Neutral citation [2013] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1189/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

15 February 2013

Before:

THE HONOURABLE MR. JUSTICE HENDERSON
(Chairman)
WILLIAM ALLAN
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

TELEFONICA UK LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

EVERYTHING EVERYWHERE LIMITED
HUTCHISON 3G UK LIMITED
VODAFONE LIMITED

Interveners

RULING (COSTS)

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1. This is our decision on the written application ("the Application") made by Ofcom on 30 November 2012 under rule 55 of the Competition Appeal Tribunal Rules 2003 ("the Rules"), seeking an order that Telefónica should pay Ofcom's external legal costs of the appeal which we dismissed in our judgment released on 30 October 2012 (*Telefónica UK Ltd v Ofcom* [2012] CAT 28). Telefónica responded to the Application on 14 December 2012, and Ofcom replied on 20 December 2012. In accordance with the usual practice of the Tribunal, we have reached our decision on the basis of the parties' written submissions without an oral hearing.

2. So far as material, rule 55 (as amended) provides as follows:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Senior Courts 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.
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> (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 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 a costs officer of the Senior Courts …"

3. It is common ground that rule 55 gives the Tribunal a "wide and general discretion" in relation to costs: see *Quarmby Construction Co Ltd v Office of Fair Trading* [2012] EWCA Civ 1552 ("*Quarmby*") at paragraph [12] per Lloyd LJ, with whose judgment Jackson and Laws LJJ agreed. *Quarmby* also establishes that, in the absence of any equivalent in the Rules to rule 44.3(2) of the Civil Procedure Rules, it would be wrong for the Tribunal to adopt the principle that costs should follow the event as the primary guide to the exercise of its discretion: see paragraphs [19] to [23]. As Lloyd LJ pointed out in paragraph [21], "… the proceedings that come before the tribunal are, for all their range and variety, rarely analogous to civil litigation to which the CPR apply". He went on in paragraph [23] to endorse the approach taken by this Tribunal in a number of recent cases as being one which "is

prudent and sensible and allows proper regard to be had to the considerable variety of the types of dispute that come before the tribunal, almost all of them by way of appeal from one regulator or another". The essence of that approach, as we understand it, is that the Tribunal should take account "of the specific factors arising in the individual case before it": see *CTS Eventim AG v Competition Commission* [2010] CAT 8 at paragraph [6], cited with approval, in relation to costs applications in appeals under section 192 of the Communications Act 2003 ("CA 2003"), in *British Telecommunications Plc v Ofcom (Partial Private Circuits) (Costs)* [2011] CAT 35 at paragraph [20].

4. Nevertheless, despite the width and generality of the discretion, it is often material for the Tribunal to consider whether there has been a winner in the proceedings before it, and to accord significant weight to that consideration. This was recognised by Lloyd LJ in *Quarmby* at paragraph [24]. Furthermore, in two recent cases, in the context of an appeal under section 192 of CA 2003 where Ofcom had been the successful party, this Tribunal when asked to make a costs order in favour of Ofcom has taken as its starting point the principle that costs should follow the event: see the *Partial Private Circuits (Costs)* case, cited above, at paragraphs [19] to [20] and *Everything Everywhere Limited v Office of Communications (080/0845/0870) (Costs)* [2011] CAT 45 at paragraphs [5] to [10]. Without regarding ourselves as in any way bound to do so, we consider it appropriate to follow a similar approach in the present case. Telefónica's appeal against Ofcom's determination has been comprehensively rejected by us on each of the five grounds which were argued. On any reasonable view, Ofcom must be regarded as the successful party, and in the absence of good reason to the contrary we think simple justice would require that Telefónica should pay Ofcom's reasonable costs of successfully resisting the challenge to its determination.

5. In their response to the Application, Telefónica argue that it would be appropriate for the Tribunal to make no award of costs in Ofcom's favour, for two reasons: first, because of an alleged change in Ofcom's position during the course of the case, and secondly, because the appeal raised important issues of general application which it was in the public interest to have determined. If those submissions are rejected, Telefónica then submit that any award made in Ofcom's

favour should be materially reduced from the amount claimed by Ofcom "to reflect the unnecessary extra cost incurred in instructing leading counsel".

