

Neutral citation [2014] CAT 19

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1226/2/12/14

Victoria House
Bloomsbury Place
London WC1A 2EB

26 November 2014

Before:

PETER FREEMAN CBE QC (HON)
(Chairman)
BRIAN LANDERS
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

SKYSCANNER LIMITED

Appellant

-supported by-

SKOOSH INTERNATIONAL LTD

Intervener

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

- supported by -

BOOKING.COM B.V.
EXPEDIA, INC.
INTERCONTINENTAL HOTELS GROUP PLC

Interveners

RULING (COSTS)

INTRODUCTION

1. By a judgment handed down on 26 September 2014 (the “Judgment”)¹, the Tribunal decided the appeal by Skyscanner against the Decision by the OFT of 31 January 2014 to accept commitments, pursuant to section 31A(2) of the Competition Act 1998 (the “Act”). The Tribunal found in favour of Skyscanner on two of its three grounds of appeal. In this Ruling, on the issue of costs, we use the same abbreviations as in the Judgment.

THE PARTIES’ SUBMISSIONS

2. Skyscanner seeks an order that the CMA pay its costs of this appeal in full, or, in the alternative, a substantial proportion of its costs. In the Schedule to its application, Skyscanner set out a statement of costs incurred, amounting to £258,642.01 excluding VAT. These costs can be divided into: (i) solicitors fees of £78,902.00; (ii) Counsel’s fees of £96,675.63; (iii) economists’ fees of £77,538.45; and (iv) other disbursements of £5,525.93. Of these costs, £4,654.50 relates to Skyscanner’s successful application for disclosure of the OFT’s Statement of Objections, which Skyscanner claims on an indemnity basis.
3. The CMA resists Skyscanner’s application. Whilst accepting that it must pay a proportion of Skyscanner’s costs, the CMA contests the amount claimed by Skyscanner. It contends that Skyscanner’s lack of success on Ground 1 and alleged partial success on Ground 3 should be reflected by a 25% reduction of its costs entitlement. Further, the CMA challenges the quantum of claimed costs on the basis that they are excessive and include costs which are not properly recoverable. In particular, the CMA argues that: (i) the economists’ fees, together with the legal costs relating to those fees, are not properly recoverable; and (ii) the application for indemnity costs in relation to Skyscanner’s application for disclosure of the Statement of Objections should be rejected.

¹ [2014] CAT 16.

4. Broadly, the CMA argues that the quantum of solicitors' fees, Counsel's fees and other disbursements claimed appears to be unreasonable and/or excessive. However, it says the level of detail provided about how and by whom these costs were incurred makes it impossible to fully assess the reasonableness and proportionality of those costs. This leads the CMA to argue that the matter ought to be submitted to a costs officer for detailed assessment. Before reaching a decision on the need for detailed assessment, we asked Skyscanner to provide the Tribunal with additional information about certain heads of costs, which it duly did.
5. We were informed by Skyscanner that, during the course of negotiations between the parties in relation to costs, Skyscanner offered to accept £202,156.36 in settlement of its costs claim. However, the CMA did not accept this offer.
6. There remains accordingly a substantial difference of view between the parties as to the amount of costs Skyscanner should recover. Nevertheless, the parties are content for us to decide this matter on written submissions, without a hearing. The ruling which follows is our unanimous decision.

THE TRIBUNAL'S GENERAL APPROACH

7. The Tribunal's jurisdiction to award costs is governed by rule 55 of the Competition Appeal Tribunal Rules 2003 (the "Tribunal Rules")², which provides insofar as material:
 - "(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.
 - (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 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 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 (2) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the

² S.I. No. 2003/1372 (as amended)

detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.”

8. The approach to be adopted under rule 55(2), and the corresponding provision of its previous rules, has been considered by the Tribunal on a number of occasions. As the Tribunal explained in *Eden Brown Ltd v Office of Fair Trading*³, the provision is framed in broad and general terms to reflect the varied forms of jurisdiction conferred upon the Tribunal and therefore the different nature of the proceedings that come before it. The categories of proceedings were summarised by the Tribunal in its judgment on expenses in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform*⁴ at [16]; they include the category relevant to the present case, namely an appeal to the Tribunal against a decision by the OFT to accept commitments under section 31A of the Act, where the Tribunal must determine the appeal on judicial review grounds rather than “on the merits”.

