Neutral citation [2009] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1078/7/9/07

Victoria House
Bloomsbury Place
London WC1A 2EB

30 January 2009

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)
Sitting alone

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CONSUMERS' ASSOCIATION

Claimant

-v-

JJB SPORTS PLC

Defendant

Appearances

Mr Nicholas Bacon (instructed by Clyde & Co LLP) appeared on behalf of the Claimant.

Mr Paul Lasok QC and Mr Benjamin Williams (instructed by DLA Piper UK LLP) appeared on behalf of the Defendant.

Heard at Victoria House on 30 January 2009

JUDGMENT ON ASSESSMENT OF COSTS

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1. This is the edited version of the extempore judgment given on the 30 January 2009.

2. I start by saying how grateful I am to all counsel for the assistance they have given, and the clarity and conciseness of the written and oral arguments.

3. On 14 January 2008, the Defendant was ordered by agreement to pay the Claimant's costs of these proceedings, those costs to be assessed if not agreed. On 10 October 2008, the Claimant applied to the Tribunal for its costs to be assessed. The questions which I must decide are whether those costs should be summarily assessed or assessed in detail, and if they are to be assessed in detail whether that assessment should be carried out by this Tribunal or by the Supreme Court Costs Office (SCCO).

4. I have concluded that the assessment should be a detailed assessment; and that it should be carried out by the SCCO. So that my decision may be understood in its proper context, I think I must set out briefly the circumstances which gave rise to these proceedings.

5. The background is as follows. On 1 August 2003, the Office of Fair Trading ("OFT") published a decision (CA98/06/2003) in which it found that Manchester United plc, the Football Association Ltd, Umbro Holdings Ltd, and a number of sportswear retailers (including the Defendant) had entered into price-fixing agreements in relation to replica football kit, thereby infringing the Chapter I prohibition contained in section 2 of the Competition Act 1998 ("the Act"). The OFT imposed a fine of £8.373 million on the Defendant.

6. The Defendant brought an appeal before the Tribunal. On 1 October 2004, the Tribunal handed down its judgment on liability (see [2004] CAT 17), substantially upholding the OFT's decision. On 19 May 2005, the Tribunal handed down a further judgment on penalties (see [2005] CAT 22). The Tribunal reduced the fine imposed on the Defendant from £8.37 to £6.7 million. The Defendant's further appeal to the Court of Appeal on both liability and penalty was dismissed on 19 October 2006 (see EWCA Civ 1318). The House of Lords refused permission to appeal the judgment of the Court of Appeal on 5 February 2007.

7. On 5 March 2007, the Claimant filed a claim for damages with the Tribunal under sections 47A and 47B of the Competition Act 1998 as amended by the Enterprise Act 2002. The claim was a "representative claim" brought on behalf of some 130 individual consumers listed in an appendix to the claim form.

8. The Claimant is a specified body for the purposes of section 47B of the Act by virtue of the Specified Body (Consumer Claims) Order 2005 (SI 2365 of 2005). Indeed, the Consumers' Association is, to date, the only designated specified body which may bring a claim under section 47B. There has been only one claim to date and this is it. Whether the Consumers' Association will bring any other claims under this provision is of continuing interest to this Tribunal. The fullness or otherwise of section 47B as a vessel for consumer class claims remains a matter of debate.

9. The Claimant sought the following relief on behalf of each aggrieved consumer:

   (a) First, compensatory damages of such sum as the Tribunal considered appropriate, in respect of each shirt bought by a consumer from a participant in one of the three infringements during the period of the infringement found by the OFT and upheld by the Tribunal.

   (b) Second, an interesting claim for exemplary or restitutionary damages in the sum of 25 per cent of the relevant turnover of the Defendant net of VAT, or such other sum as the Tribunal considered appropriate, to be distributed in accordance with the direction of the Tribunal.

   (c) Third, alternatively, all necessary accounts and inquiries and an order for payment of all such sums as may be found to be due and payable by the Defendant to the Claimant upon the taking of such inquiry.

   (d) Fourth, further or other relief; and

   (e) Fifth, interest.

10. In addition, on its own, the Claimant sought payment by the Defendant of the expenses and disbursements incurred by the Claimant on behalf of the consumers in discharging its statutory role as a specified body under section 47B and the order I have already referred to.

