Neutral citation [2017] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1249/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

26 May 2017

Before:

THE HON. MR. JUSTICE ROTH
(President)
WILLIAM ALLAN
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

SOCRATES TRAINING LIMITED

Claimant

- v -

THE LAW SOCIETY OF ENGLAND AND WALES

Defendant

Heard at Victoria House on 26 May 2017

RULING (COSTS)

APPEARANCES

Mr. Philip Woolfe (instructed by Mr Bernard George) appeared on behalf of the Claimant.

Ms. Kassie Smith QC and Ms Imogen Proud (instructed by Norton Rose Fulbright LLP) appeared on behalf of the Defendant.

1. Following the handing down of our judgment in this matter today, the one outstanding issue on which we have heard adversarial argument concerns the question of costs. The Law Society has very properly accepted that as, in broad terms, Socrates is the overall winner in the action, Socrates should have its costs on the standard basis up to a maximum as determined by the costs cap fixed by order of the Tribunal, as varied, of £230,000.

2. Socrates, however, has urged that its costs should be assessed on the indemnity basis, and therefore not subject to the cap; and, further, has argued that it should be entitled to additional costs because of disclosure of particular documents by the Law Society after trial, which, as we think the Law Society effectively accepts, should have been disclosed before trial.

3. The costs cap was set pursuant to Rule 58(2)(b) of the Tribunal Rules, which requires a cap to be determined in any case made subject to the fast-track procedure. It was set by order of 30 June 2016 in the sum, as regards Socrates, of £200,000. By agreement and at Socrates' request, that figure was raised at the outset of the hearing by 15 per cent to £230,000.

4. It seems to us that the clear implication of a costs cap is that those costs are the maximum recoverable on the standard basis. If the conduct of a party, however outrageous during trial, giving rise to substantially increased costs, could not be reflected in an order for indemnity costs then the operation of a costs cap could work an injustice. Accordingly, we think that if a party should be entitled to indemnity costs, then the limit in the costs cap should not, in those unusual circumstances, operate as a constraint.

5. Secondly, we consider that if there should be a material change in circumstances which adds significantly to the overall costs reasonably and properly incurred by the receiving party after the time at which the costs cap was imposed, then the Tribunal would be justified in amending the limit of the costs cap to reflect the effect of that change.

6. Subject to those considerations, it must be emphasised that the costs cap is set as part of the fast-track procedure for a purpose: that is in order that both sides

should know the extent of financial risk and exposure to which they are subject.

7. It is important at the outset to remember that the difference between indemnity costs and standard costs amounts to two matters: first, although indemnity costs still have to be reasonable, there is not a requirement that they be proportionate as there is under the standard basis of assessment; secondly, when costs are assessed on an indemnity basis any doubt about reasonableness is resolved in favour of the receiving party, whereas on a standard basis it is resolved in favour of the paying party.

8. The grounds for an award of indemnity costs have been considered in a number of authorities in the High Court and the Court of Appeal under the analogous provisions of the Civil Procedure Rules. Although the Court of Appeal has said that it is a matter for the trial court's discretion and that there are no strict guidelines, over the years some guidance has nonetheless been forthcoming. The position was helpfully summarised by the former President of this Tribunal, Barling J, in his judgment in *Catalyst Investment Group Ltd v Lewinsohn* [2009] EWHC 3501 (Ch). There, Barling J said at [18]:

> "First of all, the normal order is an order for standard costs. In deciding whether to order indemnity costs, ultimately the question will always be whether there is something in the conduct of the action or in the circumstances of the case which takes the case out of the normal in a way which justifies an order for indemnity costs: see the *Excelsior* case [*Excelsior Commercial & Industrial Holdings Limited v Salisbury, Hammer, Aspden & Johnston (A firm*) [2002] EWCA Civ 879]…Secondly, it is now clear that indemnity costs are not reserved for cases where there has been a lack of probity or conduct deserving of moral condemnation: see for example, May LJ's remarks in *Reid Minty (A firm) v Taylor* [2001] EWCA Civ 1723 at [27] and [28]. Thirdly, an award of indemnity costs is not penal but compensatory, the question in all cases being, what is fair and reasonable in all circumstances of the case: see again *Reid Minty* …"

9. In pursuing his application for indemnity costs, Mr. Woolfe for Socrates refers to a number of matters in the way the litigation has been conducted by the Law Society. Mr. Woolfe has referred to a 'without prejudice save as to costs' letter that was sent on behalf of his client on 22 June 2016. Also, in the witness statement from Mr. George, there is reference to the correspondence that he had on behalf of Socrates with the Law Society prior to the action being commenced. However, those matters all pre-date both the original imposition

of the costs cap by this Tribunal, and then the amendment of the costs cap at Socrates' request on the first day of the trial. We do not see how matters which precede the imposition and then revision of the cap can be relevant either in any argument that indemnity costs should apply or that the costs cap should be higher, or additional costs allowed.

