Appeal numbers: PR/ 2018/0066, 0067, 0068, 0069

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
PROFESSIONAL REGULATION

WORLDWIDE TICKETS LIMITED **Applicants**
GARY HARVEY
ALAN GAMBIN
BLACK SYNC LIMITED

- and -

NORTH YORKSHIRE COUNTY COUNCIL **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA (CP)

Sitting in Chambers on 3 June 2019

RULING ON COSTS APPLICATION

The Applicants' application for costs is allowed in each case.
The Applicants' costs are to be assessed if not agreed.

REASONS

1. This matter concerns the first appeals to this Chamber against penalty notices for breaches of the "secondary ticketing" provisions contained in The Consumer Rights Act 2015. The Respondent served the maximum £5000 penalty on each of the Applicants. The Applicants appealed to the Tribunal under schedule 10 paragraph 5 to the Act. Following an oral hearing of all four appeals (heard together) on 19 March 2019, I issued my reserved Decision on 10 April 2019. I upheld all four appeals and quashed the four Final Notices. I did so having concluded that the Respondent had in each case breached the statutory time limit for serving the Notices of Intent (paragraphs 37 to 41 of the Decision). There has been no application for permission to appeal.

2. The Respondent had relied for the service of the penalties on year-old evidence obtained by the Competition and Markets Authority in making test-purchases during a related investigation. I was satisfied that the test-purchase evidence had been available to the Respondent so as to enable it to serve the Notices within the time limit, but that it had attempted to *"re-set the clock"* by serving a statutory request for information on the CMA and relying on the date it obtained that information as the date on which the time limit had started to run. I expressed myself to be "*troubled"* by the Respondent's conduct in a number of respects, but also observed that it was "*unpalatable"* to allow appeals in which the Appellants admitted they had broken the relevant law.

3. The Applicants now apply for costs in a joint application dated 26 April 2019. Their application relies on the Respondent's alleged "*unreasonable behaviour*" in "*defending…proceedings*" in circumstances where (as its officer eventually accepted in her oral evidence) it had employed a "*device*" to circumvent the time limit in three appeals. In the fourth appeal, I found that the relevant information had been available to the Respondent so as to enable it to act within the time limit, but that it had not done so.

4. It is submitted by the Applicants that the relevant *"unreasonable behaviour"* by the Respondent lay in defending these appeals by putting a "*disingenuous*" case before the Tribunal. It was not accepted by the Respondent in its pleadings that a *"device"* had been used to circumvent the statutory time limit, whereas the Respondent's officer accepted in her oral evidence that this was the case. The Applicants also rely on the Respondent's approach to defending the other two grounds of appeal, which I did not formally need to rule upon, having found their first ground of appeal established. However, I did express some criticisms of the Respondent's approach.

5. The Respondent was given an opportunity to respond to the costs application (rule 10 (5)(a)). In a submission dated 10 May 2019, the Respondent resisted a costs order on the basis that the Respondent's actions may be characterised as misguided but were not objectively unreasonable. It is submitted that this was a difficult case, involving the application of new legislation, and that the working relationship between the Respondent and CMA was not straightforward. The Respondent also relies on the fact that the Tribunal did not expressly find its officer to have been dishonest.

6. As the Respondent is a corporation, there is no obligation for me to consider its financial means before deciding this application (rule 10 (5)(b)). The Applicants have prepared a costs schedule for the purposes of rule 10 (3)(b), detailing the preparation and representation costs for each Appellant. Reduced fees are said to have applied given the global nature of the preparation as to the new law and the fact that the four appeals would be heard together.

The Law

7. Rule 10 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 relies on the statutory authority of s. 29 of the Tribunals, Courts and Enforcement Act 2007. It provides (where relevant) as follows:

Orders for costs

10.—(1) … the Tribunal may make an order in respect of costs…only—

(a) Under section 29(4)of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings;..

(c) …

…

(2) The Tribunal may make an order under paragraph (1) on an application or on its own initiative.

(3) A person making an application for an order under this rule must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver a schedule of the costs or expenses claimed with the application.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings…

…

(5) The Tribunal may not make an order under paragraph (1) …against a person ("the paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs or expenses to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses ("the receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed.

(7) Following an order under paragraph (6)(c) a party may apply—

(a) in England and Wales, to the county court for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis;

……

(8) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

8. I have considered the Decision of the Upper Tribunal (Lands Chamber) in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC)[1], in which the Court of Appeal's judgment in *Ridehalgh v Horsefield* [1994] Ch 205, was applied. These authorities provide a definition of "*unreasonable conduct*" as involving conduct which is vexatious, designed to harass the other side, and does not permit of a reasonable explanation. The definition excludes conduct which simply leads to an unsuccessful result or where a more cautious legal representative would have acted differently.