11. The Defendant filed its Defence on 4 April 2007. The Defendant at that stage contested the claim in its entirety.

12. A case management conference was fixed for 26 April 2007, but subsequently was adjourned at the joint request of the parties so as to allow for an attempt at alternative dispute resolution (ADR). A one-day mediation took place in June 2007, of which this Tribunal was informed, followed by further negotiations between the parties. The claim was substantively settled in September 2007 but it took the parties until January 2008 to agree the precise wording of the settlement agreement, of which the Tribunal has a copy.

13. On 9 January 2008, the Claimant wrote to the Tribunal confirming that the parties had reached a settlement and requesting permission to withdraw the claim. A copy of the settlement agreement, dated 9 January 2008 and stated to be confidential to the parties, was provided to the Tribunal on 11 January 2008. Both parties issued press releases announcing settlement of the claim. The Defendant agreed to pay damages to affected consumers of between £5 and £20 per shirt, that information being in the public domain.

14. As part of the settlement, on p.8 there was an agreement as to costs. The relevant subparagraphs read as follows:

> "5.1 The Defendant will pay to the Association its reasonable costs to either be agreed or if not agreed, to be subject to detailed assessment on the standard basis.
>
> …
>
> 5.4 If the Association's reasonable costs are not agreed the Association will make an application to the Competition Appeal Tribunal for Assessment proceedings to be commenced and the Defendant will make an application to the Tribunal for a detailed assessment to be carried out by the Supreme Court Costs Office."

As I read those subparagraphs it seems to me clear that the words "on the standard basis" in subparagraph 5.1 simply reflect the language of the Civil Procedure Rules and provide for the basis of assessment to be contrasted, for example, with a phrase like "on an indemnity basis".

15. It is said on behalf of the Defendant that paragraph 5 of the Agreement creates a contractual obligation, which obligation means that if there is to be a detailed assessment of costs it must be carried out by the SCCO. So far as that point is concerned, even if it is possible to reach a contractual agreement which requires part of the High Court (the Supreme Court) to carry out a detailed assessment (which I doubt) I do not find that such a contractual obligation exists. Without being over detailed in the parsing of paragraph 5.4 it seems to me that the Tribunal is in no way bound by that agreement. The obligation certainly exists for the Defendant to make an *application* for a detailed assessment to be carried out by the SCCO, but it does not create an obligation as such upon the Tribunal so to order.

16. On 14 January 2008, this Tribunal made an Order granting permission for the claim to be withdrawn. The operative parts of the Order stated:

> "IT IS ORDERED THAT:
>
> 1. The Claimant's action be withdrawn.
>
> 2. The Defendant pay the Claimant's reasonable costs, to be assessed if not agreed.
>
> 3. The Claimant be at liberty to apply for an Order that its costs be assessed and in such event both parties be at liberty to apply as to the manner of assessment pursuant to Rule 55(3) of the Tribunal Rules."

The relevant rules are the Competition Appeal Tribunal Rules 2003 (SI 1372 of 2003). In my judgment the agreed order makes it clear that there is nothing in subparagraph 5.4 of the agreement which limits whatever is permitted under Rule 55(3) of the Tribunal Rules.

17. I turn to Rule 55 of the Tribunal Rules which provides, so far as material, as follows:

> "Costs
>
> 55 (2) 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 …
>
> (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 all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court…"

This is reflected in part 17 of the Tribunal's Guide to Proceedings, of October 2005.

18. On 10 October 2008, the Claimant wrote to the Tribunal stating that the parties had been unable to agree an amount representing the reasonable costs incurred by the Claimant. The Claimant requested that the Tribunal carry out an assessment of the Claimant's costs and enclosed a copy of the Claimant's detailed bill of costs. The Claimant submitted in that letter that the Tribunal was the most appropriate forum for the assessment of costs, as it was the proper forum for the issue of the original claim and it is a specialist tribunal that is familiar with the issues that were raised in the claim.

