Neutral citation [2008] CAT 39

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1094/3/3/08

Victoria House
Bloomsbury Place
London WC1A 2EB

18 December 2008

Before:
LORD CARLILE QC
(Chairman)

DR ARTHUR PRYOR CB
PROFESSOR PAUL STONEMAN

BETWEEN:

VODAFONE LIMITED

Appellant

supported by

BRITISH TELECOMMUNICATIONS PLC
TELEFÓNICA O2 UK LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED
T-MOBILE (UK) LIMITED

Interveners

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

HUTCHISON 3G UK LIMITED

Intervener

RULING ON COSTS

Background

1. In a judgment dated 18 September 2008, [2008] CAT 22 ("the Judgment"), the Tribunal allowed an appeal brought by Vodafone Limited ("Vodafone") under section 192(1)(a) of the Communications Act 2003. By an Order of 18 September 2008, the Tribunal set aside the concluding statement published by the Office of Communications ("OFCOM") entitled "*Telephone number portability for consumers switching suppliers*" dated 29 November 2007 ("the Decision").

2. By a letter dated 27 October 2008, Vodafone applied to the Tribunal for an order that OFCOM should pay Vodafone's legal costs in respect of these proceedings in the sum of £307,725.93 (excluding VAT). In the alternative, Vodafone applied for their costs incurred since 30 May 2008 (amounting to £130,191.35 (excluding VAT)). On that date a without prejudice offer contained in a letter sent by Vodafone to OFCOM expired. The without prejudice letter invited OFCOM to consent to Vodafone's appeal and have the Decision remitted for reconsideration.

3. By letters of 4 November and 12 November 2008, respectively, Orange Personal Communications Limited ("Orange") and Telefónica O2 UK Limited ("O2") applied for an order that OFCOM should pay their costs in respect of their intervention in these proceedings.

4. All of the parties agreed that no oral hearing was required to consider the costs applications. In light of the helpful written submissions we have received from the parties, the Tribunal is able to deal with the matter without a hearing.

The Tribunal's jurisdiction on costs

5. Rule 55 of the Competition Appeal Tribunal Rules 2003, SI 2003 No. 1372 ("the Tribunal Rules") sets out the Tribunal's jurisdiction to award costs. It provides (so far as is relevant) as follows:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.

> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings 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 and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
> …"

Vodafone's application and OFCOM's response

6. Vodafone submit that, while there is no rule binding the Tribunal to order that the unsuccessful party pays the costs of the successful party, costs should follow the event in this case. They set out a number of factors in support of their submission, in particular:

   i. Vodafone's appeal was "overwhelmingly successful";
   ii. The appeal cannot be described as merely part of a regulatory dialogue between OFCOM and the industry, but rather it concerned the adequacy of OFCOM's factual analysis in adopting the Decision and was decided mainly on the facts;
   iii. Vodafone's case remained substantially unchanged throughout the consultation process and the course of the appeal; and
   iv. The appeal raised no novel points of law.

7. In response, OFCOM submit that to grant Vodafone's application would mark a clear departure from the Tribunal's approach to costs in sectoral regulation appeals (in particular, appeals under section 192 of the Communications Act 2003). That approach, it is submitted, consistently expects all parties to bear their own costs, save where a party has behaved unreasonably or there is some other specific exceptional factor justifying a costs award. After reference to decided cases, OFCOM say (in a written submission dated 21 November 2008):

> "…the principle for which OFCOM contends [is] that some exceptional factor such as unreasonable conduct is a basis for a costs award, not merely the lack of success in upholding a regulatory decision arrived at in good faith"

8. OFCOM further argue that the Decision was adopted against the background of strong disagreement among mobile industry participants over many years as to whether and when to move to direct routing and faster porting. In these circumstances, Hutchison 3G UK Limited ("H3G"), which, during the main hearing in these proceedings, broadly supported the position of OFCOM, may well have sought to appeal any other

decision on the arrangements for number portability reached by OFCOM; if so, an appeal was inevitable. Also, the parties would not have received the Tribunal's guidance as to the proper method for conducting a cost benefit analysis, as set out in the Judgment.

9. We also received submissions from H3G. Those submissions support, and to a very great extent adopt, the position taken by OFCOM.

