Neutral Citation [2018] CAT 9

IN THE COMPETITION

APPEAL TRIBUNAL

Case No: 1279/1/12/17

BETWEEN

PING EUROPE LIMITED

Appellant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

REASONED ORDER

HAVING REGARD TO the Tribunal's Order of 31 January 2018 establishing a confidentiality ring in these proceedings (the "**Confidentiality Order**")

AND UPON the Appellant ("**Ping**") applying for the disclosure of the Confidential Information relating to the Complainant on 9 February 2018 (the "**Disclosure Application**")

AND UPON reading the submissions of Ping, the Respondent (the "**CMA**") and the Complainant filed in advance of the application hearing on 2 March 2018 ("**Application Hearing**")

AND UPON hearing counsel for the parties and the Complainant at the Application Hearing

AND UPON the Tribunal's Ruling dated 9 March 2018 (the "**Ruling**") directing that disclosure of the Complainant's identity and of the unredacted version of the Complainant's First Witness Statement dated 25 January 2018 be made to Mr Pete Brown, subject to the giving of suitable undertakings to protect the Complainant's anonymity

AND HAVING REGARD TO the Tribunal's Order of 13 March 2018 establishing a further confidentiality ring giving effect to the Ruling

AND UPON reading the submissions for the parties and the Complainant on the costs of the Disclosure Application

IT IS ORDERED THAT:

1. Ping's application for costs be dismissed.

2. Within 28 days of the date of this order Ping pay the CMA's costs of the Disclosure Application incurred after 16 February 2018 in the sum of £25,000.

3. Within 28 days of the date of this order Ping pay 50% of the Complainant's costs of the Disclosure Application incurred after 16 February 2018 in the sum of £9,162

4. The parties' costs of the Disclosure Application incurred up to and including 16 February 2018 be in the case.

REASONS:

Background

1. This Order concerns the costs arising in connection with Ping's Disclosure Application of 9 February 2018 which was disposed of by way of the Tribunal's Ruling of 9 March 2018 ([2018] CAT 7). Ping, the CMA and the Complainant each sought their costs arising from the Application.

2. In the Disclosure Application as originally filed Ping sought the disclosure of an unredacted version of the Complainant's witness statement outside the Confidentiality Ring established in these proceedings on 31 January 2018.

3. In response to a letter from the Tribunal, on 16 February 2018 Ping clarified that it did not consider its rights of defence would be infringed if an unredacted version of the witness statement were disclosed to certain of its employees within the confines of a confidentiality ring. Ping nominated Messrs Clark and Carter as suitable candidates to be given access to the witness statement and contended that disclosure to Mr Clark was essential. Notwithstanding this concession, Ping maintained its primary position that the witness statement should be disclosed outside any confidentiality ring on the basis that this was required by the principle of open justice.

4. The Tribunal ultimately rejected Ping's submissions, ruling that the unredacted witness statement should be disclosed within the Confidentiality Ring to Mr Pete Brown, Ping's UK Sales Manager, a person whom the CMA and Complainant had proposed as an alternative to Mr Clark.

5. Against this background Ping and the Complainant seek 100% of their costs arising in connection with the Disclosure Application. The CMA contends that costs up to and including 16 February 2018 should be in the case, but that Ping should pay its costs incurred thereafter because Ping had acted unreasonably in its insistence on disclosure to Mr Clark. According to the CMA, these costs could have been avoided had Ping been willing to compromise on the identity of the relevant Ping employee.

Law

6. The Tribunal's jurisdiction to award costs is set out in rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "**Tribunal Rules**"). Rule 104 provides that the Tribunal has

a discretion to make any order it thinks fit in relation to the payment of costs. Rule 104(4) sets out a number of factors to be taken into account when exercising that discretion, including:

> "(a) the conduct of the parties in the proceedings;
>
> […]
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention. […]"

7. Commenting on an earlier (but materially unchanged) version of this rule, the Court of Appeal stated that the Tribunal has a "wide and general discretion" in relation to costs: *Quarmby Construction Co Ltd v OFT* [2012] EWCA Civ 1552 at [12]. Nevertheless, in the context of appeals against decisions concerning the Chapter I or Chapter II prohibitions under the Competition Act 1998, the Tribunal has established that the starting point is that costs follow the event (see, for example, *Skyscanner Ltd v CMA* [2014] CAT 19 at [9]). With regards to interveners, the general position is that interveners are neither liable for other parties' costs, nor able to recover their own costs: see, for example, *Ryanair Holding plc v Competition Commission* [2012] CAT 29 ("***Ryanair***") at [7]. However, the Tribunal has on occasion departed from this starting point. See, for example, *Independent Media Support Ltd v Ofcom* [2008] CAT 27 at [17]-[18] where the Tribunal considered it appropriate to award the intervener, BBCB, 35% of its costs associated with its intervention because it was particularly and directly affected by IMS's challenge to Ofcom's decisions that it (BBCB) had not infringed the Chapter I or Chapter II prohibitions or their European law equivalents.

