Neutral citation [2011] CAT 25

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1184/1/1/11

Victoria House
Bloomsbury Place
London WC1A 2EB

1 August 2011

Before:

MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

RG CARTER LIMITED
RG CARTER BUILDING LIMITED
RG CARTER CONSTRUCTION LIMITED
RG HOLDINGS LIMITED

Applicants

-v-

OFFICE OF FAIR TRADING

Respondent

JUDGMENT ON APPLICATION FOR AN EXTENSION OF TIME

INTRODUCTION

1. On 21 September 2009, the Office of Fair Trading ("OFT") published an infringement decision entitled *Case CE/4327-04: Bid rigging in the construction industry in England* ("the Decision"). The Decision found that, between 2000 and 2006, 103 undertakings had been party to one or more agreements and/or concerted practices infringing section 2 of Chapter I of the Competition Act 1998 (the "Chapter I prohibition"). Penalties amounting to £129.2 million in total were imposed on those undertakings found to have infringed the Chapter I prohibition.

2. Admissible appeals against the Decision were lodged by 25 companies ("the Appellants") before the Tribunal. An application to extend time in order to allow an appeal by a twenty-sixth appellant, lodged three days late as a result of an administrative error, was rejected by the President of the Tribunal in *Fish Holdings Limited v Office of Fair Trading* [2009] CAT 34.

3. In a series of judgments handed down between March and April 2011, the Tribunal (comprised of a number of differently constituted panels) upheld some of the challenges made against the Decision, which in the majority of cases led to substantial reductions in the penalties originally imposed by the OFT: *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3; *GF Tomlinson Building Limited and others v Office of Fair Trading* [2011] CAT 7; *Barrett Estate Services Limited and others v Office of Fair Trading* [2011] CAT 9.

4. In summary, the Tribunal panels concluded *inter alia*:

    (a) That the final penalties imposed on the Appellants were excessive given the nature of the infringements found by the OFT to have been committed (see e.g. *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3 at paragraph 108);

    (b) That the OFT's interpretation of its guidance, contained in a document published in December 2004 entitled *Guidance as to the appropriate*

amount of a penalty ("the Guidance"), as meaning that "relevant turnover" was measured in the undertaking's last business year prior to the Decision was incorrect (see e.g. *Kier* paragraphs 130 to 139); and

(c) That the Minimum Deterrent Threshold, used by the OFT at Step 3 of the Guidance, was by its nature and application such as to give rise to penalties which were excessive and disproportionate (see e.g. *Kier* paragraphs 164 to 186).

The OFT did not seek permission to appeal any of the judgments of the Tribunal to the Court of Appeal.

5. In the Decision, the OFT found RG Carter Limited, RG Carter Building Limited and RG Carter Holdings Limited (together with RG Carter Construction Limited, "the Applicants") jointly and severally liable for three infringements of the Chapter I prohibition (referred to in the Decision as Infringements 202, 210 and 222) and imposed a penalty totalling £2,981,580. The Applicants did not, at the time the Decision was originally published, seek to appeal the Decision to the Tribunal and the penalty has since been paid in full to the OFT. In paragraph 4 of their written application to extend the time limit to appeal against the Decision (the "Application"), the Applicants explained this decision not to appeal in the following terms:

> "The decision not to appeal was based upon advice received by the Applicants that the OFT should be presumed to have properly interpreted its own guidance on penalties..., as to the appropriate year base against which to assess turnover and in relation to gravity, and that the Tribunal's past approach to a minimum deterrant threshold would be upheld by the Tribunal. The fine was paid in full."

6. Following handing down of the Tribunal's judgments referred to in paragraph 3 above, the Applicants sought fresh legal advice. On 10 May 2011, they wrote to the OFT in which they referred to the Tribunal's *Kier* judgment dated 11 March 2011, and requested a proposal from the OFT for a refund of "that proportion of our penalty that has been affected by the errors you made in your calculations". The OFT acknowledged receipt of the Applicants' letter on 13 May 2011 and stated that the Applicants' request for a refund had been passed to the Office of the General Counsel of the OFT. The

Applicants wrote again to the OFT on 10 June 2011, once more requesting the OFT's proposals for a refund. However no response to that letter was received.

