



Neutral citation [2008] CAT 27

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1087/2/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

15 October 2008

Before:

VIVIEN ROSE
(Chairman)
MICHAEL BLAIR QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

INDEPENDENT MEDIA SUPPORT LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

RED BEE MEDIA LIMITED
BRITISH BROADCASTING CORPORATION

Interveners

RULING ON COSTS

Introduction

1. IMS's appeal, filed on 29 June 2007, challenged two decisions by OFCOM, both dated 30 May 2007, concerning contracts entered into by BBCB (now Red Bee Media Limited) for the exclusive provision of access services to the BBC and Channel 4. The first decision closed OFCOM's investigation into whether the BBC contract infringed the Chapter I and Article 81 prohibitions ("the Case Closure Decision"). In the second decision ("the Channel 4 Decision") OFCOM found that BBCB's contract for the exclusive supply of access services to Channel 4 did not infringe the prohibitions contained in Articles 81(1) and 82 EC or the equivalent provisions of the 1998 Act.
2. By its judgment of 31 October 2007 ([2007] CAT 29, [2008] Comp AR 48: the "Admissibility Judgment"), the Tribunal determined as a preliminary issue that the Case Closure Decision challenged by IMS did not constitute an appealable decision and that, consequently, that part of the appeal was inadmissible. A hearing subsequently took place in respect of the challenge to the Channel 4 Decision. On 20 May 2008 the Tribunal gave judgment upholding OFCOM's finding that there had been no infringement and dismissing that part of the appeal ([2008] CAT 13, [2008] Comp AR 161: the "Main Judgment"). The abbreviations used in this ruling bear the meaning given to them in the Main Judgment.
3. OFCOM now seeks its costs of the appeal and the Interveners also ask for an order that IMS pay a proportion of their costs. These applications are resisted by IMS who, by letter of 5 September 2008, submitted, in essence, that the Tribunal should not make any order as to costs or, in the alternative, should order IMS to pay only a proportion of the costs incurred by OFCOM. None of the parties requested an oral hearing and in the circumstances of this case the Tribunal does not consider that an oral hearing is necessary or desirable.
4. On 24 July 2008 the Tribunal refused a request by IMS for permission to appeal against the finding in the Main Judgment that the Channel 4 Contract did not infringe the prohibitions in Article 81(1) EC or Chapter I of the 1998 Act: [2008] CAT 18. IMS has made a further application for permission directly to the Court of Appeal. Although

that application is currently pending, the Tribunal considers that it is appropriate for it to determine the applications for costs. Any orders made by the Tribunal can only take effect once the Court of Appeal proceedings have come to an end.

5. By letter of 25 July 2008, OFCOM lodged a further application that IMS pay its costs in the sum of £3,411.61, including VAT, being all of the costs it incurred in resisting IMS's request for permission to appeal before the Tribunal.

The Tribunal's jurisdiction to award costs

6. The Tribunal's jurisdiction to award costs is set out in rule 55 of The Competition Appeal Tribunal Rules (S.I. 2003, No. 1372) ("the Tribunal Rules"). Rule 55 provides that the Tribunal has a discretion to make any order it thinks fit and that it may take account of the conduct of all the parties in relation to the proceedings. By comparison with the relatively detailed guidance on costs orders to be found in the CPR rule 44.3, rule 55(2) contains little guidance as to the criteria to which the Tribunal should have regard in exercising its discretion. The Tribunal has set out some general principles: see *Institute of Insurance Brokers v Director General of Fair Trading* [2002] CAT 2, [2002] Comp AR 141 ("*GISC: costs*") at paragraph [48]. Those guiding principles may be summarised as follows:

- (a) There is no fixed rule as to the appropriate costs order; how the Tribunal's discretion will be exercised in any case will depend on the particular circumstances of the case.
- (b) It follows that there is no presumption under rule 55 that costs should be borne by the losing party.
- (c) Subject to the first principle, a legitimate starting point is that a party who can fairly be identified as a winning party should ordinarily be entitled to recover his costs from the losing party.
- (d) The starting point is, of course, subject to a consideration of whether the winning party has incurred costs in arguing issues on which he has lost, or

has acted unreasonably in the proceedings: see, by analogy, CPR rules 44.3(4) and (5) in these respects.

- (e) Other relevant considerations include whether it was reasonable for the unsuccessful party to raise, pursue or contest a particular ground of appeal; the manner in which the parties pursued or defended the appeal and whether any award of costs may frustrate the objectives of the 1998 Act.

