



Neutral citation [2011] CAT 45

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1168/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

21 December 2011

Before:

MARCUS SMITH QC
(Chairman)
PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

EVERYTHING EVERYWHERE LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

-and-

BRITISH TELECOMMUNICATIONS PLC
TELEFÓNICA O2 UK LIMITED
VODAFONE LIMITED
CABLE & WIRELESS UK
HUTCHISON 3G UK LIMITED
OPAL TELECOM LTD

Interveners

RULING (COSTS)

INTRODUCTION

1. On various dates in April 2010, the Tribunal heard appeals by British Telecommunications plc (“BT”) and Everything Everywhere (“EE”) against two decisions by OFCOM contained in written determinations dated 5 February 2010 (“the 080 determination”) and 10 August 2010 (“the 0845/0870 determination”). The Tribunal determined these appeals in a judgment handed down on 1 August 2011 ([2011] CAT 24, “the Judgment”), which upheld BT’s appeal in respect of both determinations, but dismissed EE’s appeal against the 0845/0870 determination. On 18 November 2011, the Tribunal delivered its ruling ([2011] CAT 39) in relation to certain applications for permission to appeal, including by EE (“the Ruling”).

2. By its application of 30 November 2011 (“the Application”), OFCOM sought an order for the payment of its external legal costs in respect of EE’s appeal, such costs to be subject to a detailed assessment, if not agreed. OFCOM sought a broad-brush apportionment of its costs. Paragraph 7 of the Application states:

“...Ofcom’s application is limited to the costs of its external counsel. Some costs are clearly attributable wholly and exclusively to the EE appeal (most notably the costs of drafting Ofcom’s Defence to that appeal) while other costs (such as the costs of preparing for and attending the hearing) clearly require apportionment between the EE and BT appeals. The details can no doubt be worked out by detailed assessment if not agreed, but Ofcom invites the Tribunal to make an overall broad-brush apportionment of the costs of preparing for and attending the hearing, in order to assist the parties. Ofcom submits that 20% of those costs should be regarded as attributable to the EE appeal.”

3. EE filed written submissions in relation to the Application on 7 December 2011, contending that there should be no order for costs. We have taken these written submissions fully into account. None of the parties requested an oral hearing in respect of this question of costs, and the Tribunal does not consider an oral hearing to be necessary.

THE TRIBUNAL'S COSTS JURISDICTION IN SECTION 192 APPEALS

4. Rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) (“the Tribunal Rules”) covers all proceedings which come before the Tribunal, and provides as follows:

“(1) For the purposes of these rules “costs” means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.

(2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.

(3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.”

5. The Tribunal has recently considered in some detail the question of costs in relation to appeals under section 192 of the Communications Act 2003 (“section 192 appeals”) in its ruling on costs in *British Telecommunications plc v Office of Communications (Partial Private Circuits)* [2011] CAT 35 (“the PPC ruling”). At paragraphs 6 to 22 of the PPC ruling, the Tribunal considered a number of decided cases, together with submissions from OFCOM and BT, and concluded in particular that the most appropriate starting point for the assessment of costs in section 192 appeals was that a successful party will normally obtain a costs award in its favour.

THE PARTIES' SUBMISSIONS

6. OFCOM contended that it was clearly the successful party in the EE appeal. Although OFCOM accepted that the Tribunal must take account of all the specific factors arising in the individual case before it in exercising its discretion on costs, OFCOM submitted that, in the case of the present appeal, there was no reason to

depart from the starting point identified in the PPC ruling. In particular, OFCOM submitted that there was no basis for making an issue-based costs order in relation to EE's appeal, as EE did not succeed on any of its grounds of appeal.

7. In its written submissions on the Application, EE emphasised the need for the Tribunal's decisions on costs to reflect the circumstances of each case, arguing that it would be unfair if the "starting point" articulated by the Tribunal in the PPC ruling were to harden into a stronger presumption.

