Neutral citation: [2005] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1019/1/1/03
1020/1/1/03
1021/1/1/03
1022/1/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB.

15 July 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
BARRY COLGATE
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

UMBRO HOLDINGS LIMITED — Appellant
and
OFFICE OF FAIR TRADING — Respondent

and

MANCHESTER UNITED PLC — Appellant
and
OFFICE OF FAIR TRADING — Respondent

and

ALLSPORTS LIMITED — Appellant
and
OFFICE OF FAIR TRADING — Respondent
supported by
SPORTS WORLD INTERNATIONAL — Intervener

and

JJB SPORTS PLC — Appellant
and
OFFICE OF FAIR TRADING — Respondent
supported by
SPORTS WORLD INTERNATIONAL — Intervener

Miss Kelyn Bacon (instructed by Umbro Holdings Legal Department) appeared for Umbro Holdings Limited.

Mr. Paul Harris (instructed by Messrs James Chapman) appeared for Manchester United PLC.

Mr. George Peretz (instructed by Messrs Addleshaw Goddard) appeared for Allsports Limited.

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

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

RULING (COSTS)

A THE OFT'S APPLICATIONS FOR COSTS

1. We deal first with the OFT's applications for the costs of these proceedings against the four appellants, JJB, Allsports, Manchester United and Umbro. We deal separately with the liability appeals (which concern only JJB and Allsports) and then with the penalty appeals (which concern all four appellants), as the parties have invited us to do.

The Liability appeals

2. The OFT is seeking its costs in the liability appeals. The OFT points to the wide terms of Rule 55(2) of the Tribunal's rules (S.I. 2003 No. 1372), and to a number of previous decisions of the Tribunal, in particular *GISC (costs)* [2002] CAT 2, *Napp (Interest and costs)* [2002] CAT 3, *Aberdeen Journals (No. 2)* [2003] CAT 21, at paragraphs 12 to 30, *Apex* [2005] CAT 11 at paragraph 28 and *Argos*, transcript of 29 April 2005 [2005] CAT 15, particularly at paragraph 9. In the last mentioned case, the Tribunal indicated that there may be strong grounds for considering cost orders, "especially in heavy price fixing cases involving substantial undertakings" where the OFT is successful. The OFT submits that that principle should apply here, although the OFT also accepts that each case must be considered on its own merits, there being no fixed rule as to costs.

3. The OFT invites us to take a broad approach. First, says the OFT, in a case involving several appellants and common issues, we should order each of relevant appellants to pay an appropriate proportion of the OFT's <u>total</u> costs (depending on the overall outcome), rather than make orders in the form, for example, that JJB (or Allsports, as the case may be) pay an appropriate proportion of the costs incurred by the OFT in defending JJB's appeal, or Allsports' appeal, taken separately.

4. The appellants do not oppose that approach. It has the merit of avoiding a detailed and largely pointless investigation into which costs related to which appeal, whereas in fact the issues were dealt with largely in common. We propose to

follow that approach in principle, albeit that, as the OFT points out, a separate approach is necessary in respect of the costs of Allsports' strike out application.

5. Next, the OFT submits we should not make costs orders against the OFT on particular issues where the OFT has been unsuccessful; for example we should not order JJB to pay X per cent of OFT's costs in respect of the England and MU Agreement, while ordering the OFT to pay JJB's costs in respect of the England Direct Agreement. We should, says the OFT, simply reduce the OFT's costs by an appropriate proportion. We come back to this point later.

6. The central issue is whether we should make any costs order at all in favour of the OFT. JJB opposes any order for costs, pointing to the fact that it has already had a heavy penalty imposed; that the Tribunal in *Napp* said that it would "lean against" costs orders in penalty cases; that the appellants could not have anticipated a change in that case law; that heavy costs orders would discourage appeals and lead to a denial of access to the Tribunal in quasi-criminal proceedings. This, says JJB, was the first major cartel case to come before the Tribunal and all parties were feeling their way, particularly on interlocutory issues. A great deal of evidence came to light, says JJB, during the appeal, particularly Mr. Ronnie's evidence about the England Agreement, which diverged from his previous statements. Mr. Hughes' evidence was new, too. JJB's appeal was not clearly unfounded; they obtained a substantial reduction in penalty and have conducted an efficient and economic appeal. JJB objects to the characterisation by the OFT of certain aspects of its conduct as "unreasonable". In the alternative, says JJB, it should pay no more than 30 per cent of OFT's costs of the liability appeal.