19. On the same day, the Defendant made an application to the Tribunal that the detailed assessment of the Claimant's costs be transferred to the SCCO, pursuant to Rule 55(3). The Defendant observed that the original claim had been stayed prior to any involvement of the Tribunal and it could not, in the Defendant's submission, therefore be familiar with the issues that were raised in the claim in the way in which the Claimant had asserted. I should say that, although that is strictly accurate, in the nature of our work as members of this Tribunal, once a claim is made the Tribunal reads itself into the case. It can be taken that the Tribunal at all stages (at least until anything occurred outside the Tribunal's purview in the context of ADR) was reasonably familiar with the issues that were raised. The Defendant submitted that the SCCO was the only appropriate forum for undertaking a detailed assessment of a bill of costs particularly of this detail and magnitude, and submitted that the SCCO was in effect the expert tribunal for this kind of assessment.

20. The Claimant wrote to the Tribunal again on 13 October 2008 confirming that it believed that the Tribunal was the appropriate forum for the assessment of costs and opposing the Defendant's application for a transfer. By another letter of the same date, the Defendant stated that the question of the appropriate forum was a very important issue between the parties and needed to be fully argued before the Tribunal.

21. The Tribunal then wrote to the parties indicating that, if both parties were to consent, the Chairman was willing to decide the following two questions on the papers:

    (i) Whether costs should be assessed on a summary or detailed basis; and

(ii) If detailed, whether costs should be assessed by the Tribunal or the SCCO.

It is common for decisions of this kind or similar to be made on the papers, though the parties were entitled to require a hearing today.

22. The Claimant consented to the proposal by the Tribunal that the matter should be dealt with on the papers, but the Defendant, by letter of 22 October, indicated that it did not consider that these questions should be decided on the papers, hence the hearing.

23. On 5 December 2008 the parties filed skeleton arguments admirable in their completeness and equally admirable in their brevity.

24. The hearing has taken place this morning. Much has been common ground. The common ground includes:

(a) in any event an assessment of costs in this case would be at least a one to two day process, even if carried out by the Tribunal; and

(b) it would be a longer process before a costs judge.

25. As to the experience of this Tribunal perhaps this is the appropriate point for me to say that the common practice here in the Competition Appeal Tribunal is for assessments of costs when they take place here to be done on the papers. There is not a wealth of experience here of detailed assessments of costs being conducted orally.

26. I hope both counsel will forgive me if I oversimplify their submissions, but essentially Mr. Lasok QC has submitted that there is no discretion for the Tribunal to assess costs here, partly on account of the agreement (a point I have already dealt with); and, more particularly, he submits, because Rule 55(3) correctly constructed means that all detailed costs assessments *must* go to the SCCO. Secondly, Mr. Lasok submitted that in this case there are issues of principle and detailed complexity such that in the proper exercise of discretion (if there be one) the costs should be assessed by the expert tribunal best equipped to deal with such assessments, namely the SCCO.

27. Essentially, and again I hope I do not caricature his submissions, Mr. Bacon submits that although there are complexities and matters of detail and volume, the expertise of

this Tribunal in competition issues and connected matters means that we are in reality the appropriate expert Tribunal. He says that the SCCO has no more experience than this Tribunal in such assessments. In that, of course, he is right, and inevitably right, in that this is the first and, therefore, the only case brought so far under section 47B of the Act. Mr. Bacon says too that an expeditious and just conclusion is best achieved in this matter in this Tribunal, and it is part of the Tribunal's responsibility to dispose of such applications as part of our specialism in competition matters.

28. I have received submissions from both counsel drawing on their own experience, all of which I accept, about what happens in other Tribunals. I have concluded that those submissions, though interesting, are mutually cancelling. All Tribunals exercise a judicial discretion whether to deal with and adjudicate themselves upon costs applications or direct that they be heard by the SCCO, and I think the only conclusion that one can draw is probably best described as "sometimes they do and sometimes they do not".

29. The Claimant submits that the Tribunal is the most natural forum for the assessment because it is the forum for the issues raised in the claim; it is familiar with competition issues, is better placed to assess reasonableness in relation to competition issues and really ought to deal itself with all but the most complex of costs assessments. The Claimant submits that the Tribunal has jurisdiction to conduct summary assessment and there is no reason why that jurisdiction should not be exercised in this case.

30. The Defendant submits, on the other hand, that the Tribunal lacks expertise in very detailed assessment of the kind necessary here, and that the SCCO has that expertise; indeed, its sole purpose is the detailed assessment of costs. It has also been submitted (in skeleton argument but not orally today) that costs processes are currently under general review and that the Tribunal should be careful therefore about applying current rules slavishly, the implication being that the SCCO might be better placed to apply costs standards in a changing climate, though that point can be argued in both ways.

