



Neutral citation [2019] CAT 17

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1283/5/7/18 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

21 May 2019

Before:

THE HON MR JUSTICE BIRSS
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) UNLOCKD LIMITED
(2) UNLOCKD MEDIA TECHNOLOGY LTD
(3) UNLOCKD MEDIA OPERATIONS LTD

Applicants/Claimants

- v -

(1) GOOGLE IRELAND LTD
(2) GOOGLE COMMERCE LTD
(3) GOOGLE LLC

Respondents/Defendants

RULING (COSTS)

A. INTRODUCTION

1. The applicants (“Unlockd”) brought competition claims against the defendants (“Google”). The claims began in the High Court. On 14 May 2018, Roth J granted an interim injunction against Google and directed that the proceedings be transferred to the CAT after close of pleadings on 8 June 2018.
2. In early June 2018 administrators were appointed in relation to at least some of the applicant companies. On 13 June 2018, the CAT was informed that the First Claimant entered into administration. On 15 June 2018, Google’s then solicitors wrote to the CAT proposing extensions of time for compliance with various directions given the uncertainty over the future course of the proceedings. On 18 June 2018, Roth J in his capacity as the President of the CAT ordered an extension to the deadline for disclosure set down by the High Court. On 29 June 2018, the President ordered a stay of the requirements for disclosure until further order and directed that a case management conference (“CMC”) be held in the third week of September 2018. On 17 July 2018, the Tribunal wrote to the parties listing a CMC for 18 September 2018. On 6 September 2018, the Tribunal wrote to the parties enclosing a provisional agenda for the CMC of 18 September 2018.
3. On 10 September 2018, Unlockd wrote to the Tribunal requesting an adjournment of the 18 September CMC. Following receipt of comments from Google, on 12 September 2018, the Tribunal wrote to Unlockd granting a short adjournment and listing a CMC for 15 October 2018.
4. On 27 September 2018, the Joint Administrators for the Second and Third Claimants wrote to the Tribunal seeking a stay of the proceedings for a period of six months. On 28 September 2018, the Tribunal wrote to the parties informing them that the 15 October CMC would still go ahead to discuss the further conduct of the proceedings.

5. At a hearing in the CAT on 15 October 2018 the proceedings were stayed until March 2019 to give the UK administrators time to seek third party funding for the claim.
6. No funding was secured and Unlockd sought to withdraw the claim. On 21 February 2019, the parties agreed that the claim be withdrawn under Tribunal rule 44(1)(a) without prejudice to Google's right to seek an order for costs under Tribunal rules 44(2) and 104(2). I gave directions for written submissions to be filed by both sides on costs.
7. Google's case is that they should be awarded their costs, which should be summarily assessed. The costs claimed included costs in the High Court, the costs in the CAT and the costs of responding to Unlockd's unsuccessful application for permission to appeal parts of Roth J's order of 8 June 2018. In their first written submissions of 11 March 2019 Google claimed about £1.1 million (ex VAT) in costs. In a Statement of Costs for summary assessment signed on 22 March 2019 the total costs claimed were about £835,000.
8. Unlockd's submissions dated 5 April 2019 were that, in principle there is no presumption in the CAT that a losing party ought to bear the costs and that applying the wide discretion under Tribunal rule 104(4). In this case no order for costs should be made. Unlockd had a real prospect of success but has not been able to bring the case due to consequences of Google's conduct leading to the destruction of Unlockd's business. Unlockd do not seek to persuade the Tribunal that they would have won but ask to take the real prospect of success into account.
9. Unlockd also contends that the costs claimed by Google are unreasonable and disproportionate and point out that some of the costs claim relate to earlier applications which were the subject of costs orders already. Unlockd also notes that over £600,000 of Google's costs were incurred unnecessarily because they were incurred after the case was transferred to the CAT. Shortly after transfer the Unlockd companies went into administration.

10. Google's submissions in reply are dated 18 April 2019. Google maintain that costs should be awarded to them. As regard unreasonableness and proportionality, they note that when the case was in the High Court, Unlockd's costs at the same stage were somewhat higher than Google's. As for the unnecessary incurring of costs Google point out that although the UK administrators were appointed in June 2018, they were not notified of the appointment of the administrators over the Australian Unlockd company until 27 September 2018. Google explained that it was appropriate to incur costs for the hearing in October and that no substantive work was done to prepare for trial.
11. Taking into account the overlap with the costs of applications already dealt with and some other smaller discounts, Google reduced the sum claimed from about £835,000 to about £582,000. Google offered to file another Statement of Costs if required. They contend that summary assessment is appropriate.