7. Allsports makes a number of similar points. Allsports emphasises in particular that it was reasonable to appeal in respect of the England Agreement, where the case made in the Decision was thin and unparticularised, and the law unclear. Potential appellants should not be deterred by unjust orders of costs. Allsports also gave the Tribunal considerable assistance in the way it presented its Notice of Appeal and should be given credit for that. Allsports emphasises that if costs orders are made against the appellants, the OFT may be at risk in future cases if it loses. There is no analogy with civil litigation, not at least in the absence of

settlement possibilities. There were substantial "trail blazing" costs in this case which should not in fairness be borne by Allsports. If matters which emerged before the Tribunal had emerged (as they should have done) during the administrative proceedings, the OFT's costs would not be recoverable.

8. Those being the arguments, in our judgment we consider first that, in the particular circumstances of this case, a costs order should be made in the OFT's favour in respect of the liability appeals. We accept that it is appropriate to take a measured approach to costs orders against appellants who have had penalties imposed on them by the OFT. First, we should not unduly discourage appeals to the Tribunal in reasonable cases, especially since appellants cannot recover the costs of the administrative proceedings and will in any event have to bear their own costs if unsuccessful. We are also conscious of the fact that the administrative procedure, however well conducted by the OFT, is not particularly well adapted to deciding issues of disputed fact (there is no provision for sworn evidence or cross-examination). In some instances the first real chance to test the OFT's case in depth will arise before the Tribunal.

9. On the other hand, in this particular case the appellants are substantial and well resourced companies (although admittedly JJB more so than Allsports) who chose to launch root and branch attacks on the OFT's findings of fact, including attacks on the reliability and (in the case of Allsports more than JJB) on the veracity and integrity of the OFT's principal witnesses. As a result the Tribunal was occupied for over three weeks, and expense was incurred by the OFT which would otherwise fall on the taxpayer. One aspect of that was the appellants' detailed attempt to investigate the relationship between Umbro and Sports Soccer which the Tribunal ultimately found to be not germane to the principal issue. In our view, in a case such as the present it would not be right for the taxpayer, rather than the appellants, to pick up the whole of the tab in respect of the wide ranging and in the end unsuccessful attack launched by the appellants on the OFT's findings of primary fact.

10. On the basis that there is to be an order for costs, we accept the OFT's broad brush approach. In our view the costs of the liability proceedings should be divided, as

a starting point, approximately 80% for the England and MU Agreements and 20% for the Continuation Agreement and the England Direct Agreement.

11. As regards the latter two agreements, JJB was partially successful but lost on the principal issue as regards the Continuation Agreement, which took up most of the time. As to the England Direct Agreement, the Tribunal did not accept JJB's version of the facts but did find in favour of JJB on a point of law. In our judgment JJB should pay half of the OFT's costs relating to those agreements, i.e. 10% of the OFT's overall costs, by reason of the fact that JJB lost on the Continuation Agreement.

12. We do not consider that it would be appropriate to make a costs order in favour of JJB on these issues. The aspects on which JJB succeeded in relation to the Continuation Agreement did not occupy much of the Tribunal's time and were scantily argued. As to the England Direct Agreement, JJB succeeded on a point of law but lost on the facts. We add for the record that we were unimpressed by JJB's argument that we should make a cross order in JJB's favour to reflect the fact that JJB's lawyers were charging rates higher than those the OFT was apparently paying to its lawyers. That point in our view simply has no bearing in the matter and confuses the question of quantum with the question of responsibility for costs.

13. Turning to the costs in relation to the MU and England Agreements, our starting point is that those costs should be split approximately equally between JJB and Allsports, i.e. 40% each, on the basis that those costs represent 80% of the OFT's total costs. At this stage of the analysis that would result in an order that JJB should pay in total 50% of the OFT's costs on the liability issues and Allsports should pay 40%.

