Neutral citation [2006] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1059/4/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

8 September 2006

Before:

Marion Simmons QC (Chairman)
Professor Andrew Bain
Vivien Rose

Sitting as a Tribunal in England and Wales

BETWEEN:

CELESIO AG

Applicant

-v-

OFFICE OF FAIR TRADING

Respondent

supported by

BOOTS GROUP PLC

-and-

ALLIANCE UNICHEM PLC

Interveners

JUDGMENT: COSTS

1. On 9 May 2006, the Tribunal dismissed an application under section 120 of the Enterprise Act 2002 (the "Act") made by Celesio AG ("Celesio") on 21 March 2006, to set aside a decision (the "Decision") by the Office of Fair Trading (the "OFT"). The Decision, made under section 33 of the Act, was not to refer to the Competition Commission the proposed acquisition of Alliance UniChem plc ("UniChem) by Boots Group plc ("Boots"), provided that suitable undertakings were given pursuant to section 73 of the Act: see [2006] CAT 9.

2. On 8 June 2006, the OFT lodged with the Tribunal an application for an order, under Rule 55 of the Competition Appeal Tribunal Rules (SI 2003 no. 1372) that Celesio pay the OFT's costs of defending Celesio's application, those costs to be summarily assessed at £95,900.45.

The parties' submissions

3. The OFT submits that applying the principles that the Tribunal has developed in relation to costs in appeals under section 120 of the Act, this is a clear case in which it should be entitled to its costs, taking into account the following factors. First the Tribunal dismissed Celesio's application in its entirety and in the absence of compelling reasons for limiting that recovery, it should be awarded all of its costs.

4. Secondly, the OFT refers to the position of Celesio as the merged entity's closest UK rival. The OFT submits that where a rival is bringing an application pursuant to section 120 for commercial reasons it must recognise that there is no good reason why it should avoid costs liability to the OFT should its application fail.

5. In that regard the OFT relies on paragraph 16 of the Tribunal's judgment on costs in *UniChem v Office of Fair Trading* [2005] CAT 31 ("*UniChem: Costs*"), which states:

> "The Tribunal recognises that there may be a danger that applications under section 120 of the 2002 Act may be used as a 'spoiling tactic' by third parties in merger cases who seek to gain some commercial advantage by using an

> application to the Tribunal as a means to delay the completion of a merger involving competitor undertakings".

In the OFT's submission, the Tribunal's concerns expressed in *UniChem: Costs* apply directly to this case.

6. Thirdly, the OFT submits that the applicant is a very large and profitable multinational corporation and is a very well resourced litigant. There is no good reason, according to the OFT, why the public purse should bear the costs of this litigation since Celesio is aware of the risks of engaging in litigation and is able to fund claims against rivals' deals even when its own foreclosure from the market is not at issue in the litigation.

7. Fourthly, the OFT points out that Celesio raised and then did not pursue various issues which the OFT had to prepare. In particular Celesio's first ground of review, which challenged the use and sufficiency of sole reliance upon a fascia test, was abandoned in its skeleton argument filed on 7 April 2006. The OFT submits that it was clear from the Decision that a range of other factors had been considered and it would be disingenuous to suggest that this only became apparent after the OFT's submission of its skeleton and evidence. The OFT also refers to requests for disclosure made but not pursued by Celesio which the OFT describes as wholly misconceived.

8. Fifthly, the OFT states that its commitment of time and resources in order to defend the challenge has been substantial. Given the accelerated timetable which is imposed by the Tribunal in cases such as this, the pressure on the OFT to prepare its case is significant. Arguments, requests or applications which are then later not pursued can cause significant additional and unnecessary pressure and cost to OFT which diverts resources away from other work. The OFT submits that the additional expense to which it was put in dealing with arguments, requests or applications put forward by the Applicant which were then dropped further points in favour of the award of costs to the OFT.

9. Finally, the OFT argues that the conduct of Celesio in the proceedings fell below the standards which should properly be expected. The OFT submits that Celesio made misplaced allegations regarding third party evidence and made misleading submissions as to the nature of judicial review proceedings under section 120 of the Act. In the

OFT's submission, these two particular instances of Celesio's conduct should particularly point in favour of a costs order for the OFT.

10. Celesio submits that there should be no order for costs because the reasoning adopted in the Decision was not sufficiently developed and/or clear. Celesio submits that the Tribunal's judgment identifies shortcomings in the reasoning contained in the Decision on the key issue in the appeal, namely the OFT's reasoning for its conclusions regarding a 4-3 fascia reduction in local retail markets.

