [2016] EWHC 2315 (CH)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Competition Appeal Tribunal,
Victoria House, Bloomsbury Place
London WC1A 2EB

Date: 14/09/2016

Before :

MR JUSTICE ROTH

- -

Between :

AGENTS' MUTUAL LIMITED **Claimant**

- and -

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)

Defendant

- -

JUDGMENT (SECURITY FOR COSTS)
(approved by the Judge)
- -

Alan Maclean QC and **Mr Josh Holmes** (instructed by **Eversheds LLP**) for the **Claimant**
Paul Harris QC (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Defendant**

Hearing date: 14 September 2016

Mr Justice Roth :

1. There are applications listed for today in two actions that will be tried together. Both actions were commenced in the Chancery Division of the High Court, but as a result of defences served in those actions, which raised substantial competition law issues, those issues were transferred to this Tribunal under s.16 of the Enterprise Act 2002 by order of Sir Kenneth Parker (sitting as a Judge of the High Court) of 5th July 2016. In hearing these applications, I am sitting both as President of the Competition Appeal Tribunal and as a judge of the Chancery Division of the High Court.

2. Since, in response to applications by the claimant for interim injunctions, both defendants gave interim undertakings, and the resolution of the disputes is for various reasons urgent, both cases have been expedited. The hearing of the competition issues in this Tribunal is now listed to commence on 3rd February 2017.

3. Most of these applications have been resolved and determined either by consent or following discussion in the hearing or relatively brief argument today, including all applications concerning the action against Moginie James Ltd ("Moginie James").

4. This judgment, therefore, addresses the only outstanding application made by the defendant Gascoigne Halman Ltd ("Gascoigne Halman") for additional security for costs in the action against it. It is agreed that this application, issued in the High Court on 20 June 2016 and determined partially by the order of Sir Kenneth Parker with the balance adjourned, falls to be decided formally in the High Court and not the Tribunal.

5. Before dealing with that directly, it is appropriate to set out very briefly what this case is about. I should emphasise that this is only a broad outline to the extent relevant for consideration of the likely and proportionate costs.

6. The claimant is a start-up company, set up in January 2013 with the aim of launching a new online property portal. Property portals are websites on which

estate agents list properties which they have available to them for sale or rent in order to attract prospective purchasers or tenants. While there are a number of property portals in the UK, by far the largest two are Rightmove, and then in second place the two portals, Zoopla and PrimeLocation, both owned by Zoopla Property Group.

7. The stated aim of the claimant was to establish a new portal that would break into what it and its backers considered to be a duopolistic market. As its name suggests, the claimant is a mutual limited company which is said to be run in the interests of its members who are all estate agents. The six founding members of the claimant were leading estate agents, including Savills, Knight Frank, Strutt & Parker and Chesterton Humberts. One aim of the claimant was to reduce the fees which estate agents were spending by way of payment for listings on property portals.

8. The claimant duly launched its portal called 'OnTheMarket' ("OTM") in January 2015. Estate agents were invited to sign up to OTM and Gascoigne Halman and also Moginie James did so.

9. The essential issues in this case concern the terms of membership of OTM. In particular, not only are members of the claimant required to list all their properties on the OTM portal, which I understand is common for property portals, but they are subject to a restriction called the 'one other portal' or 'OOP' rule. Under that rule, a member may only list their properties on one other portal, and no more. Hence a member may list its properties on Rightmove, for example, or on Zoopla, but cannot do so on both. Gascoigne Halman became a Gold Member of the claimant and, as such, the requirement or restriction of the OOP rule lasted for a period of five years.

10. Gascoigne Halman contends that the OOP rule contravenes the Chapter I prohibition under the Competition Act 1998. It argues that it is an infringement either by object, having regard to the terms of the rule, or, if not, then by effect.

11. The claimant contends that this restriction is necessary and proportionate as a means to enable effective new entry into this essentially duopolistic market and so serves to promote competition; or, in the alternative, if it does constitute a

restriction on competition, that it fulfils the criteria for exemption under s.9 of the Competition Act 1998.

12. I should add that there is an issue on the interpretation of the membership rules regarding whether a member was required to procure that any other company in its corporate group should also list all its UK residential properties on OTM, but if that is the correct interpretation then that is said to aggravate the alleged anti-competitive effect of the OOP rule.

13. Gascoigne Halman also raises several other allegations of violation of competition law, although I think it is fair to say that some, at least, may prove of lesser significance:

(a) one of the membership rules excludes from membership an estate agent operating only an online business model - that is to say an agent that does not operate from physical premises; and

(b) another of the rules requires members to promote only OTM and not any other portal, including any second portal on which the member may be listing properties;

(c) further, and this is a serious allegation, Gascoigne Halman contends that the claimant, together with at least some of its six founder members, was engaged in a wider concerted practice collectively to boycott Zoopla and PrimeLocation. It is alleged that this concerted practice was deliberately concealed from Gascoigne Halman.