Analysis

8. I consider first which party succeeded in the Disclosure Application. In my view the clear "winners" were the CMA and the Complainant: they succeeded in persuading me that disclosure of the witness statement should be confined to a confidentiality ring and that Mr Brown should be preferred for inclusion in the confidentiality ring. Ping points out that it succeeded in obtaining an extension to the deadline for it to file its Reply to the CMA's Defence of 10 days. However, it did not obtain the full 20 day extension that it had sought and, in any event, I consider that the deadline extension formed only a very minor aspect of the overall dispute.

9. I also accept the CMA's submission that it was Ping's insistence on the inclusion of Mr Clark in the confidentiality ring which prevented the parties from settling the dispute without the need for a hearing. In contrast, the CMA and the Complainant were willing to proceed on the basis of the admittance of a Ping employee into the confidentiality ring, despite their general preference for a lawyer-only confidentiality ring. The CMA and Complainant proposed that Mr Brown be included in the confidentiality ring in their submissions of 22 February 2018. However, this proposal was roundly rejected by Ping in its reply of 27 February 2018.

10. As regards the CMA, I am persuaded that it is right to order Ping to pay the CMA's costs. The starting point is that costs follow the event and the other factors also point in favour of awarding the CMA its costs. I accept that the appropriate starting point for costs should be 16 February 2018, when Ping began to insist on the inclusion of Mr Clark in the confidentiality ring.

11. As regards the Complainant, I have reached the view that it is just and reasonable that Ping should pay 50% of the Complainant's costs incurred after 16 February 2018.

12. Although it has not formally intervened in these proceedings, I consider the complainant to be in a position analogous to that of an intervener. Accordingly, I work from the starting point that the Complainant should bear its own costs. The Tribunal explained the rationale for this starting point for interveners in *Ryanair* at [7] as follows:

> "The Tribunal's general position in relation to interveners' costs is concerned to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties."

13. Accordingly, I do not regard the fact that the Complainant (together with the CMA) was successful against Ping as itself sufficient to justify an award of costs in its favour. I consider that something more is required.

14. In my view, it is appropriate to depart from the neutral starting point in this case because the Disclosure Application directly concerned the Complainant's interests: as explained at [19] of the Ruling, the Complainant faced potential retaliatory measures if an unredacted version of the witness statement was not confined to a confidentiality ring. In those circumstances the Complainant had a real and direct reason to be represented at the hearing and to seek to refute Ping's arguments. This was not a case where the Complainant had a mere indirect interest in supporting a main party, which might be typical of interveners in the majority of cases. In this case the interest was personal to the Complainant.

15. In the circumstances of this case, I consider that the Complainant should recover 50% of its costs. I consider this percentage proportionate and reasonable. The reduction reflects the fact that there was a degree of duplication between the submissions of the CMA and the Complainant. Whilst this duplication could not have been avoided, it seems to me that Ping should not have to "pay twice" and should therefore not bear those costs. For the same reasons explained above, I also consider it appropriate that the Complainant should recover only those costs it incurred after 16 February 2018.

16. The CMA and the Complainant both submitted costs schedules setting out their costs from 16 February 2018 onwards and Ping has filed written observations in response. The CMA is claiming costs of £31,195.02 made up of in-house costs of £13,429.80 and disbursements of £17,765.22. Ping criticises the absence of detail in the CMA's schedule and the CMA's reliance on the Government solicitors' guideline hourly rates. I reject these criticisms although I consider that the number of hours spent by the CMA is somewhat excessive. I assess the CMA's costs in the sum of £25,000.

17. The Complainant is claiming costs of £18,324 made up of counsel's fees incurred on a direct access basis. Ping criticises this figure on the basis that it includes costs incurred after the hearing on 2 March 2018 and that the time spent was excessive compared with the time spent by the CMA. I consider that post hearing costs relating to the application are in principle recoverable and that the amount of time spent by the Complainant's legal team was reasonable. I assess half the Complainant's costs in the sum of £9,162.

Andrew Lenon QC
Chairman of the Competition Appeal Tribunal

Made: 9 May 2018
Drawn: 9 May 2018