Neutral citation [2022] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

20 May 2022

Before:

THE HONOURABLE MR JUSTICE WAKSMAN
(Chairman)
EAMONN DORAN
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN LE PATOUREL

Class Representative

- v -

(1) BT GROUP PLC
(2) BRITISH TELECOMMUNICATIONS PLC

Defendants

Heard at Salisbury Square House on 13 May 2022

RULING AT CASE MANAGEMENT CONFERENCE

APPEARANCES

Ms Ronit Kreisberger QC and Mr Nikolaus Grubeck (instructed by Mishcon de Reya LLP) appeared on behalf of the Class Representative.

Ms Sarah Ford QC and Allan Cerim (instructed by Simmons & Simmons LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This Ruling arises in the context of a case management hearing today of this "opt-out" case, dealing with the future conduct of the claim following the decision of the Tribunal dated 27 September 2021 ([2021] CAT 30), which was upheld by the Court of Appeal on 6 May 2022 ([2022] EWCA Civ 593) ("the Court of Appeal Decision"). The particular issue with which this Ruling is concerned is the appointment of a "Trial Tribunal" as referred to in paragraph 6.7 of the CAT's Guide to Proceedings 2015 ("the Guide").

2. We consider that this issue needs to be resolved before dealing with directions to trial.

3. Paragraph 6.7 of the Guide provides as follows:

> "Collective proceedings, and in particular opt-out collective proceedings, require intensive case management by the Tribunal, so as to ensure that the interests of the class are adequately protected. Furthermore, an application for approval of a collective settlement will often involve a Tribunal being shown material which, in the event that the settlement is not approved and the case continues to trial, should not be placed before a Tribunal hearing the trial and deciding the merits. Accordingly, if the proceedings are certified as opt-out collective proceedings, the panel conducting the case management (the "case management tribunal") will at an appropriate stage prior to the trial determine that the proceedings should thereafter be heard by a separate panel (the "trial tribunal"). If at any stage (including after the commencement of the trial) the parties come to terms and seek approval of a settlement, the application for a collective settlement order will be determined by the case management tribunal."

4. The one core problem identified by this paragraph, and which it seeks to address, is the risk that the Tribunal dealing with a proposed collective settlement (which it must approve for the settlement to be effective) may become debarred from hearing the case thereafter, where the collective settlement has not been approved. That is because that Tribunal will by then have seen a variety of privileged materials including, for example, counsel's advice.

5. Paragraph 6.7 has sensibly suggested one particular way of dealing with that problem; that is the appointment of a "Trial Tribunal", which will, in any event, conduct the trial and probably become involved at some stage beforehand, perhaps, as is submitted by the Defendants here ("BT"), a long time beforehand. The current Tribunal ("the Case Management Tribunal") will therefore bow out, as it were, to be recalled if, and only if,

there is a collective settlement to be approved. Its role will be limited to approving, or not approving, the proposed settlement.

6. However, as it seems to us, this route to the solution of the problem is not the only one. One difficulty with the suggested route has arisen here. BT says that because it is important to get the Trial Tribunal involved at an early stage, then we, as Case Management Tribunal, should not make directions all the way through to trial today (although we appreciate there are other reasons advanced for that argument as well) but rather we should leave them to the next case management conference ("CMC"), which is presently due to take place in November 2022. That CMC would then be heard by the appointed Trial Tribunal.

7. Further, BT says that since we would not be the Trial Tribunal, no trial date should be set now, even if it were otherwise appropriate, because one would not know of the availability of the putative Trial Tribunal, and also because it should be a matter for them in any event. On the other hand, the claimant Class Representative here, Mr Le Patourel ("the CR") submits that as this Tribunal is very much up to speed on the case, especially here, having given one detailed judgment already, it should continue for the time being and it can set a trial date now. That suggestion, however, would not quite work if another Tribunal would, ultimately, conduct the trial.

8. If the trial date was set now, but the Trial Tribunal was not appointed for some time, say six months before the trial, or even later, it may not then be easy at that stage to find a Trial Tribunal which was available to conduct what would be a lengthy trial (a figure of six weeks has been mentioned) in say three- or six-months' time. Nor would it, to us, seem to be sensible or fair to then jettison the original trial date in favour of a later trial date when the Trial Tribunal became engaged, as this would lead to significant delay.

