Neutral citation [2017] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1258/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

27 October 2017

Before:

THE HON. MR JUSTICE ROTH
(President)
MARGOT DALY
DR CLIVE ELPHICK

Sitting as a Tribunal in England and Wales

BETWEEN:

UKRS TRAINING LIMITED

Claimant

- v -

NSAR LIMITED

Defendant

RULING: COSTS

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1. On 5 July 2017, the Tribunal handed down judgment (the "Judgment") on a preliminary issue in this action, following a two day hearing. The issue was decided in favour of the Claimant and the Claimant has applied for its costs of that issue. The Tribunal has received written submissions from both sides and the Claimant appended to its submissions a detailed schedule of costs in support of its application that they should be summarily assessed. In accordance with the Tribunal's direction, the Defendant's solicitors submitted brief observations regarding the figures in the Claimant's schedule.

2. The Tribunal has a wide discretion regarding costs. Rule 104(2) of the Competition Appeal Tribunal Rules 2015 states:

> "The Tribunal may at its discretion…at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings."

Further, rule 104(4) states:

> "In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of –
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> (a) the conduct of all parties in relation to the proceedings;
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> (b) any schedule of incurred or estimated costs filed by the parties;
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> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
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> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 Offer to which costs consequences under rules 48 and 49 apply;
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount."

3. By its claim in these proceedings, the Claimant alleges that the Defendant abused a dominant position contrary to the Chapter II prohibition under sect. 18 of the Competition Act 1998 ("CA"). In response, the Defendant served an application to strike out the claim on the grounds that it was not an undertaking and therefore not subject to the Chapter II prohibition. By order made on 21 July 2016, the Tribunal directed that the question whether the Defendant was an undertaking for the purpose of sect. 18 CA would be determined as a preliminary issue. The Defendant duly served a defence confined to addressing that issue.

4. In their letter dated 11 August 2017 arguing that no order for costs should be made at this stage, the Defendant's solicitors state:

> "The preliminary issue before the Tribunal regarding the definition of the Defendant as an undertaking for the purposes of the Competition Act 1998 was a technical point of interpretation, and so did not go to any of the main aspects of the Claimant's case."

5. We do not accept that submission. On the contrary, it was fundamental to the claim that the Defendant was an undertaking since if it did not constitute an undertaking it would fall outside the scope of competition law. If the preliminary issue had been decided the other way, that would therefore have been the end of the case. Nor was this a technical question of interpretation. The legal criteria for determining what constitutes an undertaking are well established: see para. 67 of the Judgment. The issue before the Tribunal, as developed in detail by both sides, involved a factual investigation of the nature of the Defendant and its relevant activities. That was the reason why the Defendant called four witnesses of fact and both sides presented the Tribunal with a significant number of documents.

6. As already mentioned, the Defendant had applied to strike out the claim and it was consequent upon that application that the Tribunal ordered the hearing of a preliminary issue. Of course it is possible, as the Defendant points out, that the underlying claim may fail. But that will only be after a further trial, and in that event the Defendant will be able to seek its costs related to that further trial. The fact remains that if the Defendant had not raised this ground for resisting the claim, there never would have been a preliminary issue hearing and none of the costs which the Claimant now seeks to recover would have been incurred.

7. In *Merck KGaA v Merck Sharp & Dohme Corp & Others* [2014] EWHC 3920 (Ch), Nugee J rejected a similar argument that the defendants should not pay the claimant's costs of a preliminary issue on which the defendants had failed, stating at [6]:

> "It is in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial."

We respectfully agree.

8. In their submissions, the Defendant's solicitors further state:

> "…the preliminary issue presented by the Defendant clearly raised a sufficiently valid topic of discussion in order to necessitate a two-day hearing. This discussion was therefore evidently worth having and should not be deemed to be a mere frolic on the part of the Defendant."

9. We accept that submission, but that goes only to show that the Claimant's costs should be assessed on the standard basis and that there is no question here of the Claimant being awarded indemnity costs. Indeed, it does not make any such application.

