



Neutral citation [2018] CAT 16

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1279/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

15 November 2018

Before:

ANDREW LENON Q.C.
(Chairman)
PROFESSOR JOHN BEATH O.B.E.
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

PING EUROPE LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (PERMISSION TO APPEAL)

A. BACKGROUND

1. On 7 September 2018 the Tribunal handed down its judgment in these proceedings ([2018] CAT 13) (the “Judgment”). This Ruling adopts the same defined terms as are set out in the Judgment.
2. In the Judgment, the Tribunal dismissed Ping’s appeal on liability but reduced the penalty imposed on Ping from £1.45 million to £1.25 million.
3. On 28 September 2018 Ping applied for permission to appeal in respect of the Judgment. Both Ping and the CMA were content for the issue of permission to be dealt with on the papers.
4. Pursuant to section 49 of the 1998 Act, an appeal lies from a decision of the Tribunal to the Court of Appeal both as to the amount of any penalty imposed and on a point of law arising from any decision of the Tribunal on an appeal against an infringement decision. In considering whether to grant permission to appeal to the Court of Appeal in England and Wales, the Tribunal applies the test in what is now CPR rule 52.6(1) such that permission may only be granted where: (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.
5. Ping contends that it has a real prospect of success on appeal on the basis that the Tribunal committed errors in relation to: (a) its finding that Ping’s internet policy constituted a restriction of competition ‘by object’; (b) the evidence on alternative measures; and (c) the penalty. Ping contends in the alternative that there is a compelling reason why permission to appeal should be granted.

(a) Alleged errors on the finding of object restriction

6. Ping argues, firstly that the Judgment ignored the legal implications for its object assessment of the fact that Ping operates a selective distribution network. Under Article 101 TFEU it is clear that: (1) quality-based competition is an important facet of competition for selective distribution; and (2) this justifies a reduction in intra-brand price competition within selective distribution (in

support of this proposition Ping cites *AEG-Telefunken* case). By contrast, Ping contends, the Judgment did not take into account the implications for object that the increase in Ping's product quality caused by the internet policy; and instead, attached decisive importance to "*capability*" as respects intra-brand price-competition which is not the primary competitive parameter for selective distribution agreements.

7. We do not consider this argument has a real prospect of success. The Tribunal took into account Ping's argument that the internet policy had positive or neutral effects on inter-brand competition which precluded a finding of object infringement (Judgment at [132]-[134]). The Tribunal concluded that a measure which revealed a sufficient degree of harm to competition did not cease to be an object infringement because it brought about improvements in inter-brand competition (Judgment at [130]-[135]) and that any balancing exercise between pro and anti-competitive effects fell to be conducted under Article 101(3) not Article 101(1) TFEU. In our view, these conclusions are entirely consistent with the principles laid down by the Court of Justice in the *Consten and Grundig*, *BIDS* and *Metropole* cases cited by the Tribunal at [75], [101] and [134(1)].
8. The *AEG-Telefunken* case does not support Ping's argument. As noted by the Tribunal at [63] to [69], the Court of Justice held in that case that a measure adopted in the context of a selective distribution system fell outside the ambit of Article 101(1) if the measure was necessary for non-price competition to exist. The Tribunal found that, on the facts, Ping's internet policy failed to satisfy that test (Judgment at [201]). The Court of Justice did not hold that a measure which produces an increase in non-price competition cannot constitute an object infringement.
9. Ping's second argument is that the Judgment erred in treating Ping's internet policy as merely being part of a "*subjective aim*" (Judgment at [130]) which did not preclude other anticompetitive objects. The Judgment found, at [170], that the internet policy causes Ping's custom fitting rate to be higher than it would be absent the internet policy. Accordingly, Ping argues, the Tribunal's own findings concluded that Ping's internet policy causes an increase in the quality and distribution of products purchased by consumers and this is

incompatible with a finding that the internet policy constitutes an object infringement.

10. This second argument is essentially the same as the first and is similarly inconsistent with well-established principles laid down by the Court of Justice. Whilst the Tribunal concluded that the internet policy marginally increased Ping's custom fitting rates (Judgment at [170]), this did not preclude a finding of object infringement. Moreover, the Tribunal considered the impact of the internet policy on Ping's custom fitting rates in its analysis under Article 101(3) (Judgment at [211]), concluding that whilst the internet policy marginally increased custom fitting rates it was not a particularly effective means of doing so.
11. Ping's third argument is that the Judgment erred in rejecting the argument that a plausibly pro-competitive measure cannot be an object infringement under Article 101(1) TFEU and, relatedly, that it erred in finding that such benefits are only relevant under Article 101(3).
12. In our view, this argument does not have any realistic prospect of success. As we explained at paragraphs [101]-[106] and [130] of the Judgment, the European courts have repeatedly held that an agreement may restrict competition by object even if it pursues other legitimate objectives: see *BIDS*, *General Motors* and *Brasserie Nationale* cited at paragraphs [101]-[102] of the Judgment. *Cartes Bancaires* restates the same principle.
13. Ping's fourth argument is that the Judgment erred in respect of its assessment of the competitive impact of Ping's internet policy - the Tribunal applied a "*per se*" rule in assessing whether the internet policy constituted an object restriction.
14. We do not consider this argument to have any realistic prospect of success. The relevant legal principles are set in section D of the Judgment, including *Cartes Bancaires*, which both parties accepted was the leading authority on the concept of an object infringement. The Tribunal then applied the principles in section F, finding on the evidence that Ping's internet policy "*revealed in itself a sufficient degree of harm to competition*" (Judgment at [147]-[149]). The Tribunal

assessed the content, objectives and context of Ping’s internet policy and concluded that it restricted competition “*significantly*” (Judgment at [122]-[149]).

