



Neutral citation [2009] CAT 20

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1095/4/8/08
1096/4/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

22 June 2009

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Applicant

-v-

(1) THE COMPETITION COMMISSION
(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND
REGULATORY REFORM

Respondents

supported by

VIRGIN MEDIA, INC.

Intervener

VIRGIN MEDIA, INC.

Applicant

-v-

(1) THE COMPETITION COMMISSION
(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND
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RULING ON COSTS

I. INTRODUCTION

1. There are before the Tribunal in total four costs applications relating to the two separate proceedings brought by Sky and Virgin respectively pursuant to section 120 of the Enterprise Act 2002. This costs ruling, which deals with all four applications, adopts the abbreviations and terminology used in the Tribunal's judgment of 29 September 2008: [2008] CAT 25, [2008] CompAR 223 ("the Main Judgment").
2. In the main proceedings Sky and Virgin challenged decisions of the Commission and Secretary of State made following a reference by the Secretary of State to the Commission under subsection 45(2) of the Act in relation to Sky's acquisition of a 17.9% stake in ITV. In the Main Judgment the Tribunal dismissed Sky's challenge in its entirety (Case 1095/4/8/08), but upheld part of Virgin's application, namely that part which related to the so-called plurality issue (Case 1096/4/8/08). The Tribunal quashed the Report and the Decision to the extent that they related to that issue, leaving open the question whether any and if so what further relief was appropriate: [2008] CAT 25, [2008] CompAR 223. The question of further relief was ventilated at an additional hearing on 15 October 2008. On 30 October the Tribunal gave judgment holding that its conclusions in the Main Judgment did not affect the validity of the partial divestment remedy imposed on Sky in respect of the SLC, and declining to refer the plurality question back to the Commission and the Secretary of State for reconsideration, on the ground that to do so would serve no useful purpose: [2008] CAT 32, [2009] CompAR 98 ("the Relief Judgment").
3. On 4 December 2008 the Tribunal refused a request by Sky and a contingent request by Virgin for permission to appeal, respectively, against the Main Judgment and the Relief Judgment. In each case, renewed applications were made to the Court of Appeal. By Order of 17 March 2009 Carnwath LJ granted Sky and Virgin permission to appeal on the papers.
4. By applications dated 17 February 2009, the Commission and Secretary of State seek their respective costs of resisting Sky's application for review (Case 1095/4/8/08). In addition Virgin asks for an order that Sky pay the costs of its intervention in Sky's application, in the sum of £117,327.55. Sky opposes all three cost applications and

primarily invites the Tribunal to make no order as to costs. In the alternative Sky submits that a substantial discount should be given in the percentage of the costs of the Commission and Secretary of State that Sky is ordered to pay.

5. On 10 October 2008 Virgin lodged an application in respect of the costs of its own application for review (Case 1096/4/8/08) in the sum of £261,075.92. This sum is said not to include, and Virgin does not seek to recover, any costs relating to its challenge to the remedies imposed or to the arguments about further relief. This is hardly surprising as it lost on these issues.
6. The Commission and the Secretary of State resist Virgin's application and submit that no order should be made as to its costs in the proceedings in question.
7. None of the parties requested an oral hearing in respect of any of these costs applications and accordingly the Tribunal will determine the matters on the papers.

II. THE TRIBUNAL'S COSTS JURISDICTION

8. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Competition Appeal Tribunal Rules S.I. 2003 No. 1372 ("the Tribunal's Rules") which provides as follows:

"55. (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales ...

(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.

(3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) or may direct that it be assessed by the President, a chairman or the Registrar or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court ..."

9. The Tribunal has had occasion to consider a number of previous applications for costs following an application for review under section 120 of the 2002 Act¹. In these and other cases the Tribunal, whilst identifying as the appropriate starting point that a successful party would normally obtain a costs award in its favour, the Tribunal has emphasised that the width of the discretion under rule 55 enables the Tribunal to deal with cases justly and to retain flexibility in its approach, avoiding the risk of guiding principles evolving into rigid rules. In *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform (costs)*, [2009] CAT 19, the Tribunal stated (paragraph [19]):

“It is axiomatic that all such starting points are just that – the point at which the court begins the process of taking account of the specific factors arising in the individual case before it - and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly. The Tribunal’s decision in relation to costs/expenses can be affected by any one or more of an almost infinite variety of factors, whose weight may well vary depending upon the particular facts. Beyond recognising that success or failure overall or on particular issues, the parties’ conduct in relation to the proceedings, the nature, purpose and subject-matter of the proceedings, and any offers of settlement are always likely to be candidates for consideration, the factors are too many and too varied to render it sensible to attempt to identify them exhaustively.”