9. No doubt there are refinements which could be made to each side's position here to still accommodate in some way the particular route suggested by paragraph 6.7 of the Guide. Even so, in this case, and perhaps in others, there is, in our view, a much simpler solution. This is that the current Tribunal will case manage the claim through to trial and conduct the trial itself. The only issue is if a collective settlement is proposed. But at that stage, the President of the CAT can be requested to, and can appoint, a separate

Tribunal panel to consider the settlement, to which I will refer as "the Settlement Tribunal". In that way, real continuity is established by having one Tribunal dealing with the case all the way through.

10. There is a considerable advantage to that, in our view, especially in collective proceedings. The fact that a Tribunal appointed to consider settlement may not have dealt with the case previously is not, in our view an obstacle. It can easily appraise itself of the issues. And in any event, the collective settlement proposal itself will have to explain why both sides consider that it is appropriate. If in doubt, the Settlement Tribunal can avail itself of the statements of case, judgments and orders already made and the evidence filed, if any, by that point. Here, of course there is our lengthy judgment, which at least sets out the key issues on the merits, and then there is the helpful Court of Appeal Decision.

11. Given that neither side here had suggested this alternative route, we informed the parties on 12 May 2022 that we wished to consider it and have the benefit of focused submissions upon it. These we have had: the position of the CR is to support the alternative route. BT has taken what, in our view, is a responsible attitude. It has, by Ms Ford QC, pointed out what it says are a number of potential difficulties and reminded us of the structure of and the background to paragraph 6.7 of the Guide. We will deal with these points hereafter. BT is not, however, positively opposing this proposal.

12. One of the points which Ms Ford QC has emphasised is this question of the ability of the Settlement Tribunal to deal with settlement, on the basis it has not been involved in the case previously. We have already indicated that we do not think this is a significant problem. But further, it is worth mentioning that BT's own position is that a Trial Tribunal should be appointed at an early stage, if not now, then very shortly after this CMC. But if that were done and the collective settlement was only proposed close to trial, say in 18 months' time, the original Tribunal, i.e. ourselves (the Case Management Tribunal), would have been away from the proceedings for a considerable amount of time. The Tribunal which might be said to be fully appraised of the matter would be the Trial Tribunal and not the Case Management Tribunal. Indeed, in other cases, the original Tribunal might have made an opt-out CPO without objection, in which case their involvement might be much less than ours has been, and they would then be bowing out, only to come back into the picture, say, 18 months down the line.

13. So it seems to us that if there was anything in BT's point here, it would actually affect the position in relation to the route suggested by paragraph 6.7, in any event. The truth is that this is not a real problem. If this alternative route is a permissible way of dealing with the problem over a proposed collective settlement, then it is one which we consider is easily, and proportionately and fairly dealt with.

14. The first question then is: is there a reason why it is not permissible? Ms Ford QC has not suggested that it is outright impermissible, but she makes a number of points in this regard. She of course reminds us of what the text of paragraph 6.7 of the Guide says, and in particular the fact that the paragraph uses the word "will", so far as the appointment of a Trial Tribunal is concerned. She also makes the point, which is correct, of course, that the Guide has the status of a Practice Direction issued by the President. She reminds us that the paragraph also refers to the appointment of a Trial Tribunal at a stage before trial.

15. Dealing first with the status, as it were, of paragraph 6.7, we remind ourselves that it is a guide, providing guidance. It is not a set of rules. And moreover, the important observations at paragraphs 60 and 65 to 68 of the judgment in the Court of Appeal Decision are highly relevant here.

16. Paragraph 60, which of course is dealing with what the Guide had to say about the desirability or otherwise of having opt-out proceedings as opposed to opt-in proceedings, says this:

> "We start with the argument that there is, in law, a "*general preference*" or presumption in favour of opt-in proceedings. This is a point of law which concerns the construction and weight to be attached to legislation and to the Guide."

