



Neutral citation [2019] CAT 7

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1279/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

6 March 2019

Before:

ANDREW LENON Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

PING EUROPE LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (COSTS OF THE COMPLAINANT)

A. BACKGROUND

1. On 7 September 2018, the Tribunal handed down its judgment in these proceedings ([2018] CAT 13) (the “Judgment”). This Ruling adopts the same defined terms as are set out in the Judgment.
2. In the Judgment, the Tribunal dismissed Ping’s appeal on liability but reduced the penalty imposed on Ping from £1.45 million to £1.25 million.
3. The Complainant is the person whose complaint to the CMA about Ping’s online sales ban originally led to the CMA’s investigation. The Complainant was not a party to these proceedings. However, in the course of the proceedings the CMA adduced a witness statement from the Complainant in anonymised form. This led to an application by Ping for disclosure of the Complainant’s identity (“the Disclosure Application”). Having rejected the Disclosure Application, the Tribunal awarded the Complainant 50% of its costs of the application for the period after 16 February 2018, being the date when the Ping unreasonably rejected the Complainant’s suggestion of a compromise, with the costs of the Disclosure Application incurred up to and including 16 February 2018 being costs in the case. The Complainant was subsequently called by CMA as a witness of fact at the main hearing.
4. The costs now claimed by the Complainant, totalling £19,368, comprise the costs of its participation in the proceedings excluding the costs of the Disclosure Application for the period after 16 February 2018 which were covered by the earlier ruling.

B. LEGAL PRINCIPLES

5. The Tribunal’s jurisdiction to award costs is governed by rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. 1648) (the “Tribunal Rules”). Rule 104 provides insofar as material:

“(1) For the purposes of these rules “costs” means costs and expenses recoverable before the Senior Courts of England and Wales [...]

(2) The Tribunal may at its discretion [...] at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.

[...]

(4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—

(a) the conduct of all parties in relation to the proceedings;

(b) any schedule of incurred or estimated costs filed by the parties;

(c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;

[...]

(e) whether costs were proportionately and reasonably incurred; and

(f) whether costs are proportionate and reasonable in amount.

(5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be –

(a) assessed by the President, a chairman or the Registrar; or

(b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales [...]"

6. Rule 104 gives the Tribunal a wide and general discretion in relation to costs: see *Quarmby Construction Co Ltd v OFT* [2012] EWCA Civ 1552 at [12] and [37] and *HCA International Ltd v CMA* [2015] EWCA Civ 492 at [101].
7. Whilst rule 104 confers a wide and general discretion on the Tribunal, the starting point in appeals brought under the 1998 Act is that costs follow the event: see *Eden Brown Limited v OFT* [2011] CAT 29 at [18], *Skyscanner Limited v CMA* [2014] CAT 19 at [9], and *Ping Europe Ltd v CMA* [2018] CAT 9 at [7] and [10].
8. The general position is that interveners are neither liable for other parties' costs, nor able to recover their own costs: *Ryanair Holdings plc v CC* [2012] CAT 29 at [7]. However, the Tribunal has on occasion departed from this starting point: *Independent Media Support Ltd v Ofcom* [2008] CAT 27 at [17]-[18] and *Ping Europe Ltd v CMA* [2018] CAT 9 at [14].

C. PARTIES' SUBMISSIONS AND THE TRIBUNAL'S ANALYSIS

9. The Complainant submits that this is an appropriate case for departure from the general approach for the following reasons:

(a) The Complainant had a real, direct and personal interest in the case. The Complainant was at the origins of the CMA's investigation and had a direct interest in ensuring that Ping's conduct was brought to an end and therefore that the Decision was upheld. The Complainant's position and legal analysis, dating back to the original complaint, has been vindicated by the rejection of Ping's appeal. Costs should therefore follow.

(b) The Complainant's credibility and motives were subject to personal attacks by Ping. This made it necessary for the CMA to revert to the Complainant to collate his evidence into a formal statement and supplement it with additional evidence. The Complainant needed to instruct Counsel to assist with verifying and drafting his statement and checking for confidentiality.

(c) In the Disclosure Ruling, the Tribunal decided that the Complainant should recover its costs but reduced that by 50% because there was a "*degree of duplication*" between the submissions of the CMA and the Complainant: Disclosure Ruling at [15]. That reasoning does not apply for the period before 17 February 2018.

(d) The Complainant's costs were reasonable and proportionately incurred and they are reasonable and proportionate in amount. The costs were strictly limited, notably to those which were necessary for the preparation of witness statements and to address the complex confidentiality issues that arose through Ping's insistence.

(e) There are other factors relevant to the exercise of the Tribunal's discretion:

- i. the Complainant has assisted in the public interest by identifying the "*by object*" anti-competitive conduct in this case;

- ii. the Complainant has incurred significant legal costs;
 - iii. the Complainant has not sought to intervene like a normal intervener under Rule 16 of the Tribunal Rules - it could, as happened in the whistle blower in the *Replica Football Kits* case ([2005] CAT 26) have been granted “*informal observer*” status with accompanying rights to submit written submissions and attend the trial. In *Replica Football Kits* the complainant was entitled to recover “*the costs of and incidental to the proceedings*”: [2005] CAT 34; and
 - iv. the Complainant was involved in the appeal because the CMA considered its witness evidence was of assistance in supporting the Decision which has been upheld by the Tribunal.
10. In response, Ping submits, in summary, that there is no legal basis for recovery as the Complainant was a mere witness of fact and not even an intervener. It was not surprising that Ping had challenged the credibility of its evidence and its motives. This was not a justification for a claim for recovery of costs. Nor was the fact that its evidence, like that of other witnesses, was found to be helpful. The confidentiality arrangements were required by the Complainant.
11. The Tribunal does not consider that any of the grounds put forward by the Complainant justifies a costs award in its favour, for the following reasons.
12. Firstly, the Tribunal accepts Ping’s submission that the Complainant’s role in the proceedings was essentially that of a witness of fact for the CMA. Whilst the Complainant had a direct and personal interest analogous to that of an intervener in relation to the Disclosure Application (the Complainant faced potential retaliatory measures if an unredacted version of the witness statement was not confined to a confidentiality ring and so had good reason to be represented at the hearing and to defend its interests) the same cannot be said of the substantive appeal. In the substantive appeal, the Complainant did not advance any case of its own and did not instruct Counsel to make submissions on its behalf. Nor was its position the same as that of the Complainant in the

Replica Football Kits case, who had been granted informal observer status by the Tribunal.

13. Second, none of the discretionary factors advanced by the Complainant have any significant weight, even assuming that the Tribunal had the power to order the recovery of costs of a person who was neither a party nor an intervener in the proceedings. The Complainant's role in the CMA's investigation is not relevant to the allocation of the costs of the proceedings. Nor is the fact that the Tribunal found the Complainant's evidence to be helpful. It was, in any event, clearly in the Complainant's interest to furnish evidence in support of the CMA as the Complainant would benefit commercially from selling Ping clubs online: see Judgment at [52]. The fact that the CMA's case was successful does not justify an order for costs in favour of the Complainant as one of the CMA's witnesses.

14. In those circumstances, the Complainant's application for costs is refused.

Andrew Lenon Q.C.
Chairman

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

Date: 6 March 2019