Neutral citation [2016] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1249/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

21 June 2016

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

SOCRATES TRAINING LIMITED

Claimant

- v -

THE LAW SOCIETY OF ENGLAND AND WALES

Defendant

Heard at Victoria House on 21 June 2016

JUDGMENT (COSTS CAPPING)

APPEARANCES

Mr Philip Woolfe (instructed by Socrates Training Limited) appeared on behalf of the Claimant.

Ms Kassie Smith QC (instructed by Norton Rose Fulbright LLP) appeared on behalf of the Defendant.

1 This case has been allocated to the fast-track procedure ("FTP") by Rule 58 of the Competition Appeal Tribunal Rules 2015. That means that the amount of recoverable costs is to be capped at a level determined by the Tribunal: Rule 58(2)(b).

2 The FTP was introduced pursuant to an amendment to the Enterprise Act 2002 made by the Consumer Rights Act 2015, which came into force on 1 October 2015. This is the first case to proceed this far under that new regime.

3 The policy behind the FTP was explained in the Government White Paper of January 2013, *Private Actions in Competition Law* (see paragraph 4.22 and following). It is a procedure particularly designed to help small and medium sized enterprises ("SMEs") to obtain access to justice in an appropriate case. That reflects a view widely expressed in the prior consultation that the cost and complexity of competition actions deter smaller companies from pursuing their rights, particularly as regards injunctive relief. I believe that it is inherent in a claim where the main remedy is an injunction that the opportunities for outside funding are more limited, since the successful outcome will not produce a large sum of damages from which the funder may be rewarded.

4 In the present case, the claimant is an SME with an annual turnover of some £750,000. The claim alleges an abuse of dominant position by the defendant, the Law Society, and seeks an injunction and damages. The part of the case that is subject to the FTP by order of the Tribunal is limited to the injunction claim. If an abuse is established, then the question of damages has been split off for a subsequent trial outside the FTP. However, it is relevant to note that the damages are quantified in the claim form at £112,500, on the basis that by reason of the conduct complained of the claimant has lost the custom of some 75 firms who would spend some £600 each for two and a half years. In pure financial terms, as a competition action this is not a large claim. Of course, if an injunction were not granted after trial, the ongoing loss would be greater, so it may be said that the value of the claim is not limited to the damages to trial but extends several years into the future. Even so, it is hard to see that in broad terms it is over £500,000.

5 Both sides have put in costs budgets as directed. The claimant's budget is in the total sum of some £220,000, which includes almost £56,000 for an expert economist. The

defendant's budget is a little over £637,000, including a little over £33,000 for an expert economist.

6 One would expect the defendant's budget to be significantly higher than the claimant's in this case for a number of reasons:

(a) The claimant is conducting the solicitors' work in-house, with limited external assistance at the solicitors' level. This still entitles it to charge a commercial fee, but it does not have the overheads of a large solicitors' firm.

(b) The Law Society, having initially instructed a well-known firm of solicitors in Birmingham, then changed to instruct a major firm in the City of London. Of course the Law Society is fully entitled to use a City of London firm, and there is nothing remotely unreasonable about its decision to use a firm in the City with specialist competition expertise for a competition claim. But that decision has obviously resulted in significantly higher costs: for example, the hourly rate being charged by the partner in the City of London firm is almost exactly double the rate by the partner previously handling the case in Birmingham.

(c) This is so although, as Mr. Scott, a partner in the Law Society's current solicitors, explains in his witness statement and as I accept, the solicitors have reduced their fees below their usual commercial rate. However, even with this reduction the charge amounts to £395 an hour for the partner and £315 an hour for a senior associate. I note that the trainee solicitor is charged at £150 an hour.

(d) The amount of work the Law Society's solicitors will have to do on this case will exceed the work of the claimant's legal advisers: in particular, as Ms Smith QC has stressed, the Law Society is a large organisation and so the relevant documents are more widely dispersed; inevitably more individuals will have to be interviewed, and it is indeed calling a few more witnesses in all probability than the claimant; and the disclosure burden on the Law Society under the Tribunal's order, albeit that this is targeted and not standard disclosure, is higher than the burden on the claimant. Moreover, the Law

Society is advancing a positive case on objective justification as well as defending the allegations against it.

7 In deciding what costs cap is appropriate, I start by looking at the costs budget of the Law Society's solicitors. Even accepting the level of charge per fee earner, I consider that in terms of the modern approach to costs, the overall figure in excess of £600,000 is disproportionate for a case of this nature, where the trial is estimated to last three to four days. Looking at the individual elements in that costs budget, I make just a few comments:

(a) So far, this case has involved the preparation and then amendment of a defence, which was drafted by counsel, attendance at one case management conference and consideration of issues concerning disclosure, but not any actual disclosure. I find it surprising and certainly not reasonable that the solicitors have spent 450 hours since being instructed on the 25 April 2016 at a cost of almost £140,000.