10. The costs position in the courts in England & Wales is set out in slightly different terms in CPR Rule 44.3(2)(a) which applies also to public law challenges. That provides that the “general rule” is that the unsuccessful party will be ordered to pay the costs of the successful party (although the court has a discretion to make a different order). There is no such general rule so far as the Tribunal is concerned. Nevertheless the rationale for that rule also underlies the Tribunal’s starting point, to which we have referred. This rationale was elaborated upon by Dyson J (as he then was) in *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347, [1998] 2 All ER 755 as follows:

“36. I accept the submission of Mr Sales that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate

¹ *IBA Health Ltd v Office of Fair Trading* [2004] CAT 6, [2004] CompAR 529; *Federation of Wholesaler Distributors v Office of Fair Trading* [2004] CAT 11, [2004] CompAR 764; *Unichem Ltd v Office of Fair Trading* [2005] CAT 31, [2006] CompAR 172; *Celesio AG v Office of Fair Trading* [2006] CAT 20, [2007] CompAR 269; *Stericycle International Llc v Competition Commission* [2006] CAT 22, [2007] CompAR 322; *Co-operative Group (CWS) Ltd v Office of Fair Trading* [2007] CAT 25; *Merger Action Group v Secretary of State for Business Enterprise and Regulatory Reform* [2009] CAT 19.

result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's costs of establishing that. If it transpires that the claimant's claim is ill-founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim.

37. The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases."

See also *Davey v Aylesbury Vale District Council* [2007] EWCA Civ 116, [2008] 1 WLR 878, per Sir Anthony Clarke M.R. at paragraph [29]. (As to the exceptions to the general rule in public law cases, see per Sedley LJ in *Davey* at paragraph [21], Dyson J in *ex p Child Poverty Action Group* at paragraph [27], and *R (on the application of Smeaton) v Secretary of State for Health (costs)* [2002] EWHC 886 (Admin), [2002] 2 FLR 146, per Munby J at paragraph [17].)

III. SKY'S APPLICATION FOR REVIEW

The Commission's and the Secretary of State's applications for costs - summary of the parties' arguments

11. The Commission submits that its costs of defending Sky's application should be paid in full by Sky on the ground that the application was unsuccessful in every respect. Referring to the Tribunal's approach in previous section 120 applications, the Commission submits that a successful party will normally be awarded its costs (*Unichem Ltd v Office of Fair Trading* [2005] CAT 31, [2006] CompAR 172, at [17]). The Commission further submits that the wide-ranging nature of Sky's challenge as well as its having necessitated a detailed consideration of the underlying evidence, was onerous and costly for the Commission.
12. The Secretary of State contends that he is entitled to recover his costs of Sky's application for essentially the same reasons as the Commission. The Secretary of State submits, in addition, that Sky is not a small entity which would be disproportionately burdened by a costs order against it.
13. Sky's response to these applications is set out in its written submissions of 6 March 2009. Sky's primary contention, in answer to the Commission's and Secretary of State's applications, is that there should be no order for costs (paragraphs 7-15 of Sky's

Response). In short Sky submits that the fact that the Respondents were successful is not, in itself, determinative of any costs order. Sky's application for review concerned the first reference under subsection 45(2) of the Act and raised novel and complex points for the Tribunal to determine. Sky's acquisition of a 17.9% stake in ITV lies, it is said, at one extreme of the spectrum for a material influence finding. Sky refers to the OFT's draft "Mergers – jurisdictional and procedural guidance" (OFT 526con, March 2008), and argues that it implicitly recognises the novelty of the Commission's findings in the Report. Moreover, Sky's application was in no way frivolous or vexatious; rather it raised important and complex points of law and of the latitude to be afforded to the Commission and the Secretary of State in the discharge of their tasks under Chapter II of Part 3 of the Act.