B. DECISION

12. The CAT has a wide discretion on costs (Tribunal rule 104(4)). I am satisfied that I should order Unlockd to pay Google's costs including the costs in the High Court and in the Tribunal. The starting point in this case is that the losing party ought to pay the successful party's costs albeit that the Tribunal may make a different order in all the circumstances. This was a competition action brought by one commercial party against another. There is no other factor which justifies making a different order. The fact the case was withdrawn rather than going to trial is relevant but it does not justify making a different order.
13. I will not include Google's costs in responding to Unlockd's application for permission to appeal Roth J's order. They could have been awarded to Google by the Court of Appeal in refusing permission if that court saw fit. There is no reason to order them now.
14. As for assessment, the Chairman can assess the costs (Tribunal rule 104 (5)(a)). A detailed assessment in this case would be entirely disproportionate. An

assessment on a summary basis is appropriate. There is no need for Google to file another Statement of Costs.

15. Google's submission of 18 April 2019 does not dispute the submission that over £600,000 of Google's costs were incurred after transfer to the CAT. Google make a point on entitlement to recover costs incurred after transfer relating to the preparation for the hearing in October 2018. I agree but that work cannot account for such a sum. I note the statement of costs includes an entry for disclosure in the document schedule. I infer that was done after transfer. It was unnecessary and disproportionate. It supports the view that further substantial costs were incurred after transfer which were unnecessary.
16. The removal of the costs relating to certain applications from Google's original claim will have removed only costs incurred before transfer. That indicates that a substantial part of what is now claimed are costs incurred after transfer which were not costs of the preparation for the hearing in October 2018. £50,000 of costs were incurred by Pinsent Masons (and Counsel) after the change of Google's solicitors in December 2018.
17. With the information available the result can only be broad brush at best. I approach the figures as follows (in round figures):
 - (1) I estimate that £150,000 of the £582,000 claimed represents recoverable costs incurred by Google before transfer which are not otherwise catered for in costs orders.
 - (2) That means that of the sum claimed, £432,000 was incurred after transfer.
 - (3) Of that sum, £50,000 was incurred after Pinsent Masons were instructed leaving £382,000 as the share of the sum claimed which was incurred after transfer and before Pinsent Masons were instructed.
 - (4) Of that £382,000, I estimate £100,000 would generously represent what one might expect to be incurred in preparing for the hearing in October,

attending the hearing in October and dealing with the correspondence arising from the administrations both in the UK and Australia.

- (5) That leaves £282,000 on other matters.
 - (6) I infer that includes the £37,000 incurred on disclosure and most of the £72,000 spent on unspecified “documents” at item 4 of the documents schedule. In any event even if that total £282,000 does not include both items, I would not allow those items.
 - (7) That leaves £173,000 unaccounted for. I infer these costs include resisting the appeal amongst other things.
18. I will award two-thirds of the total of the following:
- (1) The estimated pre-transfer costs of £150,000;
 - (2) The post-Pinsent’s costs of £50,000;
 - (3) The October hearing preparation etc. costs of £100,000.
19. Two-thirds is a fair and reasonable proportion of the sums incurred which I will allow. That produces a total of £200,000 in round figures. The remainder of the costs claimed are either unnecessary and disproportionate, or are unreasonable and disproportionate.

The Hon Mr Justice Birss
Chairman

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

Date: 21 May 2019



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ORDER

UPON considering the Claimants' request for withdrawal of the claim

UPON reading the Defendants' costs submissions and the responsive submissions of the Claimants

IT IS ORDERED THAT:

1. The Claim be withdrawn.
2. The Claimants pay the Defendants their costs of these proceedings in the High Court and in the Tribunal. Those costs are summarily assessed in the sum of £200,000. They must be paid within 21 days.

The Hon Mr Justice Birss
Chairman of the Competition Appeal Tribunal

Made: 21 May 2019
Drawn: 21 May 2019