



Neutral citation [2016] CAT 21

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1262/5/7/16 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

21 October 2016

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

AGENTS' MUTUAL LIMITED

Claimant

-v-

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)

Defendant

JUDGMENT (COSTS MANAGEMENT III)

Introduction

1. By order made on 14 September 2016, I directed that these proceedings in the Competition Appeal Tribunal (“CAT”) shall be subject to costs management and that, by analogy, the procedure set out in rules 3.13 to 3.18 of the Civil Procedure Rules (“CPR”) and Practice Direction 3E (“PD3E”) should apply. They would not otherwise apply in the CAT which has a broad costs management power under the Competition Appeal Tribunal Rules 2015, rule 53 (2) (m).
2. Pursuant to that order, both sides served costs budgets in the form of Precedent H. The Claimant’s budget, dated 25 August 2016, was in the total amount of just over £1.8 million. Of that sum, the budget stated about £417,000 had already been incurred. However, bringing that budget up to date, since disclosure was due to be completed by 23 September 2016 (although there has been some slippage) it would appear that close to £560,000 have now been incurred. The costs budget of the Defendant (“Gascoigne Halman”), dated 19 September 2016, was a little over £2.8 million, of which just over £1.2 million have already been incurred.

The costs management regime

3. This is the first occasion on which the costs management regime set out in CPR Part 3 has been adopted in CAT proceedings. CPR rules 3.15 and 3.18 provide as follows:

“3.15. – Costs management orders

- (1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.
- (2) The court may at any time make a “costs management order”. Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will—

- (a) record the extent to which the budgets are agreed between the parties;
 - (b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.
- (3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs."

"3.18. - Assessing costs on the standard basis where a costs management order has been made

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

- (a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and
- (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

(Attention is drawn to rules 44.3(2)(a) and 44.3(5), which concern proportionality of costs.)"

4. It follows, in my view, that in considering whether to approve the phases in a costs budget, the Tribunal should approach those costs as if an eventual assessment would be on the standard basis. That is reinforced by the fact that Precedent H now requires the solicitor to certify that the budget "is a fair and accurate statement of the incurred and estimated costs which it would be reasonable *and proportionate* for my client to incur in this litigation" [my emphasis]. It is therefore relevant to refer to CPR rules 44.3 and 44.4, insofar as material:

"44.3 - Basis of assessment

- (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
- (a) on the standard basis; or
 - (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

...

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

- (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
- (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

...

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party; and
- (e) any wider factors involved in the proceedings, such as reputation or public importance...”

“44.4 - Factors to be taken into account in deciding the amount of costs

(1) The court will have regard to all the circumstances in deciding whether costs were –

- (a) if it is assessing costs on the standard basis –
 - (i) proportionately and reasonably incurred; or
 - (ii) proportionate and reasonable in amount, ...

(3) The court will also have regard to –

- (a) the conduct of all the parties, including in particular –
 - (i) conduct before, as well as during, the proceedings; and
 - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
- (b) the amount or value of any money or property involved;
- (c) the importance of the matter to all the parties;
- (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (e) the skill, effort, specialised knowledge and responsibility involved;
- (f) the time spent on the case;
- (g) the place where and the circumstances in which work or any part of it was done; and
- (h) the receiving party’s last approved or agreed budget.”

5. Practice Direction 3E states, insofar as material:

“C. Costs management orders:

7.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court’s approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

7.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

...

7.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

7.7 After its budget has been approved or agreed, each party shall re-file and re-serve the budget in the form approved or agreed with re-cast figures, annexed to the order approving it or recording its agreement.

...

7.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.