14. Alternatively Sky submits that the amount of costs claimed by the Respondents should be significantly reduced by, for example, 50 per cent (paragraphs 16-31 of Sky's Response). Sky first repeats its submission on novelty and complexity of the issues raised by its application. Second, Sky argues that there was a substantial measure of duplication in the arguments advanced by the Commission and the Secretary of State (citing *IBA Health (Costs)*, at [46])². While Sky accepts that some degree of duplication was inevitable, this should not mean that Sky now has to pay two full sets of costs defending its application for review. Further Sky submits that the costs of its application were higher than they might otherwise have been due to ITV's decision not to intervene. ITV's decision necessitated complex (and costly) arrangements for confidential treatment of ITV's information, which is a further factor for reducing the proportion of any costs awarded. Sky also denies the Commission's suggestion that its application was onerous or costly. The nature of its application and the response demanded was, in Sky's view, perfectly proper. Finally, Sky argues that it should not be required to pay the costs incurred by the Respondents in connection with Virgin's intervention since it did not materially aid the Tribunal.

² Sky refers to (i) the Tribunal's approach to the intensity of review under section 120 of the Act and (ii) whether complete divestiture should be an appropriate starting point for the analysis of remedies as examples of the Respondents making identical submissions.

The Tribunal's decision on the Commission's and the Secretary of State's applications for costs in Case 1095/4/8/08

15. The Tribunal starts from the position that Sky has been unsuccessful in all aspects of its wide-ranging challenge to the Report and the Decision and that in those circumstances an award of costs will normally be made in favour of the successful parties. The Commission and Secretary of State successfully defended each of Sky's numerous grounds of challenge.
16. This was not a case in which the issues were very finely balanced. Whilst we do not consider that any of Sky's arguments were frivolous or vexatious, some were only just arguable and some were in substance more suited to an appeal on the merits than a judicial review (see for example paragraphs 122 and 193 of the Main Judgment). Nor do we consider that it matters in this context that the case concerned the first reference to be conducted under the public interest merger provisions in Part 3, Chapter 2 of the 2002 Act, nor that some of the issues raised were complex.
17. In the Tribunal's view there was no unnecessary or unreasonable duplication of effort by the Commission and the Secretary of State. The findings and decisions of both these bodies had been challenged by Sky, and each was entitled to put its defence before the Tribunal. There was nothing in the manner of their conduct of those defences either before or during the hearings which would justify a reduction in whatever costs order the Tribunal would otherwise make.
18. Nor should any such order be reduced by reason of ITV's non-participation in the proceedings. To the extent that this increased the costs of the parties, that is one of the risks of litigation. The same applies to any additional costs incurred by the Commission's and Secretary of State's in connection with Virgin's intervention, even if it were possible to identify such costs.
19. In the circumstances the Commission and the Secretary of the State should recover from Sky the costs of their respective defences. Those costs should be subject to detailed assessment in accordance with rule 55(3) of the Tribunal's Rules unless agreed.

Virgin's application for costs of its intervention in Case 1095/4/8/08 – summary of the parties' arguments

20. Virgin submits that it should be awarded the costs of its intervention in Sky's application for review, arguing that it was entirely reasonable for Virgin to intervene, that its intervention has been entirely successful, and that its submissions did not merely duplicate those of the Commission and the Secretary of State, but materially advanced the argument before the Tribunal.
21. Sky submits (paragraphs 32-41 of its Response) in essence that there is no reason to depart from the general position that costs of an intervention should be allowed to lie where they fall. Citing *Vodafone v Office of Communications (Costs)* [2008] CAT 39 and *Aberdeen Journals Ltd v Office of Fair Trading (Costs)* [2003] CAT 21, [2004] CompAR 189, Sky submits that the Tribunal has only granted costs to an intervener where there existed compelling and case-specific reasons. Sky argues that no such reasons exist here. There was no legitimate commercial reason for Virgin to have intervened in Sky's application, as the Commission's counterfactual was that ITV would remain independent rather than that Virgin or another undertaking would purchase ITV. Even if there was any commercial justification to intervene, that is not a compelling reason such as would justify the Tribunal departing from the principle that interveners' costs generally lie where they fall. Nor did Virgin's submissions materially assist the Tribunal.