Security for costs

14. The claimant has already given security in the sum of £500,000. Gascoigne Halman seeks further security and, as so often, the issue is not whether security should be given, but how much. The claimant has offered to pay a further £500,000; Gascoigne Halman says that is wholly inadequate and asks for an order for a further £1 million.

15. There is also a secondary issue in that while Gascoigne Halman accepts, albeit (as its counsel expressed it) by way of indulgence, that any additional sum can

be paid in stages, there is a question as to the dates on which any such instalments should be paid.

16. It is common ground that at this point security should relate only to the trial of the competition issues before this Tribunal and not any subsequent hearing of other issues in the High Court. Those other issues are now stayed pending judgment in this Tribunal.

17. Accordingly, it is necessary to look with some care at Gascoigne Halman's estimate of its costs. The action against Gascoigne Halman was commenced in February 2016. Three successive lists of costs have been served by the solicitors to Gascoigne Halman. For reasons that it is unnecessary to develop, I think the first schedule of costs in the form of Precedent H and dated 27th May 2016 can now be disregarded. However, the second, dated 17th June 2016, is again in the detailed form of Precedent H prepared by Gascoigne Halman's then solicitors, Hill Dickinson. It is in a total amount of close of £2.54 million, excluding VAT. It was produced specifically in support of Gascoigne Halman's original application for security for costs to be heard in the Chancery Division. That costs budget therefore covered the costs of the whole action.

18. In the witness statement exhibiting that schedule, the partner in Hill Dickinson responsible for the matter, Mr. Iain Campbell, stated as follows:

> "The costs budget has been prepared following careful consideration by this firm, counsel and expert advisers as to the likely amount of time that will be required at each stage of these proceedings, albeit that it cannot be known now with certainty all of the issues which would be in dispute as the claimant has not yet served a reply.
>
> In putting the costs budget together, we have taken into account:
>
> (i) an analysis of the many issues in the case and the evidence that is likely to be adduced at trial;

(ii) an identification by this firm and in-house lawyers within the Connells Group of potential sources of documents and the potential volume of documentation involved; and

(iii) critically, experience of other recent similar actions and the costs that have actually been incurred in them.

The costs budget has been prepared by experienced costs draftsmen at Hill Dickinson in accordance with the guidance note on precedent, and I believe is a fair and accurate statement of the incurred and estimated costs which it would be reasonable and proportionate for the defendant to incur in this litigation in accordance with CPR Practice Direction 3 and 22."

19. I should add that it is not without significance that Mr. Campbell states that the costs budget was prepared following consideration by counsel, because the point was taken that although Hill Dickinson may be experienced commercial solicitors, they are perhaps not specifically experienced in competition law to the extent of Gascoigne Halman's present solicitors. However, they did instruct specialist competition counsel, who continue to advise Gascoigne Halman.

20. As I have just indicated, Gascoigne Halman changed solicitors and on 28th June 2016 it instructed Quinn Emanuel Urquhart & Sullivan LLP ("Quinn Emanuel"), who continue to represent it.

21. In support of the application for further security, Quinn Emanuel have chosen not to update or revise the costs budget produced by their predecessors, but instead served on 1st August 2016 a one page summary schedule which, as subsequently corrected, shows the total costs estimated at just over £2.8 million. Moreover, those costs, going forward, relate only to the trial of the competition issues in the Tribunal. That qualification is significant, since Hill Dickinson prepared their budget on the assumption that if there were a transfer of the competition issues to the Tribunal, a matter which at that stage still had to be resolved, a trial there would last two weeks, with an additional one week trial in the High Court thereafter: see Mr. Campbell's second witness statement, para.44.5. Thus, their costs budget of £2.54 million was for three weeks of trial.

22. In his witness statement in support of the present application, Mr. Bronfentrinker of Gascoigne Halman's new solicitors seeks to explain the fact that no further or revised Precedent H budget has been produced, despite the very significant increase in the costs budget and specific requests from the claimant's solicitors for more detail, on the basis that this would be "both unnecessary for the purposes of the security application and premature, given that the Tribunal has made no order in respect of the claimant's application for active costs management".

23. I have to say that, in reaching that view, Mr. Bronfentrinker is labouring under a serious misapprehension. Gascoigne Halman is coming to the Tribunal seeking an order for payment. The difference between what the claimant has been prepared to offer and the sum which Gascoigne Halman is seeking is very substantial, especially for a domestic start-up company. The amount of further security sought by Gascoigne Halman, as I have mentioned, is £1 million, precisely double what the claimant has been prepared to offer.