14. This case did, however, have some particular features. We do not accept a number of points made by the OFT that one or other of the appellants behaved "unreasonably". Although criticism could be made on particular points, our overall view is that the particular matters relied on are not material. We do however consider that Allsports' approach did increase the length and cost of the

proceedings. On the other hand there were certain new issues to be dealt with, as all parties encountered novel points in the first case of its kind to come before the Tribunal. Disclosure of the leniency materials is one example of that.

15. As regards the England Agreement, although ultimately factual matters were finally resolved to the Tribunal's entire satisfaction, there were certain contradictions in certain of Mr. Ronnie's earlier witness statements, and some difficulty in the OFT's pleadings. The Decision itself was ambiguous as to the dates and times of the telephone calls relied on. With the benefit of hindsight a fuller investigation, including telephone records and diaries, might have resolved the problem. Whatever the difficulties faced by the OFT, and we accept there were difficulties, it was not unreasonable for the appellants to probe the OFT's case on the England Agreement although we would also accept that Allsports in particular showed little restraint in attacking the credibility of the OFT witnesses, nor in seeking to investigate the commercial relationship between Umbro and Sports Soccer, which was subsequently found by the Tribunal to be irrelevant.

16. Nonetheless, looking at the matter in the round we think it appropriate to reduce the percentage of the OFT's costs payable by JJB and Allsports. Taking a broad brush approach JJB should pay 40% of the OFT's costs of the liability appeals and Allsports should pay 35% of the OFT's costs of the liability appeals.

17. For reasons which will become apparent in a moment, we think it more appropriate for costs orders of that kind to be made on liability issues than on penalty issues.

18. We do not accept JJB's submission that the appellants could not have known that they were at the risk of costs as a result of the Tribunal's early ruling in the appeal in *Napp.* Those indications had already been qualified in *Aberdeen Journals (No. 2)* decided shortly before the appeals were launched. Rule 55 of the Tribunal's Rules is in wide terms. There is no justification for reading into *Napp* the idea that any appellants before the Tribunal have, in a penalty case, *carte blanche* to roam wherever they wish, to impugn the integrity of the OFT's witnesses and to

give evidence that is not accepted by the Tribunal, without facing any consequences in costs if the appeal is ultimately unsuccessful.

19. As regards Allsports' strike out application, that application was unsuccessful. On the other hand, part of that application related to the OFT's introduction in the defence of what became known as the 'pressure' case which was not in the decision but had earlier been in a Rule 14 notice. We do not think that it was unreasonable for Allsports to advance arguments about that, albeit ultimately unsuccessfully. In the circumstances the proper order is that Allsports pay 50% of the costs relating to the strike out application.

The Penalty appeals

20. Turning to the costs of the penalty appeals, somewhat different considerations apply. The OFT groups JJB, Allsports and MU together and says that those appeals raised the same issues and that there should be an order for 30%, 33% and 33% respectively, the lower percentage for JJB to mark the reduction in penalty that JJB received.

21. JJB opposes any order and says in the alternative that it should pay no more than 20% of the OFT's costs. It emphasises the substantial reduction in penalty it was given, that it had to come to the Tribunal to get that reduction, that there were new and unexplored issues and that the OFT's position was that there should be no reduction, but even an increase, in the fine.

22. Allsports emphasises that in without prejudice correspondence prior to the penalty hearing it offered to pay the penalty and abandon the proceedings on the basis that there would be no orders for costs and no party would make disparaging statements about any other. The OFT rejected that approach, so Allsports found itself in a position from which it was very difficult to extricate itself.

23. MU emphasises the economical and limited nature of its appeal and its relative success on the basis of its compliance programme and apology, that it had to use the Tribunal to obtain that success, that it had been relatively successful in the

administrative proceedings where MU has no possibility of recovering costs, that the Tribunal had rejected the OFT's argument in respect of the relevant licensing revenue and the argument that the OFT could have used a higher multiplier (10%). It submits that there should be no order as to costs.