7. By the Application, which was dated 23 June 2011, the Applicants applied to the Tribunal for an extension of time under Rule 8(2) of The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) (the "Tribunal Rules"). On 28 June 2011, the Tribunal wrote to the Applicants and the OFT setting out a timetable for the filing of further written submissions and stating the Tribunal's provisional view that the Application could be considered without an oral hearing.

8. Subsequent to the Application, the OFT filed written submissions in response, dated 8 July 2011 (the "Response") and the Applicants have filed a written reply, undated but received by the Tribunal on 13 July 2011 (the "Reply").

9. Neither of the parties requested an oral hearing, and the Tribunal does not consider one to be necessary for the determination of this application. The Tribunal has considered this application on the papers, specifically the Application, the Response and the Reply, and the documents referenced therein.

THE TRIBUNAL RULES

10. The procedural requirements relating to appeals are set out in the Tribunal Rules. The Applicants' application for an extension of time is governed by Rule 8 of the Tribunal Rules, which, so far as relevant, provides as follows:

> "**Time and manner of commencing appeals**
>
> 8. - (1) An appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.
>
> (2) The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional.
>
> …"

11. The Tribunal's *Guide to Proceedings* (October 2005) (the "Guide"), which has the status of a practice direction issued by the President pursuant to Rule 68(2) of the Tribunal Rules, is intended to give practical guidance for parties and their legal

representatives as to the procedures of the Tribunal. Section 6 of the Guide, so far as relevant, provides:

> "**RESTRICTED POWER TO EXTEND TIME FOR APPEALING**
>
> 6.14 Under Rule 8(2), the Tribunal may not extend the two-month time limit for appealing 'unless satisfied that the circumstances are exceptional'. The possibilities of obtaining an extension of the time limit for appealing are thus **extremely limited**. (The comparable rule in the Rules of Procedure of the CFI, which is to be found in Article 42 of the Statute (EC) of the Court of Justice, requires the party concerned to prove the existence of unforeseen circumstances or of force majeure: see *Hasbro v DGFT* [2003] CAT 1)." (emphasis in original)

THE APPLICANTS' AND THE OFT'S SUBMISSIONS

12. It is accepted by the Applicants that the Tribunal must be satisfied that the circumstances are exceptional before an application to extend time for appealing under Rule 8(2) can succeed. They refer in this regard to the Order of the President of the Tribunal in *Prater Limited v OFT* [2006] CAT 11, where he stated as follows (paragraph 30):

> "The time limit for commencing an appeal under Rule 8(1) is central to the Tribunal's Rules and the entire case management system operated by the Tribunal. In that context the need for clarity and certainty is paramount. The Tribunal receives a great number of complex and lengthy documents in many different kinds of cases, often within short deadlines. It is imperative that the present Rules be strictly observed."

13. In support of their application, the Applicants relied upon the two step process laid down by the Court of Appeal in *The "Al Tabith" and "Alanfushi"* [1995] 2 Lloyd's Reports 336. That case, which concerned an application to extend the two year limitation period allowed under section 8 of the Maritime Conventions Act 1911, was previously considered by the Tribunal in *BCL Old Co Limited and others v BASF SE and others* [2009] CAT 29, where the Tribunal refused an extension of the two year time limit laid down by Rule 31 for bringing claims for damages under section 47A of the Competition Act 1998. The Applicants submit that their application fulfils the two requirements set down in *The "Al Tabith"*, namely: (i) that there were good reasons why they did not appeal the Decision within the prescribed time limit; and (ii) that it is in the interests of justice that their appeal is heard.

14. In relation to the first requirement, the Applicants contend that, following publication of the Decision by the OFT, they acted on legal advice which was based upon a view of

the legal position which subsequently turned out to be wrong. They submit, further, that the legal interpretation obtained at the time was not an untenable one and that, in any event, the scale and gravity of the OFT's errors in calculating the penalties imposed by the Decision, as found by the Tribunal, were unprecedented. In those circumstances, the Applicants submit that their decision originally not to seek to appeal the Decision was understandable and the circumstances exceptional.

15. Secondly, the Applicants submit that it is in the interests of justice that their appeal be heard. In support of this submission, they refer to the quasi-criminal nature of the penalty imposed upon them by the OFT pursuant to section 36 of the Competition Act 1998 (see *Napp Pharmaceuticals v Director General of Fair Trading* [2002] CAT 1, at paragraph 98) and the virtual certainty that such a penalty would be substantially reduced were the Tribunal now to hear an appeal by the Applicants. Retention by the OFT of the penalty levied on the Applicants in those circumstances would not, they submit, be in the interests of justice.

