Neutral citation [2009] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1083/3/3/07
1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

26 May 2009

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants

-v-

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

TELEFÓNICA O2 (UK) LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Interveners

RULING ON PERMISSION TO APPEAL

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1. Each of the four interveners in these appeals has requested permission to appeal against the Tribunal's judgment handed down on 22 January 2009 ([2009] CAT 1, "the Disposal Powers Judgment") and/or the Tribunal's judgment handed down on 2 April 2009 ([2009] CAT 11, "the Final Judgment"). For the reasons set out in this Ruling, we have decided to grant permission on all of the grounds proposed.

2. BT's and H3G's appeals were brought before the Tribunal under section 192 of the 2003 Act. Appeals against decisions of the Tribunal under that section can be brought under 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 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.
>
> …"

3. In considering whether to grant permission in this case, the Tribunal applies the test in CPR rule 52.3(6). Permission is granted only if the Tribunal considers that the ground has a real prospect of success or that there is some other compelling reason why the appeal should be heard. OFCOM supports the requests but BT has made written submissions opposing the grant of permission. No one has contested the standing of the Interveners to appeal the Tribunal's decisions and none of the parties requested an oral hearing of the permission application.

4. The background to this case was explained in the earlier substantive judgment of the Tribunal in May 2008 ([2008] CAT 11). We use the abbreviations and terminology adopted in that judgment and in the two judgments under challenge. All we need to say here is that as a result of BT's appeal, the Tribunal upheld the CC's Determination that in the four year MCT price control set by OFCOM in its March 2007 Statement, the level of the price control was too high. The issue now is the scope of the Tribunal's powers to direct OFCOM to remedy that error. It is common ground that the Tribunal has power to direct OFCOM to reduce the price control levels for the period after the decision is remitted to OFCOM under section 195(4) of the 2003 Act. The decision was in fact remitted to OFCOM by the Final Judgment and on the same day (2 April 2009) OFCOM issued a new price control. For the future, which comprises years 3 and 4 of the price control, the applicable rates for MCT are the revised rates set on 2 April and there is no challenge to that. The problem arises from what was done by the Tribunal and by OFCOM about the price control in years 1 and 2; years which had elapsed by the time the appeal was concluded.

The power to direct the determination of a replacement price control

5. The Disposal Powers Judgment concerned the scope of the Tribunal's powers to dispose of BT's appeal. The Tribunal unanimously held, in particular, that it would have power to direct OFCOM to reset the TAC levels in the price control for the whole of the period 2007-2011; referred to in these proceedings as giving a replacement price control direction. The Final Judgment, in which the Tribunal unanimously disposed of the appeals, directed OFCOM (amongst other things) to adopt a replacement price control. All four Interveners want to appeal the Tribunal's decision that it has power to give a replacement price control direction. The question turns on whether that direction is inconsistent with section 195(5) of the 2003 Act which precludes the Tribunal from directing OFCOM to take any action that OFCOM "would not otherwise have power to take in relation to the decision under appeal". Does one apply that provision looking at what action OFCOM has power to take if it is imposing a price control as at the date when the decision is remitted after the appeal (i.e. as at 2 April 2009) or does one look at what action OFCOM had power to take as at the date when it took the original decision (i.e. as at 27 March 2007)? To put it another way, was OFCOM acting

"retrospectively" on 2 April 2009 when it issued a price control which covered the whole four years from March 2007 to March 2011?

6. The Tribunal was unanimous that it did have power to give a replacement price control direction and our reasoning is set out in paragraphs 33 to 46 of the Disposal Powers Judgment. Although we are confident that we have correctly interpreted the statutory provisions, we accept that this is one of many difficult issues of construction raised by this unusual appeal regime. Not only the Interveners but OFCOM also argued for the contrary interpretation of the statutory provisions. A higher court may well come to a different conclusion. We therefore grant permission to appeal on this ground on the basis both that the ground has a reasonable prospect of success and because it is of great importance to the outcome of this case and of future cases that the scope of the Tribunal's powers are clarified.

7. Beyond that, the Tribunal would make the following comments on the requests for permission. First, the Disposal Powers Judgment dealt with a further jurisdiction point raised by BT, namely whether there is power to adjust the TACs in year 3 and 4 to take account of the fact that the TACs with which the MNOs complied during years 1 and 2 have now been found to have been set too high. On that point the Tribunal was unable to reach a unanimous conclusion. The majority view was that there were serious difficulties in BT's submission that such a power exists. The majority did not rule out the existence of the power but determined that, for various procedural reasons, it was not a power that could be exercised in the disposal of this particular appeal. Professor Bain in his dissenting opinion considered that, assuming that the power did exist, it would have been appropriate in this case to exercise it on disposing of BT's appeal.