24. The issue before the Tribunal is not, as Mr. Harris QC for Gascoigne Halman sought to suggest, simply whether to order any more than the sum of £500,000 further security which the claimant has offered. This is Gascoigne Halman's application, and it is seeking further security of £1 million: see its notice of application of 20th June 2016 seeking £1.7 million, now revised to £1.5 million, of which £500,000 was covered by the initial order of 5th July 2016. Quinn Emanuel stated in their letter of 15th August that this further £1 million was "the minimum which our client is willing to accept."

25. It is noticeable that Moginie James, in connection with its independent application for security for costs, took the trouble to complete a detailed costs budget following Precedent H, to which a summary schedule of revisions was recently produced. By contrast, the one page schedule served for Gascoigne Halman gives no indication of hourly rates used and time allocated between different fee earners, although Quinn Emanuel no doubt had this information to produce the schedule of figures.

26. In response to repeated, specific requests from the claimant's solicitors raising these points, Quinn Emanuel wrote on 24th August to say simply that the rates used for partners varied between £520 and £590 and that the 'associate rate' was £395. As Mr. Harris accepted in response to my question, clearly more junior solicitors at a lower rate and paralegals or trainees will also be involved in this work.

27. In support of its application for security for costs a defendant is, of course, not obliged to present a costs budget in the precise form of Precedent H, but it can be expected, especially in view of the size of the sum being asked for here, to prepare a full schedule showing how the sub-totals under the various specified heads were arrived at, including the rates being charged and hours estimated.

28. It is, accordingly, subject to those serious shortcomings that I consider the costs schedule on which Gascoigne Halman bases its application.

29. For a case of this nature, having regard to the issues involved, with a trial over nine court days and a single expert, I consider total costs of £2.8 million to be seriously disproportionate, and I have little doubt that they would be significantly reduced on standard assessment.

30. Mr. Harris emphasised that the schedule was attested to by a partner at Quinn Emanuel as the costs that have been or will be reasonably incurred. I do not question whether they will be incurred. What Gascoigne Halman may be willing to pay its solicitors is a matter for it. The issue for the Tribunal is what are the reasonable and proportionate costs, such as may be recoverable on standard assessment.

31. It is not appropriate on this application to go into all the details of the schedule, but I note with some surprise that the figure for disclosure is over £340,000. I recognise that this covers disclosure in the entire action, covering therefore also the non-competition elements, since that is part of the order for disclosure that was made. However, given the predominance of the competition issues and the nature of the allegations, this is a case where it seems to me that a greater burden of disclosure falls on the claimant, which has to justify and

explain the establishment of OTM and the various rules that are being challenged.

32. The claimant's costs of disclosure amount to £117,000. I observe in that regard that the claimant is also represented by a City of London firm where the rate for a senior associate, £385, is very close to that of an equivalent at Quinn Emanuel, albeit that it is clear from the claimant's detailed schedule that the greater part of the time devoted to disclosure is, unsurprisingly expended by more junior personnel. Even if the number of hours estimated by the claimant in its schedule devoted to disclosure, i.e. 365 hours, is seriously under-estimated, as Mr. Harris submitted, and as much as double that time (i.e. 730 hours) is reasonably required for disclosure, on the figure in the Gascoigne Halman schedule, the *average* rate of work on disclosure would amount to around £465 per hour, which is a striking figure, especially if, as I was told in the course of argument, much of the work on disclosure is in that firm also being carried out by more junior personnel.

33. Secondly, I note with surprise that a sum of over £123,000 is ascribed to the PTR, which will be held in advance of trial in the usual way. Even the budget for the PTR previously served for Gascoigne Halman by Hill Dickinson at £94,000 strikes me as unreasonable. By contrast, I see that Moginie James' budget for the PTR is under £13,000, and the claimant's budget for the PTR covering both actions is under £27,000. Mr. Harris said, as regards this particular item, that all kinds of applications may be made at a PTR in a case of this nature, such as contested issues on disclosure, so that it may not prove to be a simple, straightforward hearing concerned only with the organisation of the trial. Even allowing for such contingencies, which I can accept, I regard the figure of £123,000 in this schedule (including counsel's fees of over £80,000) as unreasonable and disproportionate.

34. I could go on. I also think that there would some increase in Gascoigne Halman's costs as a result of changing solicitors four months into the case. That is not a matter for criticism, but any consequent increase in costs would not in the ordinary way be recoverable from the other side.

35. Having regard to all these considerations and the general difficulty I have in assessing the schedule, I think it is appropriate to look at the claimant's costs budget prepared in the detailed form of Precedent H. The claimant also is using leading and specialist junior counsel and, as I have mentioned, it also has City of London solicitors. Its total costs budget, as amended, is £1.86 million.

