Neutral citation [2011] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1135/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

5 July 2011

Before:

VIVIEN ROSE
(Chairman)
GRAHAM MATHER
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) INTERCLASS HOLDINGS LIMITED
(2) INTERCLASS PLC

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

RULING ON REQUEST FOR PERMISSION TO APPEAL

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1. On 24th March 2011 the Tribunal handed down a judgment in six appeals, including this one, challenging the level of the penalty imposed by the OFT in the Decision ([2011] CAT 7, "the Judgment"). The abbreviations used in this ruling bear the meaning given to them in the Judgment.

2. In the Decision the OFT fined Interclass a total of £464,406 for engaging in two instances of collusive tendering contrary to the Chapter I prohibition (referred to in the Decision as Infringements 75 and 150). For the reasons set out in the Judgment, the Tribunal set a penalty for Interclass of £324,000, divided equally between the two Infringements. Interclass now seeks permission to appeal against the Judgment arguing that the fine set by the Tribunal is still disproportionate and unjust.

3. An appeal lies from the decision of the Tribunal as to the amount of a penalty without the need for a point of law to be identified: see section 49 of the 1998 Act. The circumstances in which the Tribunal will grant permission to appeal are set out in the Civil Procedure Rules. Permission may be given where a proposed appeal appears to have a real prospect of success or where there is some other compelling reason why the appeal should be heard by the Court of Appeal: CPR r 52.3(6).

Percentage reduction in fine set by the Tribunal

4. Interclass's primary complaint is that the fine set by the Tribunal was only 30 per cent lower than the fine imposed by the Decision whereas it estimates that the other 22 appellants whose fines were assessed by the Tribunal had their fines reduced by between 60 and 94 per cent.

5. Interclass's challenge is, in our judgment, misconceived. First, the Tribunal does not determine the fine by assessing by how much in absolute or percentage terms the fine imposed by the OFT should be reduced. That would be contrary to the approach required by the 1998 Act which is, as the Tribunal stated in *Napp*, to review the penalty *ab initio* and arrive at its own assessment in the light of the facts and matters before the Tribunal at the stage of its judgment: see the passage cited at paragraph 68 of the Judgment. Interclass's comparison of percentage reductions is not, therefore, a legitimate exercise.

6. Secondly, the extent of the reduction in penalty in the 22 appeals depended on a number of factors; in particular the substitution of the Infringement Year turnover figures for the Decision Year figures; the rejection of the OFT's MDT calculation; and the overturning of findings of liability. As to the first of these factors, the difference between the Decision Year turnover used by the OFT and the Infringement Year turnover used by the Tribunal varied widely among the appellants. For some, this change at Step 1 lead to a very substantially reduced level of fine by Step 2; for others the reduction was not so great. This was something outside the control of the parties or of the Tribunal but was, in accordance with Step 1 of the *Guidance*, properly reflected in the ultimate level of the fine: see the discussion in paragraph 155 of the Judgment. Interclass benefited from the substitution of the Infringement Year figures at Step 1 even though the arguments on which it relied in support of this ground were rejected by the Tribunal: see paragraph 216 of the Judgment.

7. As to the second factor, Interclass's fine had not been increased to reflect the OFT's MDT in the Decision and so was not affected by the very substantial reductions resulting for some appellants from the Tribunal's decision on that point. Finally, two of the appellants to which Interclass compares itself (Durkan and North Midland) had their fines reduced because they won their appeal against liability in respect of one of the infringements for which the OFT had imposed a fine. Interclass did not challenge the two findings of infringement for which it was fined and so was not affected by this factor.

8. In our judgment, the fact that Interclass's penalty was reduced by a smaller percentage than those of other appellants does not constitute a ground of appeal. We have cautioned against relying on comparisons of this kind as a basis for alleging that the penalties were discriminatory as between addressees of the Decision: see paragraph 157 of the Judgment. It is not possible simply to compare one fine with that of the other appellants – or one percentage reduction with another – in order to conclude that the fine was disproportionate or unfair; each case must be assessed on its own facts.

