Case No: D30CF109

Neutral Citation Number: [2018] EWHC 1699 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
COMPETITION LIST (ChD)

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff

Wednesday, 23 May 2018

BEFORE:

MR JUSTICE BIRSS

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BETWEEN:
RED AND WHITE SERVICES LIMITED

Claimant

- and -

PHIL ANSLOW LIMITED

Defendant

THE PRUDENTIAL ASSURANCE COMPANY

Third Party

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MISS A CREER (instructed by Legal Studio Solicitors) appeared on behalf of the Claimant
MISS J MACLEOD (instructed by Tuppers Law) appeared on behalf of the Defendant
MR B RAYMENT (instructed by Hogan Lovells International LLP) appeared on behalf of the Defendant

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JUDGMENT

MR JUSTICE BIRSS:

1. This is a competition law claim about bus services in Cwmbran. The claimant is a subsidiary of the Stagecoach Group. It runs bus services there. It uses, I think, seven or eight slots in the Cwmbran Bus Station. The defendant is a rival bus service, a subsidiary of Varteg, a local bus company. It has fewer slots at the Cwmbran Bus Station than the claimant. The third party is the freeholder of the bus station. The claimant leases the slots from the third party

2. An argument arose between the claimant and the defendant about access to claimant's bus slots in the bus station and the claimant sued the defendant for trespass relating to those slots. The response to that claim for trespass was a competition law claim brought by the defendant against the claimant as a counterclaim and against the third party as a Part 20 claim. The competition law claim is brought both on chapter 1 grounds (Chapter 1 of the Competition Act 1998) and abuse of dominance (Chapter II of the 1998 Act). Essentially, the claim is about the leases granted by the third party to the claimant. The relief claimed includes declarations that the leases are void. A notable feature of this claim is the interaction between competition law and land law following the removal of the exclusion of land agreements from the ambit of competition law by the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010 (SI 2010/1709).

3. The claim was transferred into the specialist competition law list in the Business and Property Courts in Wales. The issues will involve market definition, which may be very significant in this case. There will be issues of dominance, which to some extent will follow from the market definition. There will also be Chapter 1 effect issues, questions of abuse and quantum. At this case management conference there was a discussion about whether it was possible to proceed on various assumptions about market definition or dominance and just try to focus on effects and abuse. At least at this stage, that is not possible.

4. There will be an opportunity to look at this case again in the autumn and it may be possible to reduce the issues or make a set of assumptions to help resolve it. In the meantime, the trial has been fixed to be next year. The window will be from 2 July 2019. It will be a 10-day trial, that is 10 sitting days, with an expert shared by the claimant and the third party, so there will be two economist experts. There is likely to be something of the order of seven fact witnesses. Some of them may be corroborative and not involve significant amounts of time.

5. Directions to bring all this about have been given today, with one issue left over which this judgment is concerned with. It is an important one - costs budgeting. That has been the major dispute between the parties and it is easy to see why. The defendant's budget is for £288,000 to bring this case to trial including £103,000 of incurred costs. The claimant's and the third party's budgets are each of £1.5 million to bring the matter

to trial in the same way. The claimant's incurred costs are about £100,000, similar to the defendant's. The third party's incurred costs are £348,000.

6. The defendant submits that the claimant's and the third party's budgets are seriously disproportionate, given that the damages in this claim are likely to be in the region of £80,000 to £120,000. The defendant recognises that competition law cases in general can cost as much as its opponents have budgeted for, if not much more. And the defendant also accepts that experienced parties, looking at the resolution of the issues of the same kind which this case raises, may well produce figures of the order of the budgets in this case. But the defendant also emphasises that in general, competition law cases are worth much more than this case in financial terms. They are very often worth more than £10 million and therefore costs budgeting does not apply.

7. The defendant takes some specific points but they are minor. The defendant's real case is about proportionality relative to what is at stake. The defendant submits that this is a case of modest value being brought by a modest company. It ought not to be impossible for a company like the defendant to be able bring a claim of this kind before the courts. Access to justice is what would be at risk with budgets of the kind put in by the claimant and the third party.

8. Turning to the budgets before me, there are striking differences in the costs budgets as is apparent simply from the totals. In detail, there are major differences at the level of disclosure and experts and in the total trial costs. A useful schedule was produced by the claimant's counsel and a copy is appended to this judgment.