(b) I note that the fees for preparing witness statements are calculated on the assumption that each of the four witness statements would be 30 pages in length. Even on that assumption, I do not think it is reasonable or necessary for the partner to devote 40 hours to reviewing those witness statements, and reviewing the statements of no more than three witnesses from the other side, when the other members of the team are also devoting 235 hours to this task. In addition, there is a charge of £16,000 for counsel's work under the same head.

(c) Given that the expert economist is charging the fees of some £33,000 for his or her work on the experts' reports, which I do regard as reasonable, it is not, in my view, reasonable or necessary for the solicitors and counsel to incur further fees of over £50,000 in connection with the preparation of the expert's report, which, of course, has to be prepared by the expert not by them, and then consideration of the report produced by the other side's expert. Some expenditure of time on that is clearly justifiable, but, in my view, not this much.

(d) For the solicitors to charge over £103,000 for trial preparation and attendance at a three to four day trial - all that, of course, quite apart from counsel's fees - seems to me excessive. I should observe that it is, of course, the claimant's solicitors, not the defendant's solicitors, that will be preparing the trial bundles and this is not a case where those bundles will comprise many thousands of documents.

9 Those are just a few particular elements that have struck me from an initial review of the costs budget. On a detailed assessment the review would, of course, be more intensive. But under the post-Jackson approach, if I can so describe it, to standard costs that has applied in the High Court since 1 April 2013, as set out in the new CPR Rule 44.3, the court will only allow costs which are proportionate to the matters in issue. Rule 44.3(2)(a) expressly states:

> "Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred . . ."

Further guidance on proportionality is given in CPR r.44.3(5) and r.44.4(3).

10 Those same principles will apply to the assessment of costs incurred in the Tribunal, which in an English case such as this may be carried out by a costs officer of the Senior Courts of England and Wales. It is important to ensure that costs are at a level that is not disproportionate to what is involved in the case, which includes not only the monetary value of the claim but also has regard to the significance for the parties of the issues raised. I accept that in this case the issues are significant for both sides.

11 However, although the decision of the Law Society to change from Birmingham to City of London solicitors, as I have said, cannot be criticised as unreasonable, it does not follow that the Law Society is entitled to place the resulting significantly increased costs on the claimant, particularly where the Law Society is also using specialist Leading Counsel.

12 As Leggatt J stated in the High Court in the case of *Kazakhstan Kagazy PLC & Ors v Zhunus* [2015] EWHC 404 (Comm) at [13], in addressing the question of the standard basis of recoverable costs:

> "The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party."

13 Altogether, taking account of all these factors, I would expect that if the Law Society was wholly successful and the claimant was held fully liable for its costs, the Law Society's costs would be reduced on a standard basis of assessment to well below £0.5 million.

14 However, that is still an enormous potential liability to face a small company if it is to bring a case which cannot be dismissed as fanciful. In my view, the measure of cost capping under the FTP is not to be approached as a form of *ex ante* standard assessment. In particular, where parties are of very disparate means, it is important that those costs strike a fair balance between enabling access to justice for the claimant and providing a measure of protection to the defendant not only from unmeritorious claims but also from the burden of having to defend a claim which it is assumed for this purpose proves to be unfounded. That may mean that in some cases the amount is not the sum required to achieve justice only for the receiving party, but a limited contribution to that party's costs.

15 There is no magic formula which produces an objectively "correct" figure. I have regard to the various factors which I have mentioned, including the fact that the claimant itself is prepared to spend over £200,000 on this claim. And, as I have said, I fully recognise that this case raises some important issues of policy for the Law Society in the way that it provides commercial services.

16 Standing back, on the material now before the Tribunal, in my judgement the appropriate figure for a cap on the claimant's recoverable costs from the Law Society is £200,000, and the appropriate figure for a cap on the Law Society's recoverable costs

from the claimant is £350,000. As I have observed, that of course does not preclude the Law Society from paying a greater sum to its own solicitors; these costs are the maximum costs which the other side is liable to pay. I would observe that for most SMEs at the smaller end of the scale, and this is, as Mr Woolfe pointed out, a category that encompasses quite a range, to contemplate bringing a claim where the total costs risk is in excess of £0.5 million is a very substantial sum indeed.

17 I should mention two additional matters:

(a) The figure in each case is a maximum. It does not mean that the respective party will, in fact, recover that sum if it is successful. All the usual considerations which govern an award of costs after trial would then have to be considered.

(b) I have reached these figures on the evidence as it is today. Either side has permission to apply to amend that figure up or down if it should emerge between now and trial that there has been a material change in the shape of the case. But I emphasise the word 'material' change and in saying this I do not intend to encourage any such applications.

The Honourable Mr Justice Roth
President of the Competition Appeal Tribunal

Charles Dhanowa O.B.E., Q.C. Date : 21 June 2016
(Hon)
Registrar