Neutral citation: [2005] CAT 34

**IN THE COMPETITION APPEAL TRIBUNAL**

**Cases: 1021/1/1/03**
**1022/1/1/03**

Victoria House
Bloomsbury Place
London WC1A 2EB

11 October 2005

**Before:**

**Sir Christopher Bellamy (President)**
**Mr. Barry Colgate**
**Mr. Richard Prosser OBE**

Sitting as a Tribunal in England and Wales

**BETWEEN**

**JJB SPORTS PLC**

Appellant

**-and-**

**OFFICE OF FAIR TRADING**

Respondent

**supported by**

**SPORTS WORLD INTERNATIONAL LIMITED**

Intervener

**ALLSPORTS LIMITED**

Appellant

**-and-**

**OFFICE OF FAIR TRADING**

Respondent

**supported by**

**SPORTS WORLD INTERNATIONAL LIMITED**

Intervener

Mr. Mark Hoskins (instructed by DLA Piper Rudnick Gray Cary UK LLP) appeared for JJB Sports plc.

Mr. George Peretz (instructed by Addleshaw Goddard) and Mr. Adam Aldred (of Addleshaw Goddard) appeared for Allsports Limited.

Mr. Jon Turner and Miss Anneli Howard (instructed by Director of Legal Services, Office of Fair Trading) appeared for the OFT.

Mr. Rupert Anderson QC (instructed by CMS Cameron McKenna) appeared for Sportsworld International Limited.

**JUDGMENT: COSTS OF THE INTERVENER**

## I INTRODUCTION

1. We deal in this judgment with an application by Sports World International Limited ("SWI"), formerly Sports Soccer, intervening in this case, to recover its costs against the unsuccessful appellants JJB Sports plc ("JJB") and Allsports Limited ("Allsports"). The background to the case is to be found in the Tribunal's judgment on liability in *JJB Sports and Allsports v OFT* [2004] CAT 17. SWI, referred to in the liability judgment as Sports Soccer, was the "whistleblower" in this case.

2. In our earlier judgment of 15 July 2005, [2005] CAT 26, we accepted that we had jurisdiction in principle to make an order in favour of SWI in respect of its costs incurred "of and incidental to" the proceedings. Following that judgment, we invited SWI to provide a more detailed schedule of costs to enable the Tribunal to rule on the question of whether specific heads of costs are recoverable. We now have the benefit of that schedule, together with further submissions from SWI, JJB and Allsports. We have also seen a more detailed schedule of 7 September 2005.

3. SWI seeks to recover legal costs in the sum of £214,553.87 (exclusive of VAT), broken down into the following groups:

    1a – Disclosure of the OFT's penalty calculations – £1,241.10.

    1b – Disclosure of SWI's leniency correspondence with the OFT – £1,992.02.

    1c – Disclosure of confidential information in the exhibits to Mike Ashley's witness statements – £697.09.

    1d – Disclosure of confidential information identified in the appellants' disclosure schedules – £72,766.61.

    2 – Verification of the details of the Umbro/Sports Soccer relationship at the main hearing and in closing – £22,283.21.

    3 – Intervention (initial application) – £14,991.65.

    4a – Attending and providing information to the OFT to assist it in preparing Mike Ashley's 1st witness statement – £13,528.12.

    4b – Attending and providing information to the OFT to assist it in preparing Mike Ashley's 2nd witness statement – £14,846.98.

5 – Providing information and clarification to the OFT on various evidential points – £5,092.43.

6 – Making representations (to the OFT and the Tribunal) to receive documents in the proceedings – £5,435.92.

7 – Costs of the application to intervene to recover costs and costs of the application for costs – £61,678.75.

## II RECOVERABLE HEADS OF COSTS

4. We begin by considering whether certain of the claimed heads of costs should be recoverable, which is a separate question from whether the sums claimed are reasonable and proportionate.

*Groups 1a and 1b – Initial consideration of certain matters of confidentiality*

5. It is apparent from SWI's schedule that these groups relate to legal advice given in respect of (i) the general raising of confidentiality on the calculation of the penalties in the decision which was ordered by the Tribunal on 18 November 2003 (see [2004] CAT 17 at [128]); and (ii) the disclosure of Umbro's application for leniency (see [2004] CAT 17 at [118]). The issue in (i) affected all of the addressees of the decision, whether they were parties before the Tribunal or not. The issue in (ii) primarily affected Umbro rather than SWI. Neither of these two heads seem to us to be sufficiently proximate to SWI's participation in the proceedings before the Tribunal to enter into consideration for present purposes.