24. We observe first that in the appeals of JJB, Allsports and MU certain main issues arose that had not previously been argued before the Tribunal, at least in any detail, namely the relevant market analysis needed in Chapter I cases, the analysis in this case (being directed to the difference between 'kit' and shirts), the relationship between various steps in the OFT's Guidance, the appropriate starting percentage, the multiplier, the issue of duration and the issue of possible discrimination between different appellants. The parties had come to the Tribunal to obtain reductions for JJB and MU, and indeed to determine what calculations the OFT had used by comparison with other appellants.

25. We take the view, at least in this early case, that we should hesitate to grant costs orders on the penalty aspect of the case. While appellants should know the position in liability, in the sense that they should be able to ascertain if they are party to an infringing agreement, penalty is a matter that does not lie within appellants' knowledge. If we were to make no costs orders on the main issues which had not previously been considered by the Tribunal, there is little basis for a costs order in the MU and JJB appeals. JJB received a substantial reduction and was in our view justified in pursuing the penalty appeal. MU received admittedly a small reduction but did accept liability and apologise. That in our view should be encouraged. In respect of Allsports, it is true that it lost on penalty, and in those circumstances an order for costs may be more justified, but Allsports has had to bear an increased penalty and pay its own costs. In our view that is sufficient as far as Allsports is concerned.

26. Umbro did not challenge any of the OFT's calculations, definition of the relevant market, multiplier or duration, and raised only a single point. In relation to the documents Umbro was correct although after a detailed examination the OFT was successful on the main thrust of Umbro's appeal as pleaded. Nonetheless, appellants should be encouraged to limit their appeals, albeit that the point became

more detailed. Although Umbro lost on that point, it did receive a substantial reduction in penalty on other grounds and would not have done so had it not appealed. We also take the view that the penalty bears harshly on Umbro relative to the other appellants. We leave Umbro to bear its own costs.

27. In the event, there will be no orders for costs in relation to the penalty appeals. Note that this case has been decided on its own facts and is not to be taken as laying down any general rules for the future.

B SPORTS WORLD INTERNATIONAL'S APPLICATION FOR COSTS

28. In respect of Sportsworld's application to recover its costs, Sportsworld initially applied to intervene in these proceedings in October 2003, shortly after the appeals were lodged. On 23 October 2003, the Tribunal refused the application by Sports World to intervene in the appeals at that stage, as we did not wish to complicate matters by introducing, in effect, a second prosecutor. In our Ruling [2003] CAT 25, we stated at paragraph 10 that:

> "10. We are, however, conscious of the fact that circumstances may arise in which it is convenient for Sports World International to follow these proceedings closely. As far as we can see there is no objection to Sports World, if so advised and if it so wishes, collaborating with the Office of Fair Trading in supplying information to the Office of Fair Trading and assisting with the presentation of the Office of Fair Trading's case. I stress the Office of Fair Trading's case and not Sports World's case. If circumstances were to arise in which fairness required that we heard directly from Sports World then we, the Tribunal, would be open to a second application, either for a formal intervention or for Sports World to be heard, as it were, informally. That is a bridge we are prepared to cross if and when it arises, so we are not entirely, as it were, slamming the door to Sports World at this stage."

And at paragraph 12:

> "12. So I think the result, Mr McNab, is that you are not permitted to intervene at this stage, but you are fully entitled to collaborate with the Office of Fair Trading if that is what you wish to do, and you are entitled to a kind of informal observer status and, if at any stage, you or your clients feel that they are prejudiced by that procedural situation then it is open to you to make a further application."

29. Sportsworld did participate, at least indirectly, in the proceedings before the Tribunal in relation to disclosure and were also present in the courtroom when Sportsworld's interests were engaged. Sportsworld's Lawyers were involved in the preparation of Mr Ashley's witness statement and in giving advice in that regard.

30. By an application dated 2 November 2004, Sports World sought an order for the recovery of the costs which it had incurred as a direct result of assisting the Tribunal in the determination of the appeals by Allsports and JJB in respect of liability. Insofar as it was necessary for its application for costs, Sports World also sought permission to intervene in the proceedings.

31. At the hearing on 19 May 2005, the Tribunal gave permission for Sports World to intervene in the proceedings. The Tribunal indicated that:

> "We are at this stage satisfied that if and insofar as Sportsworld International needs permission to intervene in order to argue its position on costs that we would allow that intervention. We will give our reasons at a later date."