9. I note in particular the test set out at paragraph 28 of the Upper Tribunal's Decision in *Willow Court*, described as follows:

> *"At the first stage, the question is whether the person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed".*

10. The Upper Tribunal's conclusion in *Willow Court* was that, only if the first stage test was met, should the Tribunal go on to consider stage two (whether it ought to make an order for costs in the light of the unreasonable conduct found to have occurred). If the answer to that question is yes, then it must move to stage three (to consider in what terms the order should be made). Stages two and three involve the exercise of judicial discretion.

Conclusion

11. The first stage of the *Willow Court* test is to consider whether there is a reasonable explanation for the conduct complained of. Applying the objective test, it seems to me that the Respondent acted unreasonably in placing before the Tribunal a case based on the purported need to serve a statutory request for information on CMA in order (as was eventually admitted) to evade the statutory time limit. I have no hesitation in finding unreasonable conduct where a statutory authority charged with enforcing the law acts in a way that is designed to circumvent a statutory provision by which it is bound. I reject the Respondent's submission that it was merely misguided in this case. As to the Tribunal's failure to find that its officer was dishonest, I regard the Respondent's submission as misconceived. I note that the test here is whether it was unreasonable for the Respondent to defend the proceedings as it did. The Respondent is of course the Council as a corporate entity, and not its employee.

12. In all the circumstances of this case, I am persuaded that this application passes the first stage of the *Willow Court* test. I find that the employment by the Respondent of one statutory power as a *"device"* to seek to evade the requirements of another is objectively unreasonable conduct. This is especially the case where the Respondent is effectively exercising a prosecutorial authority and where its obligation to adopt a fair process under statute, Article 6 ECHR and the common law should have been central to its considerations.

13. As I have concluded that the stage one threshold is met, I must proceed to consider stages two and three. As to stage two, I have considered whether I ought, as a matter of discretion, to make an order for costs in the light of the unreasonable conduct I have found. This stage has caused

[1] http://www.bailii.org/uk/cases/UKUT/LC/2016/290.html

me the greatest difficulty, given that the Applicants admitted to having breached the relevant legislative provisions. I previously noted that I found it unpalatable to allow these appeals and I find it even more unpalatable to make a costs order in favour of parties who have admitted breaching the law. Nevertheless, there were entitled to be treated fairly in these proceedings and there are important policy considerations where a public authority is found to have acted unreasonably in its conduct of legal proceedings. I have found that the Respondent in this case imposed significant financial penalties on individuals and businesses by adopting an unfair process and misrepresenting that process to the Tribunal in its written submissions. It was only when its officer was giving oral evidence that the true picture emerged. I take into account the fact that the paying party would, in this case, be the public purse but also that this particular Respondent is the lead authority for enforcing the relevant legislation. I have considered whether my concern about its conduct of these cases and the importance of it adopting a fair process henceforward might be appropriately emphasised by the making of a costs order.

14. I am also mindful of my comments about the Respondent's approach to penalty-setting in these cases. Whilst I did not need to make a formal finding, I set out at paragraphs 42 to 46 of the Decision my concern about the factors taken into account by the Respondent in deciding the level of penalty. I noted breaches of natural justice in the Respondent's attempt when setting the level of penalty to "*take into consideration"* historical matters which it had not disclosed to the intended recipients of the Notices. I note that the Respondent, in pursuit of this approach, placed significant irrelevant documentation about each Appellant's previous trading history before the Tribunal when the appeal concerned in each case a single specified transaction. I am satisfied that the Respondent's ill-considered approach to defending the appeal as to the level of penalty unreasonably inflated the Applicants' costs.

15. Weighing all these factors into the balance, I have concluded that the Respondent's conduct of this case is such that a costs order would be appropriate to mark the strength of my concern at the Respondent's conduct of these appeals. I exercise my discretion in favour of making a costs order.

16. Moving to stage three, I must consider the terms in which the costs order should be made. In all the circumstances, I consider that the Applicants' full costs of preparation and representation, as claimed, should be paid by the Respondent. I exercise my discretion to make such an order because it was the Respondent's corporate decision to defend the proceedings on the unreasonable basis that it did which resulted in a full trial of the issues. The Applicants have explained that they have tried to mitigate their costs by asking for the four appeals to be heard together and by undertaking global preparation where possible. I consider that was the correct approach.

17. As to quantum, I hope this will be agreed between the parties. If it is not, the Respondent may apply for assessment by the Court (rules 10 (6)(c) and (7) (a)). I have not been asked to direct any amount to be paid on account.

(Signed) **Dated: 3 June 2019**
Alison McKenna
Chamber President