Neutral citation [2008] CAT 17

**IN THE COMPETITION APPEAL TRIBUNAL**

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

Victoria House
Bloomsbury Place
London WC1A 2EB

23 July 2008

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

Sitting as a Tribunal in England and Wales

BETWEEN:

**T-MOBILE (UK) LIMITED**

-and-

**BRITISH TELECOMMUNICATIONS PLC**

-and-

**HUTCHISON 3G UK LIMITED**

-and-

**CABLE & WIRELESS UK & ORS**

Appellants / Interveners

-and-

**VODAFONE LIMITED**

**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

Interveners

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

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**REASONS FOR REFUSING PERMISSION TO APPEAL**

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1. Following a hearing in January and February 2008, the Tribunal on 20 May 2008 handed down judgment on the "core issues" in four appeals brought by T-Mobile, BT, H3G and a group of fixed network operators ([2008] CAT 12: the "Core Issues Judgment"). The appeals sought to overturn 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. On 20 June 2008, Orange, which was an intervener in the appeals, requested permission to appeal against the Core Issues Judgment. None of the other parties to the appeals has sought permission to appeal.

3. The appeals to the Tribunal were brought under section 192 of the Communications Act 2003 (the "2003 Act"). Subsequent appeals from the Tribunal are governed by section 196 of the 2003 Act, which provides so far as relevant:

> **"196 Appeals from the Tribunal**
>
> (1) A decision of the Tribunal on an appeal under section 192(2) may itself be appealed.
>
> (2) An appeal under this section—
>
> (a) lies to the Court of Appeal ….; and
>
> (b) must relate only to a point of law arising from the decision of the Tribunal.
>
> (3) An appeal under this section may be brought by—
>
> (a) a party to the proceedings before the Tribunal; or
>
> (b) any other person who has a sufficient interest in the matter.
>
> (4) An appeal under this section requires the permission of the Tribunal or of the court to which it is to be made.
>
> …"

4. Requests for permission to appeal from decisions of the Tribunal are considered in accordance with rules 58 and 59 of the Competition Appeal Tribunal Rules 2003

(SI 1372 of 2003) (the "Tribunal Rules"). Rule 59(2) provides that where a request for permission is made in writing, the Tribunal shall decide whether to grant such permission on consideration of the party's request and, unless it considers that special circumstances render a hearing desirable, in the absence of the parties. The Tribunal wrote to the other parties inviting them to comment on Orange's request for permission to appeal and received written observations from BT and T-Mobile, both opposing Orange's request. None of the parties requested an oral hearing of the permission application and in the circumstances of this case the Tribunal does not consider that an oral hearing is necessary or desirable.

5. Part 52 of the Civil Procedure Rules applies to appeals from the Tribunal to the Court of Appeal. Rule 52.3(6) of the CPR states:

> "Permission to appeal may be given only where–
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

6. Orange's request for permission to appeal is brief. It sets out four alleged errors on the part of the Tribunal:

> "Orange respectfully submits that the Tribunal made the following errors in its Judgment:
>
> 1. The Tribunal was wrong to conclude, at paragraphs 84-101 of the Judgment, that Ofcom failed to have sufficient regard to its statutory obligations under sections 3 and 4 of the Communications Act 2003. In particular, Orange submits that Ofcom was correct to find that its dispute resolution powers do not enable it to interfere with the commercial negotiations between network operators save where these are constrained by ex ante regulatory obligations or by the competition provisions.
>
> 2. It follows that, in Orange's submission, the Tribunal was wrong to conclude at paragraph 100 of its Judgment that Ofcom should not have distinguished in the BT Dispute Determinations between the period before and after BT's end-to-end connectivity obligation was imposed.
>
> 3. It follows further, in relation to the period after the imposition of BT's end-to-end connectivity, that the Tribunal was wrong to conclude at paragraph 117 of the Judgment that the term "reasonable" in the end-to-end connectivity obligation should be construed as referring to a price that it is fair should prevail between the parties taking into account the matters referred in that paragraph, in circumstances where the obligation of reasonableness was contained in an access-related condition imposed on the purchaser (BT), but not on the seller (the mobile network operators), of the services in question.

> The Tribunal's conclusion at paragraph 117 is, in Orange's submission, inconsistent with the detailed scheme for the imposition of regulatory obligations on communications providers contained in particular in sections 45-48 of the 2003 Act.
>
> 4. It follows further that the Tribunal was wrong to conclude at paragraphs 107-114 that Ofcom placed too much weight on the need for consistency with its 2004 Statement. It would, in Orange's submission, have been wrong for Ofcom having decided in its 2004 Statement not to regulate 3G termination, to then seek to do so through its dispute resolution powers."

