IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1081/4/1/07

Victoria House
Bloomsbury Place
London WC1A.2EB

Friday, 27th July 2007

Before:

MARION SIMMONS QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

CO-OPERATIVE GROUP (CWS) LIMITED Applicant

and

OFFICE OF FAIR TRADING Respondent

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Mr. Matthew Cook (instructed by Clifford Chance) appeared for the Applicant.

Mr. Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

PROCEEDINGS
AFTER JUDGMENT HANDED DOWN

THE CHAIRMAN: The Tribunal is today handing down the Judgment in Co-Operative Group (CWS) Limited v Office of Fair Trading. For the reasons given in the Judgment the application is dismissed. The Judgment will be made publicly available on the Tribunal website later today.

Are there any applications?

MR. GREGORY: The OFT has an application for costs.

THE CHAIRMAN: Yes.

MR. GREGORY: We are asking for all of our costs. I think I can give the reasons relatively briefly. The Tribunal sets out its approach to costs in s.120 cases in the following costs' Judgments: *IBA*, *Unichem* and *Celesio*. The relevant points may be gleaned from *Celesio* paras. 17 – 21, supplemented by *Unichem* paras. 17 and 25. I am not planning to take you to the Judgments, I was just going to highlight four points arising from them.

(1) Under Rule 55.2 of the Rules the Tribunal has a broad discretion as to costs.

(2) While there is no fixed rule that costs should follow the event, an application of the relevant principles will generally mean that the successful party in a s.120 case will be awarded at least a proportion of its costs (*Unichem* para.17).

(3) It is relevant to take into account the extent of the victory, i.e. whether a party has been successful on all or the vast majority of its points; and

(4) The reasonableness of the parties' conduct of the case is also relevant, and one aspect of that is the extent to which the parties have sought to rely on new arguments or new evidence during the proceedings.

A potential fifth point is that smaller, poorly resourced companies should not be deterred from bringing claims by having large costs' orders made against them where they have been unsuccessful but have brought a reasonable claim. I am not expecting CGL to argue that it is poorly resourced.

On the facts, the OFT considers that it should get its costs:

(1) Because it has won the case and succeeded on every ground – I am tempted to say it secured a victory that is as comprehensive a victory as is reasonable and practical in the circumstances.

THE CHAIRMAN: Using the words of the section.

MR. GREGORY: Yes.

(2) It should have been obvious to CGL that the OFT would win at the time that it brought its application. CGL's argument on its first two grounds, which

occupied most of our time, was that it was unlawful under public law principles for the OFT to conclude that Southern was not independent of and unconnected to CGL on the basis of the fact that Southern's chief executive was a director on CGL's board.

Standing back the OFT submits that it should have been obvious to anyone with a knowledge of public law principles and competition policy that that was an argument that was highly unlikely to succeed

The next few points set out why I think that is the case:

(3) The CGL's competition advisers should have been well aware that the OFT was entitled to a broad margin of assessment in these circumstances. That follows from the language of s.73 of the Act: "… the OFT may accept …". It is also evidence from the Tribunal's Judgments in *Unichem* and *Stericycle* referred to in the Judgment in this case (para.92).

(4) The language of the undertakings was clear and unambiguous. As the Tribunal noted in its Judgment (para.142) CGL's case eventually came to rest on the proposition that the undertaking should have said that the proposed purchaser must be sufficiently independent of and unconnected to CGL for a sale to remedy, mitigate or prevent the SLC. But the undertakings did not say that. CGL had had plenty of opportunity to comment on their wording but it did not oppose such language.

(5) CGL should have been well aware that structural links between undertakings, such as overlaps in senior management, are capable of raising competition concerns. The OFT made the point in its witness statement that it is something that is well known within the competition law world, and CGL appeared not to dispute it. CGL, of course, commented that most competitors would relish the sort of information that Mr. Bennett was getting as a result of his seat on CGL's Board. Set against that background the OFT's decision was entirely unsurprising.