The Tribunal's decision on Virgin's applications for costs of its intervention in Case 1095/4/8/08

22. Although Virgin's intervention was helpful to the Tribunal, and did not merely duplicate the submissions of the Commission and the Secretary of State, it must be assumed that Virgin intervened in its own commercial interest. The Tribunal has stated on several occasions that there should be no general expectation that a successful intervener is entitled to its costs (see e.g. *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 6, at page 11, line 26 to page 13, line 27). Virgin's reliance on *Aberdeen Journals (Costs)* is misplaced since the circumstances in that case were very different to the present. (See, similarly, *Vodafone (Costs)*, at [26].) The Tribunal therefore sees no reason to depart from the general position that costs of an intervention should not be the subject of any specific order.

IV. VIRGIN'S APPLICATION FOR REVIEW

Virgin's application for costs - summary of the parties' arguments

23. Virgin submits that, having succeeded on the major part of its case concerning the construction of the public interest provisions of the Act, it should recover the costs of its review application (save for the costs relating to its unsuccessful challenge to the SLC remedies and relating to its unsuccessful attempt to have the plurality issue referred back to the Respondents) in accordance with the relevant principles to which we have referred earlier in this judgment. The amount claimed is £261,075.92. (A schedule of costs is included with Virgin's written submissions; this does not separately identify the sum in question, but sets out what are said to be Virgin's total costs.) In support of this Virgin also relies on the following: that all its arguments were points which it had asked the Commission to consider during the administrative procedure, that its conduct was reasonable throughout, and that the costs it is claiming are reasonable given that the point of statutory construction in issue was novel and by no means straightforward.
24. The Commission submits that no order as to costs should be made on Virgin's application for review. According to the Commission, Virgin's application should be seen as falling into two parts: that relating to the plurality issue, and that relating to the remedy for the adverse effects on the public interest resulting from the SLC. On this basis, in principle, Virgin should pay the Commission's and the Secretary of State's costs of defending Virgin's unsuccessful challenge to their respective recommendation and decision in relation to remedies. However the Commission does not seek these costs from Virgin. Instead the Commission says that its success on that part of Virgin's application is a factor strongly militating in favour of no order overall.
25. Further, the Commission argues that Virgin should not be awarded its costs on the plurality issue in any event. First, the Tribunal's conclusion on the plurality issue ultimately made no practical difference to the outcome of the case: see Relief Judgment, at [39]. Second, the Commission (and the Secretary of State) can clearly be said to have succeeded on a distinct aspect of the plurality issue, namely Virgin's application (supported on this point by Sky) that the plurality issue be remitted for reconsideration: *ibid*. Indeed Virgin accepts that it has no claim to these costs. Third, Virgin did not pursue a number of the arguments raised in its Notice of Application.

Fourth, Virgin only succeeded on one of its two main arguments on the plurality issue, namely the argument relating to the construction of subsection 58A(5) of the Act. Fifth, the construction of that subsection is, on any view, a complex question on which different parties with very different perspectives have taken quite different views. The question of statutory construction was finely balanced and would have been challenged whatever the interpretation reached by the decision-makers, who exercised their statutory functions reasonably in difficult conditions.

26. The Secretary of State, too, contends that each party should bear its own costs in Virgin's application. The Secretary of State submits that Virgin either did not pursue, or did not succeed on, a number of the issues raised in its application. Virgin succeeded on only very limited grounds. Also Virgin was entirely unsuccessful in relation to its challenge to the remedies imposed and the relief to be granted in respect of its application for review. According to the Secretary of State, Virgin is a well-funded large commercial entity and will not suffer any real hardship by bearing its own costs. Finally, the Secretary of State submits that if, contrary to his primary submissions, the Tribunal is minded to award Virgin some of its costs, those costs should be subject to detailed assessment.

27. In a written response to these arguments dated 6 March 2009 Virgin contends in particular that the proper interpretation of the statutory provisions on plurality was a matter of public interest, particularly to broadcasters. In any event prior to the Tribunal's conclusions on Sky's application for review it was far from clear that the issue would not affect the outcome, and indeed it could still do so if Sky were to be successful in the Court of Appeal. As to the suggestion that the arguments pursued by Virgin were narrower than those in its pleadings, Virgin maintains that it has been consistent throughout in its contention that the deeming provisions of section 58A precluded the relevant decision-makers having regard to the degree of control exercised by Sky over ITV. In contrast the arguments put forward by the Commission and the Secretary of State evolved over time, requiring Virgin to meet them all in their various manifestations. Finally Virgin contends that the fact that the decision-makers as public authorities were acting reasonably in difficult circumstances does not lead to the result that they should not be the subject of a costs order. Nor are they assisted by the Tribunal's decisions in *Vodafone (Costs)* and *IBA Health (Costs)*, neither of which supports the proposition that a public authority should not bear the costs of an applicant

who succeeds in establishing that the relevant authority has incorrectly interpreted the legal provisions it is under a duty to apply.

