



Neutral citation [2010] CAT 3

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1027/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

3 February 2010

Before:

VIVIEN ROSE
(Chairman)
MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

VIP COMMUNICATIONS LIMITED
(in administration)

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

T-MOBILE (UK) LIMITED

Intervener

RULING ON COSTS

1. On 19 November 2009 the Tribunal brought this appeal to an end by rejecting VIP's application to amend its notice of appeal and rejecting the remainder of the Notice of Appeal on the grounds that it disclosed no arguable points, see [2009] CAT 28.
2. Following that ruling, OFCOM and T-Mobile have applied for their costs pursuant to Rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 2003 of 1372). That rule confers on the Tribunal a discretion to make any order it thinks fit in relation to costs.
3. The costs in these proceedings fall into two categories. First there are the costs incurred by OFCOM and T-Mobile in defending an unsuccessful application for interim relief that VIP made part way through these proceedings in 2006. In its ruling in April 2007 ([2007] CAT 19), the Tribunal ordered that VIP pay the reasonable and proportionate costs of OFCOM and T-Mobile in respect of the interim relief proceedings, such costs to be assessed by the Tribunal if not agreed. But the Tribunal suspended that obligation to pay pending resolution of the appeal.
4. Now that the appeal has been resolved in OFCOM's and T-Mobile's favour, it is clearly right that the suspension is lifted and that the obligation to pay those costs comes into effect upon the terms ordered.
5. As for the costs of the substantive proceedings, those were limited because this appeal was stayed at an early stage, pending the result of the parallel appeal brought by Floe Telecom Ltd (VIP agreeing to be bound by the result in *Floe*). The *Floe* case culminated in the judgment of the Court of Appeal in *OFCOM and T-Mobile v Floe Telecom Ltd* [2009] EWCA Civ 47 handed down on 10 February 2009. Costs were incurred after that judgment because VIP successfully resisted OFCOM's and T-Mobile's initial attempts to strike out the Notice of Appeal in order to propose amendments to its Notice of Appeal which, it argued, raised points which survived the Court of Appeal's ruling. As we have mentioned, VIP failed to persuade the Tribunal that anything arguable remained of its case.

6. In our judgment, VIP has no answer to OFCOM's application for costs. OFCOM's application is limited to external costs of counsel; they are not seeking to recover their internal solicitor costs. They have also limited their claim to the costs that they incurred after the Court of Appeal handed down its judgment in *Floe*. We consider that it is entirely fair that they should be paid those costs by VIP. We further agree with OFCOM that the costs should be subject to assessment if not agreed between the parties.
7. T-Mobile is an intervener in these proceedings. The usual practice of the Tribunal is that interveners do not recover their costs if they support the winning party and are not held liable to pay costs if they support the unsuccessful party (see, for example, *Freeserve.com v Director General of Telecommunications* [2003] CAT 6 at page 11, lines 17 to 24). In the April 2007 costs ruling the Tribunal considered that the circumstances were exceptional as regards T-Mobile because the application for interim relief was manifestly unfounded and because the application was entirely directed at T-Mobile. The relief sought by VIP was that T-Mobile reconnect the SIM cards that it had disconnected and provide VIP monthly with further SIM cards as required. However, in the substantive proceedings we do not consider that there are any exceptional circumstances which justify departing from the Tribunal's practice as regards interveners. In our judgment the appropriate result is that there is no order for costs as between T-Mobile and VIP other than the order made on 7 April 2007.
8. VIP is in administration. The administrator, Mr Jeremy Frost gave an assurance through VIP's solicitors that VIP would be able to pay the costs of the proceedings and that he would be personally liable for any costs award left unfulfilled. It is therefore appropriate to grant liberty to apply in the event that there are difficulties in recovering the costs from VIP itself.
9. The Tribunal therefore unanimously orders that:
 - (a) the suspension of the obligation to pay costs imposed by the Tribunal in its ruling in Case 1074/2/3/06 (IR) of 3 April 2007 ([2007] CAT 19) is hereby lifted;

(b) the appellant pay the reasonable costs of the respondent incurred after 10 February 2009 in respect of the proceedings in Case 1027/2/3/04, such costs to be assessed by the Tribunal if not agreed;

(c) there be liberty to apply.

10. Finally, we would like to record our sadness at the untimely death last year of Rupert Anderson QC, leading counsel for OFCOM in both this appeal and the *Floe* proceedings.

Vivien Rose

Michael Davey

Sheila Hewitt

Charles Dhanowa
Registrar

Date: 3 February 2010