36. Mr. Harris submitted that many of the figures in that schedule are much too low, and that a claimant facing an application for security for costs has an incentive to understate its own costs estimate. However, the claimant's costs budget dated 25th August 2016 is signed by a partner in Eversheds attesting to it being a fair and accurate statement of incurred and estimated costs. Nothing in the rates being charged suggests to me that Eversheds are conducting this case for their commercial client on a reduced or concessionary rate, and Mr. Maclean QC confirmed that my supposition is correct.

37. Moreover, their budget was not prepared simply for the purpose of resisting Gascoigne Halman's security for costs application. It was also adduced in support of the claimant's own application for costs management, which has also been disposed of today. So if that budget were under-estimated, the claimant would face a serious risk that the costs it can recover, if successful, would be insufficient.

38. I accordingly reject the criticisms levelled at the claimant's costs budget or its relevance. Indeed, a somewhat remarkable feature of the argument on this application is that so much time was devoted to scrutiny of the claimant's costs budget and not the Gascoigne Halman costs schedule setting out the costs for which security is being sought.

39. I have regard to the observations I made about disclosure, namely, that I would expect, given the allegations in this particular case, that the claimant's costs of disclosure would be somewhat higher than Gascoigne Halman's. On the other hand, the claimant's costs budget to which I have referred covers only the action against Gascoigne Halman, and it served a separate costs budget for the case against Moginie James in the total amount of £458,000. Since the two cases are being heard together, the Gascoigne Halman representatives will have to be

present and read the documents also in the Moginie James case. So that would lead to its budget being higher than the claimant's budget as allocated for the Gascoigne Halman action alone. I also can accept the point made by Mr. Harris that reasonable costs for a PTR for counsel are likely to be more than set out in the claimant's schedule.

40. On a rough and ready basis, I think it is, therefore, fair to proceed on the assumption that Gascoigne Halman's costs on a standard basis may be a little bit above the £1.86 million of the claimant's budget, and on a broad brush approach I shall adopt a figure of £1.9 million.

41. Much was made in the submissions for the claimant by Mr. Maclean of the fact that the giving of security in this case would come not simply from money deposited in the bank but out of working capital or income, and is, therefore, likely to reduce the amount that the claimant can spend on marketing, such as to cause it prejudice. He referred to the judgment of the Court of Appeal in *Stokors SA v IG Markets Ltd* [2012] EWCA Civ 1706, where the court, in dismissing an appeal against an order for security for costs, referred to the relevance of a defendant seeking security giving an undertaking to compensate the claimant for loss which the court later finds that the putting up of security has caused, where the defendant does not in the end recover the costs secured. In an appropriate case, it is said that the lack of such an undertaking can shift the balance of prejudice that can weigh with the court when assessing what amount of security to order.

42. It is correct that the claimant in this case derives its income primarily from membership fees. However, the degree of information that has been given about the level of the claimant's expenditure and how much goes on marketing is rather sparse. I do not think that it would be right, where the assertion by Mr. Maclean in argument that every £1 devoted by the claimant to security is £1 less spent on marketing is not, in my view, supported by the rather more general statements in the witness statements from its solicitor, to reduce or moderate the amount of security being ordered by reason of the lack of an undertaking of the kind referred to in the *Stokors* case.

43. Although in the claimant's skeleton argument it is suggested that it is fair to order security at 55 per cent of estimated reasonable costs, I see no ground for that particular percentage. A proportion of 70 per cent seems to me to be fairer and produces, on the figure of £1.9 million that I adopt, an amount of £1.33 million. Since the claimant has already paid £0.5 million, the balance amounts to £0.83 million.

44. Turning to the dates for payment, I do accept that the claimant has limited working capital, and, as I have just indicated, it is dependent on membership subscriptions as its principal if not sole source of income. It seems to me clear from the evidence of its solicitor that this income is paid monthly.

45. The claimant has referred to its cash flow issues. It is, as I said earlier, a start-up company, and it has limited resources. While I am not reducing the amount of security by reference either to the claimant's financial position or any lack of an undertaking from Gascoigne Halman, I do think it is appropriate for the total which I have arrived at to be paid in stages. Although Gascoigne Halman submitted that there should be two stages – the first at the end of September and the second on 1st December - it seems to me fairer for the payment to be made in three stages. In arriving at the amounts and dates, I have regard to the progression of fees and costs being incurred by Gascoigne Halman as set out in an exhibit to the evidence of Mr. Bronfentrinker.

46. I, therefore, direct that it should be paid in three stages: £280,000 by 30th September, £250,000 by 31st October, and £300,000 by 30th December.