Unjustified doubling of the penalty

9. In the Tribunal's determination of the fine, Interclass's aggregate penalty arrived at by applying taking 5 per cent of turnover in the Infringement Year was £285,533. Interclass' worldwide group turnover was about £24.5 million in the year ending 31 October 2008. The Tribunal concluded that in the light of all relevant circumstances, a penalty in excess of that amount was necessary in order to act as a deterrent. We do not accept that the Judgment, read as a whole, failed to disclose the reasons for the doubling of the penalty. The reasons for and against increasing the fine at Step 3 were fully explained in the earlier sections of the Judgment in particular paragraphs 161 to 164 describing how the Tribunal went about determining the fine in each of the six appeals and paragraphs 79 to 81 concerning the Tribunal's conclusions as to the seriousness of the infringements condemned in the Decision. It was sufficiently clear that these paragraphs of the Judgment applied to Interclass's case without the Tribunal needing to recite those factors in relation to each of the six appeals covered by the Judgment.

10. We also disagree with Interclass's assertion that other panels hearing different appeals against the Decision did not use multipliers to uplift the penalties arrived at by Step 2 of the calculation. In *Kier* several of the fines determined for appellants before that Tribunal panel were increased very substantially at Step 3. The fact that this was not expressly calculated using a figure as a multiplier but rather by increasing the fine to a larger round figure does not, in our view, make any difference.

Rejection of the financial hardship plea

11. Interclass argues that its overall fine should have been further reduced by the Tribunal because of its alleged financial hardship. The OFT had rejected Interclass's request for a reduction on this basis entirely. The Tribunal concluded that Interclass's specific criticisms of the OFT's treatment of its financial hardship claims were unjustified. However, having considered the financial data provided by Interclass in support of this ground, we reduced the fine by 20 per cent to reflect the Interclass undertaking's poor financial performance in the year ending 31 October 2009.

12. Interclass raises two challenges to the Tribunal's treatment of its claim of financial hardship. As to the position of directors, Interclass submits that the Tribunal (effectively) required individuals to forgo their contractual remuneration and made them liable for breaches of the Act. This is a mischaracterisation of what the Tribunal decided. At paragraph 232 of the Judgment, the Tribunal found that the substantial increase in its directors' emoluments for the year ended 31 October 2008 cast doubt on Interclass's claim of hardship. This did not make those individuals liable for an infringement of the Act. Rather, the point was that Interclass could not ask the Tribunal to reduce the fine to enable the company to stay afloat, when its financial woes were in part caused by the payment to its directors of substantial bonus or pension contribution entitlements. We disagree with Interclass's submission that the Tribunal should have ignored the financial position of the directors when considering the overall health of the undertaking in the relevant year. The Tribunal is entitled to take a realistic, commercial approach to this issue based on the nature of the undertaking under consideration and our assessment of the financial evidence put before us. Interclass's assertions in its request for permission to appeal that the penalty set by the Tribunal "will tip Interclass over the edge" and result in the loss of jobs is not evidence on which the Tribunal can base its decision. That evidence, in the form of Interclass's statutory accounts, was placed before the Tribunal during the appeal and our assessment of that evidence wsas explained in the Judgment.

13. Interclass also argues that the Tribunal failed to take sufficient account of the relative lack of seriousness of its Chapter I infringements when deciding how much to deduct for financial hardship. We do not see that there is or should be any direct relationship between the thresholds set for financial hardship reductions and the seriousness of the infringements. The latter is a matter which is considered when setting the starting point percentage used in Step 1: see paragraph 235 of the Judgment.

The Tribunal's rejection of other points raised by Interclass

14. As regards, lastly, the various points made by Interclass in its notice of appeal, these are a re-run of arguments before the Tribunal and, for the reasons given in paragraphs 124-130 and 146-148 of the Judgment, those arguments do not have any prospect of success.

Conclusion

15. For all the foregoing reasons the Tribunal unanimously refuses Interclass's request for permission to appeal. We do not consider that any of those grounds has a reasonable prospect of success and there is, in our view, no compelling reason for a higher court to consider this matter.

16. The Claimants may, if so advised, renew their application for permission to the Court of Appeal within 14 days pursuant to CPR r 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application to the Court of Appeal be made, a copy of this ruling together with copies of Interclass's letter of 27 May 2011 requesting permission to appeal and the OFT's response dated 17 June 2011 should be placed before the Court of Appeal.

17. The Tribunal accordingly orders that Interclass's request for permission to appeal be refused.

Vivien Rose Sheila Hewitt Graham Mather

Charles Dhanowa
Registrar Date: 5 July 2011