17. Paragraph 65 then states:

> "First, when read fairly, the Guide does not purport to impose predetermined limits upon the exercise of discretion. The Registrar, in the Preface to the Guide, made clear that the collective action jurisdiction was "*novel*", that there was no prior experience to draw upon, that the Tribunal might "*develop its approach on a case by case basis*" and that the Guide might, in the light of experience, require future revision:
>
> > "As regards collective proceedings and collective settlements, the jurisdiction of the Tribunal is novel. In prescribing directions and providing guidance for such proceedings and settlements, the Tribunal therefore has no prior practice from any part of the United Kingdom on which to draw. While the Guide seeks

> to provide as much assistance as possible, it is expected that the Tribunal will further develop its approach on a case-by-case basis, and the Guide is likely to need revision accordingly in the light of experience." "

18. In paragraph 66, and dealing with what the Guide says about opt-in as opposed to opt-out, the Court of Appeal continues:

> "[…] This text was not drafted in terms intended to impose limits upon the exercise of discretion. It was a tentative view as to how, in 2015, before the CAT had acquired hands-on experience, the President, quite reasonably, considered that the exercise of discretion might pan out […] This illustrates how, as contemplated in the Guide, subsequent judicial analysis has identified factors of relevance not covered by the Guide and this will necessarily affect the weight the CAT will attach to the Guide on the issue in question. It also illustrates why the Registrar was correct to be tentative in his evaluation of the effect of the Guide in this new and evolving procedural field."

19. At paragraph 67, it observed:

> "Secondly, upon the basis of first principles, it would not in any event be open to a President in the exercise of a legislative power to issue practice directions departing from the legislative intent. The power conferred is to supplement and implement the intent, not deviate from it. If the legislator has concluded therefore that a discretion is to be exercised in an open textured way without prior disposition then a presumption in favour of opt-in proceedings cannot lawfully, by a practice direction, be injected into the equation to reduce or curtail that otherwise unfettered discretion. To argue that the Guide binds the Tribunal as a matter of law or sets out matters which must in law be taken into account as attracting enhanced weight is for the tail to wag the dog."

20. And then the Court of Appeal deals with the power to order opt-out, but concludes by saying in paragraph 68:

> "Whether, over time and in the light of experience, the Tribunal and the courts identify considerations which will typically attract greater or lesser weight in the scales is quite a different matter."

21. In relation to that, we have also been reminded that paragraph 48 of the judgment in the Court of Appeal Decision pointed out that the Guide itself recognised that "the CAT would need to undertake "*intensive*" case management of collective proceedings, especially where they are opt-out". That is justified by the need to protect the interests of the class. And that is, in our judgment, also an important matter.

22. All of that, so far as the Court of Appeal was concerned, was in the context of the desirability, or otherwise, of opt-out collective proceedings. If there were limits to the weight to be attached to parts of the Guide in that critical respect, then the same must apply *a fortiori* to what is very much a subsidiary question that arises in the opt-out proceedings, and only if a collective settlement is proposed.

23. Moreover, from first principles, it must be correct that the text of any guidance cannot override the obligations of the Tribunal to give case management directions, which is what this issue concerns, in order to give effect to the overriding objective in the CAT context, as set out in paragraph 4 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules"), parts of which Ms Kreisberger QC has referred to. This includes that cases should be dealt with justly at proportionate cost, which include saving expense, ensuring the claim is dealt with expeditiously and fairly, and (we think of some significance here) allotting to it an appropriate share of the Tribunal's resources while taking into account the need to allot resources to other cases.

24. In that regard, the Tribunal also refers to rule 115(1) of the CAT Rules, which says:

> "Subject to the provisions of these Rules, the Tribunal may regulate its own procedure."

25. In addition, rule 88(1) of the CAT Rules provides that:

> "The Tribunal may, at any time, give any directions it thinks appropriate for the case management of the collective proceedings"

thereby illustrating the nature and width of the discretion to which, in addition, the Court of Appeal has referred.

26. What all of that means is that, in our judgment, the Guide itself cannot rule out the proposed alternative solution. Indeed, the proposal which has attracted us is simply a different way of dealing with the core problem which was identified in paragraph 6.7. In that sense, this different proposal, although not specified in the paragraph, is addressing the same problem and can therefore be said to be consistent with the underlying spirit of paragraph 6.7. Nor is there anything in the CAT Rules to prevent this solution, and indeed it has not been suggested positively that there is. And in our judgment, there are good reasons connected with the overriding objective for taking this course.