15. Ping’s fifth argument is that the Judgment erred because it overlooked the legal criterion that, whilst actual effects are not required, the internet policy must be “*so likely to have negative effects*” (or have “*sufficiently deleterious effects*”) on competition that it is “*redundant*” to examine its effects. In so doing, Ping argues, the Judgment conflated the separate questions of: (i) the basic capability of a measure to harm competition; and (ii) the further requirement that the potential for such harm must be extremely high (“*so likely*”). The Judgment disregards: (i) important factors pointing to low potential for any such harm; and (ii) it found that the internet policy causes Ping custom fitting rates to be higher than its rivals, thus increasing product quality.
16. In our view, the Judgment did not overlook the relevant legal criterion for a finding of object infringement and there is no realistic prospect of the Court of Appeal coming to a different conclusion. The essential legal criterion for such a finding is whether the measure “*reveals in itself a sufficient degree of harm to competition*”. The Tribunal identified this criterion and applied it to the facts of the case (Judgment at [82], [130], [147]-[148]). The Tribunal then addressed the likelihood of such harm occurring (Judgment at [83], [136] and [148]).

(b) *Alleged errors in relation to the evidence on alternative measures*

17. Ping argues that the Judgment erred because it overlooked the important evidence of Messrs Lines, Patani and the Complainant on the “alternative measures”, Dr Wood’s evidence on consumers “guessing specifications”, Ping’s survey evidence on the difference between Ping and rival custom fitting rates, and the evidence regarding the United States and Ping Inc.
18. We consider the errors alleged by Ping under this ground are simply challenges to the factual findings made by the Tribunal. They do not reveal any error of law in the Tribunal’s analysis or provide any basis for the assertion that the

Tribunal overlooked relevant matters such as to give rise to a realistic prospect of success on appeal.

19. Contrary to Ping's submissions, the Tribunal dealt with Ping's arguments as to the effectiveness of the alternative measures. Having considered the evidence, the Tribunal rejected Ping's submissions that those measures would unacceptably compromise the objective of promoting custom fitting (Judgment at [163]-[198]). The Tribunal addressed Dr Wood's evidence on "guessing". We found on the evidence that the alternative measures would not lead to customers guessing their specifications and buying the wrong clubs (Judgment at [20]-[23] and [175]-[182]).
20. Furthermore, the Tribunal did not overlook Ping's evidence on the difference between its customer fitting rates and those of its rivals. The Tribunal considered the evidence and found that the difference was a modest one and that it was not uniquely attributable to the internet policy (Judgment at [163]-[170]). We also found that, absent the internet policy, Ping would require its retailers to adopt measures such as the alternative measures identified by the CMA. This is what Ping Inc. had done in the US (Judgment at [174(4)]).

(c) Alleged errors on penalty

21. Ping contends firstly that the Judgment erred in finding that Ping had committed the infringement negligently, and secondly as Ping's infringement was not intentional there ought to have been a much larger reduction to the penalty than £200,000.
22. In our view, Ping does not have any realistic prospect of success of persuading the Court of Appeal that the Tribunal erred in relation to the penalty. The test for negligence is whether an undertaking "*ought to have known that its conduct would result in a restriction of distortion of competition*" (Judgment at [219]). The Tribunal held that Ping took no steps to satisfy itself that the internet policy was objectively justified or exempt under Article 101(3) and, having regard to the Court of Justice's case law, Ping "*ought to have known*" that its internet

policy “*would result in a restriction or distortion of competition*” (Judgment at [219] and [228]).

23. The Tribunal considered its finding that the infringement was not intentional when assessing the appropriate amount of penalty; the reduction of £200,000 reflected the Tribunal’s assessment of as to what was necessary to give credit for that finding (Judgment at [229], [247]-[248] and [254]).

(d) Some other compelling reason

24. Ping argues that the core ‘*legal criterion*’ for an object infringement identified by the Tribunal in the Judgment – namely what constitutes sufficient harm and how that harm is to be assessed (Judgment, [147]) – is a fundamentally important question of public interest, that a review of this criterion would be in the national and EU wide interest and that this constitutes a compelling reason why permission to appeal should be granted.

25. We disagree. The legal criterion for object infringement was reviewed by the Court of Justice in *Cartes Bancaires*. The question whether a plausibly pro competitive rationale precludes a finding of object infringement has been decided in the negative by the European courts. The opportunity for the Court of Appeal to review further the legal criterion for an object infringement, in the context of an appeal which we consider has no realistic prospect of success, is not in our view a compelling reason for the appeal to be heard.

26. For these reasons the Tribunal refuses permission to appeal.

Andrew Lenon Q.C.
Chairman

Professor John Beath
O.B.E

Eamonn Doran

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

Date: 15 November 2018