Neutral citation [2009] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1099/1/2/08

Victoria House
Bloomsbury Place
London WC1A 2EB

23 July 2009

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR PAUL STONEMAN
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

NATIONAL GRID PLC

Appellant

- v -

GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

supported by

SIEMENS PLC
CAPITAL METERS LIMITED
METER FIT (NORTH WEST) LIMITED
METER FIT (NORTH EAST) LIMITED

Interveners

RULING ON COSTS

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1. In the judgment handed down on 29 April 2009 ([2009] CAT 14) the Tribunal dismissed National Grid's appeal against the Authority's finding that National Grid had infringed Article 82 of the EC Treaty and section 18 of the Competition Act 1998 ("the Main Judgment"). The Tribunal reduced the fine imposed on National Grid by the Authority from £41.6 million to £30 million and made some other amendments to the directions designed to ensure that National Grid put an end to the infringement.

2. Rule 55 of The Competition Appeal Tribunal Rules (S.I. 2003, No. 1372) provides broadly that the Tribunal may at its discretion 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. In determining how much the party is required to pay, Rule 55 provides that the Tribunal may take account of the conduct of all parties in relation to the proceedings.

3. Three applications for costs have now been lodged. The Authority has applied for an award of 80 per cent of its costs, the 20 per cent reduction reflecting, in the Authority's view, National Grid's success in relation to the reduction of the fine. In the Schedule to its application the Authority sets out a rough calculation of its costs, amounting in total to some £1,036,000. The Authority asks for an interim payment of £700,000 pending an assessment of its costs. Siemens and CML who were interveners in the appeal have also applied for their costs. CML is a partly-owned subsidiary of Siemens and the two companies used different external solicitors and different junior counsel but instructed the same leading counsel. CML's costs amount to almost £400,000 and Siemens' amount to about £680,000. The other interveners, referred to in the proceedings jointly as Meter Fit, have not applied for their costs.

4. National Grid has argued that costs should lie where they fall and that no order should be made. The parties were content for us to decide this matter on the papers without an oral hearing. The following ruling is the unanimous decision of the Tribunal.

The Interveners

5. The Tribunal's general practice is that Interveners bear their own costs: *Freeserve.com v Director General of Telecommunications* [2003] CAT 6 at page 11, lines 17 to 24.

Interveners are not generally held liable to pay costs if they intervene in support of the unsuccessful party and they are not awarded costs if they support the successful party. There have been cases in which the Tribunal has departed from this practice, for example in cases where the intervener has been the target of the abusive behaviour (as in *Aberdeen Journals (No. 2)* [2003] CAT 21, on which Siemens and CML seek to rely) or where the intervener is a party to the contract which was alleged by the appellant to be void under Article 81 EC or the Chapter 1 prohibition (as was the case, for example, in *Independent Media Support Ltd v OFCOM* [2008] CAT 27).

6. In our judgment, neither Siemens nor CML was in a comparable position to the intervener in *Aberdeen Journals*. We accept that they were affected by the operation of the Legacy MSA and hence had a sufficient interest entitling them to intervene in the appeal. They were actively involved in the investigation carried out by the Authority and they provided useful information to the Tribunal on the factual background to the dispute. But we do not consider that their interests were so directly and seriously affected as to justify departing from the Tribunal's usual practice. They were not the target of the abusive behaviour and although National Grid pointed to the failings of the CMOs when the contracts with British Gas were implemented, this was not an attack on the integrity of the officers of the companies. On the contrary, it was clear from Mr Lee's evidence on behalf of Siemens that there were initial problems with the operation of their contract with British Gas (though not all these problems were of Siemens' making).

7. Siemens' and CML's involvement was primarily concerned with a narrow aspect of the case, namely whether the Legacy MSAs had had an actual effect on the volume of work the CMOs were asked to carry out for British Gas. CML also provided evidence as to the relationship between the rentals charged for DCMs by CML and National Grid. Although other parts of the evidence of their witnesses were referred to at various points in the judgment, this does not entitle them to recover their costs. We note also the point made by National Grid that some of the issues initially included in the Statements of Intervention and in the Interveners' witness statements were excluded by the Tribunal in the first of its earlier rulings ([2008] CAT 26) on the grounds that they sought to introduce issues going beyond what was legitimate having regard to the scope of the Decision.

8. We therefore conclude that the Interveners should bear their own costs in this appeal.

9. Although the question of the quantum of costs does not arise, we have some sympathy with National Grid's description of the combined claim for over £1 million from Siemens and CML as "startling and grossly excessive". Such a sum is, in our view, out of all proportion to the role that they have played in this appeal.

The Authority

10. In its submissions the Authority referred us to a number of earlier decisions of the Tribunal, in particular *The Institute of Independent Insurance Brokers v DGFT* [2002] CAT 2, *Napp (Interest and costs)* [2002] CAT 3, *Aberdeen Journals (No 2)* (cited above) and *Umbro Holdings Ltd v OFT* [2005] CAT 26. They conclude that: "There is no general presumption against making costs orders against unsuccessful appellants in cases involving penalties. On the other hand, the Authority does not assert that there is any presumption in favour of making such orders. All will depend on the facts of the particular case".