16. The Applicants further contend that refusal to grant permission to extend time in circumstances where they have suffered reputational and financial harm would breach their right to a fair trial, protected by Article 6 of the European Convention on Human Rights ("ECHR").

17. Finally, the Applicants argue that such reputational and financial harm that they would suffer were the Tribunal to refuse to extend time outweighs any prejudice the OFT might suffer were their application to be granted.

18. The OFT's response to the Applicants' submissions may be shortly stated:

    (a) Firstly, the OFT contends that the test mandated by Rule 8(2) of the Tribunal Rules means that the cases where "exceptional circumstances" are likely to be found to exist are rare (citing the judgment of President in *BSkyB v Competition Commission* [2008] CAT 1, where he considered an application for an extension of the four week period to appeal under section 120(1) of the Enterprise Act 2002 and Rule 28). As such, once the two month period for appeals set out in Rule 8(1) had expired, the OFT was

entitled to assume that the Decision was finally determinative in respect of all non-appealing addressees.

(b) Secondly, there is nothing "exceptional" about the circumstances raised by the Applicants. Any company which decided not to appeal an adverse decision after taking legal advice which, with the benefit of hindsight, did not correctly anticipate the likelihood of success would find itself in a similar position. In particular, the 76 other addressees of the Decision who had chosen not to appeal to the Tribunal would be in the same position. More generally, any appeal against a Chapter I infringement decision will likely involve a consideration of general issues that could potentially have an impact on those undertakings that choose not to appeal.

(c) The OFT dismisses as inapposite the cases relied upon by the Applicants drawn from other contexts, in particular the reliance they seek to place on the Tribunal's judgment in *BCL*. A more pertinent comparison, the OFT submits, would be the very strict rules on limitation applied by the General Court and the European Court of Justice.

(d) Finally, the OFT rejects the Applicants' reliance on Article 6 ECHR and submits that, even in the criminal context, the imposition of time limits will not be struck down provided that they are not too short or too vigorously enforced, neither of which applies here. No unfairness can be alleged by the Applicants in circumstances where all the addressees of the Decision had an equal opportunity to lodge appeals to the Tribunal.

ANALYSIS

19. The Tribunal Rules do not permit the Tribunal to extend the two month time limit in Rule 8(1) unless it is satisfied that the circumstances are exceptional. Having carefully considered the points raised by the Applicants in support of their application to extend time, I do not consider that the circumstances of this case can be properly regarded as "exceptional" such as to warrant the exercise of my discretion under Rule 8(2).

20. The Decision, which (by this application) the Applicants seek permission to appeal, is unusual in its scope: it followed an extensive investigation, which took place over some five and a half years; it runs to nearly 2,000 pages; and it is addressed to some 103 undertakings. These facts were all known to all addressees of the Decision, and it was for them to consider (in the light of their own particular circumstances) how to respond to it. I do not consider that the circumstances in which the Decision was taken should have any bearing on the Tribunal's assessment of whether the test for exceptional circumstances for extending time under Rule 8(2) is met. By definition, these are facts and matters that will be known at the time the decision in question is published.

21. Decisions which penalise breaches of the Chapter I prohibition will often, by their nature, tend to involve consideration of the activities of multiple undertakings over the course of many years. Multiple addressees of such decisions are the rule, and not the exception. Whilst some addressees may seek to appeal such decisions, others, for whatever reason, may not. The Decision in this case is no different, save in terms of scale, which I do not regard as a relevant factor.

22. In paragraph 4 of the Application, the Applicants stated that they based their decision not to appeal on legal advice to the effect that the OFT should be presumed to have interpreted properly its own Guidance. In the event, the Tribunal found that the OFT had misinterpreted and misapplied its Guidance in a number of respects. Such an outcome, however, could scarcely have been regarded as unforeseeable when the Applicants were considering whether or not to appeal the Decision between September and November 2009. The fact that a decision is successfully challenged on an appeal can scarcely be described as "exceptional": the whole point of the appeal process is to enable decisions to be challenged. A number of other addressees of the Decision (26 in total) decided to appeal the Decision in November 2009, albeit one (Fish Holdings Ltd) was out of time.

