



Neutral citation [2017] CAT 19

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1267/3/12/16

Victoria House
Bloomsbury Place
London WC1A 2EB

21 August 2017

Before:

ANDREW LENON QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (COSTS)

1. This ruling addresses the liability for the costs of the appeal brought by British Telecommunications plc (“BT”) pursuant to section 192(1)(e) of the Communications Act 2003 (“the 2003 Act”), from the costs order dated 8 July 2016 made by the Competition and Markets Authority (“CMA”) pursuant to section 193A of the 2003 Act (“the Costs Order”).
2. In a judgment dated 2 June 2017, the Tribunal dismissed BT’s appeal from the Costs Order save in relation to sums which the CMA had agreed to repay and a further small sum which we considered that the CMA should refund to BT in respect of Counsel’s fees.
3. The CMA has applied to the Tribunal for an order that BT pays half its costs of defending BT’s appeal which came in total to £58,421.55. BT contends that there should be no order as to costs.
4. In its letter dated 9 June 2017 the CMA submits, in summary, as follows:
 - (1) During the appeal the CMA made several without prejudice save as to costs offers of settlement inviting BT to withdraw its appeal on a drop-hands basis. These were premised on the CMA’s view that the Tribunal would dismiss BT’s appeal if it proceeded to a substantive hearing. None of these offers was accepted. If they had been, the appeal could have been disposed of at a much earlier stage without the need for the matter to be determined substantively by the Tribunal.
 - (2) BT was provided with the disclosure it sought in the Notice of Appeal, and which the Tribunal subsequently considered to be necessary as a matter of good practice, by 4 October 2016. BT was therefore aware of the basis upon which the CMA had recovered its costs in the Costs Order and could properly have taken a view as to whether or not to continue to pursue the appeal.
 - (3) Immediately upon providing that disclosure to BT, the CMA wrote to BT on a without prejudice basis inviting it to withdraw its appeal. That offer was made

at a point at which the CMA had not incurred substantial costs. The CMA offered to forego any costs incurred if BT agreed to withdraw its appeal. BT refused.

- (4) Two further offers of settlement were subsequently made. The final offer was made immediately prior to the CMA commencing substantive work on its defence and witness evidence. BT did not respond to this offer.
- (5) The CMA has acted reasonably throughout and sought to minimise the cost of the proceedings to the taxpayer.
- (6) It is desirable for public bodies to recover their litigation costs in circumstances where appeals brought against their decisions are dismissed.
- (7) BT is a well-resourced company with legal representation and was fully aware of the cost risks attendant on bringing an appeal.
- (8) The Tribunal upheld the CMA's approach to the assessment of costs. It held that it would not interfere with the CMA's assessment merely on the basis that an appellant can suggest other ways of approaching matters and that it was not the Tribunal's role to supervise the operations of regulators.
- (9) The reduction in its overall costs obtained by BT was a very small proportion (approximately 8%) of that which was sought.

5. In its reply dated 16 June 2017 BT submits, in summary, as follows:

- (1) In view of the very limited information that had been provided by the CMA before it made the Costs Order, the appeal was at least as much about obtaining clarity regarding the principles to be applied in making future costs orders under section 193A, and in particular the degree of transparency to be expected of the CMA, as about the amount payable by BT in the present case. The appeal was intended to benefit businesses in the telecoms sector operating under the same regime and in other regulated sectors where similar costs

regimes applied. The significance of the appeal in providing guidance as to the operation of a section 193A order was recognised by the CMA.

- (2) If the CMA had agreed to act more transparently, the appeal could have been avoided or substantially narrowed. The CMA had failed to engage with BT in relation to the appropriate degree of transparency to provide in making a section 193A order.
- (3) The CMA had provided more reasonable disclosure only after BT had issued its appeal, effectively conceding BT's application for disclosure.
- (4) The Tribunal's findings as to principle with respect to the degree of disclosure required of the CMA under section 193A closely reflected the position for which BT argued.
- (5) BT had bettered the CMA's without prejudice save as to costs offers, the second of which accepted that BT was entitled to a refund of only £481.95, in that (i) as to principle, the Tribunal had supported BT's argument as to the need for greater transparency; and (ii) as to quantum, the CMA had accepted that BT was entitled to a refund of ca. £10k which, though considerably lower than the sum sought by BT, was around 20 times more than the amount for which the CMA had accepted liability; the Tribunal had awarded BT a modest further sum on top of that.
- (6) It is irrelevant that the CMA is a public body or that BT is well-resourced.

DECISION

6. Under Rule 104 of the Competition Appeal Tribunal Rules 2015, the Tribunal may at its discretion make any order it thinks fit in relation to the payment of costs. It may take into account, amongst other things, whether a party has succeeded on part of its case, even if that party has not been wholly successful and any admissible offer to settle which is drawn to the Tribunal's attention.

7. In my judgment, the appropriate costs order is that each party should bear its own costs. This is for the following reasons.
8. First, I accept BT's submission that the appeal served to clarify the approach to the making of costs orders under section 193A, including in particular the need for the CMA to provide an appropriate level of disclosure at the consultation stage. The CMA did provide that disclosure but only after the appeal had been initiated.
9. Second, it was as a result of BT's appeal that the CMA discovered errors in its costs calculations and agreed to refund to BT an amount totalling £9,269.45, on top of which the Tribunal awarded a further modest sum. Although falling far short of the amount claimed by BT, the refunded amount was significantly higher than the amount offered by the CMA to settle the appeal in its without prejudice offers.
10. Had the appeal only been concerned with the amount to be refunded by the CMA, an order that BT pay some of the CMA's costs might well have been appropriate, but having regard to the disclosure issue, I prefer to make no order as to costs on the basis that this best reflects the partial success of both parties.

Andrew Lenon QC
Chairman

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

Date: 21 August 2017