



Neutral citation [2006] CAT 18

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

31 August 2006

Before:

Marion Simmons QC (Chairman)
Mr Michael Davey
Mrs Sheila Hewitt

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

VODAFONE LIMITED

and

T-MOBILE (UK) LIMITED

Interveners

Mr Edward Mercer (of Taylor Wessing) represented the Appellant.

Miss Anneli Howard (instructed by the General Counsel, Office of Communications) represented the Respondent.

RULING: ASSESSMENT OF COSTS

I INTRODUCTION

1. On 1 December 2004 the Tribunal made an order that the OFCOM pay the costs of Floe in respect of its appeal filed on 2 January 2004 and directed that the parties reach agreement as to the amount of costs recoverable and, failing agreement, that such costs were to be assessed pursuant to rule 55(3) of the Tribunal's Rules following an application by either party. According to OFCOM's submissions, with a view to reaching agreement with OFCOM as to the amount of its costs, Floe submitted a statement of costs to OFCOM in March 2005. This statement of costs has not been provided to us. Following receipt of that statement OFCOM has paid on account the sum of £90,000 but declines to pay any further sum. The sum of £90,000 reflects over 80% of the legal fees charged by Taylor Wessing, solicitors acting for Floe, which amounted to £94,085.00 and 25% of the combined fees presented by Mr Happy and Mr Fenton.

2. Floe refused to accept the sum of £90,000 in full and final settlement of its costs of the appeal. Accordingly on 20 March 2006 OFCOM applied to the Tribunal to assess Floe's costs pursuant to rule 55 of the Tribunal's rules. By a letter dated 23 March 2006 the Registrar of the Tribunal directed Floe to file a statement of costs, with such submissions in support as it was advised to make by 31 March 2006 and directed OFCOM to reply by 7 April 2006. There is now before the Tribunal an application for the Tribunal to assess the sum to be paid (if any) in respect of the following items claimed by Floe:
 - a. In respect of Mr Stonehouse: £28,500
 - b. In respect of Mr Happy, an additional £5,500
 - c. Additional Miscellaneous costs including
Taylor Wessings's fees: £ 6,000

3. The Statement of Costs provided to the Tribunal values Mr Stonehouse's and Mr Happy's work at £57,000 and £48,375 respectively although the claim for recovery of costs is limited as above. OFCOM submits that this is to be compared with the

amounts recorded on the Statement of Costs provided to it in March 2005 which valued Mr Stonehouse' work at £36,375 and Mr Happy's at £20,000. OFCOM included £9,187.50 for Mr Happy when calculating the payment of £90,000 on account of costs. Floe's claim for £5,500 in respect of Mr Happy is in addition to the sum of £9,187.50 which OFCOM has already paid to Floe under this head of claim. OFCOM have not paid any sum towards the claim for costs of Mr Stonehouse.

4. We are asked by both parties to determine this application on the information and submissions before us and without an oral hearing.

5. Rule 55(3) of the Competition Appeal Tribunal Rules 2003, SI 2003/1372 (the "Tribunal's Rules") provides:

"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, 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 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) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court ...".

6. Floe is entitled to so much of its costs "as may be just". This is to be contrasted with Part 44 at paragraph 44.4 of the Civil Procedure Rules, SI 1998/3132 ("the CPR") which provides:

"44.4 (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 48.3 sets out how the court decides the amount of costs

payable under a contract)

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue; and

(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.”

7. Paragraph 44.5(3) of Part 44 of the CPR provides that the court is to have regard to all the circumstances in deciding whether costs were proportionate and reasonably incurred and reasonable in amount. Paragraph 44.5(3) provides that:

“(3) The court must also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done.”

8. In assessing the costs “as may be just” this Tribunal will take into account, *inter alia* the matters set out in paragraph 44.5(3) of the CPR as well as whether the costs are reasonably incurred and proportionate to the amount in issue.