7.10 The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.”

The present case

6. The nature of the present proceedings and the way in which costs management has arisen have particular features which impact on the way the regime will apply.
7. First, these proceedings were not started in the CAT. This is a High Court action which began on 17 February 2016 with an application for interim relief in the Chancery Division. On 5 July 2016, by order of Sir Kenneth Parker (sitting as a High Court judge), specified competition issues were transferred to the CAT pursuant to the regulations made under sect 16 of the Enterprise Act 2002. That is over 7 months ago and the competition issues are coming on for an expedited trial in the CAT to be held over 12 days in February 2017. As a result, the costs management order to be made in the CAT relates only to that part of the

proceedings and, moreover, it is being made at a considerably later stage in the proceedings than might otherwise be the case. Over half the time to trial since the commencement of proceedings has already elapsed. That is significant since power to approve or disapprove a costs budget under Part 3 relates only to future costs and not to costs already incurred (although the incurred costs may be taken into account when considering the reasonableness and proportionality of subsequent costs): see PD3E, para 7.4.

8. Further, as regards the High Court element of the case, in his order of 5 July 2016 transferring the competition issues to the CAT, and by consent, Sir Kenneth Parker directed that costs budgeting would not apply. That of course concerns only the High Court aspects of the case: see my judgment of 7 October 2016, [2016] CAT 20. But the early stages of this case, reflected in the budgets, took place in the High Court and disclosure, which has largely been completed, covers the whole of the action and not just the competition issues (although I think it is fair to say that the competition issues are predominant).
9. Secondly, this case is being heard along with a parallel case, i.e. a claim by the Claimant against Moginie James Ltd (“Moginie James”) which like Gascoigne Halman is an estate agent. Although the CAT’s order of 14 September 2016 directed costs budgeting also in that action, the Claimant and Moginie James have agreed each other’s costs budget so those budgets were not subject to argument before the CAT. The competition issues in the two actions significantly overlap. The Claimant has very properly allocated its costs as between its separate budgets filed for the two actions. Gascoigne Halman has agreed the Claimant’s costs budget in the present action. In the usual way, the Claimant has invited comparison with its own, substantially lower costs budget when challenging the figures in Gascoigne Halman’s costs budget. However, since Gascoigne Halman is mounting its own independent defence, in some respects one would expect Gascoigne Halman’s costs to be higher than that part of the Claimant’s costs allocated to the Gascoigne Halman case. Accordingly, on some aspects, in so far as comparison between the two budgets is helpful, I think it is appropriate to look also at the Claimant’s costs budget in the Moginie James case.

10. Before turning to the detail of the budget, it is appropriate to make the following preliminary observations:
- (a) Costs management as regards Gascoigne Halman's budget is not concerned with what Gascoigne Halman's solicitors and counsel may actually charge their client but with what will be Gascoigne Halman's recoverable costs should costs on the standard basis be awarded in its favour after trial of the competition issues in the CAT.
 - (b) Proportionality is fundamental to the standard basis of assessment. It is inherent in the concept of proportionality that even when costs were reasonably or necessarily incurred, they may be disproportionate: see CPR rule 44.3 (2) (a).
 - (c) Although comments were made about and comparing the hourly rates and number of hours set out in the budgets, a costs management order is not concerned with a determination of rates or hours. However, the details set out in Precedent H can be scrutinised to understand the constituent basis of the overall figures and in order to assist with the evaluation, but no further. See PD3, para 7.10.
 - (d) I accept that these are complex proceedings in that they involve a specialist area of law and therefore involve higher costs. Both sides are using City of London solicitors and I do not regard that as disproportionate. I accept also that the issues are of great importance for both parties although, it seems to me, they are still more important for the Claimant than for Gascoigne Halman: the Claimant contends that its future in the online portal market may depend on the determination of the competition issues.
 - (e) The fact that Gascoigne Halman has agreed the Claimant's costs budget means that the latter budget is not subject to review by the CAT. Since the Claimant will therefore prima facie be able to recover on the basis of its budget if costs are awarded in its favour, even if I may consider that some of those costs are disproportionate it seems to me that it would not be fair to revise costs in Gascoigne Halman's costs budget for the same phase of the

action to a lesser amount, unless there was a material difference between the two sides in terms of the work involved.