11. We do not agree with National Grid's submission that, in cases where a penalty is imposed, costs should only be awarded in exceptional circumstances or only in cases where the unsuccessful party has acted unreasonably in bringing and pursuing the appeal. This is not a case where the costs should "lie where they fall".

12. We agree with the Authority that costs were increased by the length and lack of clarity of National Grid's case. The Tribunal has commented a number of times on the unwieldy nature of the Notice of Appeal (see, for example, paragraph 228 of the Main Judgment) and, as the Tribunal noted in the ruling of 8 October 2008 ([2008] CAT 26), there were several places in which even at that stage, it was still unclear what was the National Grid case.

13. We also consider that in challenging so many aspects of the Authority's findings, National Grid vigorously pursued points which were bound to fail and which did not seem to be helpful or pertinent to their case. Their arguments on market definition were particularly protean. The supposed division between a market for Legacy meters and a market for N/R meters was not maintained at the hearing, at least not in the same

way as it had been put in the pleadings. Even if the market could be divided as National Grid claimed, it was not clear how this helped their case since they were undoubtedly dominant in at least one of the markets which was relevant to the Decision. National Grid's challenge to the Authority's conclusion that there were significant barriers to entry flew in the face of all the evidence before the Tribunal about how the market works. The Tribunal found that National Grid's evidence as to British Gas' countervailing buyer power fell far short of demonstrating that British Gas had sufficient power to negate National Grid's market power, having regard to the contemporaneous documents and the commercial reality of the bargaining positions of the parties. National Grid's challenge to the definition of the market and the finding of dominance generated substantial volumes of expert evidence and submission and we agree that, adopting the language of the *Umbro* judgment (at paragraph 9), the Authority should not have to pick up the tab for the costs of rebutting these points.

14. We also agree with the Authority that, aside from the reduction in the fine, the aspects of the case on which National Grid succeeded were relatively minor and did not engender significant costs. Further, National Grid is a large and well resourced company and an award of costs against it in this case is unlikely to dissuade such a company from bringing an appeal against liability or penalty in future.

15. On the other side of the equation, there is some merit in National Grid's argument that the case on abuse raised novel points. The Authority did not present the case, either in the Decision or on appeal, as one of conventional, loyalty-inducing abusive conduct on the part of a dominant undertaking. The fact that the Authority accepted that some early replacement protection was legitimate meant that the robustness of the counterfactual it employed was key to the overall robustness of the Decision. It would not be right in the circumstances of this case for the Authority to recover all the costs which it attributes to National Grid's challenge to the finding of infringement.

16. Having considered all the matters raised by the parties our decision is that the Authority should recover 50 per cent of its costs.

17. The Authority has to date only given us a broad estimate of its actual costs up to January 2009 in relation to some heads of cost and up to April 2009 in relation to

external counsel, so we are not in a position to make a summary assessment. We expect National Grid and the Authority now to attempt to agree between themselves the amount to be paid. We have the following comments on the categories of costs that the Authority has listed in its preliminary schedule.

18. First, the costs claimed include a sum of a little over £350,000 in respect of the work of the Authority's internal legal department. In the Tribunal's experience it is somewhat unusual for a regulator to claim internal legal costs for successfully defending an appeal. The Tribunal certainly does not wish to exercise its discretion in a manner which discourages parties from arranging for their legal representation in what they see as the most cost effective way. But we would expect the Authority to consider carefully how much of its internal legal costs can properly be attributed entirely to defending this case before the Tribunal.

19. Secondly, the sum of about £29,000 is claimed for an "external litigation consultant" during some months in mid 2008. We would need to understand more of what this consultant actually did (given that the period referred to overlaps with the period in which leading and two junior counsel were engaged) before being able to assess whether this sum should be recoverable from National Grid.

20. The sum of about £5,250 is claimed for "witness training". Given that the Authority's witnesses called for cross examination at the hearing were two expert witnesses and a senior member of staff, we would need to hear further submissions as to the nature of this training and who benefited from it.

21. The other heads of costs (external counsel, expert witness fees and photocopying) may well be the subject of negotiation between the parties and we make no comments about the reasonableness of the amounts claimed.

22. Finally, we do not consider there is any justification for making an order for the interim payment of a sum by National Grid at this stage of the proceedings. No reasons were put forward by the Authority in support of such an order and, given that National Grid is and remains a substantial company and that the parties may well be able to agree on

the quantum of costs without too much delay, an interim payment is not appropriate here.

23. In the light of the foregoing, the Tribunal unanimously:

ORDERS THAT:

(1) National Grid pay the Authority 50 per cent of such sum as may be agreed between the parties or hereafter determined as the costs reasonably incurred in this appeal.

(2) The parties shall seek to reach agreement on or before 18 September 2009 as to the amount of costs recoverable. In default of agreement the procedure to be followed thereafter will be determined by the Tribunal.

(3) The Interveners bear their own costs.

(4) There be liberty to apply.

Vivien Rose Professor Paul Stoneman David Summers

Charles Dhanowa Date: 23 July 2009
Registrar