9. The established practice of the English courts is that the costs of employees in investigating, formulating and prosecuting a claim by legal proceedings does not of itself qualify for an order for the payment of the costs of and incidental to those proceedings (see *Admiral Management Services Limited v Para-Protect Europe Limited* [2002] EWHC 233 (Ch), [2003] 2 All ER 1017 per Stanley Burnton J at paragraph 27 as approved by Warren J in *Sisu Capital Fund v Tucker* [2005] EWHC 2321 (Ch), [2006] All ER 167). However, in circumstances where the costs would be recoverable had the work been carried out by someone who was not an employee but was an independent expert, then if that work is carried out in-house and not by an independent expert, the reasonable costs of the in-house experts are recoverable as an item of costs. Although such reasonable costs will not include any element of overhead recovery or of profit. (*Admiral Management Services Limited v Para-Protect Europe Limited* per Stanley Burnton J at paragraph 27 – 34 as approved by Warren J in *Sisu Capital Fund v Tucker*). This practice is one which the Tribunal considers is just and should be adopted by us in the circumstances of this case.

10. The question therefore is whether the work done by Mr Stonehouse and Mr Happy was expert work of the kind that may be the subject of an order for costs or instead is work the costs of which are not recoverable. In the particular area of telecommunications it seems to the Tribunal that technical knowledge available in-house which is required for the day-to-day operation of the business would not qualify as expert evidence. Such knowledge is part of the factual circumstances which a client is expected to provide to its solicitors for the purposes of prosecuting a claim without instructing an independent expert. As Stanley Burnton J said at paragraph 43 of *Admiral Management Services Limited v Para-Protect Europe Limited*:

“Familiarity with a party’s business does not make a witness into an expert either for the purpose of testimony or for the purpose of the recovery of costs.”

II FLOE’S COSTS SCHEDULE

Mr Stonehouse

11. Mr Stonehouse did not provide a witness statement before the hearing of this appeal. In a witness statement dated 26 August 2005, for the purposes of Floe's second appeal against OFCOM's Second Decision dated 28 June 2005, Mr Stonehouse states: "I was a director of Floe Telecom Limited ("Floe") during all the relevant periods related to the complaint to OFCOM. My specialty is technical matters but I also have long experience of the commercial aspects of the telecommunications service".

12. In its costs submissions Floe informs the Tribunal that by the time of the appeal Mr Stonehouse was not an employee of Floe Telecom Limited (in administration) but he was a provider to it of consultancy services. He was a director of Floe Networks Limited (in administration) which was a sister company to and provided network services to Floe Telecom Limited.

13. Mr Stonehouse's bill (which was not provided to us) was, we are told, attached to the Statement of Costs provided by Floe to OFCOM in March 2005. Floe submits that there should not be any argument about the following items of Mr Stonehouse's work for which his fees total £28,500:
 - (a) Research and preparation of document in support of CAT filing;
 - (b) Technical meeting;
 - (c) Research and analysis of GM specification, preparation and drafting of document in support of expert evidence;
 - (d) Research, preparation and drafting of IMEI documents in support of expert evidence;
 - (e) Analyse and comment on Vodafone Witness Statements;
 - (f) Analysis of Ofcom responses, comment and drafting of Floe's responses;
 - (g) Meeting with Taylor Wessing in London;
 - (h) Preparing and drafting of GSM overview expert evidence documents;
 - (i) Preparation for meeting on 8 July 2004;
 - (j) Tribunal hearing.

14. Floe submits that Mr Stonehouse's technical input was vital, in particular in the agreement of the Statement of Facts, in explaining IMEI numbers, in explaining the specification of GSM so that submissions could be made to the Tribunal as to the MNOs' control of the frequency and power output of a handset, as to the profile of particular SIM cards and as to the margins achievable using SIMs in the industry generally.

15. OFCOM submits that the work done by Mr Stonehouse falls into the non-recoverable category of work done by a litigant in investigating, formulating and preparing legal proceedings and so does not qualify as "costs of and incidental to the proceedings". OFCOM submits that most of the entries included in the description of Mr Stonehouse's activities relate to matters of general assistance with the conduct of the litigation or otherwise duplicate tasks conducted by solicitors or are themselves duplicative and should therefore be discounted. Moreover, OFCOM submits that Mr Stonehouse's activities, where they relate to more technical issues, form part of a factual exercise, preparing documents in support of technical elements in Floe's pleadings. OFCOM refers to Mr Stonehouse not having provided a witness statement in this appeal: nor did he appear as an expert. OFCOM also refers to Floe not having provided any information about Mr Stonehouse's qualifications as an expert and also points out that Floe has not explained the manner in which the work Mr Stonehouse carried out called upon his particular expertise.