9. Whilst the Tribunal has emphasised that the width of discretion conferred by rule 55(2) enables it to retain flexibility in its approach and avoid rigid rules, it has over time developed guiding principles that take account of the particular jurisdictional context. As regards appeals against decisions concerning the Chapter I or Chapter II prohibitions under the Act, the Tribunal summarised its general approach in *The Racecourse Association v OFT (costs)*⁵ as follows at [10]:

“First, as in all cases, there is no immutable rule as to the appropriate costs order; and how the discretion will be exercised in any case will depend on its particular circumstances, one relevant consideration being whether any award of costs may be perceived as frustrating the objects of the Act. Second, subject to this, the starting point is that a successful appellant who can fairly be identified as a “winner” is entitled to recover his costs. Third, such an appellant will not necessarily be entitled to recover all his costs, and may in particular be deprived of those costs referable to issues on which he has failed, or which were not germane to the Tribunal’s decision, or which involved unnecessary prolixity or duplication, and he may suffer a partial or total disallowance of costs by reason of any unreasonable conduct on his part. Fourth, the OFT is not entitled to any special protection from vulnerability to costs orders in favour of successful appellants save such protection as it may obtain by appropriate case management of the appeal directed at ensuring that the costs of the appeal are kept within proportionate bounds.”

³ [2011] CAT 29

⁴ [2009] CAT 19

⁵ [2006] CAT 1

10. Although the present case is a third party appeal against a decision to accept commitments, and accordingly is to be determined according to the principles of judicial review rather than on the merits, we consider that for the purpose of awarding costs the general approach set out above applies equally here.

ANALYSIS AND CONCLUSIONS

11. We consider first whether this case merits being referred for detailed costs assessment, as the CMA contends it should, before moving on to consider each head of costs claimed by Skyscanner.

A. Detailed assessment

12. The CMA contends that the amount of Skyscanner's claimed costs should be subject to detailed assessment by a costs officer of the Senior Courts Costs Office under rule 55(3) of the Tribunal Rules. The CMA argues that this would be appropriate since it considers that Skyscanner's cost schedule is insufficiently detailed, and costs officers have relevant and specialist expertise to assess the points in dispute. Skyscanner objects to this on the grounds that it was successful in its appeal and that the involvement of a costs officer would entail additional expenditure and delay which could be avoided by an award of costs on a summary basis.
13. Although in some cases such a detailed assessment may be appropriate, we do not think that approach would be appropriate here. First, Skyscanner has provided the Tribunal with a considerable amount of information as to the costs incurred and claimed. Second, this matter is not of such a nature or complexity, and the sums at issue are not so large, as to require the specific expertise of a costs officer. Finally, although the difference between the parties on the amount to be recovered remains significant, they broadly agree on the principles to be applied, disagreeing only as to the discount to be applied, the adequacy of detail that has been provided and the relevance of certain specific items.
14. We therefore have decided to make a summary award of costs on the following basis.

B. Solicitors' costs

15. Skyscanner's solicitors' costs were subject to a capped fee arrangement which means that the costs sought are less than 50% of those actually incurred. Having reviewed the profit costs breakdown (including the persons involved, their relative seniority, the time spent and hourly rates applied), and taking into account the amount of work involved, the absence of junior counsel and the importance of the appeal to Skyscanner's business, we consider that it is reasonable for these capped costs to be recovered in full, subject to the further considerations set out in section G. Had the costs not been so capped, we might have wished to conduct a more detailed examination but, in the circumstances, we do not consider it would be fair or appropriate to do so.

C. Counsel's costs

16. Skyscanner instructed one leading counsel but no junior counsel in relation to the appeal. As the application concerned a complex and developing area of law, instructing leading counsel was in our view justified. Having reviewed the time records provided (at our request) by Skyscanner, we consider that it is reasonable for these costs to be recovered in full, again subject to the further consideration set out in section G.

D. Economists' costs

17. Skyscanner instructed Oxera, a firm of economic consultants, to advise it in relation to the appeal and to produce a report on the economic effects of the Decision. Skyscanner negotiated a discounted fee arrangement, which meant that Oxera's time value of £104,311.26 was reduced to £77,538.45 (excluding VAT).
18. Oxera produced a detailed report on the effect of the Decision on competition in the supply of online hotel booking services and on the consumers of those services, including on Skyscanner's business. This Report was exhibited to the second witness statement of Carolyn Jameson, which was filed together with Skyscanner's skeleton argument.

19. Skyscanner submits that, given the CMA's insistence in the course of these proceedings that Skyscanner produce evidence of the alleged impact of the disputed Decision, it was reasonable for it to produce such a report and to recover its costs for doing so. The CMA, on the other hand, contends that the costs incurred by Oxera (and all related costs) are not properly recoverable and should be disallowed because Skyscanner did not apply for permission to adduce expert economic evidence and did not rely on any such evidence in its grounds of appeal or in its subsequent pleadings. The CMA further argues that the Oxera Report itself was referred to only briefly in argument before the Tribunal and not at all in the Judgment.
20. We understand Skyscanner's position with regard to why it sought to obtain economics advice, but nevertheless conclude that the CMA's objections are at least in part justified. We agree with the CMA that the Report was of very limited assistance in deciding the appeal, which was concerned not so much with assessing the actual effects of the Decision but rather with the fairness and rationality of the Decision when it was made. On that basis, we must disallow that part of the economic consultants' costs that is attributable to preparation of the Oxera Report (including £967.50 (discounted rate) for communications with Skyscanner in relation to the Oxera Report). However, we have not sought to allocate solicitors' or Counsel's costs by reference to the Oxera Report, as we consider the fee cap which was in place and the reduction for partial success discussed in section G below are sufficient to cover this. In any event, it appears that Counsel's involvement in the preparation of the Oxera Report was minimal.
21. We sought clarification from Skyscanner on the other cost items incurred by Oxera and are satisfied that all of these costs (in an amount of £14,787.82 at the discounted rate) were reasonably and proportionately incurred, and are therefore recoverable from the CMA, subject to the further considerations set out in section G.