11. For the Claimant, it was submitted that as it carries the burden of proving its case, its costs can be expected to be higher than those of Gascoigne Halman. I regard that as a rather simplistic approach which in any event is not applicable in this case. This is a trial only of the competition issues and those issues were raised and are being advanced by Gascoigne Halman by way of defence and counter-claim. Thus, to a significant extent, on those issues it is Gascoigne Halman here which has the burden of proving the case. However, as Gascoigne Halman alleges a violation of the Chapter I prohibition in the Competition Act 1998 and the Claimant in response contends that if the impugned arrangements prima facie restricted competition then they meet the statutory criteria for exemption, the Claimant too carries the evidential burden of making a case. Accordingly, I see no disparity in this respect between the parties, save only as regards the mechanics of trial preparation for which it is the Claimant that in the usual way will have to prepare the bundles, etc.

The Gascoigne Halman costs budget

12. I turn to the phases of the costs budget of Gascoigne Halman. For the reasons indicated above, I do not think it is appropriate to make any comment about the costs incurred for those phases that have been completed, including disclosure, save insofar as they inform the future phases of the case.

Witness Statements

13. The total estimated under this head is £299,819. That is based on the assumption that Gascoigne Halman will have 6-7 witnesses and also the task of reviewing the Claimant's 4 witness statements and the evidence of Moginie James in the related action. The Claimant's budget under this head is £147,650 and it is perhaps relevant to note that its budget is £19,575 for witness statements in the Moginie James action.

14. I recognise that preparation of witness statements is time-consuming and that in this case the costs for Gascoigne Halman are likely to exceed those of the

Claimant because it has more witnesses. Nonetheless, I regard the total of close to £300,000 as unreasonable and disproportionate. The explanation may be that a significant share of the work in the legal team at Gascoigne Halman's solicitors is being undertaken by two partners: between them, it is proposed that they will spend 150 hours on witness statements, whereas the associate on the case (who herself is being billed at £395 per hour) is expected to spend 215 hours. I think it is reasonable to expect that a much greater share of the work would be undertaken by more junior lawyers, subject only to review by the partners. Taking a broad view, I consider a reasonable and proportionate sum under this head is £200,000.

15. As £53,194 have already been incurred, I would revise the budget for estimated future costs to £146,806. In adopting that approach, I recognise that there is the possibility that on a detailed assessment the recoverable amount in respect of costs already incurred might be reduced to below £53,194. But I have set out what I consider should be the total and how the budget for future costs is therefore derived, and in that eventuality this should provide a basis to depart from the costs budget under CPR rule 3.18(b). I note that this is the approach recommended by the editors of the White Book supplement, *Costs & Funding following the Civil Justice Reforms: Questions & Answers* (2nd edn.), para 4-55.

Expert Reports

16. Each side has a single economic expert. Gascoigne Halman's budget under this head is £317,133. Of that sum, £153,933 have already been incurred. However, those figures do not tell the full story. In the first place, the expert concerned has separately been paid £85,000 in connection with advice on the pleadings and is estimated to have fees of £35,000 for trial preparation and a further £35,300 for attendance at the trial. Secondly out of the total £317,133 stipulated for expert reports, some £66,000 is for solicitors' fees and £18,000 for counsel's fees.
17. By way of comparison, the Claimant's costs budget for expert reports amounts to £257,763, which includes the cost of expert assistance regarding the pleadings and in trial preparation. The only addition is for the expert's attendance at trial, in the sum of £30,000. Included in the first figure are lawyers' costs associated with the expert report at just under £83,000 for solicitors and £25,000 for counsel.