8. We understand why BT has not requested permission to appeal against the Disposal Powers Judgment, given that the Tribunal refrained from making a finding as to the existence or non-existence of the power to direct the adoption of a future adjusted price control. The disadvantage of this, however, is that the Court of Appeal may not have before it arguments relating to the full range of possible outcomes: a "revised" price control (re-determining the prices only for years 3 and 4); a "replacement" price control (covering all four years and including a redetermination of the prices for years 1 and 2) or a "future adjusted" price control (covering all four years, leaving years 1 and 2

unchanged and re-determining the prices in years 3 and 4 so as to take account of the overcharging in years 1 and 2). If the Interveners succeed in establishing that the revised price control is the only possible outcome then that probably rules out a future adjusted price control as well as a replacement price control. But if the Tribunal was right to hold that it has power to direct a replacement price control then it would be useful to know whether the Tribunal also has power to direct OFCOM to adopt a future adjusted price control.

9. Secondly, there are many aspects of the operation of sections 192 to 195 of the 2003 Act on which the Tribunal has not ruled. T-Mobile argue that a declaratory order would have enabled the Tribunal to "give effect" to its decision without the need for a replacement price control. The Tribunal has not heard argument on whether such a power exists. Section 195 of the 2003 Act appears exhaustively to prescribe the powers of the Tribunal when disposing of an appeal under section 192 and does not mention declaratory relief. A similar point can be made in relation to the assertion that the Tribunal's concerns about being unable to give effect to its decision could be alleviated by the granting of interim relief: see paragraph 43 of the Disposal Powers Judgment. Orange in their Request asserts that interim relief would be available in an appropriate case to address the Tribunal's concerns. T-Mobile's and Orange's respective submissions depend on establishing that the declaratory remedy and/or the power to grant interim relief exist.

10. Finally as regards Vodafone's reference to other judicial review remedies and the *Quark Fishing* case, we note that the current appeal does not concern the question whether OFCOM should compensate BT for the fact that because of OFCOM's errors in devising the price control BT has paid too much to the MNOs in years 1 and 2. The Tribunal did not decide either that the MNOs should compensate BT for those overpayments: that characterisation of the case was unanimously rejected by the Tribunal: see paragraphs 58 to 59 of the Disposal Powers Judgment.

The exercise of the jurisdiction to direct a replacement price control

11. If the Interveners' challenge to the Tribunal's decision on the jurisdiction point fails, then Vodafone and T-Mobile challenge the finding that it is right to direct OFCOM in

this case to adopt a replacement price control. This issue relates only to the Final Judgment: the Tribunal did not intend to say, in paragraph 72 of the Disposal Powers Judgment, anything other than that there is a power to direct the setting of a replacement price control covering all four years if it should turn out to be appropriate to do so in the circumstances of the case. That judgment was concerned only with the existence of the powers, not with their exercise.

12. The nature of T-Mobile's and Vodafone's challenge to the Tribunal's ruling depends on whether the decision on the Appropriateness Question is a matter for the Tribunal or for the CC. This turns on whether the Question is a specified price control matter within the meaning of rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. 2004 No. 2068) ("the 2004 Rules") or not. Again, although the Tribunal is confident that it reached the right answer on this bundle of issues, we consider that there are other compelling reasons for this ground of appeal also to be considered by the Court of Appeal, namely that the issues follow on from the primary issue of the scope of the Tribunal's powers.

The position if the Appropriateness Question is a specified price control matter

13. If, as Vodafone contends, the Appropriateness Question is a specified price control matter, then it was for the CC to decide. It is common ground that the questions referred to the CC by the Tribunal in March 2008 encompassed the Appropriateness Question **if** the Question is a price control matter. Vodafone submit that the CC did not properly turn their minds to the Appropriateness Question; the CC simply jumped from acknowledging the existence of the power to a decision that the power should be exercised in this case. Vodafone in effect alleges that the CC failed to address and hence properly to determine one of the specified price control matters referred to it, contrary to their obligation under section 193(2) of the 2003 Act. The Tribunal disagreed and held that, on a proper reading of the Determination, the CC had addressed its mind to the Appropriateness Question: see paragraphs 50 to 52 of the Final Judgment.

