Neutral citation [2023] CAT 14

Case No: 1577/12/13/23

IN THE COMPETITION APPEAL TRIBUNAL

21 March 2023

Before:

SIR MARCUS SMITH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

THE DURHAM COMPANY LIMITED

Appellant

- and –

DURHAM COUNTY COUNCIL

Respondent

Ruling made on the papers after receiving submissions in writing

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JUDGMENT (COST CAPPING)

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A. THE PROCEEDINGS

1. This is the first appeal under section 70 of the Subsidy Control Act 2022 (the "2022 Act") to come before the Tribunal. By section 70(1) of the 2022 Act, an interested party who is aggrieved by the making of a subsidy decision may apply to the Tribunal for a review of the decision. In determining the application, the Tribunal must apply the same principles as would be applied on a judicial review (in the case of proceedings in England and Wales or Northern Ireland) or on an application to the supervisory jurisdiction of the Court of Session (in the case of proceedings in Scotland): section 70(5) of the 2022 Act.

2. A case management conference took place before me (sitting remotely) on 17 February 2023. Directions for a trial of certain issues has been listed for 3 and 4 July 2023 by an order made 17 February 2023. I will not recite the terms of that order in this Judgment, but will take it as read.

B. GENERAL PRINCIPLES

3. Each case that comes before the Tribunal is dealt with on its own merits and in accordance with the governing principles set out in Rule 4 of the Competition Appeal Tribunal Rules 2015 (SI 2015 No 1648) (the "Tribunal Rules"). That said, subsidy control cases under the 2022 Act are likely to have certain attributes that will inform how they are to be resolved. In particular:

    (1) The issues are likely to be narrow in scope, generally limited to a consideration of the lawfulness or otherwise of a "subsidy decision".

    (2) The nature of these issues is such that extensive disclosure, witness and expert evidence is unlikely to be required.

    (3) The jurisdiction needs to be fast, cheap and simple. It would be highly unfortunate were the undoubted benefits of properly granted subsidies (or the equally important matter of declining to grant a subsidy) to be subsumed in challenges to subsidy decisions.

(4) Although it is neither appropriate nor helpful to debate whether a formal fast track order should be made in subsidy control cases pursuant to Rule 58 of the Tribunal Rules, that is the lens through which subsidy control cases generally ought to be seen.

4. It was because of these attributes that the case management conference took place remotely; that was why the order of 17 February 2023 made provision for extremely limited disclosure; and why a substantive hearing was scheduled within 6 months of the review being commenced.

5. At the case management conference, the Tribunal proposed a costs cap, applicable to the costs of both parties, the cap being set at £50,000. The Appellant favoured such an approach; the Respondent did not and – entirely properly – sought the opportunity to address the question more fully in writing. The order of 17 February 2023 made provision for sequential exchange of written submissions and for the question of costs control to be determined on the papers, unless the Tribunal ordered to the contrary. This Judgment deals with this outstanding question.

C. THE RESPONDENT'S CONTENTIONS

6. The Respondent, in careful and detailed written submissions, maintained its opposition to a cost capping order. Although it was accepted that there was jurisdiction in the Tribunal to make such an order, it was submitted that as a matter of discretion that jurisdiction should not be exercised. Indeed, the Respondent went further and submitted that to order a costs cap in the present case would "amount to a sufficiently serious breach of the principles governing the exercise of the Tribunal's discretion as to amount to an error of law". The reason such an error would arise, *pace* the Respondent, was because:

(1) These are judicial review proceedings (or, in Scotland, proceedings subject to Scotland's supervisory jurisdiction).

(2) In such proceedings – in whichever part of the United Kingdom – a costs cap is only justifiable in exceptional circumstances. In the ordinary

course, costs should follow the event, without a cap. Costs budgeting should be preferred to a costs cap in any event. A costs cap (again, according to the Respondent) "is to be distinguished from costs budgeting, where the likely amount of reasonable and proportionate costs is estimated at an early stage of the proceedings".

D. ANALYSIS

7. Clearly, there is jurisdiction to make a costs capping order in the Tribunal. This concession was rightly made by the Respondent. The jurisdiction arises out of Rule 19(2)(r) of the Tribunal Rules, which provides that the Tribunal may give directions "for the costs management of proceedings, including for the provision of such schedules of incurred and estimated costs as the Tribunal thinks fit". In *Belle Lingerie v. Wacoal*, [2022] CAT 24, the Tribunal held that a costs capping jurisdiction arose out of the (identically worded) Rule 53(2)(m).