*Group 1c – Confidential matters in witness statements*

6. The Tribunal considered that confidentiality should not apply to certain matters referred to in Mr. Ashley's witness statements and ordered disclosure. In our view the costs of this relatively small item should lie where they fall.

*Group 1d – Disclosure of documents confidential to SWI*

7. This major item of expenditure relates to requests made by Allsports and JJB for the disclosure of a large number of documents relating to Umbro and SWI, and in

particular to the commercial relationship between Umbro and SWI. SWI contends that it is entitled to its costs in dealing with such applications, and that it acted constructively and helpfully throughout. JJB and Allsports submit, essentially, that their requests for disclosure were reasonable, and that SWI was wrong to resist them. In particular, it is submitted that it was reasonable for the appellants to explore the commercial relationship between Umbro and SWI.

8. In our view, in principle the costs reasonably incurred by SWI in receiving advice on, and responding before the Tribunal to, the appellants' extensive requests for the disclosure of documents are properly to be regarded as "costs of or incidental" to the proceedings. Although the appellants' applications were made primarily against the OFT and Umbro, and many of the documents were Umbro documents, a number of the documents contained highly sensitive commercial information about SWI of a kind protected from disclosure by the OFT under the provisions of Part 9 of the Enterprise Act 2002 and, as regards the Tribunal, by paragraph 1 of Schedule 4 of that Act. SWI could not in our view reasonably leave its interests to be represented solely by the OFT.

9. It was therefore in our view appropriate for SWI to be heard on the confidentiality issues that arose. In fact, for example, SWI participated in the Tribunal's case management conferences of 12 December 2003 and 22 January 2004, and made a number of written and oral submissions, including at the further hearing on disclosure of 5 March 2004.

10. As to whether SWI should recover its reasonable costs in this regard from JJB and Allsports, in our view it was not unreasonable for JJB and Allsports to seek the disclosure in question, nor was it unreasonable for SWI to resist disclosure. To the extent that SWI did so, it adopted a largely balanced approach and acted responsibly in making concessions where appropriate. However, SWI did maintain resistance to the disclosure of certain highly sensitive documents. That resistance was ultimately unsuccessful, since the Tribunal ordered disclosure of the disputed documents, for example by its provisional order of 12 February 2004, its final order of 25 February 2004 ([2004] CAT 3) and its order of 5 March 2004.

11. That said, it is also the case that in its judgment on liability the Tribunal found, after hearing the witnesses, that many of the documents for which disclosure had been sought were not after all germane to the factual issues the Tribunal had to decide. The Tribunal commented that it was unfortunate that the appellants had chosen to devote so much time to the Umbro/Sports Soccer relationship: [2004] CAT 17 at [367]. Ultimately, therefore the disclosure granted did not assist the appellants. The Tribunal found against the appellants on the relevant issues of liability.

12. Rule 55(2) of The Competition Appeal Tribunal Rules 2003 SI 2003/1372 as amended (the "Tribunal's Rules") gives the Tribunal a wide discretion as to costs:

> "The Tribunal may at its discretion, subject to paragraph (3), 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."

13. While we have considerable sympathy for SWI's position, the fact that the Tribunal ultimately decided that the Umbro/Sports Soccer relationship was irrelevant to the issues the Tribunal had to decide does not mean that it was unreasonable for JJB and Allsports to seek disclosure of the documents in question. SWI too acted reasonably, but was in the end ultimately unsuccessful on the disclosure issue, at least to an important extent. In all the circumstances, and bearing notably in mind the disclosure which the Tribunal ordered, we have come to the conclusion that SWI should have 50 per cent of its reasonable and proportionate costs on the disclosure issues. We reach that view on the basis that it was reasonable for SWI to seek legal assistance on the disclosure issues, that SWI made a number of reasonable concessions and that, in general, SWI's attitude to disclosure of some highly sensitive material was reasonable, while, on the other hand, making allowance for the fact that, as regards certain documents, the Tribunal ultimately ordered disclosure despite SWI's opposition.