9. The defendant has referred me to the judgment of Coulson J, as he then was, in the *Willis* case, that is *Willis v MRJ Rundell & Associates Ltd and Grovecourt Ltd* [2013] EWHC 2923 (TCC). It was a professional negligence claim. The judge found that the budgets which had in fact been agreed between the parties, nevertheless were disproportionate having regard to the sums at stake in the action. He decided at paragraph 25 to decline to make a costs management order. That meant that the costs would go to a detailed assessment. Paragraphs 11 to 14 deal with proportionality, as follows:

> **"4. PROPORTIONALITY**
>
> 11. As noted above, the claim now has a maximum value of £1.1 million. The total amount of the costs in the costs budgets (excluding VAT on the claimant's costs), is about £1.6 million. In other words, it will cost significantly more to fight this case than the claimant will ever recover. On that basis alone, it seems to me that the costs in the costs budgets are both disproportionate and unreasonable. During the course of his helpful submissions, Mr Wygas argued that, as a result of the comparison between the costs figure and the amount at stake, the claimant's costs were indeed disproportionate. In my view, there is insufficient difference between the two costs budgets to mean that the defendant's costs could be characterised in a different way.
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> 12. In reaching that conclusion, I accept that a professional negligence claim of this kind can involve costs that other commercial disputes may not. For example, in a

professional negligence case, expert evidence will almost always be necessary to demonstrate that a professional fell below the standard required. Furthermore, there also needs to be an allowance, in any consideration of the proportionality of costs, for the non-quantifiable, but potentially serious, damage to the defendant's professional reputation that may be caused by a claim of this kind.

13. But even making due allowance for both these factors, I do not regard the budget costs figures in this case as proportionate or reasonable, particularly given the relatively limited nature of the disputes between the parties. The individual dispute which is worth the most is the overpayment/overvaluation claim. That will involve some quantity surveying evidence, although experience of such disputes leads me to suspect that this will not necessarily be extensive: the various valuation items in issue will probably fall into a handful of types or categories, so that once an expert has addressed the leading items in each category, there will be little left for the expert to do. The defects are a relatively modest element of this claim, so that even if they required both M and E and architectural experts, the involvement of such experts ought to be relatively limited.

14. As I put to the parties during submissions, it seems to me that one test of proportionality is whether the trial is likely to be an end in itself, or merely a lesser part of the process which the parties will use in order to put themselves in the strongest position to argue that, subsequently, the other side should pay all or most of their costs. When the costs on each side are much higher than the amount claimed/recovered, the latter is almost inevitable. I have no doubt that that will be the case here. For those reasons, therefore, I conclude that the costs shown in the costs budgets are disproportionate and unreasonable."

10. Also mentioned before me was the judgment of Flaux J, as he then was, in *Wright v Rowland* [2016] 5 Costs LO 713. There, the court was also faced with a dispute about costs budgets. The particular debate was about how complex the litigation actually was. At paragraph 12, the judge decided not to take the course as in *Willis* and make no costs management order at all. Rather the judge decided to to manage the items in the costs budget that could be managed and leave some other parts of the budget to be done at a later stage when the complexity of the claim became clearer.

11. The defendant submits that the court should accept its submission that the budgets from the claimant and the third party are disproportionate and on that footing, take one of three courses. The first is to declare that the budgets are disproportionate and invite the parties to go away and prepare fresh budgets with that in mind. The second course is to make a costs management order now as best the court can (following *Wright*), setting figures which are much lower than the levels in the current budgets for the claimant and the third party. Those lower levels would be levels which are proportionate. The third course is to follow *Willis* and refuse to make a costs management order at all.

12. Although there are detailed differences between the positions taken by the claimant and the third party, essentially, they make common cause. They strongly disagree with submissions of the defendant. They submit that not only are these budgets realistic estimates of what a case of this complexity and importance is likely to cost, but they

also submit that the defendant's budget itself is unrealistically low. It is essentially, although these are my words not counsel's, an attempt to create figures for costs which are unrealistically low for the purpose of budgeting and to act as an unfavourable contrast to the figures from the claimant and the third party.

13. The difference between the parties is particularly stark in the figures for disclosure (see the cost comparison schedule). The claimant and third party submit that the defendant's figures simply cannot be right for this case. On experts, while they do not doubt that the defendant has been able to find an expert prepared to act for the sum recorded in the schedule, they submit that it is an astonishingly low figure for expert economists in competition law claims; it is not realistic to think that the claimant and third party could find an economist who would work for that sort of fee on a case like this.

14. The claimant and the third party invite the court to approve their budgets, essentially, as they stand, as realistic estimates of the likely cost.

15. Specifically on proportionality, it is pointed out that the figure given for the quantum has only emerged at this hearing and is not in evidence. Nevertheless, it is fair to say that I did not detect that the claimant or the third party really challenge the figure produced by the defendant for what the financial consequences of this claim are likely to be in terms of damages. I must say, that seems realistic as best one can tell, having regard to the nature of this market in this case.