7. The Tribunal's discretion in dealing with costs under rule 55(2) also extends to interveners. In *Freeserve.com v Director General of Telecommunications* [2003] CAT 6, [2003] Comp AR 280 at page 11, line 26 to page 13, line 27 ("*Freeserve: costs*"), the Tribunal considered the position of BT who had intervened in support of the Director General of Telecommunications in that case. The Director's submissions had been partially, but not wholly, successful. The Tribunal said:

“In expressing views on the position of BT [the intervener], we are not allowing the indications we are about to give to harden into a rule, but they do express our view in general on interveners in the situation of BT.

The general position, as far as the Tribunal is concerned, is that the costs of an intervention will very often in justice be allowed to lie where they fall. It is true that in some cases it will be proper to make orders either in favour of or against interveners, but in our view there should be no general expectation that a successful intervener is necessarily entitled to its costs.”

OFCOM's costs application

8. OFCOM's application is straightforward. They successfully defended the Case Closure Decision and Channel 4 Decision. The Tribunal accepted most of their arguments in support of their defence. There is nothing in their conduct of the appeal that would make it unfair for them to be awarded their costs. We have considered carefully the points raised by IMS in their letter of 5 September and the earlier correspondence. Although we understand why IMS decided that it was in its commercial interests to attempt to get the decisions overturned, this is not a ground for reducing their liability to pay costs given that they have failed in that attempt. We reject IMS's argument that the law in relation to the admissibility of the Case Closure Decision was unclear. As the Tribunal stated in the Admissibility Judgment, there have now been a number of

cases in which the Tribunal has considered this issue and there was nothing in the present case which took the facts out of the ordinary.

9. In the Main Judgment we found that OFCOM had properly analysed the relevant market in the Channel 4 Decision and correctly concluded that, in light of the features of the access services market, the Channel 4 Contract and similar agreements did not have the effect of appreciably restricting competition in that market: see Main Judgment, at paragraphs [113] *et seq.* IMS raised and pursued many points in its appeal to which OFCOM was obliged to respond in detail. OFCOM's submissions were germane to the Tribunal's decisions in this case and did not involve unnecessary prolixity or duplication. We do not consider that the appellant is entitled to any special protection from a costs order in favour of the successful respondent. Policy considerations relating to the risk of frustrating the objectives of the 1998 Act by deterring appeals by smaller companies, representative bodies and consumers do not apply in this case (see *GISC: costs* at paragraph [54]). We also note that IMS's written submissions appear to accept that in principle it must pay a proportion of OFCOM's costs.
10. OFCOM has provided a schedule of the costs they are claiming. These total £87,677.80 in respect of IMS's appeal against OFCOM's decisions dated 30 May 2007 and £3,411.61 in respect of IMS's request for permission to appeal. OFCOM's costs are limited to their counsel's fees and it is not claiming for the work undertaken by its in-house legal team. IMS submits that these costs are excessive and therefore asks that OFCOM only be awarded a relatively modest proportion of its costs.
11. The Tribunal does not consider that the amounts claimed are excessive. The comparison IMS seeks to make between the fees paid to OFCOM's counsel and the fees incurred by IMS for its own representation during the appeal is not a legitimate one. OFCOM was entitled to treat this case as an important one and to instruct leading and junior counsel. The fact that IMS may have chosen more modest representation in its appeal does not provide a benchmark limiting their opponents' representation.

The Interveners' costs applications

12. We also have before us applications by BBCB and the BBC, both interveners in this case, to recover an appropriate proportion of their costs against IMS. BBCB's costs amount to £212,800 made up of counsel's fees of £69,209, solicitors' fees of £142,112 and some disbursements.
13. BBCB recognises that as a successful intervener there is no presumption that it should be awarded its costs. Nonetheless, it submits that in the particular circumstances of the present case such an award is appropriate. BBCB referred us to *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 21, [2004] Comp AR 189 where the intervener was awarded 60 per cent of its costs of the first appeal and all of its costs in relation to a second appeal. BBCB contends that: (a) it successfully supported the case by OFCOM to the Tribunal, both at the preliminary issue and main hearings; (b) its submissions were of assistance to the Tribunal, and it was also able to assist at the hearing by providing a redacted copy of the Channel 4 Contract; (c) its submissions did not merely duplicate those of OFCOM; and (d) IMS's appeal consisted of an attack on a core element of BBCB's business, i.e. its contracts for the provision of access services to the BBC and Channel 4. BBCB submits that an award within the range of 30 to 50 per cent would be proportionate and reasonable.
14. The BBC agrees with and adopts the submissions of BBCB and applies for an award of costs against IMS in the same terms as BBCB.
15. In the Tribunal's judgment, there is a public benefit in not discouraging legitimate intervention, either in support of a contested decision or in opposition to one. Equally, the Tribunal recognises the public benefit in not unduly encouraging interventions. Accordingly, the Tribunal's approach to intervener's costs to date has generally been neutral, i.e. that interveners should be neither liable for other parties' costs, nor able to recover their own costs, although that approach may be departed from in appropriate cases. That being so, we consider that IMS's reliance on the rules governing awards of costs by the Court of First Instance is misplaced since those rules are materially different from rule 55(2) of the Tribunal Rules.

