Neutral citation [2005] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1025/3/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

18 May 2005

Before:

Sir Christopher Bellamy (President)
Marion Simmons QC
Ann Kelly

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

(FORMERLY THE DIRECTOR GENERAL OF TELECOMMUNICATIONS)

Respondent

supported by

THUS PLC AND BROADSYSTEM VENTURES LIMITED

and

NJ ASSOCIATES

Interveners

Gerald Barling QC and Sarah Lee (instructed by BT Legal) appeared for the appellant.

Eleanor Sharpston QC and John O'Flaherty (instructed by OFCOM) appeared for the respondent.

John Edwards and Nusrat Zar (of Herbert Smith) appeared for the Interveners Thus plc and Broadsystem Ventures Limited

JUDGMENT: COSTS

I INTRODUCTION

1. On 9 December 2004 the Tribunal handed down its judgment on the merits of the appeal brought by the appellant British Telecommunications plc ("BT") pursuant to section 192 of the Communications Act 2003 (the "2003 Act") against a notification by the Director General of Telecommunications to BT dated 7 November 2003 (the "Notification") (see [2004] CAT 23). By the Notification the Director notified BT that he had reasonable grounds to suspect that BT was acting in contravention of General Condition 1.2 of the General Conditions of Entitlement made by the Director pursuant to section 45 of the 2003 Act by using customer-specific information acquired from another "Communications Provider" in connection with the provision of Carrier Pre-Selection ("CPS") for the purposes of carrying out CPS Save Activity (as defined in the Notification).

2. For the reasons given in our judgment the Tribunal upheld the Notification, subject to further consideration, from the point of view of legal certainty, of the definition of "marketing activity" in the Notification.

3. On handing down the judgment the President of the Tribunal made the following observations regarding costs:

> "It is not entirely accidental that the Tribunal has not yet ruled on the issue of costs in another regulatory case (the case about Radio Base Station Backhaul Circuits) in which BT was the successful appellant, whereas in this case BT is the losing appellant. It seems to the Tribunal that in some ways there are parallel issues in these two cases which do raise the rather general question of how we should approach the question of costs in this particular regulatory framework. I think in this particular case we have invited submissions on costs by a date in the New Year, but certainly what the Tribunal is wondering, as it were, in the back of its mind, is whether the principles of costs that would apply in orthodox litigation are wholly appropriate to this kind of regulatory litigation which is in a sense an extension of the regulatory system; whether it would not be appropriate in most cases for the various parties – whether regulator or regulated – to support their own costs unless there is some particular reason for deviating from that rule because of the particular circumstances of the case. That is simply a point that the Tribunal has in mind and if the parties in this case would

> care to bear that in mind when considering the issue of costs in their submissions that, I think, would be helpful to the Tribunal."

4. The other case referred to above is *BT v. Office of Communications (RBS Backhaul)* [2004] CAT 8. In that case, the reverse situation applies, since there BT was successful. In reaching this judgment we have been aware of the submissions made in that case. The Tribunal's judgment on costs in that case is being delivered at the same time as this judgment: see [2005] CAT 20.

5. By a letter dated 6 December 2004 the Tribunal invited the parties' written submissions as to consequential directions and costs by 24 January 2005. BT, OFCOM and Broadsystem Ventures Limited and Thus plc provided written submissions as to costs on 24 January 2005.

6. A directions hearing was held on 10 March 2005 to consider consequential matters arising from the Tribunal's judgment, including the terms of a permissible CPS Notification of Transfer Letter and costs. Following that hearing OFCOM and BT have written in agreed terms to the Registrar of the Tribunal to the effect that agreement has now been reached between them as to the terms of the CPS Notification of Transfer Letter. Accordingly it is not necessary for the Tribunal to give a separate judgment on that issue. Accordingly, the only outstanding issue in the present appeal is the question of costs.

