Neutral citation: [2005] CAT 38

IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House
Bloomsbury Place
London WC1A 2EB

21 November 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

JUDGMENT: COSTS OF THE INTERVENER – ASSESSMENT

I INTRODUCTION

1. The background to this judgment is to be found in the Tribunal's earlier judgments of 15 July 2005 (*JJB Sports and Allsports v OFT* [2005] CAT 26) and 11 October 2005 (see *JJB Sports and Allsports v OFT* [2005] CAT 34. In our judgment of 11 October 2005 we held that Sports World International ("SWI") was entitled, in principle, to its reasonably and proportionately incurred costs in relation to the following heads of claim:

    - 50 per cent of the costs of disclosure
    - providing information and representation regarding the Umbro/Sports Soccer relationship
    - legal assistance in preparing Mr Ashley's second witness statement
    - 50 per cent of the costs of applying for costs.

    See paragraph 28 of that judgment.

2. At paragraph 31 of that judgment, the Tribunal said:

    > "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."

3. By a letter dated 13 October 2005, Messrs Addleshaw Goddard, the solicitors who had acted for Allsports during the course of the proceedings before the Tribunal, stated that they were currently without instructions as Allsports had gone into administrative receivership. However, the Tribunal was referred to the provisions of the Insolvency Act 1986, which states at section 43(6) of Schedule B1:

    > "No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except—
    >
    > (a) with the consent of the administrator, or
    >
    > (b) with the permission of the court."

By a letter dated 19 October 2005 JJB Sports ("JJB") submitted certain brief observations. As to the costs claimed by SWI in relation to disclosure, JJB submits that the starting figure of £76,696.82 is unreasonable and disproportionate. Very little disclosure was sought from SWI by JJB and Allsports. The time spent by SWI on organising the request was excessive. Moreover, there was no need for anything more than minimal input from counsel.

4. As to the costs claimed in relation to the exploration by JJB and Allsports of the Umbro/Sports Soccer relationship, for which £22,283.31 is claimed, JJB contends that it was unreasonable for SWI's solicitors to have spent considerable time drawing up explanatory papers and to seek to recover under this head the costs of certain unrelated actions. Counsel's fees are also disproportionate.

5. As to the costs claimed by SWI in relation to Mr Ashley's second witness statement, JJB argues that SWI's solicitors played a minimal role, simply reviewing the drafts apparently prepared by the OFT and discussing them with SWI; a figure of £14,846.98 is in the circumstances unreasonable.

6. As to the costs claimed by SWI in relation to its application to recover costs, the starting figure of £61,678.75 is unreasonable. An unreasonably large amount of time was spent researching the Tribunal's rules of procedure and case law on costs; moreover, a large amount of the work done would have been unnecessary had SWI properly particularised its application in the first place.

7. JJB also submits that the partner rates being claimed by SWI, namely £403.75 per hour and £413.28 per hour, are unreasonable in the light of the City of London guideline rate of £359 per hour. Further, it contends that the use of two partners was in itself unreasonable.

8. JJB submits that, in accordance with what it says is High Court procedure, SWI should be awarded no more than two thirds of the costs incurred under the heads of cost to which it is entitled; in other words, SWI should be awarded costs of no more than £66,000 plus VAT, to be split equally between JJB and Allsports.

9. SWI submits that a summary assessment, which is what the Tribunal is engaged in, is a general assessment of what it is reasonable for one party to recover against the others. JJB has sought, in its submissions, to engage in a detailed assessment exercise, looking at whether particular time entries are reasonable. SWI contends that it is unreasonable to reduce the figure of £100,000 plus VAT – which equates to only 34% of its total costs – yet further. In particular, SWI submits that an assessment of the reasonableness of SWI's costs has apparently already been conducted by the Tribunal in its judgment of 11 October 2005; that JJB has constantly resisted SWI's application to recover costs; that SWI has sought to keep to a minimum its legal costs in these proceedings, using counsel sparingly and keeping partner involvement to a minimum; and that SWI is in fact unlikely to recover much, if anything, from Allsports now that it has gone into administration.

II THE TRIBUNAL'S ANALYSIS

10. It seems to us that the rationale behind section 43(6) of Schedule B1 of the Insolvency Act 1986 is the protection of a company from enforcement action from creditors. There is no authority, as far as we are aware, to the effect that the making, by a court or tribunal which is not the court seized with the administrative receivership, of an order on the basis of a previous costs judgment is a continuation of a legal process for the purposes of that provision. In the circumstances, the Tribunal's discretion to make such an order is not in our view affected by that Act or the administration order apparently made in respect of Allsports, of which we have been provided with no details. In any event, the Tribunal needs to complete the process of cost assessment in order to determine the amount payable by JJB, even if an order for costs may be unenforceable against Allsports. In our view, any restriction on commencing or continuing a legal process arising under the Insolvency Act 1986 falls to be considered, if at all, in the event that SWI seeks to enforce the order for costs in its favour against Allsports, and not at the stage of the making by the Tribunal of the present Order.

11. The exercise we are conducting is a summary assessment of the costs incurred by SWI of and incidental to these proceedings. This task does not involve making detailed inquiries into particular entries in SWI's schedules but, rather, requires the Tribunal to

look at the matter in the round, ensuring that the costs actually awarded are not unreasonable and disproportionate in all the circumstances of the case.

12. We bear in mind in particular, as general matters, the voluminous nature of the proceedings, that this was the first time a whistleblower had been called on by the OFT to assist it in such proceedings, and that on the face of the costs schedules the great majority of the work was done at associate rather than partner level. We also bear in mind that in relation to two of the items – disclosure and the costs of the application for costs – we have already excluded 50 per cent of the costs originally claimed.

13. As to the particular heads of costs in respect of which we have already indicated that an award should be made, we note, first, that disclosure of the Umbro/Sports Soccer relationship, which ultimately proved to be irrelevant to the issues in the proceedings, was understandably very sensitive for SWI, for the reasons set out in our judgment of 11 October 2005, in particular at [8]. That issue was provoked entirely by the approach adopted by JJB and Allsports by way of defence and was found by the Tribunal to be irrelevant and a distraction from the main issues to be decided. Although the disclosure was sought mainly from Umbro, the documents themselves closely affected SWI's interests. In our view, the time spent and the involvement of counsel were reasonable. The second head of claim, explaining the Umbro/Sports Soccer relationship, in our view was also provoked entirely by the tactics adopted by JJB and Allsports and could not reasonably have been dealt with by SWI without the assistance of solicitors and counsel. No partner time is involved.

14. Thirdly, it appears on the face of SWI's schedule that the preparation of Mr Ashley's second witness statement, responding to JJB and Allsports' appeals and in particular the witness statements of Messrs Whelan, Hughes, Bryan and Russell, involved more work on the part of SWI's legal advisers than simply reviewing drafts prepared by others. No counsel's fees and little partner time are involved. Finally, the proportion (50 per cent) awarded by the Tribunal in relation to SWI's application for costs already excludes various matters, as set out in our earlier judgment at paragraph 26. Given that this was the first time in which a whistleblower had sought costs, and that a renewed application to intervene was necessary for that purpose, the involvement of counsel in our view was reasonable.

15. In all these circumstances, we consider that on a summary assessment of SWI's costs a figure of £100,000 (out of £214,553.87 originally claimed in these proceedings) plus VAT is reasonable and proportionate. An order will be drawn accordingly. That figure is to be paid equally by JJB and Allsports subject, in the case of Allsports, to the relevant statutory provisions applicable in respect of the administration of that company.

Christopher Bellamy Barry Colgate Richard Prosser

Charles Dhanowa 21 November 2005
Registrar