(6) CGL's main argument turned out to be that the OFT had been obliged to carry out a detailed investigation at the purchaser approval stage. However, nowhere in its notice of application did CGL refer to, or appear to have taken into account, the explanatory notes to the Act, or the OFT's Guidelines on undertakings in lieu. While those documents refer primarily to the stage when the OFT is accepting undertakings, it should nonetheless have been

apparent from them, that if a detailed consideration was not appropriate at the acceptance stage, nor would it be appropriate at the stage when undertakings are applied. The OFT therefore had to draw CGL's attention to these documents in its witness statements.

(7) Before the application was launched, CGL wrote to the OFT to inform it of its intention of bringing proceedings. By letter of 30th April 2007 the OFT put CGL on notice that, if the OFT won, it would seek its costs.

(8) Finally, a point of policy. If the Tribunal concluded that the OFT was not entitled to its costs in a case such as this where the OFT has won comprehensively and we would submit have conducted itself reasonably before the Tribunal, it is difficult to see in what circumstances the Tribunal would ever consider it appropriate to allow the OFT to recover its costs in these type of proceedings. Such an approach would inevitably reduce the resources that the OFT has available for its other work, applying the provisions against, for example, cartels and other anti-competitive agreements and abusive practices. It would also have the effect of not discouraging unmeritorious applications for review.

I have made all those points which I think are positive points which I think are positive points; I have not yet attempted to anticipate the points that CGL may or may not make.

THE CHAIRMAN: We will have to find out if they are opposing this. Thank you very much, that was very comprehensive. Are you opposing it?

MR. COOK: Madam, I do intend to do so, and I would have jumped in 10 minutes ago had I not been intending to do so rather than taking up the time.

My submission is going to be that this is a case where there should be either or no order for costs or alternatively that certainly CGL should not be liable for the entirety of the OFT's costs. I am afraid I have only four points, but I hope I will not lose simply on a head count!

THE CHAIRMAN: I thought even if you had 10 points you should say that you only had three!

MR. COOK: Yes, and keep using "Finally" for my last seven points. There are four points I am going to make and I hope they answer most of my learned friend's points, obviously accepting the basic points he set out about the structure of how this is done, *Celesio*, which will be very familiar to you – it is your Judgment – I am not going to go back over those sort of general principles, but I would suggest this is a situation in which we are in actually prime *Celesio* territory and that is a situation where the OFT produced, in this case a page and a half decision, which was then amplified by a very lengthy 20 page or so witness

statement with an enormous body of exhibits. That was obviously vital to it because it chose to do so, and it was very significant in terms of what it chose to amplify, gloss, in many ways ----

THE CHAIRMAN: "Elucidate", is the word.

MR. COOK: "Elucidate" I appreciate is how they like to refer to it, but in many cases it was a lot more than elucidation.

THE CHAIRMAN: But you did not make that point. You did not make the point that it was not admissible.

MR. COOK: I am not suggesting now at this stage it is not admissible. What they did with what is consistent with what has happened in the past; with what happened in *Celesio*, for example, but the point I make on it is, as in *Celesio*, it is a point where actually they ended up having to put that evidence in in order to stay in the case. I will give you one very clear example – it is one my learned friend referred to – paras. 142 to 143 in your Judgment today.

This is a point about how exactly you construe the wording of the undertaking, whether natural meaning, what gave to it in terms of what exactly the phrase "independent" and "unconnected" meant. What you had was the OFT position shift there, by virtue of the elucidation, because it was not dealt with in the decision really at all, it came out of previous conversations about it and what they previously said that it should be done the "natural man on the street", and then para.143 explained what it became and para.142 was our version of the Tribunal's characterisation of our version, which is rather than it being the view of the natural man in the street of what constitutes "connection" it actually is a connection that gives rise to a competition concern. They used Mr. Pritchard's evidence to provide that elucidation and gloss. It is an elucidation because it was not actually in the original decision, but it was contrary to what was being said previously.

