Neutral Citation [2018] CAT 10

IN THE COMPETITION

Case No: 1279/1/12/17

APPEAL TRIBUNAL

BETWEEN

PING EUROPE LIMITED

Appellant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

REASONED ORDER

UPON the Respondent ("**CMA**") applying on 11 December 2017 to exclude certain evidence submitted with the Notice of Appeal of the Appellant ("**Ping**") (the "**Admissibility Application**")

AND UPON reading the papers filed by the parties and hearing counsel for the parties at the hearing on 15 January 2018

AND UPON the Tribunal dismissing the Admissibility Application at the application hearing and providing its reasons for its decision in a ruling dated 26 March 2018 ([2018] CAT 8)

AND UPON reading the submissions for the parties and the Complainant on the costs of the Admissibility Application

IT IS ORDERED THAT:

1. The CMA pay Ping £60,000 within 28 days of the date of this order.

REASONS:

1. This Order concerns the costs of the CMA's Admissibility Application of 11 December 2017 which the Tribunal dismissed at a hearing on 15 January 2018. The Tribunal's reasons for dismissing the application were given in its ruling of 26 March 2018 ([2018] CAT 8).

2. The Tribunal's jurisdiction to award costs is set out in rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "**Tribunal Rules**"). Rule 104 provides that the Tribunal has a discretion to make any order it thinks fit in relation to the payment of costs. Rule 104(4) sets out a number of factors to be taken into account when exercising that discretion, including the conduct of the parties in the proceedings.

3. As noted in my reasoned costs order of today's date [2018] CAT 9, the Tribunal has a "wide and general discretion" in relation to costs but the starting point in Competition Act appeals is that costs follow the event.

4. Ping seeks its costs of defending the application, it points out that the CMA was the clear loser of the application since it failed to persuade the Tribunal to exclude the contested evidence.

5. The CMA's primary contention is that costs should be in the case. I do not consider this is appropriate in this case since the admissibility application was a discrete issue and there is no good reason why I should postpone dealing with it. On the contrary, I consider that it would be appropriate to deal with it now. As Nugee J remarked in *Merck KGaA v Merck Sharp* [2014] EWHC 3920 (Ch) at [7]:

> "It is in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather that leaving the costs to be swept up at trial."

6. The CMA's fallback contention is that the parties should bear their own costs of the application. The CMA contends that its application was not without merit and it points out that it did win on certain issues. For example, the Tribunal agreed that the disputed evidence was not available to the CMA at the time of the decision was taken (see [37] of the Ruling) and it also vindicated itself in respect of Ping's meritless allegation of bias in the administrative proceedings (see [45] of the Ruling).

7. Whilst I accept that the CMA's application was not without merit, I am not persuaded that these matters are sufficient to displace the starting point that costs should follow the event. Accordingly, I shall rule that the CMA must pay Ping's costs.

8. Turning to the amount of the costs sought, I consider the sum of £80,225.76 sought by Ping to be somewhat excessive for what was only a single day hearing. I note, for example, that Ping has sought advice from partners of two firms which must inevitably entail some duplication. I consider that a more proportionate figure for a matter of this complexity would be £60,000 and I shall order accordingly.

Andrew Lenon QC
Chairman of the Competition Appeal Tribunal

Made: 9 May 2018
Drawn: 9 May 2018