



Neutral citation [2012] CAT 15

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number:1186/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

30 May 2012

Before:

MARCUS SMITH Q.C.
(Chairman)
CLIVE ELPHICK
JONATHAN MAY

Sitting as a Tribunal in England and Wales

BETWEEN:

TALKTALK TELECOM GROUP PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH SKY BROADCASTING LIMITED
BRITISH TELECOMMUNICATIONS PLC

Interveners

RULING (COSTS)

Introduction

1. In a judgment handed down on 10 January 2012 ([2012] CAT 1, the “Judgment”) the Tribunal dismissed TalkTalk’s appeal, made under section 192 of the 2003 Act, in respect of OFCOM’s WBA Charge Control Decision. This ruling should be read together with the Judgment, and it adopts the terms and abbreviations defined in the Judgment.
2. Rule 55 of the Competition Appeal Tribunal Rules (S.I. 2003, No. 1372) provides broadly that the Tribunal may at its discretion 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. In determining how much the party is required to pay, Rule 55 provides that the Tribunal may take account of the conduct of all parties in relation to the proceedings.
3. On 10 February 2012, two applications for costs were lodged at the Tribunal. OFCOM has applied for an order that TalkTalk pay its external legal costs. In the Schedule to its application OFCOM sets out a rough calculation of its costs, amounting in total to some £68,020.01. TalkTalk has also applied for an order that OFCOM pay its costs of the appeal or such proportion thereof as the Tribunal considers appropriate; TalkTalk did not provide a statement of costs. Neither of the Interveners applied for their costs.
4. The parties were content for us to decide this matter on the papers without an oral hearing. The following ruling is the unanimous decision of the Tribunal.

The positions of the parties in outline

5. OFCOM submits that it is the successful party and there is no good reason to depart from the starting point that costs follow the event in such circumstances: see *British Telecommunications plc v OFCOM (Partial Private Circuits)* [2011] CAT 35, at [13], and *Everything Everywhere Ltd v OFCOM (0845 and 0870 numbers)* [2011] CAT 45, at [5]. OFCOM adds that it is only seeking to recover its external legal

costs, which were limited to instructing junior counsel and were reasonable and proportionate. For completeness, we note that OFCOM emphasises that it is not to be taken as making any representations on whether it has any general policy on the recovery of its costs or on the circumstances in which the Tribunal might be entitled to make an order for costs against it.

6. TalkTalk resists OFCOM's costs application and applies for an order that OFCOM pay its costs for three reasons. First, TalkTalk's case is that OFCOM "brought this appeal on itself" by failing to articulate properly the way in which it had defined Market 1 (citing *Daniels v Walker* [2000] EWCA Civ 508). TalkTalk relies on the third witness statement of Mr Andrew Heaney, who says that had OFCOM explained that it had adopted the market definition found by the Tribunal at paragraph 109 of the Judgment, TalkTalk would have been less likely to appeal against the WBA Charge Control Decision and more likely to have challenged the WBA Market Prior Determination. Second, OFCOM lost, and TalkTalk won, on key issues in the appeal. TalkTalk gives as an example the fact that the Tribunal rejected OFCOM's proposed construction of section 86 of the 2003 Act. Third, TalkTalk submits that OFCOM choose to defend the appeal on a different basis from that on which the Tribunal ultimately dismissed TalkTalk's appeal.

The Tribunal's decision

7. Having considered all the matters raised by the parties our decision is that there should be no order as to costs. It is in our judgement clear that OFCOM was successful, at least in the sense that the appeal was dismissed. The starting point is therefore that OFCOM is entitled to its costs. However the Tribunal's approach, as described in the case-law cited above, recognises that the need to deal with each matter justly means that all relevant circumstances of each case will need to be considered. The question then arises whether there are any circumstances which mean that costs should not follow the event. We have reached the conclusion that a costs order in OFCOM's favour is not justified in this particular case.
8. First, the Tribunal noted at paragraph 136(g) of the Judgment that the summary description of Market 1 contained in paragraph 1.19 of the WBA Market Power

Determination was wrong and that respondents to OFCOM's 20 January 2011 consultation might well not have understood exactly how OFCOM had defined Market 1 in the WBA Market Power Determination. In the event, this deficiency of process was cured in this case by the fact that the Tribunal heard TalkTalk's appeal on the merits. It is our judgment that weight should be given to this factor when exercising our discretion whether to award costs, in particular because it helps to explain why TalkTalk brought its appeal on the grounds it did.

9. Secondly, we bear in mind that both parties won, and lost, some of the argument before us; indeed this no doubt explains why both sides have applied for their costs. As we have noted, the Tribunal dismissed TalkTalk's substantive argument that OFCOM had erred in concluding there had been no material change, within the meaning of section 86(1)(b) of the 2003 Act, between the WBA Market Power Determination and the WBA Charge Control Decision: paragraphs 109-111 of the Judgment. We therefore do not accept TalkTalk's submission that they were "misled" by OFCOM's failure to properly particularise how it had defined Market 1. The WBA Market Power Determination, read as a whole, makes clear that OFCOM factored TalkTalk's intended roll-out of local loop unbundling into its Market 1 definition.
10. On the other side of the ledger, however, the Tribunal did not accept OFCOM's contention that a change would only be material for the purposes of section 86(1)(b) if it affects the nature of the condition that OFCOM is minded to set: paragraph 92 of the Judgment. Moreover, the Tribunal agreed with TalkTalk that there had been a deficiency in OFCOM's procedure: paragraph 136(g) of the Judgment. We do not consider it would be right to make an award of costs in favour of OFCOM in circumstances where a potentially important aspect of their consultation was found to be wanting on an important point (albeit one in respect of which TalkTalk received full and fair consideration as part of this appeal).
11. Thirdly, we consider that the hearing would have been a much shorter and less expensive event had the WBA Market Power Determination been clearer that OFCOM's definition of Market 1 took into account TalkTalk's "uncommitted" plans for the future unbundling of exchanges, but that the market definition

contained in paragraph 1.19 remained otherwise unchanged. As we noted in paragraph 115 of the Judgment, the matter was far from clear on the face of that WBA Market Power Determination. That said, we do not accept TalkTalk's submission that OFCOM "brought this appeal on itself" as a result of the way the matter was conducted. We consider that OFCOM acted in good faith and reasonably throughout this matter. We do not consider OFCOM's behaviour is remotely analogous to the conduct of the defendants in dealing with the evidence of a single joint expert in *Daniels v Walker* [2000] EWCA Civ 508. The fact that the Tribunal found against OFCOM on a narrow, but potentially important, point of procedure under Ground B of the appeal does not detract from that acceptance. Notwithstanding the procedural failure identified in the Judgment, we considered that OFCOM's conduct was in all other respects reasonable and that narrow shortcoming does not, in our judgment, come close to justifying an award of costs in TalkTalk's favour.

12. Accordingly, in the particular circumstances of this case, we consider that a fair and reasonable position with regard to costs would be achieved in ordering that each side should bear their own costs.

Conclusion

13. For these reasons, the Tribunal unanimously orders that each party bear its own costs.

Marcus Smith QC

Clive Elphick

Jonathan May

Charles Dhanowa QC
Registrar

Date: 30 May 2012