14. If there was a failure to address the Appropriateness Question, there is an important issue as to how the failure should be remedied. The first possibility is that the matter could be remitted to the CC to reconsider. There is no express power in the 2003 Act to

remit a matter to the CC -- the provisions are generally silent as to what is to happen if a judicial review challenge to the CC's determination succeeds in whole or in part. The second option is that the Tribunal could decide the matter itself in the exercise of its primary duty under section 195(1) to dispose of the appeal. This appears to be the option supported by Vodafone in its judicial review challenge to the CC's determination (see the application dated 20 February 2009). Even though Vodafone's submission was that the Appropriateness Question was a price control matter for the CC to decide, the primary relief sought was that the Tribunal direct OFCOM not to make any adjustment in respect of years 1 and 2. This, Vodafone asserts, was the only conclusion that the CC could lawfully have reached (see paragraphs 69 and 70 of Vodafone's application) and hence the matter can be resolved without remitting it to the CC. The third possibility is that the matter is remitted to OFCOM with directions that it complete the task which Vodafone alleges the CC failed lawfully to complete. This was the alternative relief sought by Vodafone in the event that the Tribunal agreed that the CC had failed to address the Appropriateness Question but did not agree that the only possible conclusion was that no adjustment should be made to years 1 and 2 (see paragraphs 71 and 72 of Vodafone's application).

15. If the Tribunal was right to find that the CC had addressed its mind to the Appropriateness Question, then the CC's conclusion that a replacement price control should be adopted in this case can only be overturned by the Tribunal on judicial review grounds in accordance with section 193(7) of the 2003 Act. On that point the Tribunal made clear that it agreed with the CC's conclusion: see paragraphs 53 to 60 of the Final Judgment. Implicit in the Tribunal's finding that it entirely agrees with the CC's conclusions is a finding that those conclusions are neither irrational nor perverse. On appeal Vodafone will have to establish that the Tribunal erred in deciding that the CC's conclusion was not to be overturned on judicial review grounds. If the Tribunal did err and the Tribunal should have found that the CC's conclusion on the adoption of the replacement price control was perverse, then the same question arises as to who is now to take the decision on whether the power which *ex hypothesi* exists should be exercised: is it the CC, the Tribunal or OFCOM?

The position if the Appropriateness Question is not a specified price control matter

16. Vodafone also challenges the Tribunal's judgment on the basis that the Appropriateness Question is not a specified price control matter and is therefore a matter for the Tribunal to decide. If that is the correct position then the reasoning and conclusion of the CC in its Determination are of no legal relevance. The question then is whether the Tribunal erred in law in the reasoning set out in paragraphs 53 to 60 of the Final Judgment. Vodafone states in paragraph 52 of the Request for Permission that the only reason that has been advanced for the imposition of a "retrospective" price control is that this would assist BT in enforcing the SIA. This is not the case. We referred to the potential effect of the ruling on future litigation between the parties under the Standard Interconnect Agreement: paragraphs 58 and 59 of the Final Judgment. We made clear that the aiding or hindering of potential private recovery was not a factor that we had taken into account. We recognise that there is a certain artificiality in leaving out of account the one issue which is, in fact, the reason why the treatment of years which have elapsed is so hotly disputed by the parties in this appeal. It may be that a higher court would take a different view of the factors which are relevant to the exercise of the power by the Tribunal (or the CC), if that power is held to exist. It is therefore appropriate to grant permission to appeal on this point.

Is the Appropriateness Question a specified price control matter?

17. Vodafone argues that the Appropriateness Question is a price control matter and therefore for the CC to decide. T-Mobile does not make any submission on this issue. Vodafone argues that the wording of rule 3 of the 2004 Rules is apt to cover the issue. At the hearing in December 2008 that led to the Disposal Powers Judgment, OFCOM argued that the Appropriateness Question relates to the remedy that follows on from the CC's determination whether there had been an error in the setting of the price control and the impact of any such error on the price control. The Tribunal left the matter open in both the Disposal Powers Judgment and in the Final Judgment. However the issue may be important if the question of what test the Tribunal ought to have applied arises: must the Tribunal apply judicial review principles to the conclusion reached by the CC or must the Tribunal decide the issue itself.

18. If one or more of the Interveners' grounds of appeal succeeds, it is hoped that sufficient guidance will be given by the Court of Appeal to enable the ruling to be implemented without further interlocutory disputes.

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa
Registrar Date: 26 May 2009