*Group 2: Providing information and representations regarding the Umbro/Sports Soccer relationship*

14. During the course of the hearing, the appellants, and Allsports in particular, sought to explore in detail the commercial relationship between Umbro and Sports Soccer, with a

view to showing, notably, that any price fixing agreements entered into were solely between Umbro and Sports Soccer, acting in their own commercial interests, and did not involve the participation of JJB or Allsports, or result from pressure by Allsports and JJB. The costs claimed by SWI under this head were, it is submitted, incurred by SWI in responding to these allegations, and also in responding to questions put directly by the Tribunal, for example on 8 March 2004, and making various oral and written submissions to the Tribunal, for example on 10 March and 1 April 2004, and at the hearing on 25 March 2004.

15. In our view, costs of this kind are costs "of and incidental to" the proceedings. Moreover, in our view certain costs falling under this head were necessarily incurred by SWI as a result of defending its interests against the line of attack directed by the appellants with regard to SWI's commercial arrangements with Umbro, and the integrity of SWI's CEO Mr. Ashley. We do not accept the appellants' suggestions that SWI was the author of its own misfortune in having been less than frank with its disclosure, nor that SWI could have left the OFT to look after its interests, or that SWI was not obliged to respond to the Tribunal's questions.

16. The appellants' line of attack against SWI was entirely rejected by the Tribunal, which upheld Mr. Ashley's evidence: see [2004] CAT 17 at [296]. Similarly the Tribunal rejected any supposed adverse inferences to be drawn from the evidence about the Umbro/Sports Soccer relationship: see section IX of that judgment.

17. In those circumstances, without going into detail at this stage with regard to particular items, we consider that SWI should in principle be entitled to recover its costs reasonably and proportionately incurred under this head. We accept in particular that it was reasonable for SWI's legal representatives to be in attendance at the hearings of the Tribunal to protect its interests, in particular on the issue of confidentiality, and also to supply information in response to the Tribunal's questions.

*Group 3 - The initial application to intervene*

18. This group of costs relates to SWI's initial application to intervene. The Tribunal did not formally admit SWI to intervene at that stage (see [2003] CAT 25) but accorded

SWI an informal "observer status" which entitled SWI to be present at the relevant case management conferences and to appear in the proceedings where necessary to protect its interests. We bear in mind that SWI did not, formally speaking, succeed on its first application to intervene. We also bear in mind that it is not necessarily desirable in penalty cases to expose potential appellants to costs incurred by interveners in simply making an application to intervene. In all those circumstances we consider that SWI should bear its own costs of its initial application to intervene.

*Group 4 – Assisting the OFT in preparing Mr Ashley's witness statements*

19. The costs claimed under this heading consist of costs incurred on behalf of SWI in relation to (i) Mr Ashley's first witness statement of 28 November 2003, which was a short document which essentially verified various statements Mr Ashley had made on behalf of SWI during the administrative procedure, and (ii) Mr Ashley's second witness statement of the same date which to a considerable extent replied to witness statements submitted by the appellants, notably Allsports.

20. Allsports and JJB submit that these statements should have been submitted by SWI to the OFT during the administrative procedure, when no costs would have been recoverable; that there is a risk of duplication with the OFT's costs; that the assistance apparently given to the OFT went well beyond protecting the commercial interests of SWI or Mr Ashley's reputation; and that this head of costs is not legally recoverable.

21. SWI submits that these costs are recoverable; that it was never asked by the OFT for additional material at the administrative stage; and that the work was reasonably done, especially since Mr Ashley's second witness statement responded to evidence produced by the appellants at the appeal stage.

22. In our view, costs falling under this head are in principle costs "of and incidental to" the proceedings. Such costs relate to, or are closely connected with, the preparation of witness evidence that was used in and, indeed, was central to the proceedings before the Tribunal. It is true that Mr Ashley's evidence was given on behalf of the OFT, not SWI. However, in our view a company which is a whistleblower in a price fixing case, which is asked by the OFT to assist the latter by providing a witness to give sworn evidence

before the Tribunal, is entitled in principle to have assistance from its lawyers in that connection. To what extent the assistance is appropriate, reasonable and proportionate is another matter, but in our view there is no reason why such assistance should not be in principle be regarded as "incidental" to the proceedings, in particular since the opposite view would tend to deter a whistleblower from assisting the authorities in a price fixing case.