23. The truth of the matter, in the present case, is that the Applicants, having made an informed decision not to appeal, now regret that decision in the light of the outcomes of the appeals that were made by other addressees of the Decision, and now seek to re-visit that decision. The exceptional circumstances relied upon by the Applicants amount to nothing more than the normal decision process that any addressee of a decision goes

through when deciding whether or not to appeal. It is simply that in this case, with the benefit of hindsight, the Applicants wish to change their decision not to appeal.

24. I agree with the OFT that a circumstance that applies equally to the 76 other addressees to the Decision who chose not to appeal cannot be considered exceptional. No injustice is caused to the Applicants by my refusal to extend time under Rule 8(2). They enjoyed precisely the same opportunity as every other addressee of the Decision to lodge an appeal in time at the Tribunal, but they chose not to do so.

25. The Applicants' circumstances are not exceptional and cannot be compared with those circumstances considered to be exceptional by the Tribunal in *Prater* and *BSkyB*. In the former case, the Tribunal granted the appellant an extension of some 40 minutes when Prater's representatives encountered difficulties lodging hard copies of its notice of appeal, but had sent by e-mail a signed copy of the notice of appeal to the Tribunal Registry in advance of the 5pm deadline. In *BSkyB*, the President extended time for appealing the Competition Commission's report into the acquisition of a stake of 17.9 per cent of the shares in ITV plc, so as to be coterminous with the expiry of the deadline for appealing the related decision of the Secretary of State for Business, Enterprise and Regulatory Reform, due to the considerable consequent case management and other procedural advantages (see *BSkyB* at paragraph 32). The President was also persuaded by the fact that the proposed respondents and third parties did not object to the requested extension, and that the application was made prior to the expiry of the deadline for the Secretary of State's decision. Such considerations do not apply here.

26. I am in some doubt as to whether specific prejudice to the OFT is a relevant factor in determining whether exceptional circumstances exist. I have reached my conclusion that exceptional circumstances do <u>not</u> exist in the present case without considering the question of specific prejudice to the OFT, or the relevance of that question. (I would only note that, in paragraph 16(a) of the Application, the Applicants suggested that it would be unjust for the OFT to retain the penalty that had been paid by the Applicants to the OFT. Pursuant to section 36(9) of the Competition Act 1998, any penalties levied by the OFT for breaches of Chapter I are subsequently paid into the Consolidated Fund.

The penalties paid to the OFT following publication of the Decision, including those of the Applicants, have not therefore been retained by the OFT.)

27. What is important – and what underlies the existence of a strict limit for the time for making an appeal – is the need for certainty and finality of process. In that regard, I share the views expressed by the President in *Fish Holdings Limited v Office of Fair Trading* [2009] CAT 34 at paragraph 21:

> "…Where no challenge to a decision is lodged with the Tribunal within the time allowed for doing so, the OFT and everyone else is entitled to assume that the decision in question is definitive. Where, exceptionally, time is extended that assumption is undermined. It seems to me that there is some inevitable prejudice to legal certainty in that regard, as well as in the effort and expense entailed in defending the decision and in processing the appeal…"

Almost two years have now elapsed since the Decision was published in September 2009. The oral hearings of the appeals lodged in time against the Decision were defended by the OFT before the Tribunal in the course of June and July 2010. There can be no doubting that the OFT expended considerable time and resources in seeking to defend its Decision against multiple and varied attacks from 25 well-represented appellants. A substantial period of time has passed since the Decision was published. It is only right and proper that anyone considering the Decision should now be able to assume that, absent truly exceptional circumstances, the Decision can be considered to be immutable against those undertakings that chose not to appeal the Decision before the deadline set down by Rule 8(1) expired in November 2009.

28. I consider the Applicants' reliance on Article 6 ECHR to be misplaced. As the OFT noted in paragraph 30 of the Response, it is well-established that the imposition of a time limit on appellate proceedings does not infringe Article 6 ECHR as long as such limits are not too short or vigorously enforced. It is not contended that two months is too short a period, and I do not consider that the exceptional circumstances test in the Tribunal Rules to be unduly stringent or rigorous. The test is intended to allow extensions of time in appropriate circumstances; for the reasons I have given, an extension of time in the present case would be inappropriate and wrong.

29. In conclusion, I cannot identify any circumstances which could be regarded as exceptional within the meaning of Rule 8(2). The Applicants' application for an extension of time under Rule 8(2) of the Tribunal Rules is accordingly refused.

Marcus Smith QC

Charles Dhanowa
Registrar

Date: 1 August 2011