The Tribunal's decision on Virgin's application for costs in Case 1096/4/8/08

28. Virgin has succeeded on an issue which it correctly describes as “a pure point of statutory construction” namely the meaning and effect of the legislation and in particular subsection 58A(5) of the Act (see written submission 10 October 2008, paragraph 36). Thus the decision-makers had misdirected themselves on the approach to the plurality assessment with the result that their conclusions thereon could not stand. In our view it cannot fairly be suggested that because there was some argument as to, in particular subsection 58A(4), a provision which did not in the end hold the key to the issue, Virgin's success on this point was less than total. Nor do we consider that Virgin's application for costs is weakened because, in the event, the statutory construction did not affect the outcome. Virgin could not have been sure that this would be so until they had the Tribunal's conclusions on Sky's challenge. Moreover, as Virgin argues, the plurality issue could still become relevant were the Court of Appeal to reach a decision in Sky's appeal which affected the divestment remedy.
29. On the other hand Virgin's application for review was not limited to that particular point of statutory construction. Virgin also raised a discrete and substantial ground alleging that the decision-makers had misinterpreted the provisions relating to remedies, and had acted unreasonably and made manifest errors in determining the appropriate remedy for the adverse effects on competition identified by the Commission. This ground of challenge was not soft-pedalled by Virgin; it took up its share of the pleadings both written and oral. Virgin lost on this ground (in so far as it did not overlap with the plurality ground, and Virgin argued strenuously that the existing remedy in respect of SLC was not impugned by the decision-makers' errors on plurality).
30. In addition to losing on its challenge on remedies, Virgin was also unsuccessful in seeking further relief in the form of remittal of the plurality issue to the decision-makers. This was the subject of a separate hearing. Although it is true to say that Sky too argued for remittal, nevertheless Virgin's arguments on that point were somewhat

different in nature and required to be dealt with, undoubtedly adding to the length of the hearing and the costs generally.

31. Having carefully considered all the parties' submissions and the relevant principles to which reference is made earlier in this judgment, we do not consider that in this case there are any other significant features of the proceedings, or the parties' conduct, which point one way or the other so far as the appropriate costs order is concerned.
32. One possible outcome would perhaps have been that Virgin should be the beneficiary of a costs order in respect of the point of statutory construction on which it won, and an order for costs should be made in favour of the Commission and the Secretary of State on the issues on which Virgin was unsuccessful. If we had adopted that course we would have ordered a detailed assessment in each case, subject to agreement being reached. Such an assessment would be appropriate in respect of the costs of the Commission and the Secretary of State because we have no information as to their costs, whether in relation to the issues on which they were successful or at all. A detailed assessment would also be appropriate in relation to Virgin's costs because the amount claimed (£261,075.92) appears to us to be very high in respect of what was admittedly a pure point of statutory construction, and although it would be open to us to make a summary assessment ourselves, we would be reluctant to do this if there were to be a detailed assessment in respect of the issues on which the other parties were successful.
33. However we have come to the conclusion that in all the circumstances of this case justice is best served by making no order for costs. Moreover it is far from clear that on a detailed assessment either side would be a substantial net winner in terms of establishing entitlement to a greater amount than the other, and significant further costs would certainly be expended in the exercise.

V. CONCLUSION

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

ORDERS THAT:

- (a) In Case 1095/4/8/08, Sky pay to the Commission and the Secretary of the State the costs of their respective defences, such costs to be subject to detailed assessment in accordance with rule 55(3) of the Tribunal's Rules unless agreed.

- (b) In Case 1096/4/8/08, there be no order for costs.

The Honourable Mr Justice Barling

Peter Clayton

Peter Grinyer

Charles Dhanowa
Registrar

22 June 2009