7. Our starting point is to consider whether these grounds disclose a point of law as required by section 196(2)(b) of the 2003 Act. In his judgment concerning permission to appeal in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] EWCA Civ 796, Buxton LJ stated at paragraph 15 that:

> "[I]t is important that parties seeking to appeal to this court should isolate within the criticised decision what is an issue of law, and what is merely a determination, by a specialist Tribunal, or a matter of fact or judgement."

Buxton LJ, with whom Brooke LJ agree, went on to stress that the applicant must identify in precise terms the rule of law said to have been infringed and demonstrate briefly from the Tribunal's judgment the nature of the error by reference to the Tribunal's handling of the issue in question.

8. Orange's application has not followed this sound guidance. Orange's reason for seeking to appeal the Tribunal's decision on the first point goes no further than to say that the approach OFCOM adopted in resolving the disputes under consideration was right all along and should not have been impugned by the Tribunal. The reference to paragraphs 84 – 101 of the Core Issues Judgment is unhelpful because those paragraphs cover a large number of individual findings by the Tribunal about the nature of the dispute resolution procedure under section 185, the effect of the recitals to the Framework Directive and the Tribunal's analysis of the Court of Appeal's judgment in *Derbyshire Waste Limited v Blewett* [2004] EWCA (Civ) 1508 and so forth. The grounds do not reveal which of the various points made in the relevant paragraphs is said to amount to an error of law and why any particular point is said to be in error.

9. The fact that the second sentence of paragraph 1 of the application starts "In particular" implies that that is not the only point Orange is making. But we do not

know whether that implication is right or, if it is, what other points Orange is challenging.

10. The Tribunal's findings on this aspect of the Core Issues Judgment were arrived at following a full and detailed public hearing at which all parties, including Orange as intervener, had the opportunity to state their case. It is not enough for the purposes of requesting permission to appeal simply to allege that an error has been made without giving any reasons or explanation as to the nature of the alleged error.

11. Orange's second ground of appeal fails for similar reasons to the first. The allegation is that the Tribunal was wrong to conclude at paragraph 101 of the Core Issues Judgment that in relation to the BT Dispute Determinations, OFCOM should not have distinguished between the period before and after BT's end-to-end connectivity obligation was imposed. This is a misreading of the paragraph. The point made by the Tribunal was that the test to be applied in these disputes should have been no different for the periods before or after the imposition on BT in 2006 of a condition to secure end-to-end connectivity under the 2003 Act. No reasoning is given in support of this alleged error, which we reject for the reasons set out in the Core Issues Judgment.

12. The third alleged error identified by Orange is that the test that the Tribunal held should be applied in resolving disputes under section 185 is wrong because it is inconsistent with the detailed scheme for the imposition of regulatory obligations on communications providers contained in sections 45-48 of the 2003 Act. The Core Issues Judgment explains in some detail what the test to be applied by OFCOM is (see paragraphs 101 and 117) and how that test is consistent with the rest of the regulatory regime: see for example paragraphs 116 and 117 concerning how the test fits in with BT's end-to-end connectivity obligation and paragraph 114 concerning the relationship between dispute resolution and *ex ante* regulation. We therefore reject this criticism for the reasons given in the Core Issues Judgment.

13. Fourthly, Orange submits that the Tribunal was wrong to conclude at paragraphs 107-114 of the Core Issues Judgment that OFCOM placed too much weight on the

need for consistency with the 2004 Statement. Orange submits that it would have been wrong for OFCOM, having decided in the 2004 Statement not to regulate 3G termination, to then seek to do so through its dispute resolution powers. In our judgment, this is a manifestly bad point. In so far as this is the same point about the proper relationship between the test under section 185 of the 2003 Act and the application of the *ex ante* SMP regulatory provisions, this was fully explained by the Tribunal in the Core Issues Judgment. Orange has not identified where it asserts the Tribunal went wrong in its conclusions.

14. Further, the Tribunal made clear that it accepted that OFCOM was right to have regard to the need to be consistent with the conclusions of the 2004 Statement: see paragraph 108 of the Core Issues Judgment. However, the Tribunal differed from OFCOM in its assessment of the weight to be ascribed to that need, having analysed the content of the Statement and having considered the evidence submitted by the parties as to how the market had developed since 2004. This aspect of the Tribunal's judgment does not raise a point of law but concerns the Tribunal's expert assessment of how the regulatory principles should have been applied in the particular circumstances of these disputes. It is not therefore a matter which should be the subject of an appeal.