We give those reasons now.

32. Rule 16 of the Tribunal's Rules deals with intervention in appeals before the Tribunal and, in particular, Rule 16(1) is concerned with whether the intervening party has a sufficient interest in the outcome.

33. Rule 48.2 of the Civil Procedure Rules ("CPR") provides for the court to make costs orders in favour of or against non-parties.

34. At the time of its first application, the Tribunal specifically left open the question of whether Sportsworld had sufficient interest in the outcome of the proceedings before the Tribunal, within the meaning of Rule 16 of the Tribunal's Rules. The Tribunal takes the view that, insofar as Sportsworld was the whistleblower, had co-operated in the administrative proceedings before the OFT, and had an interest in defending its commercial interests and reputation and the reputation of its directors, Sportsworld had an interest in establishing the facts relied on in the Decision, in particular that it had been subject to pressure by other participants to

the agreements, all of which, in our view gives Sportsworld "a sufficient interest in the outcome" within the scope of rule 16(1).

35. In any event, in our view rule 16(1) of the Tribunal's Rules includes an interest in costs as part of the "outcome" of proceedings for the purposes of that Rule. That interpretation would be in parallel with the situation in the High Court where the Court does have jurisdiction, by virtue of its general discretion regarding costs under section 51 of the Supreme Court Act 1981 and CPR r 48.2, to make a costs order against a party to proceedings in favour of a non-party but, pursuant to CPR r 48.2(1)(a), the non-party "must be added as a party to the proceedings for the purposes of costs only" for such an order for costs to be made.

36. In those circumstances Sportsworld is properly a party for the purposes of these proceedings. However, at the hearing on 19 May 2005 we questioned whether Sportsworld, having being given "a kind of informal observer status" at the case management conference on 23 October 2003, was, in any event, a party for the purpose of rule 55(2) of the Tribunal's Rules, which states that the Tribunal may only make an order in relation to the payment of costs "by one party to another". We consider that rule 55 should be interpreted widely. However, since we have jurisdiction to make a costs order in favour of Sportsworld if appropriate, for the reasons stated above, and the parties do not now seriously contest that, we do not need to consider the scope of rule 55 any further.

37. By analogy with section 51 of the Supreme Court Act 1981 and CPR r 48.2(1)(a) we are able to make an order in favour of SWI for the costs "of and incidental to" the proceedings.

38. Our difficulty in making such an order at this stage is that paragraphs 6.1 and 6.2 of Sportsworld's application are somewhat vague. We do not have a precise indication of what costs were incurred doing what, what is "incidental to the proceedings" and what is not, and what costs related to what action said to be "incidental to proceedings". We can accept provisionally that Sportsworld may have reasonably incurred costs in connection with disclosure applications made against the OFT, or even directly against Sportsworld, seeking documents which

were either Sportsworld's documents or contained commercial information. We can also accept provisionally that there may have been some justification for Sportsworld to be present, from time to time, at the hearing before the Tribunal.

39. There is very little authority under CPR rule 48.2 on awarding costs in favour of a non-party. In our view, we cannot determine whether or to what extent we should do so without a more detailed schedule of costs.

40. With regard to Mr. Ashley's witness statement, we have some sympathy with the argument that a whistleblower should not be out of pocket. However whether the costs associated with the preparation of witness statements are within the ambit of the jurisdiction to grant costs in a case such as the present is open to question and is going further than existing practice would seem to justify. We consider that even if Sportsworld is entitled to recover some of its costs the amount is likely to be substantially smaller than the amounts currently claimed.

41. We propose that Sportsworld's application for its costs should be adjourned for 21 days to permit Sportsworld to prepare a schedule of costs to enable the Tribunal to determine what costs could be regarded as recoverable if Sportsworld is still minded to pursue its application. The schedule of costs, together with a supporting note, would need to be served on the OFT, Allsports and JJB. If after that no settlement or agreement is reached, and Sportsworld's application is still pursued, then we will decide the matter by order. We hope that agreement can be reached, bearing in mind the cost of proceedings and the continuing legal expenses being incurred. This is as far as we can take the matter at this stage.