11. Moreover, Celesio submits that the OFT's success in these proceedings was based very largely on the very long (52 page) witness statement of Mr Simon Pritchard and that the OFT accepted that it needed to rely upon this evidence by way of amplification or explanation of its Decision. In Celesio's submission, had it not been for shortcomings on the part of the OFT both in the adoption of the Decision and the conduct of the appeal, it is likely that the appeal by Celesio would have been avoided.

12. In respect of the OFT's submission that Celesio's application was in effect a "spoiling tactic", Celesio submits that in every section 120 review a rival will challenge a merger "for commercial reasons" but that it does not automatically follow that it should be obliged to pay costs on that basis if its challenge fails. Celesio's application had a reasonable chance of success and therefore cannot fairly be described as merely a "spoiling tactic" to delay the completion of the merger.

13. Celesio accepts that it did not pursue various issues, namely its first ground of challenge, certain of its evidence and the request for disclosure of third party material. However, Celesio notes that in preparing the notice of application it had not seen either the evidence submitted by Boots and UniChem to the OFT, or the OFT's Issues Letter, and that the OFT produced a substantial witness statement from Mr Pritchard after the lodging of the appeal. In that regard Celesio relies on paragraph 19 of *UniChem: Costs*, where the Tribunal recognised:

> " …that it is likely to be inevitable, in appeals brought by third parties, that the focus of the applicant's case before the Tribunal will develop over time as additional information comes to light."

Celesio notes that paragraph 63 of the Tribunal's judgment in this case records:

> "When the OFT and the interveners filed their pleadings and evidence, Celesio saw for the first time the requests for information and the evidence given to the OFT by the merging parties, together with the Issues Letter and the merging parties' responses. Having had the opportunity to consider this material, Celesio did not pursue this first ground of challenge."

14. In those circumstances, Celesio submits that the OFT's attempted criticism of Celesio's decision not to pursue its first ground of appeal is misplaced. Having the further material provided to it, Celesio acted entirely properly and reasonably in expressly indicating that it would not pursue this ground of appeal.

15. Celesio submits that the OFT mischaracterises the way in which the issue in relation to third party material arose and the reason why, at the hearing, Celesio ultimately (following a debate between Counsel and the Tribunal) did not press the matter. Celesio's concern was that Mr Pritchard's witness statement made repeated reference to the evidence provided by third parties. However neither Celesio nor the Tribunal had seen that evidence. It was only at the hearing that the OFT made it clear that it was not relying on third party evidence in defending the challenge to the Decision.

16. Celesio does not accept the strong allegations made by the OFT about its conduct of the case and states that it is important to bear in mind that the OFT made serious criticisms during the appeal about Celesio's conduct which the Tribunal found were unjustified. Celesio submits that, on a fair view, the appeal was conducted reasonably and fairly by all parties.

The Tribunal's analysis

17. The Tribunal's jurisdiction to award costs is set out in Rule 55 of the Competition Appeal Tribunal Rules SI 2003/1372 (the "Tribunal's Rules"), which provides as follows:

> "55. – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales …

(2) The Tribunal may at its discretion, 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.

(3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court …"

18. The Tribunal has now referred on a number of occasions both in appeals under the Competition Act 1998 ("the 1998 Act") and in applications for review of merger decisions under the 2002 Act to the wide discretion conferred by Rule 55 to award costs which is designed to enable it to deal with cases justly. The Tribunal has noted that, in the early stages of the development of cases, it is proceeding on a case-by-case basis, dealing with different, and not always foreseeable, circumstances as they arise. The Tribunal is also of the view that its decisions as to costs should not be allowed to harden into rigid rules: see generally, in relation to the 1998 Act, *Napp: interest and costs* [2002] CAT 3 at [22]; *Institute of Independent Insurance Brokers v The Director General of Fair Trading* [2002] CAT 2 at [39] and [48]; *Freeserve.com v Director General of Telecommunications* [2003] CAT 6 p.11, lines 13 to 24; *Aberdeen Journals v Office of Fair Trading* [2003] CAT 21 at [19] and *Aquavitae v Director of Water Services* [2003] CAT 23 at [17]; and, in relation to the 2002 Act, *IBA Health v OFT (Costs)* [2004] CAT 6 at [35] ("*IBA Health: (Costs)")* and *UniChem: Costs* at [19].

19. The Tribunal has considered the costs consequences of a successful merger appeal in two previous cases: *IBA Health: (Costs)* and *UniChem: Costs*, both cited above.

