



Neutral citation [2024] CAT 15

Case No: 1593/6/12/23

**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

28 February 2024

Before:

BRIDGET LUCAS KC  
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) AIRWAVE SOLUTIONS LIMITED  
(2) MOTOROLA SOLUTIONS UK LIMITED  
(3) MOTOROLA SOLUTIONS, INC.

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Intervener

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**RULING (COSTS)**

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1. On 22 December 2023, we issued our judgment [2023] CAT 76 (the “Judgment”) dismissing the application of Airwave Solutions Limited; Motorola Solutions UK Limited and Motorola Solutions, Inc. (together “Motorola”) for judicial review of the CMA’s decision in its final report on “*Mobile network services*” (the “Decision”). On 30 January 2024 we dismissed Motorola’s application for permission to appeal ([2024] CAT 7).
2. The CMA, as the successful respondent to Motorola’s application, now seeks an order that Motorola pay its costs of the proceedings to be summarily assessed in the sum of £182,529.60 as per a schedule provided to the Tribunal; alternatively an order for detailed assessment. We have received written submissions from the parties. The parties agree that it is appropriate that the question of costs be determined on the papers and without a hearing.
3. In summary, Motorola’s application was brought on two grounds: the first was that the CMA had erred in its approach when finding that there was an adverse effect on competition (“AEC”), and the second was that the CMA had erred in its profitability analysis which informed the CMA’s conclusions on both the existence of an AEC and its proposed remedy. We dismissed the application on both grounds. The CMA raised two short procedural points on which we found in favour of Motorola. These were first, that the argument on Ground 1, as articulated by the time of the hearing before us, was not raised in the Notice of Application; and secondly, that the argument made on Ground 1 was not open to Motorola as it was inconsistent with arguments made by Motorola in the course of the market investigation (see [86] to [96]). The CMA also argued that, were we to find that there was an error of public law, the principle in *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P&CR 306 applied such that we should exercise our discretion to decline to quash the decision on the basis that the CMA would inevitably have reached the same conclusion. In light of our decision, we were not required to decide the *Simplex* point. This point did not detain us for long. We concluded that had we been required to decide it, we would have found against the CMA (see [146] to 152)).
4. When making an order for costs, and determining the amount payable, the Tribunal may have regard to the factors set out in Rule 104 of the Competition Appeal Tribunal

Rules 2015 (the “Tribunal Rules”). For present purposes, the factors that are pertinent are: the conduct of all parties in relation to the proceedings; the schedule of incurred costs filed by the CMA; whether a party has succeeded on part of its case, even if that party has not been wholly successful; whether costs were proportionately and reasonably incurred; and whether costs are proportionate and reasonable in amount.

5. The CMA was clearly “the winner” on this application. There is no default presumption that costs should follow the event, however that is the general starting point. The CMA has provided a schedule of the costs it seeks, and the total is £182,529.60. Motorola’s position is that it should not pay 100% of the figure claimed.
6. The CMA submits:
  - a. It complied diligently with the expedited timetable ordered by the Tribunal.
  - b. Its costs were proportionately and reasonably incurred.
    - i. Being a respondent, the CMA had no choice but to oppose the application (the alternative being to concede to what the Tribunal has found was an unmeritorious claim). The CMA acted in the public interest in defending the claim, and incurred cost in doing so. As a public authority, and in calculating its summary costs schedule, the CMA has borne in mind what is reasonable and proportionate and has no commercial incentive to charge more than what is reasonable. It is not appropriate, in those circumstances, to apply a deduction that might otherwise be thought appropriate in a commercial case.
    - ii. The nature and complexity of the work, combined with the expedited timetable, meant that it was necessary to instruct two junior Counsel, and two leading Counsel: the first of whom was unavailable for the trial date, and the second of whom was instructed promptly after the Defence had been filed.