The point I make is that, as in *Celesio* this was a case where they chose to put very little in the original decision (a page and a half) and then substantially expanded that from Mr. Pritchard's evidence and that, in my submission, brings us into *Celesio* territory and the same consequences should follow on that principle.

I rely on three other facts which, I suggest, make clear that this is a case that was essentially appropriate to have been brought. First, this was a novel issue. It was about how you deal with the enforcement of undertakings. The Act does not deal with that at all, neither do the explanatory notes. The Guidance notes at best peripherally, in reality not at all. They deal with accepting undertakings not at all the process – apart from read across

analogy, to actually where you deal with the construction of undertakings and enforce undertakings, and there was no case law on this. So we are dealing with a novel issue which had not previously been established. Secondly, what we have to bear in mind of course is as a result of what I can best describe as a "lacunae" in the Act, we ended up effectively in a cul-de-sac position – a 'no through road' – where having agreed the undertakings we then have some months later Southern appear as a potential purchaser and this issue arose. At that point, and we dealt with it briefly at the hearing for a while, there is then no option of going to the Competition Commission (as the Tribunal concluded would really have been the right way) in order for them to deal with the very detailed analysis this issue would require. After all, no one said – the Tribunal has not said, and the OFT has not said – the connections were so serious they were fundamentally unacceptable, just that it was too complicated for them to deal with.

The difficulty is, having had the undertakings agreed in standard form before this issue arose, the issue then arose and suddenly one is in this territory where the OFT really could not deal with it properly, and there is not the option of going to have it dealt with properly, so an appeal to the Tribunal as really the only way to try and get over that hurdle with obviously the restrictions on that. The restrictions were ultimately too great, but that is the situation. There was no option for CGL in order to try and go ahead with what was commercially its best option other than by going down this route.

The next point was going to be that this was clearly a reasonable set of challenges. The Tribunal at no stage dismissed any of our points out of hand. It is 70 page Judgment and clearly these were very substantive points, they were serious challenges – they are not frivolous or wholly unmeritorious in any way. So there were real issues here to be determined.

Taking all those issues together, while obviously this is a case we have lost, this was one which was legitimately brought. It was reasonably fought, there is no criticism of conduct or anything else. My learned friend makes a very brief point about the fact that we elucidated our argument somewhat in the skeleton argument – in response, of course, to the OFT's elucidation. So insofar as there is any criticism of us it is really, as the Tribunal itself concluded, a criticism of the OFT that it makes.

That is my submission, unless I can help you further.

THE CHAIRMAN: No, thank you very much. Do you want to respond to that?

MR. GREGORY: If I may, I will respond briefly. The first point seemed to focus on the OFT's "reasonable man" comments. Unlike in *Celesio* of course that language is not found in the

decision letter, what you might call the "allegedly problematic language" is not found in the decision itself. It was language used in a telephone conversation. I should clarify that CGL's initial argument was not that it was problematic that the OFT had thought about how the reasonable man would interpret this language at all, but that was the limits of the OFT's consideration, it had not gone on to consider any sorts of competition concerns.

It is quite plain from a reading of the decision letter that that was not the OFT did. The decision letter instead referred to the fact that Mr. Bennett had a seat on CGL's board which would provide a conduit for the flow of information between CGL and Southern, so the decision letter identified the competition concerns that were the basis for the OFT's decision.

CGL was, in any event, aware that the OFT was taking into account competition concerns as well as the plain language point because, madam, if you remember there were a couple of other connections as well. There was Southern's membership of the ----

THE CHAIRMAN: Which you said you were not worried about.

MR. GREGORY: Exactly, because they did not raise competition concerns, and CGL knew that.

There was an attack made on the witness statement – that is the second point. In Judicial Review cases and in the Tribunal's jurisprudence, it is accepted that it may be appropriate for the defendant to put in additional evidence (including in the form of a witness statement) to elucidate its initial reasons as long as it does not contradict.