20. At paragraph 36 of *IBA Health: (Costs)*, the Tribunal noted that at the early stage of the Tribunal's case-law on costs, the guiding principles should be that a flexible approach to the question of costs is appropriate, and that there is no presumption that costs should necessarily be borne by the losing party. However, at paragraph 17 of *UniChem: Costs*, the Tribunal indicated that:

> "…in general terms, the Tribunal considers that the application of the principles set out in *IBA Health: (Costs)* will normally result in the successful party being awarded at least a proportion of its costs in section 120 cases".

21. Parliament has not created any presumption that in proceedings before the Tribunal costs should "follow the event". The Tribunal will consider all the circumstances of the appeal when exercising its wide discretion to award costs, including the conduct of the parties, whether it was reasonable for the unsuccessful party to raise, pursue or contest a particular ground of appeal; the manner in which the parties pursued or defended the appeal; the resources which have been devoted to particular issues on which the applicant has not succeeded and whether the OFT has succeeded in upholding its Decision without the need to rely on additional material, and if it relied on additional material, the extent to which such material was taken into account by the Tribunal in upholding the OFT's decision.

22. The OFT submits that where a decision is subject to a legal challenge it will generally be appropriate and indeed necessary that the respondent public body provides evidence to elucidate the decision and the process by which it was reached. The OFT submits that it would be unworkable if the sort of account provided in Mr Pritchard's statement were required in its decisions. We consider, however, that these submissions are inconsistent with the purpose of giving reasons to which we referred in paragraph 142 of the substantive judgment. An interested party should be able to know the justification for the decision and to be able to assess whether they have any ground for challenging an adverse decision from the decision itself. It should not be necessary for the OFT to provide, for these purposes, any elucidation of the decision.

23. The OFT relies, for justifying Mr Pritchard's witness statement, on the passage from *Office of Fair Trading and others v IBA Health* [2004] EWCA Civ 142, [2004] All ER 1103 ("*IBA Health*") which the Tribunal cited at paragraph 138 of the substantive judgment. That passage refers to there not being any statutory requirement for all the evidence to be set out in the decision letter. However, the passage does not suggest that the reasons themselves should not be clearly stated in the decision letter.

24. As we remarked in the substantive judgment, the OFT has a statutory duty under section 107 to publish its reasons (see paragraph 142), and that notwithstanding that the OFT has to work to the statutory time limit under section 33 (see paragraph 149), we considered that the OFT could, perhaps, in the time available to it, have incorporated in its Decision a certain amount of the explanation provided by Mr Pritchard as to the OFT's reasoning process (paragraph 170).

25. As can be seen from the substantive judgment the elucidation provided by the witness statement of Mr Pritchard was very important to the Tribunal's consideration of this appeal and as to its decision to dismiss the appeal.

26. Bearing these considerations in mind we turn to consider the application of Rule 55 to the circumstances of this particular case.

27. This case is the first occasion on which the Tribunal has had to consider the award of costs in an unsuccessful challenge to a decision of the OFT not to refer a merger to the Competition Commission.

28. The appeal proceeded on a consideration of two grounds.

29. The first ground as set out in the notice of application was that the OFT incorrectly based its assessment of competitive concerns at the local level solely on a "fascia test", thereby failing to consider material factors relevant to the identification of competitive concerns arising from the merger.

30. It should be noted that the Tribunal's procedural framework requires the applicant to set out its arguments at the outset. Only in limited circumstances will the Tribunal give an applicant permission to amend his notice of application: see Rule 11(3) of the Tribunal's Rules (as applied by Rule 25). This is particularly important in merger cases, where time will often be of the essence. It was in part for this reason that the Tribunal recognised in *UniChem: Costs*, cited above, at paragraph 19 that:

> "it is likely to be inevitable, in appeals brought by third parties, that the focus of the applicant's case before the Tribunal will develop over time as additional information comes to light."

31. Celesio necessarily had to prepare its notice of application within a strict deadline and without access to the material subsequently disclosed by the OFT, which included the detailed witness statement of Mr Pritchard.

32. Mr Pritchard's witness statement deals at paragraphs 64 to 98 with the points made in Celesio's first ground of application. Mr Pritchard explains, among other things, why on the facts of the particular case the OFT did not consider the fascia test to be under-inclusive in reporting potential problem areas. He points in particular to the OFT's view that it had no reason to conclude that the merging parties were particularly close competitors in terms of their overall retail proposition or identified parameters of service: see paragraph 75. Mr Pritchard also sets out why the OFT did not consider store counting to be a superior approach to fascia analysis on the facts of this case – principally because it risked being both under-inclusive and over-inclusive of potential local problem areas (paragraph 78). He also explains that standard market share data based on value or volume were unavailable at the local level (paragraphs 79 to 80).