18. I leave out the costs of the expert attending trial which are broadly similar for the two sides and seem to me reasonable. However, I regard the total budgeted cost for the Gascoigne Halman economic expert for all stages to trial at £348,000 as unreasonable and wholly disproportionate for what is involved in this case. This is not a case where the expert will have to engage in complex econometric analysis of a vast array of data to arrive at a counter-factual price. Mr Woolfe, appearing for Gascoigne Halman, argued strenuously that it would be wrong to make a comparison between the costs of the economist instructed for the Claimant and for Gascoigne Halman, on the basis that the Claimant's economist has the benefit of much greater client assistance regarding the working of the online portal market. I do not accept that. This is not an extremely complex market, both economists are assumed to be coming to the matter fresh, and Gascoigne Halman, as an experienced estate agent which is also a member of a nationwide group, makes extensive use of online property portals and is indeed a member of the Claimant.
19. Although Mr Maclean QC, appearing for the Claimant, was critical of the amount of solicitors' time attributed to the expert's report in the Gascoigne Halman costs budget, it seems to me that much the same criticism could be directed at the Claimant's costs budget. There may be a good explanation, but it should not need emphasis that the expert's report should be the product of the expert, expressing his or her own, independent opinion, and not the reflection of heavy input or edited by the lawyers. Some discussion with the lawyers is of course reasonable and the expert can be expected to assist the legal team in a critical review of the evidence of the other side's expert, but the lawyers' involvement should go no further. However, since the Claimant's costs budget has been agreed, I think the fair approach is for me to accept that Gascoigne Halman expects to spend lawyers' fees of some £84,000 in connection with expert's reports. On the basis that Gascoigne Halman has already incurred substantial fees on its expert for assistance over the pleadings, which means that the expert has done significant preparatory work on the case, I shall revise the total for this phase to £240,000. Since £153,933 have been incurred, I will approve an estimated budget for future costs in the sum of £86,067.

PTR

20. Gascoigne Halman's estimate is £105,725. That comprises £37,425 in solicitors' costs and £68,300 in counsel's fees. By contrast, the Claimant's budget for the PTR is £40,390, comprising £26,800 in solicitors' costs and £12,500 in counsel's fees.¹
21. The size of this disparity appears, at least in part, to be explained by a difference in approach. Gascoigne Halman has assumed a one day PTR with various substantive applications being made. The Claimant has assumed a half day PTR of the usual kind, and Mr Maclean explained that should a substantive application arise that had not been anticipated, that would fall outside this budget and could be claimed for in addition.
22. In my view, the Claimant's approach is correct. It is impossible to estimate at this stage whether and if so what scale of additional applications might be made at the PTR and it is therefore not appropriate to approve any budget for such a speculative eventuality: see PD3E, para 7.9. Accordingly, I cannot see any basis on which to approve a budget of over £105,000 for a PTR which, in the absence of such substantive applications, should not last more than half a day. Both the Claimant and Gascoigne Halman anticipate using senior and junior Counsel and I see no reason why there should be a divergence in the reasonable and proportionate cost for the PTR. I would therefore approve a budgeted cost for this phase revised to £40,000.

Trial Preparation

23. Gascoigne Halman's budget stipulates £98,175 for this phase. As I have mentioned, that includes £35,000 for its expert witness. The Claimant's corresponding estimate is £122,975, which does not include any fees of its expert.
24. I would expect the Claimant's costs to be higher since it carries the burden of preparing the trial bundles. The trial will involve 9 court days, with 12 working

¹ The Claimant's budget for this phase also specifies "court fees" of £1090. That is puzzling since no fee is payable for a PTR in the CAT. However, this was not challenged.

days in total (allowing for a 3 day gap for the preparation and reading of closing submissions). Accordingly, it is a substantial, but not very large, trial.

25. I think that the expert preparation costs are rather high, a reflection of the elevated level overall of the fees of the Gascoigne Halman's expert. The solicitors' costs appear to me within a reasonable band. The overall figure is nonetheless significant and contributes to the disproportionality of the total budget. I therefore make a modest reduction for this phase and revise the total to £80,000.

Trial

26. Gascoigne Halman's budget estimate is £842,195. In sharp contrast, the Claimant's estimate is £483,420. The detailed breakdowns in the respective Precedents H reveal the explanation for this discrepancy. Gascoigne Halman's solicitors' costs for trial are almost £152,000, compared to the Claimant's solicitors' estimate of £88,320; moreover the fees for Gascoigne Halman's senior and junior counsel amount to £642,520, compared to £365,000 for leading and junior counsel instructed by the Claimants. However, it is relevant to note that the Claimant's solicitors have in addition budgeted £33,120 for the Moginie James trial, which is being heard at the same time and through which Gascoigne Halman's solicitors will have to be present.