- iii. Counsels' fees of £77,375 plus VAT incurred in relation to what was ultimately a 2 day hearing were reasonable.
  - iv. The CMA acknowledges that the fact that the Home Office was granted permission to intervene ([2023] CAT 45) may have increased the costs to some extent given the need to correspond with them, as well as with Motorola, relating to the hearing. However, the fact that the Home Office, as intervener, has borne its own costs does not preclude the CMA from recovering its own costs, in so far as they may have increased as a result of the intervention.
- c. Its costs were proportionate and reasonable in amount.
- i. The amounts claimed for the work carried out by the CMA's inhouse solicitors are in line with the Solicitors' Guideline Hourly Rates set by HM Courts and Tribunal Service for "London 3" and no uplift has been applied.
  - ii. The rates charged for Counsel are significantly lower than those charged in the private sector in the field of competition law. Its first Leading Counsel was Standing Counsel to the CMA thereby minimising costs. One of its juniors was Panel Counsel. The remaining members of the Counsel team charged the Attorney General's set rates.
  - iii. The CMA has taken a conservative approach to the preparation of its costs schedule. It has sought to remove time that might be considered duplicative or unrecoverable upon a detailed assessment; sought to ensure that work performed was carried out at an appropriate level; and has not claimed for all members of the legal team working on the matter. The figure included in the summary costs schedule was prepared with a view to reaching a reasonable and pragmatic proposal capable of agreement. Were I to order a detailed assessment, the CMA reserves the right to claim a higher amount.

7. Motorola maintains that it is highly unusual for a successful party to recover 100% of the costs it claims, and that the CMA should not do so. Motorola relies on the following:
  - a. In an earlier judicial review application dated 22 December 2021 brought by Motorola against the CMA's decision to commence the market investigation in the first place, the Tribunal ordered that the CMA should recover 75% of its costs. This was on the grounds that: "This was an application that was subject to a very tight procedural timetable, and this no doubt meant that more persons at the Respondent needed to be deployed than would otherwise be the case. However, this will no doubt have caused a level of inefficiency, and for that reason the costs have been reduced to the sum of £75,000".
  - b. The CMA's position was that the present proceedings should be expedited, and the Tribunal so ordered. It follows that the CMA again deployed a very large legal team. The CMA's schedule suggests ten internal personnel have been involved in this case (as compared to the seven involved in the previous judicial review proceedings), and four Counsel (as opposed to three). It would therefore be appropriate to apply a similar 25% reduction to the costs claimed.
  - c. The fact that the CMA complied diligently with the timetable imposed by the Tribunal is not a factor that should weigh in the Tribunal's reasoning on costs.
  - d. The CMA's costs were not proportionately and/or reasonably incurred. Motorola points in particular to:
    - i. The instruction of two Leading Counsel, and two junior Counsel whose fees totalled £77,375 plus VAT. The fact that a new Leading Counsel was required for the main hearing, as a result of availability issues, would inevitably have led to duplication in reading in and getting up to speed. Motorola also points to the fact that the original Leading Counsel incurred almost one quarter of the total legal costs claimed, and almost one half of the total fees for Counsel which, it is said, "seems excessive".

- ii. The “large” internal team of ten CMA personnel incurred nearly 150 hours on preparation of the CMA’s Defence and skeleton argument, and review of transcripts. Motorola suggests that there is likely to have been an element of inefficiency and duplication of the work undertaken by the Counsel team.
- iii. There are categories of work which Motorola suggests demonstrate inefficiencies as a result of a large team being used. Specifically, Motorola point to £4,233.20 being sought in relation to “reading in”, and £4,973 in relation to “internal discussions concerning progressing the case”.
- iv. Costs of £10,000 were incurred in relation to “attendances on [Motorola] and Intervener”, the latter being a reference to the Home Office. Motorola suggests that some of this time may well have been spent liaising with the Home Office over the question of interim relief: a point which arose in the course of the hearing before us. As the Home Office’s intervention was permitted on a cost neutral basis, it would be wrong for the CMA’s costs incurred in dealing with the intervener to be recoverable.