THE CHAIRMAN: I suppose what is said – I think in *Celesio* – is that one needed the elucidation in order to understand the decision, and that was I think part of the basis upon which the Tribunal made the order they did in relation to costs, which at the moment seems to be very different here because the witness statement was really giving a lot of background, it was not actually changing or making clear what the words in the decision actually said, and therefore "elucidating". It was very difficult in *Celesio* to understand the decision unless you looked at the elucidation and there was a fine line between "elucidation" and "new decision".

MR. GREGORY: We would agree. A large part of what the statement did was identify the things like the explanatory notes and the Guidance that you would have thought CGL would have been aware of at the time of making its application but which appeared not to be reflected in any way when you read the notice of appeal.

The third point, I think, was that the Guidance and explanatory notes were not helpful in this situation because they dealt with the acceptance stage. I think it was conceded that one

could draw analogy between what was said about the acceptance stage and the application stage, and I think that is quite right. It is para. 226 of the explanatory notes.

THE CHAIRMAN: We call it "implementation stage".

MR. GREGORY: Yes.

THE CHAIRMAN: That is what you mean?

MR. GREGORY: Yes.

THE CHAIRMAN: Because there is the enforcement stage as well.

MR. GREGORY: Yes. Paragraph 226 is explanatory notes which are set out at para.6 of our defence.

> "The purpose of undertakings in lieu is to allow the OFT, where it is confident about the problem that needs to be addressed and the appropriate solution, to correct the competition problem the merger presents without recourse to a potentially time consuming and costly investigation."

Then nature of the connection here was such that it should have been obvious to CGL that really quite a detailed investigation would have been necessary.

THE CHAIRMAN: What they say is they did not anticipate that one of their members was going to bid for the business.

MR. GREGORY: Well I think we would say that they should have anticipated that. Mr. Bennett was not the only person in respect of whom this problem could have arisen.

I think the fourth point was that the points made by CGL were useful, well arguable points and to that I say it is true that perhaps in some of the cases the question about the difference between restoration of competition in the statutory language and whether it has been used as a starting point or the only point, might be relevant to the outcome of the case. But here it was quite plain that, given the nature of the connection, even if you had simply applied the statutory language and you had not referred to restoration at all the OFT could not have been confident without a detailed investigation that divestment to Southern would comprehensively remedy or mitigate the SLC.

THE CHAIRMAN: Am I right in thinking that it was conceded that if we decided that you did not have to carry out a detailed investigation then it would have to go to the Competition Commission?

MR. GREGORY: That is my recollection also.

THE CHAIRMAN: So they conceded the confidence point.

MR. GREGORY: Yes.

MR. COOK: Madam, I am not sure I understood the question.

THE CHAIRMAN: It is there, is it not? Paragraph 197 at the end, we wrote it in the Judgment.

MR. COOK: Sorry, it was the way you phrased it: "We considered it would need to go to the Competition Commission", had it arisen at the time we conceded that is when it would have happened.

THE CHAIRMAN: What you conceded, if we came to the conclusion that a detailed analysis was required then the decision was correct – in other words that they could not be confident ----

MR. COOK: Yes, but you actually said "We conceded it should go to the Competition Commission."

THE CHAIRMAN: Well no, it could not go to the Competition Commission.

MR. COOK: I was confused by it.

THE CHAIRMAN: No, but they could not be confident.

MR. GREGORY: Unless you have any questions, those are my points in reply.

THE CHAIRMAN: No, thank you very much. I will rise for a moment.

(The hearing adjourned at 2.25 p.m. and resumed at 2.55 p.m.)

(For Ruling see separate transcript)

THE CHAIRMAN: Are there any other applications?

MR. GREGORY: No, I am grateful.

THE CHAIRMAN: If there are any consequential applications, for example permission to appeal, then they should be made within 14 days in writing, and with 14 days to reply. Can I thank you both for your very clear submissions on costs.

(The hearing concluded at 3 p.m.)