Orange's and O2's intervener costs applications

10. Orange submit that the Tribunal has previously awarded interveners their costs in appropriate cases (for example, *Aberdeen Journals Limited v The Office of Fair Trading (Costs)* [2003] CAT 21) and that relevant factors include whether the intervention was reasonable and whether it was successful on the substance. In support of their application, Orange submit:
    i. their request to intervene was reasonable and limited to the issue of recipient-led two hour porting;
    ii. they needed to be separately represented in these proceedings due to issues of commercial interest and confidentiality; and
    iii. their intervention was of assistance to the Tribunal in forming its decision.

11. O2 support the submissions made by Vodafone and Orange and request that, if the Tribunal grants Orange's application for costs in relation to their intervention, the Tribunal should also order OFCOM to pay O2's costs. O2 remind the Tribunal that they kept their costs to a minimum by not instructing external solicitors.

12. OFCOM oppose the grant of costs to either of the interveners. They submit that there is a strong presumption in the Tribunal (as there is in the Administrative Court) against making costs orders for or against interveners. They submit that there are no special circumstances in relation to either intervention which would warrant rebutting that presumption. They argue that both companies intervened to protect their own commercial interests; and that their participation throughout the proceedings was not essential to the proper conduct of the matter before the Tribunal.

13. Other Interveners in these proceedings have not applied for their costs.

The Tribunal's analysis

14. Rule 55 of the Tribunal Rules (see paragraph [5] above) affords the Tribunal wide discretion in dealing with the issue of costs. Paragraph 17.1 of the Guide to Proceedings (October 2005)[1] emphasises this:

> "There is no specific rule that costs should follow the event, but 'in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings' (Rule 55(2))."

15. That the Tribunal has yet to make an award of costs following an appeal under section 192 of the Communications Act 2003, while of interest, is not determinative of the issue before us in these proceedings. The question of whether to award costs in a particular set of circumstances, coupled with the issue of the amount of any costs to be awarded, is a case specific exercise involving the exercise of judicial discretion, largely dependent on the conduct of the proceedings before the Tribunal. As the Tribunal said in *Hutchison 3G UK Limited v The Office of Communications* [2006] CAT 8 (paragraph [42]):

> "the correct approach in this case is not to proceed by way of analogy with other cases, but to apply the clearly established principle that costs have to be determined on a case by basis, relying on authorities for principles where appropriate."

16. In *City of Bradford v Booth* [2000] 164 JP 485, CO/3219/99, Lord Bingham CJ said:

> "Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

[1] The Guide to Proceedings is available from the Tribunal's website: www.catribunal.org.uk. The requirements of the Guide to Proceedings constitute a Practice Direction issued by the President pursuant to Rule 68(2) of the Tribunal Rules.

17. This was followed by Toulson J in the Administrative Court in *R (Cambridge City Council) v Alex Nestling Limited* [2006] EWHC 1374. In relation to the local authority Appellant he said:

> "Although as a matter of strict law the power of the court in such circumstances to award costs is not confined to cases where the Local Authority acted unreasonably and in bad faith, the fact that the Local Authority has acted reasonably and in good faith in the discharge of its public function is plainly a most important factor."

18. In each of those cases, the following considerations emerge: the regulatory authority was under a statutory duty; while it acted honestly, reasonably and properly in exercise of its public duty, the court struck the balance reached by the authority differently; there existed the need to encourage public authorities to make and stand by sound administrative decisions in the public interest without fear of exposure to undue financial prejudice if the decision was successfully challenged; and it was necessary to consider the financial prejudice to the applicant if an order for costs is not made in their favour. In each case, ultimately costs were refused.

19. Appeals to the Tribunal lie as of right and often involve complex issues on which reasonable people might reach different conclusions to those adopted by the relevant respondent. In our judgement, the present case provided a useful opportunity to clarify the scope of OFCOM's responsibilities when undertaking policy decisions of the kind set down in the Decision, to the benefit of all industry participants, and in the wider public interest.

20. We note too in this regard the position discussed in *British Telecommunications PLC v. Office of Communications (RBS Backhaul)* [2005] CAT 20, where the Tribunal was mindful of the reality that the principal parties to the proceedings "will be in a constant regulatory dialogue with OFCOM on a wide range of matters" (paragraph [60]). The Tribunal said:

> "The costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, will not ordinarily be recoverable prior to proceedings. We accept that the situation changes once proceedings before the Tribunal are on foot, by virtue of Rule 55 of the Tribunal's Rules. However, the question whether costs orders should be made in any particular case, or whether the costs should lie where they fall, arises against a background in which [the Appellants] and the interveners are, in their own interests, routinely incurring regulatory costs which are not recoverable."