15. In the Tribunal's judgment, therefore, paragraphs 1 and 2 of the application do not adequately identify a point of law which can properly be the subject of an appeal. In so far paragraph 3 of the application raises a point of law as to the correct test to be applied under section 185 of the 2003 Act, the Tribunal finds that the challenge has no real prospect of success. Paragraph 4 fails for the same reason and for the reason that it relates to a matter fully within the Tribunal's discretion.

16. Is there any other compelling reason why permission to appeal should be granted? In a separate ruling handed down today, the Tribunal grants permission, in part, to H3G to appeal to the Court of Appeal against the Tribunal's judgment on the non-price control matters raised in H3G's challenges to the Reassessment Statement and the 2007 Statement: Case No. 1083/3/3/07 *Hutchison 3G UK Limited v Office of Communications* ([2008] CAT 11, the "*H3G MCT* Judgment"). The main issue on which H3G is granted permission to appeal concerns how OFCOM should

approach the task of resolving disputes under section 185 of the 2003 Act. This raises questions about the test to be applied in resolving such disputes and how the dispute resolution procedure relates to the other parts of the regulatory framework.

17. Clearly therefore there are common issues between the decision of the Tribunal from which Orange seeks to appeal in the instant application and the grounds on which H3G has been granted permission to appeal in the *MCT* case. That is indeed why the core issues in the present appeals were heard at the same time as the non-price control matters in the *MCT* appeals. Having decided to grant H3G permission to appeal in respect of those issues, we have considered whether it would be appropriate also to grant permission to Orange to raise before the Court of Appeal its own challenges to the Tribunal's conclusions.

18. However, we have come to the conclusion that the fact that we have allowed H3G permission to appeal is not a compelling reason to grant Orange's application for permission. H3G's challenge to the Tribunal's conclusions on section 185 of the 2003 Act in the *H3G MCT* Judgment and Orange's challenge to the Tribunal's conclusions on that provision in the Core Issues Judgment are fundamentally different. Put simply, H3G contends that the test that should be applied by OFCOM under section 185 is a stricter test than the Tribunal found to be the case. H3G argues that in the circumstances of the hypothetical dispute which was relevant to the assessment of its SMP, OFCOM should have applied a test which meant that BT could not be required to pay a charge for MCT which was appreciably above the competitive level: see paragraphs 78 and 84 of the *H3G MCT* Judgment. The Tribunal propounded a test which allowed a greater degree of flexibility on the part of OFCOM in that the Tribunal held that there were circumstances in which OFCOM could set a price, when resolving a dispute, which was appreciably above the competitive level, albeit not an abusively high price: see paragraph 90 of that judgment.

19. Orange's argument tends in the opposite direction. Orange contends that the test propounded by the Tribunal is too strict in the sense that OFCOM's dispute resolution function under section 185 means that it can, and in some circumstances should, interfere with the commercial negotiations between the parties to arrive at a

solution which is reasonable in the ways identified by the Tribunal: see paragraph 101 of the Core Issues Judgment. Orange contends that OFCOM's dispute resolution powers do not enable it to interfere with the bargain struck by the parties unless the parties are constrained by *ex ante* regulatory obligations or by competition law.

20. The two challenges to the Tribunal's conclusions on the section 185 test do not therefore overlap. We have explained in the Ruling granting H3G permission to appeal why we consider that H3G's arguments merit consideration by a higher court. But we do not consider that the same can be said of Orange's arguments: there is no prospect, in our judgment, of the Court of Appeal finding that the provisions bear the meaning for which Orange contends. We do not consider that it would be helpful to the Court of Appeal in hearing any appeal pursued by H3G also to have before it Orange's appeal, nor do we consider that refusing permission to Orange will create any difficulty for the Court of Appeal in its consideration of H3G's appeal.

21. It has not been suggested that there is any other compelling reason why Orange should be given permission to appeal. Accordingly, we unanimously refuse Orange's request for permission to appeal.

22. If so advised, a further application for permission to appeal may be made to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling together with copies of Orange's letter of 20 June 2008 requesting permission to appeal and BT's and T-Mobile's letters of 4 July 2008 commenting on Orange's request should be placed before the Court of Appeal.

23. BT has applied for its costs in relation to Orange's application for permission. However, we do not propose to deal with costs of the Termination Rate Dispute appeals in a piecemeal manner and so we reserve consideration of BT's application for when we consider the costs of the proceedings more generally.

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa
Registrar 23 July 2008