8. The question, therefore, is whether the jurisdiction should be exercised in this case and whether – more widely – a signal should be sent that whilst, of course, each case needs to be considered on its merits, costs control is of peculiar importance in subsidy control cases. As to this:

   (1) The assertion that subsidy control cases are judicial review cases such that the case law of Administrative Court should unthinkingly be translated into the Tribunal is misconceived. Subsidy control cases are (in England and Wales) determined by the Tribunal applying the same principles as would be applied by the High Court in determining proceedings on judicial review: section 70(4) of the 2022 Act. The Tribunal Rules are not displaced by this provision; and the Tribunal will exercise its discretion according to its procedures.

   (2) That is not to say that the processes of the High Court are not extraordinarily helpful when considering procedural matters coming before the Tribunal. The Tribunal will always be alive to how other jurisdictions operate, and will want to adopt, in as much as it properly can, the best practices and processes of other courts and tribunals.

(3) We do not know – the jurisdiction is in its early stages – how many subsidy reviews this Tribunal will be required to conduct. We do know that the decision, in any given case, whether or not to award a subsidy is likely to be an important one, where it is critical that decision-makers not feel inhibited by a threat of challenge – both when making a subsidy decision and when deciding whether to resist a review. Equally, challenges to subsidy decisions matter, and the risk of an enormous costs bills on failure should not be an undue deterrent to bringing section 70 reviews.

(4) The courts are very much alive to the "chilling effects" of costs decisions. Lady Rose, in *Competition and Markets Authority v. Flynn Pharma*, [2022] UKSC 14, articulated these most clearly at [136]*ff*. In subsidy control cases, the chilling effects of costs decisions are best avoided in it being clear, from the outset, that there will be rigorous cost control. In the ordinary subsidy control case, a light touch costs budgeting approach of the sort laid down in *Instaplanta (Yorkshire) Limited v. Leeds City Council*, [2023] CAT 11 at [23] is likely to be appropriate, provided that it is understood that a costs budget of more than £60,000 will receive very careful scrutiny from the Tribunal. By way of further guidance, the following should be made clear:

(i) The costs of the creation of a costs budget itself should not defeat the object of the exercise.

(ii) In many cases, it can be very difficult to work out what costs are to be attributed to what phase of litigation activity. In such cases – and the present case is an example of this – a costs budget may well be more trouble than it is worth: see *Genius Sports Technologies v. Soft Construct (Malta)*, [2022] EWHC 2308 (Ch) at [23] to [29].

(iii) The practice of the Intellectual Property Enterprise Court represents a valuable example. As paragraph 4.10 of the *IPEC Guide* states, "[c]osts are subject to the cap provided by Part 46

rules 46.20 to 22. With certain limited exceptions, the court will not order a party to pay total costs of more than £60,000 on the final determination of a claim in relation to liability…".

(5) The Respondent suggested that it was relevant and militated against a "protective costs order" that: *(i)* the Appellant's lawyers were not acting on a *pro bono* or discounted fee basis; *(ii)* the Appellant had a distinct private interest in the appeal or review; *(iii)* if the Respondent succeeded, they would not recover any costs above the cap. I do not consider these points to be material at all:

(i) The whole point of the subsidy control regime is to give interested parties a right to challenge subsidy decisions. Generally speaking, such challenges will be informed by narrow private interests, not wider public ones; and is none the worse for that.

(ii) The critical question is to ensure that the jurisdiction that Parliament has created is effective, and costs play a critical role here. There are a number of factors in play: a costs-following-the-event-regime discourages bad points, but must not be chilling, either in terms of discouraging proper applications for review or discouraging proper resistance to such applications. Costs that are disproportionate will have precisely such a chilling effect. Parties to potential subsidy review proceedings need to know, *ex ante*, what the Tribunal's general approach will be. That is an approach that is not set in stone, but one that is going to be responsive to the individual case. That, I hope, goes without saying. But parties to potential review applications need to know the Tribunal's starting point.

E. DISPOSITION

9. In this case, neither party has provided a costs budget (this is understandable, and no criticism), and I consider that it would be a distraction for them to be

required to do so now. The Appellant did not resist a cap of £50,000; the Respondent did not identify a figure for any cap, but merely stated that any cap (should one be imposed at all) "should be based upon a generous estimate of the upper limit of what would be a reasonable and proportionate amount of costs to incur on the application".

10. This is an appropriate case for a cap; and I will order that a cap be imposed as from the date of the case management conference in the amount of £50,000 in the case of the Appellant, and £60,000 in the case of the Respondent. Normally, these figures would be the same; but because costs budgeting/capping were not considered (understandably) from the outset and the Appellant has already made its application for review, a higher cap for the Respondent is justifiable.

Sir Marcus Smith
President

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 21 March 2023