21. Vodafone argue that we should depart from such considerations on the facts before us. In particular, they argue that their appeal was overwhelmingly successful and that the right course for OFCOM to have adopted before allowing the issue to proceed to a hearing would have been to consent to the appeal and/or withdraw the Decision by the date of Vodafone's without prejudice letter.

22. The without prejudice letter was in a form familiar in proceedings in many civil actions. Its effect was intended to be similar to that of an offer letter under Part 36 of the *Civil Procedure Rules*. The writing of such a letter is a reasonable and understandable step in proceedings before the Tribunal as before any other court, and is likely to prove effective in some cases. Like any other court, this Tribunal is not a chamber designed for the hypothetical or superfluous hearing and, subject to the overriding objective shared by all civil courts to deal with cases justly, has an interest in cases before it being settled rather than contested unnecessarily. In appropriate cases a proper sanction against unnecessary contests is in costs, following a Part 36 type letter. All parties before the Tribunal, including regulators, should be conscious of that risk.

23. In this case, while the Tribunal clearly found errors in the decision making procedure adopted by OFCOM, we did not find that the Decision had been arrived at in bad faith or in an unreasonable exercise of their public function. That they were wrong is clear from our judgment. However, we are of the view that they acted as reasonable regulators and in good faith. OFCOM believed they were pursuing the wider public interest in mandating the change to direct routing and recipient-led two hour porting. Indeed, the European Commission is currently considering proposals to reduce porting lead times below the two day standard that currently operates in the United Kingdom. Whatever the means adopted by OFCOM in attempting to achieve the goals set down in the Decision, the end result sought cannot be described as illegitimate or beyond OFCOM's powers. In fact, Vodafone have consistently stated that they are not opposed in principle to any of the changes mandated by OFCOM in its Decision (see, for example, Vodafone's response to OFCOM's November 2006 review of General Condition 18).

24. Given the context of a regulatory body acting properly and in good faith, albeit reaching the wrong decision, we do not consider that in this case it was unreasonable for OFCOM to refuse to consent to the appeal or withdraw the Decision following receipt of Vodafone's without prejudice letter. This was not a situation in which OFCOM should have decided that it was inevitable that they would lose the appeal.

25. In relation to Orange's and O2's applications, we do not consider that they raise sufficient reasons to award costs. By requesting permission to intervene in these proceedings, the Interveners legitimately sought to protect their commercial interests and ensure that their side of the argument was heard following an extensive consultation process in which they were all heavily involved. However, helpful as the interventions were, none was critical to the Tribunal's understanding and analysis of the matters under consideration. We are mindful of the Tribunal's decision in *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6 where it was said (at page 11):

> "In the specific case of a sector such as telecommunications, where there may be interveners who are likely to be regularly appearing before the Tribunal, we think the general practice is likely to be to allow the costs of the intervention to lie where they fall."

There is a strong public benefit in not discouraging legitimate interventions, either in support of or in opposition to regulatory decisions. Equally, the Tribunal recognises the public interest in not unduly encouraging interventions, as to do so may have implications for the expeditious conduct of proceedings to the detriment of the main parties. For those reasons, the Tribunal's general approach to interveners' costs has been neutral. The judgment of the Tribunal in *Independent Media Support Ltd v Office of Communications* [2008] CAT 27 confirms this approach.

26. We add that we do not consider that the Tribunal judgments referred to by Orange in support of their application provide useful precedents in the instant case. In *Aberdeen Journals Limited v The Office of Fair Trading (Costs)* [2003] CAT 21, the Tribunal granted Aberdeen Independent Limited the costs of its intervention for a number of compelling and case-specific reasons, including the fact that Aberdeen Independent Limited was the original complainant and target of the abusive conduct, and its intervention was necessary in order to rebut specific attacks related to its integrity. In

VIP Communications Limited v Office of Communications [2007] CAT 19, T-Mobile were granted their costs in responding to an application by VIP for interim relief which was found by the Tribunal to be "manifestly unfounded and doomed to fail" (paragraph [3]). Those decisions concern situations manifestly different, factually and in degree, from the present case.

27. In our judgement, it is consistent with established principle, and right and proper in the context of this case, that Orange's and O2's costs should lie where they fall.

Conclusion

28. For the reasons given above, the Tribunal unanimously:

ORDERS THAT:

(1) Each party bears its own costs.

(2) There be liberty to apply.

Lord Carlile of Berriew Dr Arthur Pryor CB Professor Paul Stoneman

Charles Dhanowa 18 December 2008
Registrar