27. It might then be said that the President has no power to appoint a different Tribunal in the course of one case, although that is not a submission which has been made to us. It could not be so submitted in our view, because if it was true, paragraph 6.7 could not, itself, work, since, on the face of it, it proceeds on the basis that the first Tribunal will actually select or direct the selection of a second Tribunal in the same case. There is no

difference in principle between the selection of another Tribunal in the context of what 6.7 refers to, and the selection of another Tribunal, which we would direct, if necessary, in the context of the proposal now in question. Nor, in our judgment, is there anything to prevent the President appointing the Settlement Tribunal upon request by the parties.

28. For the sake of completeness, although it has not been submitted before us, we should add that there is nothing in the definition of the Tribunal in the CAT Rules which affects the position. The definition at paragraph 2(1) of the CAT Rules says that "the Tribunal" means the CAT, or in relation to any proceedings, “the tribunal as constituted for the purposes of those proceedings, as the context requires”. That does not rule out different tribunals being appointed for different purposes. Again, if it were otherwise, paragraph 6.7 itself would be ultra vires.

29. We are of course aware that Roth J, who was the former President and instrumental in drawing up the CAT Rules and the Guide, has in Case 1266/7/7/16 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* referred to the particular solution that was laid down in paragraph 6.7. He said that the Tribunal in that case would not be the Trial Tribunal and would not be responsible for directions going forwards. That is because it would involve looking at privileged materials, so that cannot go to the Trial Tribunal. And he added this at the hearing of the CPO Application (Day 2) on 26 March 2021:

> "So that is the way the scheme has been set up to divide it. So directions will be a matter for the trial Tribunal, which will be appointed promptly."

30. We follow that, and of course we give appropriate weight to what he has said. But again, with respect, it does not mean that this is the one and only route to solving the underlying problem.

31. We now deal with some other points helpfully raised by Ms Ford QC. On the point as to whether the Settlement Tribunal would be up to speed, she posits the potential problem of a late collective settlement proposal, perhaps on the eve of trial, and that consideration thereof by a new Tribunal would run the risk of derailing the trial. We think that this is an unrealistic fear. It has to be borne in mind that if a collective settlement is being proposed, it is being proposed by both parties who each have an

interest in the settlement being approved. They will no doubt take the timetabling into account when devising and submitting that collective settlement proposal.

32. But in any event, as we have already said, even under the route which has been referred to in paragraph 6.7, if there is a very late collective settlement proposal a long time after the Case Management Tribunal has bowed out, they would be in no better position than a new Tribunal, in our judgment, in getting up to speed. But our first response is that these are unnecessary and unrealistic fears.

33. Ms Ford QC has made the point about efficiency and continuity cutting both ways. In one sense, it does, except that we take the view that, in relation to our proposal, the appointment of a Settlement Tribunal, if a collective settlement is proposed, does not itself lead to any inefficiency.

34. A further point concerns whether under this proposal, and unlike the specific route in paragraph 6.7, there was a risk that the Tribunal which will hear the case would be alerted to the proposal for a collective settlement, which would in some way mean that it could not hear the trial, even though it was not shown any of the relevant privileged materials.

35. There are two answers to that. First of all, and this is something that can be put into the directions, it seems to us the appropriate way of dealing with this is for the parties proposing the settlement to make an application directly to the President for the constitution of a Settlement Tribunal. It is not a request which will be made directly to the existing Trial Tribunal. We do not believe that that is likely to cause any disruption.

36. But even if the Trial Tribunal got wind of the fact that there might be a collective settlement proposal, it does not seem to us that this would materially taint that Tribunal going forwards. It is quite common in litigation that the trial judge might find out something about the facts that a settlement was proposed, but it has absolutely no effect on their ability to conduct the trial fairly in any event. However, as we say, the main point is that the request will be made directly to the President.

37. Accordingly, both as a matter of case management discretion and jurisdiction, there is nothing to prevent the making of the order which we propose. Indeed, we consider there

is much to commend it. That is what we will do, and we can look at the appropriate drafting later on. Our decision is unanimous.

The Hon. Mr Justice Waksman Chairman | Eamonn Doran | Derek Ridyard

Charles Dhanowa O.B.E., Q.C. (*Hon*) Registrar | Date: 20 May 2022