II THE PARTIES' SUBMISSIONS

OFCOM' s submissions

7. OFCOM submits that the principles which apply to awards of costs in "orthodox litigation" where costs follow the event are not appropriate to "regulatory litigation". OFCOM submits that it is appropriate for the parties to "regulatory litigation" to bear their own costs unless there are exceptional circumstances that justify deviating from that rule. OFCOM makes this submission notwithstanding that it is the successful party in this appeal and that were principles applicable to orthodox litigation to be applied in the present case, it could expect BT to be ordered to pay at least some portion of its costs.

8. OFCOM cross-referred to its submissions on costs in *BT v Office of Communications (RBS Backhaul)*, cited above, in which OFCOM was the unsuccessful party and BT was the successful party.

9. According to OFCOM, the Tribunal has made clear in cases arising under the Competition Act 1998 and Enterprise Act 2002 that there is no presumption in proceedings before it that costs will follow the event (*IBA Health Limited v Office of Fair Trading: Costs* [2004] CAT 6 ("*IBA Health: Costs"*), paragraph 37; *Napp Pharmaceuticals Limited v Director General of Fair Trading* [2002] CAT 3 *("Napp: interest and costs)*, paragraph 22; and *Institute of Independent Insurance Brokers v Director General of Fair Trading* (*"GISC: Costs"*) [2002] CAT 2, paragraph 53).

10. OFCOM referred to the Tribunal's judgment in *GISC: Costs* in which the Tribunal said, at paragraph 52:

> "…Cases involving regulated industries where the costs of statutory regulation are recovered, in one way or another, from the industry, may also raise separate issues".

11. OFCOM submits that the above passage demonstrates that the Tribunal has recognised that an approach different to that applicable to orthodox litigation may be taken in cases involving regulated industries.

12. OFCOM also referred to the Tribunal's judgment in *Aquavitae v Director General of Water Services: Costs* [2003] CAT 23, albeit in the context of an appeal under the Competition Act 1998, that there could be circumstances in which an unsuccessful appellant does not have to pay the costs of a successful regulator and that such costs can be regarded as part of the general costs of regulation in the sector.

13. OFCOM submits that the Tribunal has also previously recognised as a general principle that public authorities should be encouraged to make and stand by reasonable administrative decisions and should not be discouraged from doing so by the risk of substantial costs orders against them (*GISC: Costs,* paragraphs 43, 44 and 56). OFCOM referred to the following passage in the Tribunal's judgment in *IBA Health v Office of Fair Trading: Costs* [2004] CAT 6:

> "40. The Tribunal also recognises, however, that the system of statutory appeals under the 2002 Act may not function

> properly if public authorities are not encouraged to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged: see *Bradford Metropolitan District Council v Booth* 164 JP 485 (10 May 2000), cited in *GISC: Costs* at [43], [44] and [56].
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> 41. The Tribunal is aware that the costs of litigation in this area are high. Just as it is important that smaller companies are not deterred from bringing well- founded applications before the Tribunal, it would be unsatisfactory if the risk of having to pay large orders for costs for having defended reasonably, albeit unsuccessfully, an application under section 120(4) was adversely to affect the performance by the OFT of its statutory functions, which after all exist to benefit the public generally, including other companies as well as individuals.

14. Accordingly, OFCOM submits that in regulatory litigation cases each party should bear its own costs unless there are exceptional circumstances such as a party engaging in conduct that can fairly be described as unreasonable.

15. OFCOM further submits:

    (a) the system of industry regulation under the 2003 Act exists to protect a wide range of different interests including those of the general public;

    (b) the regulatory system functions more effectively if complaints can be brought and the regulator's decision can be challenged on appeal if necessary. An appeal is less daunting for a small complainant, and hence more likely, if such a complainant does not have to worry about an adverse order for costs being made if the appeal is not successful;

    (c) It would not be in the public interest, nor in the interests of the proper administration of justice, if OFCOM were to be discouraged from taking part in proceedings or, more fundamentally, from discharging its proper duties as regulator, due to the risk of substantial costs orders being made against it;

    (d) It is in the public interest that such issues are decided by the Tribunal and as such each party should bear its own costs.

(e) Such an approach is consistent with the principle set out in *Bradford Metropolitan District Council v Booth* (cited above) and approved by the Tribunal in *GISC: Costs* and *IBA Health: Costs*.