16. The important point made by the claimant and the third party is that this is not and should not just be seen as simply a modest claim for damages in the order of £80,000 to £120,000. They submit that the competition claim has serious implications for both the claimant and the third party. An example is the potential impact of competition law affecting both of their services generally. The claimant points out that it has not been found to be in breach of what was referred to in argument as the "Bus Order".

17. The claimant and third party also point out that an infringement of competition law is a matter of public law as well as private law and is a very significant matter for commercial undertakings. They refer to the point that this claim involves interaction between land agreements and competition law which may perhaps have very wide implications. The third party also put to me that the case needs to be seen on the basis that the situation on the ground in Cwmbran will change very soon. More slots are being created and are likely to be ready in June 2018. They have been offered to the defendant. The leases in this case will expire in about July or August next year (2019), which will be roughly the same time as the trial.

18. How do I resolve this?

19. First, I will consider proportionality. As Coulson J did in *Willis*, it is relevant to compare the financial level of the claim against the costs in the budgets. When I do that here, I note that for a claim with a quantum of about £80,000 to £120,000, even the defendant's own budget is disproportionate. The defendant's budget is to spend £288,000 to catch £80,000-£120,000. It is also notable, as the claimant and the third party have pointed out, that the defendant's initial costs budget in these proceedings,

which was provided in October of last year, was for about £400,000. Now, commendably, the defendants have sought to reduce their costs, hence the current estimate. What this all goes to show, simply based on the way the defendant is approaching the matter, is that one cannot simply look at this dispute as a money claim for £80,000 to £120,000. The claim has a higher value and greater significance than can be seen simply by focussing on the likely quantum of damages.

20. Turning to the claimant's and the third party's characterisation of this case, I do not doubt that the land law issues are potentially legally novel. Now that land agreements are within the purview of competition law, that is inevitable. Nevertheless the fact is that modest value cases often raise legally novel issues which may have far-reaching implications. While that may well justify a modest increase in a costs budget, it does not seem to me that it is a factor which can be used to justify the very substantial differences between the budgets for the parties here. Putting it another way, legal novelty is not a good explanation for high costs. I accept that the land law/competition law interaction may well support the idea for two counsel. That could be a justification for a very specific aspect of the budget. However as a general point across the board, I do not accept that this argument has significant traction.

21. I also accept that this case may have wider significance for the parties' bus services and possibly wider significance for the bus industry as a whole, although I think that is a little overdone.

22. Focussing in the third party, I accept the point made by Mr Rayment, that this claim has significance from the point of view of its business as an investor in land and property. Nevertheless investors in land now have to take at least some cognisance of the fact that land agreements are no longer exempt from competition law. They will have to get used to it.

23. Also, of course I accept that infringements of competition law have a public aspect. That is a very serious matter. However the seriousness of competition law infringements, which they undoubtedly are, cannot be used in and of itself as a form of trump card justification for a very high budget. The significance of approving a budget is that the costs are more likely to be recoverable from the losing party. Thus a very significant aspect of budgeting is concerned with the other party's cost risk. That is obviously something of concern to the defendant in this case. I emphasise that the defendant, in terms of this competition claim, is really the claimant in the competition claim.

24. Costs budgeting is not directly concerned with how much a party can actually spend to protect their reputation either. Wealthy litigants can spend what they like but whether they can recover what they spend from the other party is a different matter. The budget is concerned with recoverable costs. In other words it addresses how much a party can spend whereby the other party then has to bear the costs risk that they might have to pay a figure of that order if they lose the action. As I have said, I recognise the wider issues raised by the claimant and the third party but I am concerned that that point cannot go too far in a case which is in the end about one bus station in one town in Wales for which the financial consequences are of the order of £80,000 to £120,000.

25. One further aspect I will mention at this stage is the multi-party factor. In this claim, the defendant has brought competition claims against both the claimant, Red and White, and the third party, The Prudential. It is a matter for the defendant to have chosen to join both of those independent companies and therefore the fact that the two budgets together, each of £1.5 million, mean that the defendant could be bearing a cost risk of £3 million, does not seem to me to be a matter of great significance on the facts of this case. The individual budgets are the figures I need to consider, not the net risk to the defendant of aggregating the two.

26. Taking into account the value of this claim in money terms and also taking its overall significance into account, in my judgment, a costs budget of £1.5 million is not just on the high side, it is disproportionate. It is and should be possible for a competition law claim about a bus station to be tried at a more modest costs level than that. Costs proportionate to the issues in a claim like this ought to be lower. The question which needs to be grappled with is what to do about that.