33. We observe that the points mentioned above were not set out in the Decision. The impression created in the Decision is that the fascia analysis was the overriding basis on which the OFT arrived at its conclusions. Moreover, it was unclear from the Decision, in relation to areas where there were three or more remaining fascias post-merger, what evidence the OFT had relied on in coming to its conclusions. It was only having seen the elucidation in Mr Pritchard's witness statement that Celesio had the full picture.

34. We consider that Celesio acted responsibly in indicating promptly after it had seen the OFT's defence and supporting material that it no longer wished to pursue the first ground of its application.

35. For those reasons, we do not accept the OFT's submissions that Celesio unreasonably raised the first ground of appeal and then abandoned it thereby involving the OFT in unnecessary preparation.

36. As to the second ground of Celesio's application, the crux of the case argued before the Tribunal turned, first, on the OFT's analysis of the expected loss of competition arising where there was a reduction from 3 fascias to 2 in a given area and, secondly, on

whether the OFT was justified in concluding that any lessening of competition in an area where fascia reduction numbers were higher than 3 to 2 could not be expected to be substantial.

37. We accept Celesio's submission that the OFT's success in the proceedings was based largely on the witness statement of Mr Pritchard, filed by the OFT after the proceedings had begun, which elucidated the reasoning for the Decision.

38. It is clear from the substantive judgment, particularly paragraphs 166, 167, 170 and 188 to 190, that the Tribunal's understanding of the process by which the OFT had arrived at the Decision and the factors to which the OFT had had regard was greatly assisted by the witness statement of Mr Pritchard. As is apparent from our substantive decision, without the elucidation provided by Mr Pritchard the key passages in the Decision were unclear, particularly regarding whether the OFT's concern that the merger may result in an SLC arose in relation to all 3 to 2 areas or only some of them. It was only once Mr Pritchard's witness statement explained that the OFT's concerns had been limited to a minority of 3 to 2 areas that the basis for the OFT's conclusion in relation to areas with higher numbers of fascia could be properly understood. Moreover, as we recorded in paragraphs 166 and 167 it was unfortunate that the OFT chose, at the time of drafting the Decision, to include two observations in paragraph 46 which Mr Pritchard in his witness statement explained were not being relied upon as reasons for its Decision, and referred in paragraph 46 only obliquely to the evidence it relied upon for its belief that any lessening of competition could not be expected to be substantial in areas where there was a higher reduction in fascia numbers than 3 to 2, rather than identifying or at least summarising that evidence.

39. In our view it was reasonable of Celesio to raise this second ground of appeal. The question the Tribunal has to consider in exercising its wide discretion as to costs is whether once the OFT had provided the witness statement of Mr Pritchard, Celesio would have been in the position of having before it the material on which it could then make an informed choice as to whether to withdraw or continue the appeal or whether it remained handicapped in that regard. Whilst the witness statement ultimately assisted the Tribunal in understanding the OFT's reasons for the Decision, as we stated in paragraph 143 of the substantive judgment it would have been more helpful had Mr

Pritchard's witness statement followed more closely the structure of and the paragraphs in the Decision. It can be seen from paragraphs 141 onwards of the substantive judgment that we had to consider very carefully the question of whether Mr Pritchard's witness statement altered or added to the true grounds of the Decision or whether it merely elucidated the reasons contained in it. The issue as to the admissibility of the witness statement was not a "black and white" issue. As is apparent from paragraph 143, the Tribunal's task in this respect was not an easy one. These features must equally have applied to Celesio who must have been faced with similar difficulties in considering, preparing and presenting the appeal.

40. A significant feature of the present case and of the exercise of our discretion as to costs is that the reasons contained in the Decision were capable of sustaining the OFT's conclusion only by reading them carefully in the context of the elucidation provided in the witness statement and having regard to the submissions of the OFT as to these issues at the hearing.

41. The third and fourth grounds of application did not fall to be considered in view of the fact that they were said to be parasitic on the second ground. In those circumstances we say no more about them.

42. We move on to consider the other submissions made by the OFT in its application for costs.

43. First, we do not accept that Celesio's motivation in bringing the challenge is a material factor on which we can or should form a view. We note that it is likely to be the case that a party will only challenge a decision of an authority in this context where it has a commercial interest in doing so.