10. Accordingly, we hold that the Claimant is entitled to its costs related to the preliminary issue, to be assessed on the standard basis.

Summary Assessment

11. For the Defendant, it is submitted that the costs should go to detailed assessment and that it is not appropriate for the Tribunal to make a summary assessment in this case. However, this was a relatively short hearing lasting two days and involving no expert evidence. There was no general disclosure but only specific disclosure pursuant to the President's order of 21 July 2016. The total costs claimed in the Claimant's schedule, as subsequently corrected, are £83,710.65 (including VAT). In those circumstances, we consider it would be disproportionate to send the matter off for detailed assessment. This is an appropriate case where the costs can be summarily assessed.

12. Taken as a whole, we do not consider the figure for fees is disproportionate for what was involved in this preliminary issue that required a two day hearing. This was a significant legal issue, the resolution of which depended on evaluation of the nature of what was involved in the regime for training in the rail engineering sector, which underwent a series of changes; and the way the Defendant was established and operated, and its relations with Network Rail. A significant number of documents had to be considered, and the Claimant itself served statements from two witnesses as well as, of course, having to consider the evidence from four witnesses called by the Defendant.

13. However, the fees also have to be reasonably incurred, and the Defendant challenges the reasonableness of the costs on several grounds. First, it alleges that it was not reasonable for the great majority of the solicitors' work to have been undertaken by a Grade A solicitor (i.e. over eight years' litigation experience) whereas much of it could have been delegated to a more junior lawyer. There is force in that argument, but it must be borne in mind that the Claimant's solicitors are a small, Central London firm and do not have the range of lawyers typically found at a large, commercial practice. While the Claimant could of course have instructed a larger firm, the hourly rate charged for the partner here (£350) is much less than found at such larger London firms that undertake competition litigation, and is indeed close to the rate now typically charged at such firms for Grade B solicitors. We do not think that the Claimant is to be criticised on this account for retaining the solicitors it instructed, although we take the point into account when looking at the overall level of fees charged for work on the documents.

14. The Defendant indeed also seeks to challenge the rates charged of £350 for Grade A and £150 for the Grade D fee earner as in excess of the Guideline rates. However, the Guideline rates (£317 and £126, respectively) are just that: they are "broad approximations only" and, as the *Guide to the Summary Assessment of Costs* (2005) states, at para 41: "Costs and fees exceeding the guidelines may well be justified in an appropriate case and that is a matter for the exercise of discretion by the court." Moreover, the guideline rates have not been updated since 2010. We consider that the rates charged are entirely reasonable for work in this specialised area.

15. Turning to the schedule of costs, we see nothing unreasonable in the Claimant's solicitors spending almost 7½ hours on attendance on their client. There were substantial issues of fact as well as strategy on which they would have had to take instructions. But the Defendant further challenges the time spent working on documents, as set out in the Claimant's schedule. Here, we do consider that not all the time allowed for seems reasonable, particularly bearing in mind that it is all charged at the Grade A rate. Such matters as checking listing, collating exhibits and preparing an index for the bundles should not be charged as fee earner's work, and certainly is not reasonable at Grade A. Further, the time spent reviewing transcripts (2½ hours for the transcript of the initial procedural hearing, and 3 hours on

10 October 2016, after the conclusion of the preliminary issue hearing) seems unreasonable. We mention these matters by way of the more striking examples. Since this is a summary assessment, it is not appropriate to conduct a line-by-line examination of the schedule of costs. Therefore, taking a broad brush approach, we reduce the fee for work on documents by 25%, to £22,554.12.

16. We see nothing unreasonable in Counsel's fees.

17. Since the Claimant has confirmed that it is registered for VAT, the VAT set out on the schedule is not recoverable from the Defendant.

18. Accordingly, we summarily assess the costs at £62,266.67. The Defendant is to pay this sum within 28 days of today's date, unless within 7 days it makes written representations seeking to justify a more extended payment period.

The Hon. Mr Justice Roth
President

Margot Daly

Dr Clive Elphick

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 27 October 2017