Mr Happy

16. It appears from Mr Happy's witness statement that, at the time of making it, Mr Happy had worked in the telecommunications industry for 16 years and was a freelance consultant. He had, amongst other things, assisted companies to formulate and make complaints to the UK National Regulatory Authority.

17. Floe submits that Mr Happy gave technical assistance and that at least 37% of his time in relation to this appeal was so attributable. No further breakdown is provided by Floe in respect of this head of claim.

18. Mr Happy submitted a witness statement in the appeal. OFCOM submits that its content was not expert evidence within the meaning attributable by the case law, but instead related to factual matters concerning Floe's dealings with Vodafone, the RA consultation and Floe's complaint to Oftel. OFCOM submits that the vast majority of the items in the schedule of work provided for Mr Happy relate to purely administrative or managerial tasks by way of general assistance with the conduct of the proceedings (such as internal Floe meetings and meeting with Taylor Wessing) or otherwise duplicate work done by the solicitors. Other items appear to be unrelated to the litigation, either pre-dating OFCOM's decision or post-dating the Tribunal's judgment or concerned with the administration of Floe. For those reasons OFCOM is not prepared to accede to a claim for additional costs over and above the sum already contributed in respect of Mr Happy.

III THE TRIBUNAL'S ANALYSIS

19. Floe has not produced any evidence that Mr Stonehouse or Mr Happy have expert qualifications.
20. Floe has not satisfied us that Mr Stonehouse's input into the preparation of Floe's appeal and the submissions Floe made to us were in the nature of work of an expert rather than the work of investigating, formulating and preparing the legal proceedings. Accordingly, the costs under this head of claim do not fall within the category of costs which Floe can recover. In so far as the information Mr Stonehouse provided was "technical" in nature, it was information which was within the knowledge of Floe: it was part of the knowledge of a business in the telecommunications industry. It was not information which Floe had to acquire from an outside expert. Nor has Floe satisfied us that had Mr Stonehouse not been available "in-house" his knowledge, experience and distinction was such that he would have necessarily been sought by a party to litigation in the position of Floe as a consultant in respect of the matters referred to. Nor have we been provided by Floe with any supporting information which would enable us to verify whether the costs of Mr Stonehouse have been reasonably and proportionately incurred. Accordingly Floe has not satisfied us that it would be just to order OFCOM to make any payment to Floe in respect of the fees of Mr Stonehouse.

21. As regards Mr Happy, Floe has not satisfied us as to his knowledge, experience and distinction or that his contribution to this litigation was in his capacity as or akin to an independent expert. Insofar as he made any such contribution, OFCOM have paid £9,187.50 to Floe in respect of his fees and Floe has not satisfied us that it would be just to order OFCOM to pay any sum in addition to that amount.
22. Accordingly, in our judgment, the amounts claimed in respect of Mr Stonehouse and the additional amount claimed in respect of Mr Happy (over the sum already paid by OFCOM in respect of Mr Happy's costs) are not recoverable by Floe as an item of costs.

Miscellaneous Costs of Taylor Wessing

23. Floe are seeking to recover in total 86% of the charges made to it by its solicitors Taylor Wessing or in round figures a further £6,000. This is to cover both Taylor Wessing's fees and miscellaneous disbursements. OFCOM submit that the recovery should be limited to 80% of the costs claimed and that no further sum should be paid in addition to the amount already paid to Floe by OFCOM on account. OFCOM submits that its payment of over 80% of Taylor Wessing's costs reflects a reasonable and proportionate amount of the costs incurred. So the dispute between Floe and OFCOM under this head is limited to £6,000.
24. There are two separate heads making up these costs: Taylor Wessing's fees and Miscellaneous Disbursements.

