Neutral citation [2009] CAT 8

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1089/3/3/07
1090/3/3/07
1091/3/3/07
1092/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

26 March 2009

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT OBE TD

Sitting as a Tribunal in England and Wales

BETWEEN:

T-MOBILE (UK) LIMITED
BRITISH TELECOMMUNICATIONS PLC
HUTCHISON 3G UK LIMITED
CABLE & WIRELESS & ORS

Appellants /Interveners

-and-

OFFICE OF COMMUNICATIONS

Respondent

-and-

VODAFONE LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Interveners

RULING ON COSTS

Introduction

1. On 20 May 2008, following a hearing in January and February 2008, the Tribunal handed down judgment on the "core issues" in four appeals brought by T-Mobile, BT, H3G and a group of fixed network operators referred to as "the 1092 Appellants" ([2008] CAT 12: the "Core Issues Judgment"). The appeals succeeded in overturning OFCOM's resolution of various disputes between telecommunications network operators concerning the rates charged for mobile voice call termination. The background to these appeals was set out in the Core Issues Judgment and terms defined in that judgment have the same meaning in this ruling.

2. All the appellants have now applied for orders that OFCOM should pay their costs in full or, in the alternative, pay a substantial proportion of their costs pursuant to rule 55(2) of the Tribunal Rules. OFCOM has resisted those applications submitting in essence that the Tribunal should not make any order as to costs. Further written submissions were lodged by the parties at the end of 2008 and early in 2009. None of the parties requested an oral hearing and in the circumstances of this case the Tribunal does not consider that an oral hearing is necessary or desirable.

The Tribunal's jurisdiction to award costs

3. Rule 55 of the Tribunal Rules provides that the Tribunal may at its discretion 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. In determining how much the party is required to pay, rule 55 provides that the Tribunal may take account of the conduct of all parties in relation to the proceedings. The Tribunal has now considered on several occasions its jurisdiction to award costs in respect of appeals brought against OFCOM under section 192 of the 2003 Act. For example, in *The Number (UK) Limited v OFCOM* [2009] CAT 5, ("*The Number (costs)*") the Tribunal said at paragraph [5]:

> "It is, we think, important that differently constituted Tribunals adopt a consistent and principled approach if the discretion is to be exercised judicially, as it must be. It would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed radically different weight (or perhaps no weight at all) on OFCOM's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting point will, in effect, be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. Of course, the facts of a particular case may take the

> matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct; room must always be left for the exercise of the discretion in this way where the facts justify it."

4. The Tribunal's jurisdiction under section 192 of the 2003 Act covers many different kinds of decisions taken by OFCOM, not only decisions resolving disputes under section 185 as was the case in this appeal and in *The Number (costs)*. As the Tribunal made clear in the passage quoted above, there is no immutable rule as to the appropriate costs order – how the discretion will be exercised in any case will depend on its particular circumstances. As the Tribunal has said (see above), OFCOM may be liable for the successful appellant's costs even in the absence of any bad faith or unreasonable conduct if it is appropriate in all the circumstances to make such an order.

5. We have carefully considered the parties' submissions and the principles to be derived from the cases relied on by the parties. We consider that it is appropriate to exercise our discretion to make a costs order against OFCOM in favour of BT, H3G and the 1092 Appellants for part of the costs reasonably incurred by those parties.

6. We deal first with costs as between BT and OFCOM. BT's challenge to the BT Disputes Determinations was entirely successful in that the Tribunal accepted virtually all of its arguments in support of its appeal. The Tribunal found in most instances that the charges for which BT had contended throughout were reasonable charges and these reasonable charges were substantially lower than the charges that OFCOM had upheld. The Core Issues Judgment sets out in full the reasoning as to why, in the Tribunal's judgment, OFCOM erred in its exercise of its dispute resolution powers. The Tribunal held that OFCOM failed to have proper regard to its regulatory objectives in its approach to resolving these disputes and wrongly focused on the existence of a particular regulatory constraint namely BT's E2E connectivity obligation (paragraphs [84]-[101]). They failed to have regard to information that they should have taken into account and they placed too much weight on the need to appear to be consistent with their previous regulatory decision. The "gains from trade" test used by OFCOM was seriously flawed and was not an appropriate methodology for assessing the reasonableness of the prices (paragraphs [118]-[126]). The compendium of serious errors listed above

demonstrates that the Disputes Determinations were clearly wrong. This is not a case where, in the course of an "on the merits" appeal, the Tribunal came to a different conclusion from a conclusion reasonably arrived at by the regulator. We agree with BT that this is one of the cases where the interests of justice lie in favour of awarding costs against OFCOM. If an order for costs against OFCOM is not made in circumstances where its determinations were found to be so "seriously flawed" (see paragraph [118] of the Core Issues Judgment), it is difficult to see when such a costs order would be made, short of findings of bad faith and unreasonable behaviour.