E. Other disbursements

22. Skyscanner seeks to recover £5,525.93 of disbursements relating to copy charges, travel, subsistence costs, and other miscellaneous disbursements such as conference

calls and courier charges. The CMA has raised no specific objection to these other than to note that they seem high and that without detailed assessment it cannot say whether they are reasonable or proportionate.

23. In the context of this case, which is likely to have required considerable amounts of photocopying and travel (Skyscanner and their solicitors being based in Scotland) the amount is, in our view, reasonable and recoverable from the CMA in full, subject to the further considerations set out in section G.

F. Success fee

24. The CMA objected to the success fee element in Skyscanner's schedule of costs. Skyscanner responded by explaining that, on a proper reading of its costs claim, the success fee element was not included. Accordingly, there is no issue for us to decide.

G. Reduction for partial success

25. The question arises as to whether recoverable costs should be reduced, as the CMA claims, because Skyscanner did not succeed on all of the grounds on which it relied. Our view is that a small reduction is appropriate, but not the 25% claimed by the CMA.
26. Skyscanner's Ground 1, alleging that the commitments were *ultra vires* as they imposed obligations on third parties, did not succeed. Although this ground appeared in the Notice of Appeal and Skyscanner's skeleton argument in some detail, and the CMA without doubt had to plead in response to it, Ground 1 took up little time at the hearing. We do not agree with the CMA that it was put forward as a "knock-out blow". Instead it appeared as a point that did not stand up to close examination, and in the Judgment we described Skyscanner's decision not to press this ground as wise.
27. Nor do we agree with the CMA that Skyscanner only partly succeeded on Ground 3 (illegality and irrationality). As will be apparent from the Judgment, we were very nearly persuaded that the OFT's decision breached an overriding legal duty, as argued by Skyscanner, and the time and effort spent in argument on that point were

in no sense wasted or unnecessary. Many of the same considerations underlay our finding on the alternative ground of irrationality.

28. Overall, we regard Skyscanner as having been substantially successful in its appeal, and we do not think it appropriate to dissect the grounds of appeal for the purpose of our ruling on costs. Nevertheless, we do not wish to encourage the inclusion of appeal grounds that have little possibility of success and to reflect Skyscanner's lack of success on Ground 1, we find that a reduction of 5% from the recoverable costs is appropriate.

H. Statement of Objections

29. Skyscanner submits that, regardless of any reduction that the Tribunal might make to the costs claimed as a whole, it should be allowed to recover on an indemnity basis the costs associated with its successful application for disclosure of the OFT's Statement of Objections (see [2014] CAT 12). The CMA objects to recovery on an indemnity basis on the grounds that there was no suggestion by the Tribunal that the CMA's position was adopted in bad faith or was otherwise improper in any respect. Further, the CMA challenges the quantum claimed by Skyscanner.
30. The Statement of Objections made an essential contribution to the Tribunal's understanding of the OFT's original purpose leading to the Decision, and we presume Skyscanner found it similarly helpful. While we therefore agree with Skyscanner that it should not have been necessary to apply to the Tribunal for disclosure of this document, we consider that costs should be awarded on the standard basis. As the costs of the disclosure application form part of the overall sum claimed by Skyscanner in respect of its solicitors and Counsel, which we have already decided is recoverable in full subject to the 5% reduction set out in section G, we do not consider it necessary to consider these costs separately.

CONCLUSION

31. In the light of these considerations, we decide that Skyscanner should recover 95% of the following:

- (a) costs for solicitors and Counsel, including in relation to the application for disclosure of the Statement of Objections;
- (b) costs for disbursements; and
- (c) costs for economic consultants, save in relation to the Oxera Report.

32. We have calculated the amount payable as follows:

£78,902.00 - Solicitors' costs
£96,675.63 - Counsel's costs
£14,787.82 - Economic consultants' costs
£5,525.93 - Disbursements
£195,891.38
Less 5% discount: £9,794.57
£186,096.81

ORDER

33. We therefore order that the CMA pay to Skyscanner a sum of £186,096.81 in respect of its costs within 28 days of the date of this Ruling.

Peter Freeman CBE, QC
(Hon)

Brian Landers

Stephen Wilks

Charles Dhanowa OBE, QC
(Hon)
Registrar

Date: 26 November 2014