16. Turning to the BBC's application for costs, we note at the outset the observation in *Freeserve: costs* that there should be no general expectation that a successful intervener is entitled to its costs. Although it was beneficial to the Tribunal that the BBC intervened, it was clearly in the BBC's interest to do so. It is also fair to say that the BBC played a rather limited role in these proceedings. To the extent that the BBC's intervention did cause it and the other parties to incur extra costs, we would therefore expect those costs to be relatively small. In those circumstances, we see no reason to depart from the general position that costs of an intervention should be allowed to lie where they fall.
17. The position of BBCB is different from that of the BBC. Not only was BBCB a company which was the subject of OFCOM's investigations in this case, it was the addressee of an appealable decision in which OFCOM decided that its Channel 4 Contract did not infringe the 1998 Act or Articles 81 or 82 of the EC Treaty. BBCB was particularly and directly affected by IMS's challenge to OFCOM's decisions. The relief sought by IMS was not only that these two important contracts should be declared void under Article 81(1) EC and the Chapter I prohibition but that the Tribunal should declare that BBCB occupies a dominant position so that its commercial freedom when taking part in any subsequent re-tender for the contracts would be constrained.
18. Furthermore, BBCB's submissions did not, to any material extent, duplicate those of the OFCOM. BBCB's submissions assisted the Tribunal, particularly on the issue of dominance, the scope of IMS's pleaded case on that issue, and the terms and effect of the Channel 4 Contract: see the Main Judgment, at paragraph [31]. Bearing all these factors in mind, we consider that it is appropriate, in the present case, to exercise our discretion under rule 55(2) to make an award of costs in favour of BBCB.
19. On the question of the proportion of costs which should be awarded, BBCB has invited the Tribunal to award it between 30 to 50 per cent of its costs. We have considered whether BBCB's costs, for instance, relating to the preliminary issue should lie where they fall. In our judgment however there is no reason to deal differently with the costs incurred in relation to the preliminary issue compared with the costs incurred in defending the challenge the Channel 4 Decision. The Tribunal was assisted by BBCB's submissions in respect of the Case Closure Decision (see Admissibility Judgment, at

paragraph [49]), as it was by BBCB's oral and written submissions in relation to the Channel 4 Decision. Given the helpful role played in the proceedings by BBCB, and the fact that it was directly affected by the appeal but has carefully managed its intervention, the Tribunal considers the figure of 35 per cent to be a reasonable assessment of the proportion of the overall work which BBCB as an intervener should be entitled to be reimbursed.

Conclusion

20. For all of the foregoing reasons the Tribunal unanimously:

ORDERS THAT:

- (1) IMS pay OFCOM such sums as may be agreed between the parties or hereafter determined, as the costs reasonably incurred in the appeal as determined by the judgments of the Tribunal of 31 October 2007 ([2007] CAT 29) and 20 May 2008 ([2008] CAT 13), including the costs of IMS's request for permission to appeal.
- (2) IMS pay BBCB 35 per cent of such sums as may be agreed between the parties or hereafter determined as the costs reasonably incurred by BBCB in that appeal.
- (3) The BBC will bear its own costs.
- (4) If the Court of Appeal either refuses IMS permission to appeal or grants permission but then dismisses IMS's appeal against the Main Judgment, the parties shall within 21 days thereafter seek to reach agreement as to the amounts of costs recoverable under paragraphs (1) and (2) above. In default of agreement the procedure to be followed thereafter will be determined by the Tribunal.
- (5) Liberty to apply.

Vivien Rose

Michael Blair QC

Paul Stoneman

Charles Dhanowa
Registrar

Date: 15 October 2008