16. OFCOM submitted that if the general principle is that in regulatory appeals each party should bear its own costs unless there are exceptional circumstances then there are no exceptional circumstances in this case which justify deviating from that principle. OFCOM asks the Tribunal to exercise its discretion to order each party to bear its own costs of the appeal.

17. If, contrary to OFCOM's submissions, the Tribunal should decide that the orthodox litigation costs principles apply in the present appeal OFCOM asks the Tribunal to order BT to pay OFCOM's costs of the appeal, such costs to be subject to detailed assessment if not agreed.

BT's submissions

18. BT submits that costs in hearings before the Tribunal should be dealt with in precisely the same way as costs are dealt with in general litigation, including regulatory and public law cases in the Administrative Court by way of judicial review or other statutory appeal. In other words, costs should follow the event unless there are specific reasons for making different costs orders in the circumstances of a particular case. There should be no "special rules" simply because one party to the litigation is a regulator. In the present case BT accepts that the result of its submissions is that it should be liable to pay OFCOM's costs in this case (subject to adjustment in the light of BT's further submissions below), but not those of the Interveners, which should lie where they fall.

19. BT referred to its detailed submissions provided to the Tribunal in the *RBS Backhaul* case, cited above, and repeated those submissions for the purposes of this case. In particular, BT submitted:

(a) In dealing with costs orders in other statutory contexts to date the Tribunal has generally ordered that where a competition authority, including the OFT or

OFCOM, has been unsuccessful that it should bear the successful appellant's costs (*GISC: Costs, IBA Health: Costs, Floe Telecom Ltd: Costs* [2004] CAT 22).

(b) If regulators were not subject to potential costs orders being made against them they may be more inclined to act as "over-eager" regulators and industry participants would be faced with the prospect of having to appeal against many decisions at their own cost. This would have a disproportionate effect on those who are most frequently the subject of regulation, and in particular, on BT.

(c) Following the normal costs rules will not only instil discipline in the manner in which OFCOM takes decisions but will instil discipline in the conduct of appellants;

(d) Requiring regulators to pay the costs of hearings arising from their own unlawful activity means that such costs fall upon the regulated industry as a whole (which funds OFCOM for these purposes), rather than solely on the individual that suffers from the unlawful action which is a more equitable result.

The Interveners' submissions

20. On 24 January 2005 Herbert Smith, the solicitors for Broadsystem Ventures Limited (BVL) and Thus plc (Thus) wrote to the Registrar stating that those parties did not seek their costs of the proceedings and that in all the circumstances it is those parties' view that it would be appropriate for each party to the appeal to bear its own costs.

21. NJ Associates did not provide any submissions on costs.

III THE TRIBUNAL'S ANALYSIS

22. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Competition Appeal Tribunal Rules SI 2003/1372 (the "Tribunal's Rules"). Rule 55 replaces rule 26 of the Competition Commission Appeal Tribunal Rules 2000, SI 2000/261 which was in materially the same terms.

23. Rule 55 of the Tribunal's Rules provides as follows:

> "55. – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court 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 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 such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court …"

24. We note, at the outset, that unlike the position in some other Tribunals, for example the Financial Services and Markets Tribunal, Parliament has not provided for any specific rule concerning the costs of appeals under the 2003 Act and, instead has provided that the costs of such appeals are subject to the Tribunal's wide discretion under rule 55.

25. In *Napp: interest and costs* [2002] CAT 3 the Tribunal at paragraph 22 made the following observations on the old rule 26(2):

> "[Rule 26(2)] gives the Tribunal a wide discretion on the question of costs, to be exercised in the particular circumstances of the case. There is no explicit rule before the Tribunal that costs follow the event, but nor is there any rule that costs are payable only when a party has behaved unreasonably. All will depend on the particular circumstances of the case."