31. There is an issue about proportionality of costs to damages. The Defendant refers to the size and complexity of the Claimant's bill of costs and says that the quantum of costs and the damages are dramatically disassociated and therefore require examination

against one another. The Defendant submits that the amount of costs claimed (which is confidential and I will simply call "X") is extraordinary, and "wildly disproportionate", given that there was no hearing. The Defendant contrasts the amount recovered by consumers (a figure in the public domain) of approximately £21,000 (or a little bit more) and the total amount set aside by the Defendant (a figure "Y" – confidential) with "X". X is a multiplier of Y.

32. The Defendant says that there is a point of principle here in which one must reflect upon the large costs claim as against the individual recovery by members of the public through the Consumers' Association which, if their claims were taken singly, would at best go to the small claims court where there would be no recovery by the individuals of their costs.

33. I note that some of the points of dispute are very detailed. I refer to a few. There have been two solicitors on behalf of the Claimant. The Defendant raises the possibility of duplication of work between the original solicitors for the Claimant, and the solicitors who have conducted much of the litigation process. The Claimant is said to have rejected the Defendant's first settlement offer leading to unnecessarily and unjustifiably higher costs. The Defendant queries (i) the use of counsel for various aspects and at various stages and (ii) the success fees. The Defendant says that the conditional fee agreements are relevant in respect of what they say is a lack of client discipline, and what they say is an excessive uplift given that some recovery of damages was virtually guaranteed in this case. They rely too on a question of disclosure or non-disclosure of full details of the conditional fee agreement, and also there is an issue about possible retrospectivity in relation to the conditional fee agreement of the second solicitors for the Claimant. There are also arguments as to whether some of the second solicitors' costs are properly chargeable, e.g. claims processing and the costs of marketing. There is also a question as to whether excessive rates have been used. The question is asked: Is it appropriate to charge proper 'City' rates for 'non-City' work which, if one takes the individual claims, would probably never have reached a solicitor at all, or could have been conducted by a competent High Street solicitor.

34. Taking all those factors into account and all the arguments in the skeleton arguments, I have concluded as follows: first, I respectfully reject Mr. Lasok's argument that all

detailed assessments *must* be dealt with by a costs officer of the Supreme Court, (the SCCO). In my judgment there are signposts in Rule 55(3) to which, as I have already said, Rule 55(2) is subject, but the Tribunal retains the discretion to make the final determination. By "signposts" I mean signposts towards the expected way of dealing with costs in such cases. In Rule 55(3) I notice and observe that there is a phrase "lump sum".

> "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 all or such proportion of the costs as may be just."

What follows is "The Tribunal may assess the sum to be paid." On the face of it that postulates a situation in which a lump sum by way of costs is named and, there is an area – but not a detailed analysis of every item – as to whether the claimed lump sum, or something like it is to be ordered to be paid.

35. In contrast, the later part of Rule 55(3) permits the Tribunal to direct that the costs be assessed by "the President, a Chairman or the Registrar", or "dealt with by the detailed assessment of a costs officer of the Supreme Court." The signpost seems to indicate that if there is to be a detailed assessment, as opposed to a lump sum assessment, then the expectation is that it is dealt with by the SCCO, or its Northern Ireland or Scots counterparts.

36. In my judgment the signposts are persuasive but not decisive. It seems to me that the Tribunal, albeit subject to paragraph 3, retains its general discretion, even where there is a detailed assessment to be made, to carry out that detailed assessment itself in an appropriate case. However, I find that this is not an appropriate case in which the Tribunal should exercise its discretion to carry out the exercise itself. There is considerable and real complexity raising issues for which this Tribunal has no particular expertise, but which are similar to issues the SCCO will have considered in its civil jurisdiction. The SCCO has relevant and specialist expertise in assessing the points of detail and points of dispute to which I have referred, and others, which arise in this case.

37. In the circumstances I direct that the assessment of the Defendant's reasonable costs be transferred to the SCCO for a detailed assessment, a draft order will be produced by the

Tribunal later and submitted to the parties for agreement before it is signed. That leaves the question of an interim sum.

Lord Carlile of Berriew QC
Chairman

Date: 30 January 2009