44. In referring to the need to be alert to the danger of "spoiling tactics" by a competitor of the merging parties, the Tribunal in *UniChem: Costs* did not elaborate on when an application under section 120 should be so regarded. Unless the application is obviously unfounded, it seems to us that we should be slow to condemn an applicant as having engaged in spoiling tactics. In the circumstances of this case and in particular in our consideration of the issue as to costs, we do not consider it to be necessary to decide

whether Celesio's challenge should be characterised as a "spoiling tactic". The Tribunal consideration should, rather, be focussed on whether in all the circumstances it is just to award costs to the OFT.

45. However, in considering the OFT's submission relating to "spoiling tactics" we remind ourselves of what we recorded at paragraphs 82 to 86 of the substantive judgment. It appeared from Mr Ash's evidence that both the OFT's Decision and Mr Pritchard's witness statement contained factual errors as to an aspect of the regulation of pharmacies and hence the degree of competition between pharmacy outlets. If this was the position, then it is of significance to the OFT's submission as to "spoiling tactics" that Celesio did not rely on this matter in this appeal to us. Had Celesio chosen to rely on this matter, and had the factual errors been established before us, then this may have undermined the OFT's Decision, and if it did so it may have resulted in the remission of the Decision to the OFT in any event.

46. The fact that a litigant may have concluded that the commercial advantage to it of bringing the proceedings will outweigh the disadvantages even though it might have to pay the opposing party's costs does not, in the Tribunal's view, influence the decision as to where the justice of the case lies with regard to costs. Nor does the Tribunal regard the size or financial strength of Celesio as relevant, in this particular case, to the question of whether, *prima facie*, the OFT should be awarded its costs.

47. The OFT submitted in its observations of 10 August 2006 that where a horizontal competitor brings a challenge it should bear the risk of failure in costs. We do not consider that there can be any such rule. Each case and the appropriate costs awards, depends on its own circumstances.

48. Nor is the Tribunal persuaded that it was unreasonable of Celesio to make a request for disclosure which, ultimately, it did not pursue. Celesio did not pursue its request once it became clear that the OFT would not positively rely on third party evidence in defending the Decision. Whilst we understand the difficulty of the OFT's position in relation to the disclosure of information ordinarily protected by Part 9 of the 2002 Act, we are not persuaded that Celesio's conduct in this regard was unreasonable.

49. Finally, although the Tribunal expressed its concern at aspects of Celesio's submissions regarding disclosure by the OFT of third party material (paragraph 195 of the substantive judgment), Celesio did not pursue its application for disclosure and the matters referred to by us in paragraph 195 do not have any or any significant costs implications. The Tribunal does not accept that Celesio gave a misleading or partial impression of the law in its submissions on the judgment of the Court of Appeal in *IBA Health*. Furthermore, as the Tribunal pointed out in paragraph 199 of the substantive judgment, the OFT's analysis of the regulatory framework in the different parts of the United Kingdom was inaccurate. Neither parties' shortcomings are, however, sufficiently serious to affect our decision as to costs. We accordingly do not consider these matters further.

50. The question before us is whether in all the circumstances the Tribunal should exercise its discretion in favour of awarding the OFT its costs in particular having regard to the fact that Celesio was ultimately unsuccessful in its appeal. In exercising our discretion in this case we have taken into account all the above matters and in particular the significant extent to which the OFT had to rely on Mr Pritchard's lengthy witness statement as elucidation of its reasoning in the Decision and on the oral submissions as to this at the hearing. Having regard to all the matters mentioned above, we do not consider it would be just and appropriate for us to award the OFT its costs. In our judgment the most just and appropriate course is that there should be no order as to costs.

51. In its observations dated 10 August 2006 the OFT submitted that the costs discretion should not be used as a means of "marking" the OFT for its powers of written expression. The Tribunal has not done so. It is not the written expression of the OFT which concerns the Tribunal but the fact that the reasons set out in the OFT Decision were capable of sustaining the OFT's conclusion only when read in the context of the elucidation set out in Mr Pritchard's witness statement and having regard to the oral submissions of the OFT made at the hearing.

52. We would also note that if the reasons for the OFT's decision had been clearly set out in the Decision, then the appeal, in the form that it took, could not have been brought and the attendant costs to all parties should not have been incurred.

Marion Simmons QC | Andrew Bain | Vivien Rose

Charles Dhanowa
Registrar

8 September 2006