27. I am not at all attracted by the Precedent R produced by the defendant which seeks to set the claimant's and the third party's budgets by reference to the same level, more or less, as the defendant's budget. The defendant's budget is too low and is not a good guide. For example, the defendant's budgeted figure for disclosure just does not make sense and, as I have mentioned already, the figure for experts seems to be surprisingly low. Mind you, the very, very high figure for the expert to be shared by the claimant and the third party also seems to me to be entirely disproportionate. The only reason I do not add the word "surprisingly" is I have seen how much expert economists can charge in competition law cases, but that does not mean that it is always proportionate to do so.

28. Simply to send this case away on the footing that the costs budgets are disproportionate helps nobody. Also, simply to decline to make a costs management order also helps neither side and, indeed, in some ways could just make the situation worse by prolonging uncertainty. I have considered whether the course I should take is to budget some figures but not others. That would be appropriate if the situation was like the one before Flaux J. The problem there was that the court did not have the information necessary to be able to budget all the detailed figures in the proposed budgets. That is not the problem that the court is faced with here. The problem in this case is about the overall figures, not the detail.

29. It seems to me that if the court can come up with an overall figure which is appropriate, then that is the course that the court should take. In doing that I must bear in mind what is at stake, both in terms of the quantum but also, and very importantly, the other wider issues that particularly the claimant and the third party have emphasised. Also, for what it is worth, I should take account of my own experience of high value, commercial litigation of various sorts. I also take into account the defendant's initial budget estimate, which was for £400,000. That gives some indication of what might have been thought by the defendant to be a proportionate sum in costs for this dispute, at least at one stage.

30. Turning to particular items the claimant's and the third party's budgets, the figure in the claimant's budget for £633,000 for a trial seems, I must say, really much too high.

Even the figure for £400,000 for the trial from the third party looks high. It also seems to me that the figure for disclosure in the third party's budget of £100,000 is a much more realistic figure for a case like this, bearing in mind what I am thinking about all the time is proportionality, than the £267,000 odd in the claimant's budget.

31. Inevitably, in order to do this, the court cannot do anything other than take quite an approximate approach to estimating a proper overall level for the future costs of one party. In my judgment the appropriate overall figure in this case for the claimant or the third party should be £800,000. That is double the initial estimate from the defendant and that is what I will do.

32. I will also make one further observation about the incurred costs of the third party. They are about £348,000. I accept the submission from Mr Rayment that the third party had more to do at a pre-action level than either the claimant or the defendant for a number of reasons which I do not need to get into. Nevertheless the incurred costs are high. It seems to me that a figure which would be more realistic for a proportionate incurred costs figure for the third party is one arrived at by taking the incurred costs figures of about £100,000 for the claimant (or the defendant) and then adding the pre-action costs incurred by the third party, which is £87,000 odd. Putting those two figures together and rounding produces £190,000. That seems to me to be a more realistic and proportionate figure for the incurred costs of the third party, but that is a point of detail.

33. That is my decision. We will discuss how that decision will be put into effect in a minute.

Note added after judgment was given:

34. The court made an order declaring that the court approved a budget for the future costs of each of the claimant and third party in a sum not exceeding £800,000 respectively and another order giving directions for the claimant and third party to file revised budgets in line with the declaration.

Costs comparison schedule produced by the claimant's counsel

The element of costs which have already been incurred are in [ ] below the total costs for the stage

Item	C's Precedent H (11.05.2018)	D's Precedent H (10.05.2018)	TP's Precedent H (11.05.2018)
Pre-Action	*[1,033.50]*	[*10,500.00*]	[*87,218.90*]
Issues/SoC	Total 59,397.73 Of which incurred [*39,147.73*]	41,246.60 [*33,746.60*]	147,662.50 [*97,557.50*]

CMC	70,171.10 *[28,876.10]*	15,847.93 *[6,267.93]*	121,320.50 *[55,111.50]*
Disclosure	267,194.00 *[3,194.00]*	9,375.00	106,794.90 *[11,762.40]*
WS	71,668.50 *[53.50]*	10,875.00	91,729.50 *[9,757.00]*
Expert Reports	150,521.00 *[1,541.00]*	25,875.00	190,700.00
PTR	38,165.00	7,705.00	34,850.00
Trial Prep	47,150.00	17,125.00	79,850.00
Trial	633,335.00	61,698.00	408,625.00
ADR/Settlement	47,775.50 *[23,850.00]*	59,353.65 *[53,103.65]*	123,276.50 *[70,043.00]*
Contingencies			
A) Mediation	40,078.50 *[28.50]*	15,000.00	54,800.00
B) Security for costs	47,091.50 *[6,236.50]*	13,800.00	52,385.00 *[16,792.00]*
TOTAL	**£1,473,581.33**	**£288,401.18**	**£1,499,213.30**
of which incurred costs =	*[103,961.33]*	*[103,618.18]*	*[348,242.30]*

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This transcript has been approved by the Judge