7. We also consider that it is right to take account of the fact that all of the arguments raised by BT in its appeal were points which it had asked OFCOM to consider during the consultation process. If OFCOM had had proper regard to its statutory duties during the dispute resolution procedure it could not have come to the conclusion that the rates proposed by the MNOs were reasonable. These appeals would then have been avoided.

8. The fact that BT has limited its claim to the costs of its external advisers (counsel and expert witness) properly reflects the fact that participants in this industry are in constant regulatory dialogue with OFCOM on a range of matters and must bear the cost of maintaining specialist regulatory and compliance departments.

9. OFCOM submits that the Tribunal's consistent approach to appeals under section 192 of the 2003 Act has been to make no order for costs, save where a party has conducted itself unreasonably or there are exceptional circumstances to justify an award (see *Hutchison 3G (UK) Limited v OFCOM (Withdrawal and Costs)* [2007] CAT 7 at paragraph [40]). This approach is supported by the wider public interests at stake in regulatory appeals and the stance taken by the ordinary courts in challenges to regulatory decisions (see *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233). Secondly, OFCOM's section 185 dispute resolution powers raise unique considerations because, save in limited circumstances, OFCOM are bound to accept and determine disputes referred to them. They should not therefore be exposed to adverse costs orders where they consider it is in the public interest to defend appeals.

10. We recognise the force of OFCOM's argument that it is required by the 2003 Act to determine disputes referred to it and that it adopts, as OFCOM put it, a "unique quasi-judicial role" in deciding these disputes. The nature of OFCOM's role in performing the dispute resolution function is reflected in the somewhat unusual power in section 190(6) for OFCOM to make an *inter partes* order for costs when it determines the dispute. That power was not exercised in this case but the fact that it is there emphasises that although the appeal under section 192 is necessarily brought against OFCOM as the decision maker and it therefore falls to OFCOM to mount the main defence of its decision, the underlying dispute is a commercial one between the two parties.

11. However, none of the factors raised by OFCOM's submissions detracts from our conclusion. The fact that there has been no award of costs against OFCOM to date does not establish a principle that no such award of costs should be made here; each case must be approached on its own particular facts (subject, of course, to the need for consistency: *The Number (costs)*, above). OFCOM's arguments that an adverse costs order may have a "chilling effect" on the exercise of their regulatory obligations are unduly alarmist. The modest order that we have decided to make in these appeals does not risk deterring OFCOM from standing by "honest, reasonable and apparently sound administrative decisions made in the public interest" (adopting the wording used by the Tribunal in *IBA Health v OFT* [2004] CAT 6, paragraph [40]). We do not accept that OFCOM can properly rely on the fact that some of the 2G/3G MNOs supported the reasoning adopted in its decision. That reasoning resulted in a very beneficial outcome for them so it is not surprising that they were pleased with the way OFCOM had dealt with the disputes.

12. BT does not go so far as to say that OFCOM's conduct of the appeal has been unreasonable. As envisaged by the decision in *The Number (costs)* it is not necessary for us to find (nor do we find) that OFCOM conducted its defence unreasonably or in bad faith. We understand why OFCOM defended these appeals rather than conceding that the determinations were flawed. At the hearing OFCOM emphasised how important it was to obtain a clear ruling on what the correct test is under section 185 because that procedure covers disputes about all kinds of services not just mobile termination rates.

13. The same arguments apply, in our judgment, to H3G and the 1092 Appellants. H3G's primary submission was that the costs should lie where they fall but that if the Tribunal decides to award costs in these proceedings, then H3G should have its reasonable costs. H3G was successful in appealing against both the BT Disputes Determinations and in its challenge to the H3G Disputes Determinations. Although it was, in a sense, the beneficiary of OFCOM's decision generally to uphold the levels of charge that the MNOs set for BT, it adopted a principled stance in challenging OFCOM's methodology in its challenge both to its disputes with O2 and Orange and to its dispute with BT.