6. We consider first the alleged change in Ofcom's position. Telefónica say that Ofcom's initial position, which it maintained down to the date of the hearing, was that the only factor to which it needed to have regard in seeking to uphold the determination was the compliance by Vodafone and H3G with the existing charge control regime. By contrast, as we recorded in paragraph 52 of our judgment, by the date of the hearing Ofcom had expressly accepted that a party's compliance with *ex ante* regulation did not necessarily prevent Ofcom from imposing additional regulation through the dispute resolution process, and that in resolving a dispute it was necessary for Ofcom "to have due regard to the full range of its regulatory duties and responsibilities". Telefónica do not suggest that Ofcom is to be criticised for changing its position, but argue that if they were now to be ordered to pay Ofcom's costs they would in effect be penalised for the uncertainties created by Ofcom's change of position in the proceedings.

7. We find this argument unconvincing. As we said in paragraph 52 of the judgment, there was no previous authority on the question of the relevance of the existing charge control regime to Ofcom's determination of the dispute, and both Ofcom and Telefónica moved to a significant extent from the positions they had originally adopted, to such an extent, indeed, that (as we observed in paragraph 53) the difference between them on this point by the time of the hearing had ceased to be one of any substance. This kind of evolution and convergence of the parties' rival contentions is in our view part of the normal process of litigation, and it serves the valuable purpose of helping to narrow and define the real issues in dispute. We do not consider that Telefónica suffered any real prejudice as a result of this refinement of the issues, or that there was any consequential increase in either the length or the cost of the proceedings which it would be appropriate to reflect in our costs order.

8. We are equally unimpressed by the argument that considerations of public interest would justify a departure from the principle that costs should follow the event. For reasons best known to themselves, Telefónica's challenge to the practice of flip-

flopping was both belated and confined to one month's charges. In those circumstances, however reprehensible the practice of flip-flopping, the challenge before us had no bearing upon its continued availability (which had already been addressed by Ofcom). That being so, the challenge had to us much more the appearance of a tactical manoeuvre than of a public-spirited quest to obtain rulings on issues of general importance. That apart, however, we do not consider that either of the two alleged issues of general importance had much in the way of wider significance. The first was the question of how Ofcom should approach the determination of a dispute against the background of an existing charge control. It is true, as we have noted, that there was no previous authority on this question, but as a result of the convergence of the parties' submissions it boiled down to little more than a question of the weight to be attached to considerations of legal certainty. As that was, on any view, a matter for Ofcom, it is hard to see how the question has any wider general significance. The second issue of alleged general importance concerned the construction and application of section 190(2A) of CA 2003. We accept that this gave rise to technical issues of some difficulty, but the particular transitional issue which faced us (where the reference to Ofcom was made before the effective date of the amendment, and the determination was issued after that date) is unlikely to recur in practice, while the wider question of the application of section 190(2A) is again of little practical importance, because the subsection adds nothing of substance to Ofcom's existing regulatory duties: see paragraphs 149 to 152 of our judgment.

9. As to the instruction of leading counsel by Ofcom, the case was in our view of sufficient complexity, difficulty and importance to the parties to provide ample justification for Ofcom's decision to retain both leading and junior counsel. We note in this connection that each of the interveners also considered it appropriate to instruct a leader, and in the case of H3G a junior as well. Without detracting in any way from the conspicuously able performance of junior counsel, we would not have been surprised if Telefónica too had chosen to instruct a leader. Further, the hourly rates claimed for Mr Saini QC and his junior (£250 and £40 per hour respectively) appear to us exceptionally modest for specialist litigation of this nature, and the impact on Telefónica is further reduced by the fact that Ofcom seeks to recover only its external legal costs of the appeal, i.e. the costs of its two counsel. Those

costs amount in the aggregate to £33,306.67, which together with VAT at 20% makes a grand total of £39,968. We consider those costs to be eminently reasonable in amount, and we do not think it necessary to order a detailed assessment. For the reasons which we have given, we will direct Telefónica to pay Ofcom's costs of the appeal, and we assess those costs in the sum claimed without any reduction.

The Honourable Mr. Justice Henderson | William Allan | Stephen Wilks

Charles Dhanowa
Registrar

Date: 15 February 2013