26. The Tribunal has now emphasised on a number of occasions in appeals under the Competition Act 1998 Act that the wide discretion conferred by rule 55 to award costs is designed to enable it to deal with cases justly. In appeals decided under the 1998 Act the Tribunal has noted that, in the early stages of the development of cases under that Act, the Tribunal is proceeding on a case-by-case basis, dealing with different, and not always foreseeable, circumstances as they arise. The Tribunal is also of the view that its decisions as to costs should not be allowed to harden into rigid rules: see generally *GISC: costs*, cited above, at [39] and [48]; *Freeserve.com v Director General of Telecommunications* [2003] CAT 6, ("*Freeserve: Costs*") p.11, lines 13 to 24; *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 21 ("*Aberdeen*

Journals: Costs”) at [19] and *Aquavitae Limited v Director of Water Services: Costs* [2003] CAT 23 at [17].

27. Bearing these considerations in mind we turn to consider the application of Rule 55 of the circumstances of this particular case.

28. Since OFCOM has not asked for its costs, and nor have the Interveners, it seems to us difficult to make any order in this case other than that all parties’ bear their own costs. However, in deference to BT, who accepts that it should have to pay OFCOM’s costs as the logical consequence of the position it has taken on costs in *RBS Backhaul* (see [2005] CAT 20), we deal with the issue at a general level.

29. The Tribunal notes that there have only, to date, been two appeals before the Tribunal pursuant to section 192 of the 2003 Act, this case and the *RBS Backhaul* case. Accordingly the present appeal was brought at the very early stages of development of a new appellate regime.

30. The present case arose out of an alleged breach by BT of General Condition 1.2 of the General Conditions of Entitlement made under section 45 of the 2003 Act. The contested Notification was made on 7 November 2003 by OFCOM’s predecessor, the Director General of Telecommunications, following a complaint made by the interveners Thus and BVL on 7 July 2003.

31. In the *RBS Backhaul* case, the Director acted under a specific statutory regime to resolve the dispute in question. In the present case we have not heard any argument about whether the Director or later OFCOM was obliged to take a decision on the complaint made by BVL and Thus, nor whether BVL and Thus could have appealed to the Tribunal under section 192 of the 2003 Act if the Director/OFCOM had rejected their complaint or failed to take any action. Whatever the strict legal position, it was obviously desirable that the Director should take a position on the complaint lodged by BVL and Thus.

32. Moreover, the present appeal was the first appeal to consider matters arising under the General Conditions of Entitlement and raised issues of considerable importance to BT

and to competing CPS providers. Although the appeal concerned the true construction of one provision of the General Conditions, the issues upon which the Tribunal was required to adjudicate were complex and involved consideration of relevant European legislation, the statutory framework, BT's interconnection agreements, the legislative background to the introduction of CPS and interconnection, as well as technical industry documents issued in implementation of the requirement on BT to provide CPS. We were not referred to any authority, either of the Community courts or any national court, which had previously given judicial consideration to these matters. Although the Tribunal upheld the Notification, in our view the appeal was reasonably brought by BT.

33. We also note, that at paragraphs 341 and 342 of our judgment we held that from the point of view of legal certainty and also perhaps from the point of view of proportionality, it seemed to us that there was a degree of doubt at the margin as to what was meant by "marketing activity" in the Notification. Although that ambiguity was not such as to invalidate the Notification, it was desirable that it be resolved. Following the handing down of our judgment, BT made further submissions on this aspect of the case which were considered at the hearing on 10 March 2005. The Tribunal continued to have concerns in that regard and, following further discussion between BT and OFCOM, in relation to each of the matters raised in paragraph 342 of our judgment, an agreed position has now been reached with some modification to OFCOM's previous stance. Furthermore BT raised serious and important concerns as to the practice of slamming in the industry, which OFCOM now seeks to address.

34. In those circumstances we consider that although BT was unsuccessful before us the appeal was brought reasonably and has resulted in a clarification of the law and practice in an area which was previously unclear. There was, in addition, an important public interest in clarifying the important points at issue.

35. BT submitted that unless losing parties are subject to costs orders when unsuccessful on appeal, then parties will not be disciplined either in bringing appeals or in their conduct of such appeals. There has been no evidence of any such problem in appeals before the Tribunal in other statutory contexts to date. The costs of bringing an appeal in this area are already substantial and vexatious appeals are likely to be rare. In any event we note that the Tribunal has wide powers of case management, which it exercises, to ensure

that appeals before it are conducted economically, expeditiously and fairly. The Tribunal also has powers to dispose summarily of appeals that are clearly lacking in merit. It was not suggested in this appeal that the conduct of any of the parties was ill-disciplined. Nor is there any evidence to date that there is a risk that OFCOM is acting as an "over-eager" regulatory body, as submitted by BT.