23. As to the extent to which costs should be recoverable under this head, we think there is a distinction to be drawn between Mr Ashley's first and second witness statements. Mr Ashley's first witness statement was to a large extent a simple affirmation of the truth of various matters said during the administrative procedure. If those matters had been better assembled and marshalled by the OFT during that administrative procedure, it would have been unnecessary for any, or only slight, costs to be incurred under this head. In these circumstances we do not consider the appellants should bear the costs of Mr Ashley's first witness statement (Group 4a). As to his second witness statement (Group 4b), work was required by SWI and its lawyers in order to respond to material produced by the appellants which Mr Ashley had not previously seen. We therefore think that a reasonable and proportionate sum as regards the preparation of Mr Ashley's second witness statement is properly recoverable.

*Group 5 – Providing clarification and assistance to the OFT*

24. Although this activity appears to have some relation to the preparation of Mr Ashley's witness statements, the information provided to us about the work involved is somewhat general. We are unpersuaded that background work of this kind is sufficiently proximate to the proceedings to justify an award of costs against the appellants.

*Group 6 – Representations to receive documents and document management*

25. As far as we know SWI had no difficulty in obtaining the necessary documents. The tasks of reorganising and indexing the files, which is what this item largely relates to, are tasks which SWI's solicitors chose to undertake. In these circumstances this does not seem to us to be a cost that should be borne by the appellants.

*Group 7 – The cost of intervention and of making the costs application*

26. We would consider certain costs incurred by SWI in making their application for costs as part of the "costs of and incidental" to the proceedings, but it seems to us that any such costs under this head should in principle be moderate, and proportionate to the sums at stake. For example, by way of indication, it does not seem to us that costs said to be incurred under this head should be allowable in so far as they relate to (i) the period before the Tribunal's judgment of 1 October 2004 (ii) SWI's solicitors' internal work in determining what costs relate to the Tribunal proceedings and what costs relate to other work (iii) general background work, for example preparing a chronology of the disclosure exercise and (iv) additional costs incurred as a result of the fact that, as the Tribunal indicated in its judgment of 15 July 2005, SWI's initial application for costs was not sufficiently particularised.

27. Furthermore, as seen from the foregoing, we have disallowed a number of items claimed. In these circumstances it seems appropriate to decide that SWI is entitled to no more than 50 per cent of its reasonable and proportionate costs relating to the application for costs.

## III ISSUES OF APPORTIONMENT AND ASSESSMENT

28. In the light of the above, the heads of claim which we have allowed in principle, subject to assessment, are

- 50 per cent of the reasonable and proportionate costs of disclosure (Group 1d)

- the reasonable and proportionate costs of providing information and representation regarding the Umbro/Sports Soccer relationship (Group 2)

- the reasonable and proportionate costs of legal assistance in preparing Mr Ashley's second witness statement (Group 4b)

- 50 per cent of the reasonable and proportionate costs of applying for costs (Group 7)

29. As between JJB and Allsports, in our judgment [2005] CAT 26 as regards the costs of the main proceedings we held that JJB should pay 40 per cent of the OFT's costs of the liability appeals and Allsports should pay 35 per cent of the OFT's cost of the liability appeals: [2005] CAT 26 at [16]. As regards SWI, however, we consider that the situation is somewhat different. Both JJB and Allsports launched attacks on SWI, indicating that each supported the position of the other.

30. In these circumstances we consider that any sum in costs which is ultimately ordered in favour of SWI should be borne as to 50 per cent by JJB and 50 per cent by Allsports.

31. As to the amount to be ordered, in broad terms on the basis of the Tribunal's above ruling it appears that SWI's claim at first sight now amounts to slightly over £100,000 (excluding VAT), subject to assessment. It appears to the Tribunal that for a sum of that order, and given the Tribunal's knowledge of the background, the most convenient and economical course is for the Tribunal now to make a summary assessment under Rule 55 (3) of the Tribunal's Rules. The Tribunal is particularly concerned that the costs of assessing the costs are themselves mounting, and that it is in the general interest that finality be reached. On the information available, the Tribunal would be minded to make a summary assessment of the costs of £100,000 exclusive of VAT, i.e. £50,000 plus VAT to be paid by each of JJB and Allsports. The Tribunal will make an order to that effect unless any further observations are received within 14 days.

Christopher Bellamy Barry Colgate Richard Prosser

Charles Dhanowa 11 October2005
Registrar