14. The 1092 Appellants' application succeeds largely on the same grounds as BT's. We agree with their submission that OFCOM cannot fairly rely on an alleged failure by the 1092 Appellants to complain about the dispute determination when it was in draft form. Much of the relevant information was redacted from the draft that they saw. We have not needed to decide whether this redaction made the consultation process unfair overall. But it does mean that the 1092 Appellants cannot be criticised for any failure to raise the issues before the final determination – including the relevant numbers – was published. We understand why the 1092 Appellants regarded it as important that they should be able to advance their own independent voice on appeal. Indeed the 1092 Appellants' appeal underscored OFCOM's failure to consider the effects of the Determinations on them, each of whom is a transit customer of BT (see paragraph [98] of the Core Issues Judgment).

15. Quantifying the amount of costs that OFCOM should pay to BT, H3G and the 1092 Appellants raises particular difficulties in this case because the issues in the case were bound up with the similar issues arising in the mobile call termination appeals brought against a different OFCOM decision (Cases 1083/3/3/07 and 1085/3/3/07 ("the MCT appeals")). The hearing in January and February 2008 covered both the core issues in these appeals and issues in the MCT appeals. It is true that BT has limited its claim for costs to counsel's fees and its external expert witness (amounting to about £315,000) and that it had a different team of counsel for this appeal from that acting in the MCT appeals. The 1092 Appellants were not parties to the MCT appeals. H3G was one of the appellants as regards the issues in the MCT appeals and had the same team acting in all six appeals. In our judgment, it

might still be difficult and time consuming for anyone asked to quantify a given proportion of the actual costs incurred to try to untangle the costs incurred in these appeals from the costs incurred in the MCT appeals. Such an exercise would almost certainly generate correspondence and argument between the parties.

16. For that reason the Tribunal unanimously concludes that a fair and reasonable position with regard to costs would be achieved in ordering that OFCOM to pay a lump sum to each of BT, the 1092 Appellants and H3G. In the presentation of these appeals, the appellants helpfully liaised before the hearing and generally avoided duplicating one another's arguments. Having said that, BT took the lion's share of the argument at the oral hearing and the Core Issues Judgment focused on the BT appeal. The 1092 Appellants played an important role though bore less of the burden than BT. H3G's participation in the hearing itself was limited. Accordingly, we consider that fairness is achieved by an order that OFCOM pay £100,000 in respect of the costs claimed by BT, and sums of £40,000 and £20,000 to the 1092 Appellants and H3G respectively.

17. The position in relation to T-Mobile is different. Unlike the consistent position adopted by BT, T-Mobile originally supported the approach taken by OFCOM in its response to the draft determinations. In a letter to OFCOM dated 23 May 2007 in response to the draft determinations issued by OFCOM, T-Mobile stated:

> "T-Mobile agrees with the methodology used to assess the reasonableness of the MNO's rates. We particularly welcome Ofcom's statement that neither the End-to-End Connectivity Obligation nor any dispute resolution procedures should be used as a substitute for a Market Review or to change the existing arrangements and regulation. We urge Ofcom to act consistently with this approach in future disputes."

18. T-Mobile's subsequent appeal challenging the determination of the dispute between BT and H3G thus amounted to a reversal of its original position. Further, T-Mobile challenged only H3G's charge and therefore sought to distinguish between OFCOM's reasoning as regards H3G and their reasoning as regards the 2G/3G MNOs. That was not a distinction that the Tribunal adopted in the Core Issues Judgment. We note also that the Core Issues Judgment attributed only very few points exclusively to T-Mobile. In those circumstances we consider that, as between T-Mobile and OFCOM, each side should bear their own costs.

Conclusion

19. For all of the foregoing reasons the Tribunal unanimously:

ORDERS THAT:

within 28 days, OFCOM pay BT £100,000, the 1092 Appellants £40,000 and H3G £20,000 in respect of the costs of their appeals to the Tribunal under section 192 of the 2003 Act as determined by the Tribunal's Core Issues Judgment ([2008] CAT 12).

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa
Registrar Date: 26 March 2009