10. Mr. Woolfe's submissions have rather more force when he points to matters which arose during the course of the trial. In particular, he relies on failures in disclosure on the part of the Law Society. He emphasised the Law Society's failure to disclose the business case and the related management board minutes of 20 October 2010, where that business case is referred to and presented. Those documents came to light primarily as a result of questioning from Professor Wilks of the Tribunal during the course of the hearing, and were only disclosed after the trial had concluded by letter from the Law Society's solicitors of 15 November 2016.

11. The position is that the Tribunal's order of 30 June 2016, by paragraph 3(f), required the Law Society to disclose "all policy documents and business plans relating to the inception of the CQS ... in so far as the same are found by the defendant" - that is to say the Law Society - in the course of preparing evidence pursuant to the Tribunal's previous order which gave permission for the Law Society to call a number of witnesses.

12. Following disclosure, there was correspondence from Mr. George in which Socrates pressed for additional documents, including any reference to business plans. On 12 October 2016, the Law Society's solicitors wrote in response to Socrates' request for the disclosure of additional minutes stating, "All minutes relevant to the inception of the CQS have already been disclosed to you".

13. The explanation for the failure to disclose the minutes of the management board and the business case is given in the letter of 15 November 2016, to which I have already referred, where the Law Society said:

> "In the course of preparing witness statement evidence, the 2010 Business Case was not identified or relied upon, and as such, it was not disclosed pursuant to para. 3(f) of the Disclosure Order…"

14. We have to say that that explanation is not merely regrettable, as Ms. Smith accepted, but deeply unimpressive. We do not think that the failure to disclose these documents is explicable by the fact that this was a fast-track procedure. Although the Law Society was not technically in breach of the Tribunal's order, these documents clearly should have been identified. The Law Society disclosed, and its witness, Mr. Smithers, indeed relied on, the minutes of the Membership Board of 19 October 2010. Those minutes state at para 33.1 under the heading "CQS Update", the following:

> "The business case for the CQS would be submitted to the Management Board on 20 October … for approval."

15. It seems to us that any proper reading of that document would have taken the reader to the minutes of the Management Board, as there identified, and to the business case, as there expressly referred to. The result was that Mr. Smithers could not be cross-examined on that business case, as he no doubt otherwise would have been, and we had brief written submissions on it from both sides after the trial was over.

16. However, although very unfortunate and, as I said, unimpressive, we do not think that this is so serious as to take the case out of the norm and justify any order of indemnity costs. It is a very extreme step to displace the normal requirement that the recoverable costs should be limited to what is proportionate, and this is just one particular, limited incident in the course of proceedings that, although under the fast-track procedure, nonetheless involved disclosure of a substantial number of documents.

17. Aside from any question of indemnity costs, we have considered whether this particular matter should justify an additional award of costs beyond the cap to cover the costs incurred post-trial. If it had involved substantial work that would not otherwise have been incurred, there might be a basis for finding that there had been such a material change in the circumstances that that exceptional step should be taken. However, it seems to us that if the business case had been disclosed when it should have been, the work that was done by Mr. George after trial would have been done in the preparation for trial. It is very much part of the trial work that was envisaged when the costs cap was

imposed and revised. We do not think this is something that has caused such a serious increase in costs that it materially changes the position to a degree that the Tribunal would be justified in allowing additional costs over and above the amount of the cap.

18. The other matters relied upon on behalf of Socrates are that the Law Society pursued allegations which, as expressed in Mr. George's witness statement, were "deeply flawed and had little prospect of success". In that regard Mr. Woolfe referred to the 'without prejudice save as to costs' letter. He submitted that the Law Society continued to contest fully the questions of dominance and market definition in ways that were largely unsuccessful at trial. However, the Law Society was fully entitled to contest the claims brought against it, and indeed to some extent Socrates' case was not successful. Socrates was arguing for a dominant position and breaches of the Chapter I and Chapter II prohibitions from the time that the relevant training courses were introduced. By our judgment, we have found that the breaches commenced only in April 2015. We see nothing untoward in the conduct of the defence, save only regarding the production of the schedule of income that we have referred to in the judgment at [81] to [84], and which was dealt with to a large extent in the course of the hearing. That was something that was sloppy, rather than wilfully misleading, and certainly does not justify taking the case out of the norm so as to entitle Socrates to indemnity costs.

19. In *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883, the Court of Appeal, in overturning an indemnity costs order of the trial court said, in the words of the Chancellor, at [83]:

> "The weakness of a legal argument is not, without more, justification for an indemnity basis of costs…the position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit."

20. That is not a characterisation of the way the Law Society conducted this case, and there are, in our view, no grounds for an indemnity costs order. We will, therefore, order that costs are on the standard basis and subject to the cap of £230,000, to be assessed if not agreed, with the qualification as agreed today

between the parties that the claimant in addition is entitled to its costs of the mediation, to be assessed if not agreed, up to the sum of £4,000 plus the claimant's share of the mediator's fees.

The Hon. Mr Justice Roth
President

William Allan

Prof. Stephen Wilks

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

Date: 26 May 2017