27. Addressing first the solicitors' costs, Gascoigne Halman expects two partners each to devote 85 hours to the trial and an associate to be spending 120 hours. The Claimant has one partner and an associate spending 96 hours each. I have no doubt that all the lawyers involved will be working very hard. Mr Woolfe, in answer to my question, said that it was not the intention that both partners at Gascoigne Halman's solicitors would attend the whole of the trial. Nonetheless, assuming a court day with travelling time, attendance at trial over 9 days should not involve more than some 70 hours. Of course, there may well be significant work after court and on the non-court days in reviewing the closing submissions, but the submissions themselves will be drafted by counsel. It is through the attribution of 170 hours of partner time that this part of the Gascoigne Halman budget rises significantly. As regards counsel's fees, the two QCs are of broadly equivalent seniority and the junior counsel instructed for the Claimant is in fact

considerably more senior than junior counsel for Gascoigne Halman. It may be that the fees charged by counsel acting for Gascoigne Halman represent the market rate for their services but that does not make them reasonable or proportionate: see *Group Seven Ltd v Ali Masir and ors* [2016] EWHC 620 (Ch) at [54].

28. It is not appropriate as part of the costs budgeting exercise to revise the individual figures for the various constituent elements. I must take a headline view for this phase, informed nonetheless by the observations I have made regarding those elements. I see no substantive reason why the costs of Gascoigne Halman should be greater than the costs of the Claimant, when assessed by the criterion of proportionality. I have regard to the Claimant's trial costs shown in its costs budget agreed in the *Moginie James* action. Taking an overall view, I consider that the proportionate trial costs, given the length and complexity of trial, what is at stake for Gascoigne Halman and the specialism of the representation involved, should be £550,000 and I would approve a revised figure for the trial phase accordingly.

ADR/Settlement discussions

29. The amount estimated under this head is £19,762 (of which £237 have already been incurred). Accordingly, it represents a very small part of the total picture. There was some confusion in the hearing as to what this element in fact represented since I was told that the unsuccessful mediation which had taken place was conducted on the basis that each side would bear its own costs. It appears that it is an allowance for potential "without prejudice" communications for an attempted settlement. However, this figure was not really contested on the part of the Claimant and I am prepared to approve the balance of £19,525 for that phase.

Investigation, Research and Review of third party material

30. The Gascoigne Halman costs budget states that £15,661 have been incurred under this head and no future costs are estimated. Accordingly, it does not fall within the approval process of a costs management order.

Contingencies

31. The Gascoigne Halman costs budget includes under this heading £174,830.08 as regards the costs of the security for costs application dealt with at hearings in July and September 2016. Those are stated as costs already incurred and so form no part of the budget approval process. In any event, Gascoigne Halman has made a distinct application regarding its costs of its security application and this will be therefore be dealt with separately.

Conclusion

32. I will therefore approve a costs budget for Gascoigne Halman to be revised in accordance with this judgment for the above six phases, amounting in total to £922,635 for estimated future costs. The breakdown is appended to this judgment.

The Honourable Mr Justice Roth
President of the Competition Appeal Tribunal

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

Date: 21 October 2016

Appendix

	A	B	C	
Phase	Gascoigne Halman's incurred costs	Gascoigne Halman's estimate of future costs	Approved future costs	Phase totals (Column A + Column C)
Witness statements	53,194	246,625	146,806	200,000
Expert reports	153,933	163,200	86,067	240,000
PTR	-	105,725	40,000	40,000
Trial preparation	-	98,175	80,000	80,000
Trial	-	842,195	550,000	550,000
ADR	237	19,525	19,762	19,762
TOTALS	207,364	1,475,445	<u>922,635</u>	1,129,762