Taylor Wessing fees

25. OFCOM submits that the amount of time spent at partner level on mundane tasks (such as finalising bundles and carrying out the confidentiality exercise) could have been performed by an associate solicitor or trainee. OFCOM submits that it would have been more helpful if Taylor Wessing had provided in its Statement of Costs separate rates for partners, associates and trainees rather than a "blended rate" of £231 per hour so as to allow an assessment of the reasonableness of the tasks and time

dedicated by different personnel. OFCOM also question on what basis Taylor Wessing's bills have been approved by the Administrators of Floe.

26. Floe submits that the blended charge out rate of £231 per hour is, by any standards, in the City of London (or indeed elsewhere in the UK) to be regarded as low. Floe accepts that there has been a high degree of partner involvement in the matter but submits that this has not led to a higher charge out rate overall than one might expect in the market place for a fairly junior associate in the region of two to three years qualified. Floe also submits that there was complex technical and legal aspects of the matter that required assimilation requiring senior involvement, there are no counsel's fees and so no possibility of duplication in that area, and there was no CFA and so no success uplift.
27. The Tribunal considers that there are features of this appeal which should be given particular significance when assessing the sum to award in costs under this head. First, that no counsel was instructed by Floe and that the Taylor Wessing partner appeared in court as the advocate. The advocate partner must accordingly have spent time preparing the submissions both written and oral in addition to the time which a solicitor would normally be engaged instructing an advocate and in conducting the litigation. Secondly, that the appeal involved complex and novel matters of law. Thirdly, that the skill, effort, specialised knowledge (particularly in telecommunications law) and responsibility involved in presenting Floe's case was significant. Having regard to these features we consider that a greater proportion of partner time can be justified than would normally be the case. In these circumstances and having regard to the guideline rates published by the Supreme Courts costs office in England we do not consider that the reduction proposed by OFCOM would be reasonable in all the circumstances.

Miscellaneous Costs

28. OFCOM submits that the administrative costs totalling £1,978.83 including photocopying, faxing and stationery charges should be included in Taylor Wessing's general overheads.

29. In Taylor Wessing's letter of 10th August 2006 further details are provided as to four of the items: "Disbursements", "Couriers", "Copy publications" and "Photocopying" as follows:

"1. "Disbursements"

This was in fact a typographical error by the costs draughtsman and what it should say is "stationery". Stationery in these circumstances means the provision of binders and lever arch files which were necessary in order to keep together the papers.

2. "Couriers"

The Tribunal will see that couriers were used sparingly by ourselves in the conduct of the matter, in both cases the packages being couriered were to the Tribunal and were necessary so as to ensure the documents were filed by the correct time .

3. "Copy Publications"

This referred to a copy of the Mail on Sunday which contained a report of forthcoming proceedings and which we only discovered after the event and therefore had to go to an agency to pick up a copy.

4. "Photocopying"

There are two entries because the "Miscellaneous" list is broken down into two time periods: 30 January 2004 to 30 April 2004 and 1 May 2004 to 21 January 2005. The breakdown occurs in this way because of the time and deliver of bills. Taylor Wessing's system records photocopying at the time it takes place and photocopying facilities cannot be accessed without using a correct and valid file reference. The photocopying which found its way into the miscellaneous section of the Statement of Costs would be impossible to pin down to actual documents as no narrative is given when the photocopying is recorded. However, that claimed relates to photocopies necessary and for the use of the provision of copies of the amended application and the provision of copy documents for use by Floe's advocate in Court."

30. We agree with OFCOM that "Disbursements" and "Copy Publications" as described in Taylor Wessing's letter should be included in general overheads. However the amount claimed for Photocopying is for the copies of documents used in court and is accordingly recoverable as an item of costs.

31. On a summary assessment the Tribunal must take a broad brush approach to the assessment of costs. Floe has taken a broad brush approach in limiting its claim to £6,000 to cover both the additional amount it claims for disbursements and its solicitor's fees. We consider that in all the circumstances it is just for OFCOM to pay £6,000 costs under this head. We award this figure.

Marion Simmons QC

Michael Davey

Sheila Hewitt

Charles Dhanowa
Registrar

31 August 2006