36. It is also relevant in our view that in a regulated industry such as this, the principal parties to these proceedings will be in a constant regulatory dialogue with OFCOM on a wide range of matters. The costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, will not ordinarily be recoverable prior to proceedings. We accept that the situation changes once proceedings before the Tribunal are on foot, by virtue of Rule 55 of the Tribunal's Rules. However, the question whether costs orders should be made in any particular case, or whether the costs should lie where they fall, arises against a background in which the participants in this industry are routinely incurring regulatory costs which are not recoverable.

37. Against that background, we have to strike a balance between the various interests involved. Rule 55 gives the Tribunal a wide discretion. In this case we do not consider it right to order BT to pay costs, on the basis that its appeal was reasonably brought in a complex regulatory case and there are no grounds for criticising BT's conduct of the appeal. The costs in our view should rest where they fall as part of these parties' general regulatory costs.

38. However, we accept BT's broad proposition that a possible sanction in costs remains relevant in public law proceedings, as it is in litigation between private parties. Such a sanction may be appropriate in other cases. The Tribunal is not saying that it will not exercise the discipline of a costs orders against OFCOM or any other party, if the circumstances warrant. We do not, however, consider that an order against BT is appropriate in the present case.

39. More generally, however, we consider that it is desirable, in a technical sector such as the present, not to expose parties who seek to exercise their right to appeal to the Tribunal to unduly onerous risks as to costs, in addition to their own costs which may already be substantial by virtue of the inherent complexity of the subject matter. In

those circumstances, it seems to us that a good reason would need to be shown before the Tribunal was prepared to award costs in OFCOM's favour in regulatory appeals. We see no such good reason in the present case.

40. We add for completeness that we have had drawn to our attention the funding arrangements under which OFCOM operates. OFCOM is apparently funded by grant-in-aid from the Department of Trade and Industry, and partly by a levy on the regulated companies concerned. The present matter apparently comes under the budgetary heading "Networks and Services" in respect of which administrative charges are payable to OFCOM by providers of electronic communications services pursuant to section 38 of Act. Those charges are levied as a percentage of relevant turnover, in accordance with a tariff.

41. Companies such as BT and the Interveners therefore contribute by way of administrative charges to the expenses incurred by OFCOM in regulating the "Networks and Services" sector. The effect of this is, apparently, that if BT is ordered to pay OFCOM's costs, the costs to the rest of the industry would be less by a proportionate amount. If, by contrast, there is no order for costs, BT will support its own costs, and indirectly a proportion of OFCOM's costs, through the administrative charges it pays.

42. However, we are of the view that these specific funding arrangements should not be treated as relevant to our analysis, not least because the connection between the costs of this case and the funding arrangements described above are too indirect. The tariffs for 2004/05 were apparently already set in accordance with the OFCOM publication "Licence and Administrative Fees – Statement of Principles for Broadcasting Act Licences and Telecommunications Regulation" when this case was determined. What impact the costs of appeals may have on charges in 2005/06 and later years, and how far that is likely to be material to future contributions from the various providers in question, whose relevant turnover will also vary from year to year, are matters which seem to us too distant from the present case to be taken into account. Accordingly we have not investigated the details of the funding arrangements any further.

43. Having regard to all the matters mentioned above, we consider that, as between BT and OFCOM each side should support their own costs.

44. As regards the interveners, they intervened in support of OFCOM which was successful in this appeal. Their submissions were helpful to the Tribunal and presented with commendable concision. They have not applied for their costs and no order for costs is sought against them.

45. In all those circumstances we consider that in the circumstances of this appeal the most just and appropriate order is to make no order as to costs.

Christopher Bellamy　　Ann Kelly　　Marion Simmons

Charles Dhanowa
Registrar　　May 2005