



Neutral citation [2018] CAT 6

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1260/3/3/16

Victoria House
Bloomsbury Place
London WC1A 2EB

9 March 2018

Before:

MR JUSTICE SNOWDEN
(Chairman)
DR CLIVE ELPHICK
PROFESSOR JOHN CUBBIN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

RULING (PERMISSION TO APPEAL: COSTS)

1. This is our ruling on a request by Ofcom for permission to appeal our ruling on costs dated 25 January 2018 ([2018] CAT 1) (the “**Costs Ruling**”). The request is made under Rule 107 of the Competition Appeal Tribunal Rules 2015 (SI. 2015 No. 1648). For convenience we adopt in this ruling the abbreviations used in the Costs Ruling.
2. In the Costs Ruling we rejected Ofcom’s submission that the starting point for costs where it fails to successfully defend an appeal under Section 192 of the Communications Act 2003 is that no costs award should be made against it, provided it has acted reasonably and in good faith. Instead, we ruled that the starting point should be that costs follow the event. It is this aspect of our ruling which Ofcom seeks to appeal. The Costs Ruling dealt with a number of other matters, but they are not subject to any request for permission to appeal.
3. In considering whether to grant permission to appeal to the Court of Appeal in England and Wales, the Tribunal applies the test in CPR Rule 52.6(1). Permission to appeal may only be granted where: (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.
4. Ofcom filed its request on 15 February 2018. Gamma filed written observations in support of Ofcom’s request on 22 February 2018. BT and CityFibre filed written observations opposing Ofcom’s request on 1 March 2018. As no party requested an oral hearing we have determined the request on paper.
5. The Costs Ruling followed our substantive judgment in this appeal of 10 November 2017 ([2017] CAT 17). In the substantive judgment we found that Ofcom had erred in defining the relevant markets at issue. This had the consequence that the regulatory framework imposed on the relevant markets was flawed and had to be quashed. For the reasons set out in the Cost Ruling, we determined that BT should be awarded 50% of its costs of the substantive

appeal (subject to certain deductions), but we awarded Ofcom costs in relation to a separate hearing on the form of order following our substantive judgment.

6. At [13] – [29] of the Costs Ruling we rejected Ofcom’s argument that a ‘costs follows the event’ rule was inappropriate in the context of regulatory appeals under the Communications Act 2003. Ofcom’s primary argument was that such a rule might give rise to a “chilling effect” which might inhibit Ofcom from properly carrying out its regulatory functions. We rejected this argument in essence because it had previously been considered and rejected by the Tribunal in the *PayTV* case: [2013] CAT 9. Although we were not bound by the decision in *PayTV*, we considered it appropriate to follow that ruling in the interests of judicial comity and the efficient deployment of judicial resources.
7. Although we did not accept that the ‘chilling effect’ argument should determine the starting point for the analysis of costs, we did accept that it might be a relevant factor to take into account in persuading the Tribunal to depart from that starting point: see [35] of the Costs Judgment. Moreover, in the subsequent assessment of costs of BT’s appeal, despite identifying BT as the overall winner of the appeal, we decided that it would be appropriate to depart from the basic starting point that ‘costs follow the event’ and instead awarded costs on an issue-by-issue basis: see [44]-[51] of the Costs Ruling.
8. Ofcom contends that it has a strongly arguable case that the Costs Ruling erred in law in determining that the proper starting point is that costs follow the event. In particular, Ofcom reiterates its “chilling effect” argument and argues that the Tribunal in *PayTV* erred:
 - (1) in its analysis of previous Tribunal authorities and in concluding that there was no consistent starting point that there should be no order for costs against Ofcom in the absence of unreasonable conduct;
 - (2) in distinguishing the line of cases exemplified by *R (Perinpanathan) v City of Westminster Magistrates’ Court* [2010] EWCA Civ 40; and

- (3) in inappropriately applying the approach to costs applicable to judicial review.
9. Although these points were vigorously contested by BT and CityFibre, we consider that Ofcom's arguments have a real prospect of success on appeal.
10. We are also of the view that the appeal raises a matter of importance on which the definitive guidance of the Court of Appeal would be of real value to this Tribunal and the regulated sector in general. The costs of appeals of regulatory decisions are large and regulatory appeals are not infrequent. In this regard, we note that Lewison LJ granted permission to appeal the Tribunal's *PayTV* costs ruling for similar reasons on the basis that this provided a compelling reason for the Court of Appeal to hear the appeal (although other developments led to the relevant costs order being set aside and the appeal being withdrawn by consent: see the Costs Ruling at [26]).
11. Accordingly, we grant permission to appeal. Our decision is unanimous.

Mr Justice Snowden
Chairman

Dr Clive Elphick

Professor John Cubbin

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

Date: 9 March 2018