8. The CMA, in response, submits that:

- a. The costs order made in Motorola’s previous judicial review application does not create a precedent for what should happen in relation to costs at the conclusion of these proceedings. Each case should be assessed on its own facts and merits. The level of expedition, timetable, and issues involved were different. The former had a tighter timetable, running over the Christmas break. It was concerned with whether or not the grounds to refer the matter for a market reference investigation were met, whereas in the present proceedings the issues related to arguments raised on the Decision’s findings.
- b. As regards the size of the legal team, Motorola itself had an extensive legal team, instructing two law firms: Winston & Strawn and Slaughter and May,

- c. The submissions made by Motorola in relation to whether costs were reasonably or proportionately incurred ignore the low rates charged by Counsel, and efficiencies gained in the selection of Counsel familiar with the CMA's work, and Motorola's previous application for judicial review. They also ignore the fact that the CMA has not claimed for duplication of work, and overlook the work undertaken by its first Leading Counsel which covered the preparation of the Defence and included attending the case management conference. The CMA maintains that work was not then duplicated by the second Leading Counsel who was instructed for the hearing itself.
  - d. The CMA's legal time was plainly required to read in and gain a proper understanding of the parts of the Decision being challenged.
  - e. In any event, the costs claimed by the CMA are plainly proportionate and reasonable, given the relatively low quantum. Motorola does not suggest that the overall quantum of costs claimed is disproportionate and/ or unreasonable.
  - f. As regards the costs incurred in dealing with the Home Office, Motorola's argument is misconceived, and in any event, the amount in issue is only 1.29% of the overall costs claimed.
9. I do not consider that the approach taken to costs by this Tribunal on a different application made in separate proceedings, and in a different context, is of any assistance here: still less that it means that I should adopt as a starting point a 25% reduction to the costs claimed by the CMA. I also do not think that the CMA's adherence to the expedited timetable is a factor of any significant weight, in particular in circumstances where the CMA was in favour of expedition and might be expected to comply with the directions that the Tribunal made.
10. I bear in mind the fact that the CMA considers it has already adopted a conservative approach to the preparation of its schedule of summary costs. Motorola suggests that various assumptions can be made as to inefficiencies and duplication, but on the other hand, I have the CMA's assurance that it has prepared its schedule so as not to claim

for costs that might be regarded as such. I am concerned that Motorola's approach to the CMA's costs is unrealistic and unreasonable. For example, I do not think it can sensibly be suggested that the CMA's legal team was "too large" in circumstances where Motorola instructed two law firms to deal with this application. I also struggle to see how it can be said to be unreasonable or disproportionate for new members of that team to have taken time to "read in" to the case, and to seek to recover the costs of doing so: in particular in circumstances where the amount claimed is less than £5,000.

11. I accept that the hourly rates claimed for the CMA's legal team and for Counsel are plainly reasonable, and note that Motorola does not suggest otherwise. However, I consider there is likely to have been an element of duplication when, for example, handing over the case between Leading Counsel. That is not a criticism, but in my view, a probable consequence of the need to change Counsel after the Defence had been prepared and filed. I do not think that there is any general prohibition on the CMA recovering its costs incurred in relation to its correspondence with the Intervener, but I am also of the view that, in the absence of any contrary argument from the CMA, an element of the costs claimed related to the point arising on interim relief.

12. My overall view is that the CMA's costs, as set out in the schedule, are generally reasonable and proportionate and I am not inclined to make a significant reduction to them. Subject to one point, I will order that the CMA's costs be summarily assessed at £165,000. The one caveat is that I note that if I am minded to summarily assess the CMA's costs at less than the amount claimed, the CMA would wish to proceed to a detailed assessment. I will therefore order that unless the CMA notifies the Tribunal by 4pm on 8 March 2024 that it seeks a detailed assessment, costs are summarily assessed at £165,000 such costs to be paid by 4pm on 22 March 2024. If the CMA does notify the Tribunal that it wishes to proceed to a detailed assessment, I will make an order directing that the costs be dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales.



Bridget Lucas KC  
Chair

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

Date: 28 February 2024