8. EE submitted that the fairest outcome in the circumstances of this case would be to make no order for costs, for the following reasons:

(a) EE's role in these proceedings should be viewed as more akin to that of an intervener, insofar as EE was acting in response to the anticipation of an appeal by BT of the 0845/0870 determination, and EE could only put distinctive points to the Tribunal (which did not involve supporting OFCOM's analytical framework) if it filed its own appeal. The Tribunal's consistent approach has been that the costs of interventions should lie where they fall, save in particular circumstances.

(b) The issue raised by EE in its appeal, as to the correct approach for OFCOM to adopt in disputes under section 185 of the 2003 Act, was an important point of principle, as highlighted by EE's decision to appeal the 0845/0870 determination (despite OFCOM having resolved the dispute against BT) and by the support of other MNOs.

(c) The time and work required to respond to EE's appeal was modest, in particular given the overlap with the issues raised in BT's appeal of the 0845/0870 determination, and should be set against the substantial assistance provided by EE to OFCOM in defending BT's appeals. Following the judgment of the Court of Appeal in *British Telecommunications plc v Office of Communications* EWCA Civ 245, OFCOM announced that it would only play a limited role in defending BT's appeals, and EE thus played a very substantial role in cross-examining BT's

witnesses and expert witnesses on issues which were critical to BT's appeals.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

9. We are not persuaded that any of the factors advanced by EE should lead us to make no award as to costs. In particular:

(a) We do not accept EE's submission that it should be treated in the same manner as an intervener for the purposes of costs. EE brought its own appeal against the 0845/0870 determination, advancing specific grounds of challenge against the determination in support of the relief sought at paragraph 153 of its notice of appeal, namely that the determination should be set aside, OFCOM be directed to take a new decision, and EE be awarded its costs. EE's position is thus different from a party who merely intervenes in support of OFCOM, which intervention is unlikely to add substantially to the costs of OFCOM. Having been unsuccessful in that appeal, and put OFCOM to the cost of defending the determination by reference to the grounds of appeal, it is just that EE be required to pay OFCOM's reasonable costs incurred thereby.

(b) The Tribunal noted at paragraph 24(b) of the PPC ruling that "where issues of genuine, industry-wide importance are raised in an appeal, it may be inappropriate to order the losing party to pay the costs of such issues." However, the Tribunal concluded that this was not true of BT's appeal in that case, and we have come to the same conclusion in relation to this appeal by EE. The essence of EE's appeal was to challenge the use of "ladder" pricing which had, in principle, been endorsed by OFCOM. Despite the obvious importance of the case to the parties and the complexity inherent in such appeals, evidenced by the length of the Tribunal's Judgment, the Tribunal concluded that OFCOM had adopted an "entirely reasonable and proper" approach to cost-reflectivity (paragraph 232 of the Judgment), and EE was unsuccessful in respect of its other grounds of appeal.

(c) The fact that EE may have provided a certain measure of assistance to OFCOM in resisting BT's appeals does not, in our view, lead to the conclusion that OFCOM should be expected to absorb its own costs of defending EE's appeal. As the Tribunal noted at paragraph 22 of the PPC ruling by reference to the Court of Appeal judgment cited at paragraph 8(c) above, the fact that OFCOM may not choose to engage in all the issues in dispute in a particular appeal makes the starting point articulated at paragraph 5 above all the more appropriate.

10. Accordingly, our unanimous conclusion is that OFCOM is entitled to an order for the payment of its external legal costs of the proceedings. In this regard, we note the overlap in OFCOM's costs of resisting EE's appeal and the two BT appeals, which was acknowledged by OFCOM at paragraph 7 of the Application, quoted in paragraph 2 above.
11. We agree with the suggestion that the Tribunal should make an overall "broad-brush" apportionment of costs to assist the parties by allocating a proportion (20%) of OFCOM's costs of preparing for and attending the hearing to the EE appeal. We note EE's agreement (at paragraph 8 of its written submissions) that 20% represents a reasonable apportionment of these costs.
12. Accordingly, we order that EE pay to OFCOM 20% of OFCOM's external legal costs of the proceedings, such costs to be the subject of a detailed assessment, if not agreed. We direct that this Ruling be placed before the costs judge for his consideration in this event.

Marcus Smith QC

Peter Clayton

Paul Stoneman

Charles Dhanowa
Registrar

Date: 21 December 2011