



Neutral citation [2008] CAT 35

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1095/4/8/08
1096/4/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

4 December 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Applicant

-v-

(1) THE COMPETITION COMMISSION
(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND
REGULATORY REFORM

Respondents

supported by

VIRGIN MEDIA, INC.

Intervener

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(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND
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RULING ON REQUESTS FOR PERMISSION TO APPEAL

Introduction

1. The abbreviations used in this ruling bear the meaning given to them in the Tribunal's judgment handed down on 29 September 2008 ([2008] CAT 25) ("the Main Judgment") in which the Tribunal determined Sky's and Virgin's applications for review (respectively Case 1095/4/8/08 and Case 1096/4/8/08). In its application made on 28 November 2008 Sky has requested permission to appeal against the Main Judgment. In an application also dated 28 November 2008 Virgin seeks permission to appeal against the Tribunal's judgment on further relief in relation to Case 1096/4/8/08, handed down on 30 October 2008 ([2008] CAT 32) ("the Further Relief Judgment"). Virgin's application for permission to appeal is contingent on Sky's application being granted.
2. Both Sky's and Virgin's applications for review were brought before the Tribunal under subsection 120(1) of the Act. Appeals against decisions of the Tribunal can be brought under subsections 120(6)-(8) of the Act which provide:

"120 Review of decisions under Part 3

...

(6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the appropriate court.

(7) An appeal under subsection (6) requires the permission of the Tribunal or the appropriate court.

(8) In this section—

"the appropriate court" means the Court of Appeal or, in the case of Tribunal proceedings in Scotland, the Court of Session; and

"Tribunal rules" has the meaning given by section 15(1)."

Therefore an appeal under subsection 120(6) must raise a point of law.

The criteria for granting permission to appeal

3. In considering whether to grant permission, the Tribunal, when sitting in England and Wales, applies the test in CPR r 52.3(6). Permission may be 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.

Sky's proposed grounds of appeal

4. Sky seeks permission to appeal on four aspects of the Main Judgment in relation to Sky's own application for review, namely the Tribunal's approach (i) to the intensity of review under section 120 of the Act, (ii) to the standard of proof, (iii) to the Commission's use of the counterfactual for the purposes of identifying an SLC, and (iv) to Sky's proposals for remedies other than divestiture. Sky also seeks permission to appeal on one aspect of the Tribunal's judgment in relation to Virgin's application for review, in which Sky was an intervener.
5. The Commission, the Secretary of State and Virgin submit that the Tribunal should refuse permission to appeal. In essence they submit that Sky's request amounts to little more than dissatisfaction with the Tribunal's conclusions on the facts, and an attempt to dress up matters of judgment on the part of the Tribunal as points of law. In any event they submit that Sky's proposed grounds of appeal are both misconceived and have no prospect of success.
6. Sky lodged a written reply to the other parties' observations on its application for permission, dated 4 December 2008. In its reply Sky repeats and in certain respects elaborates upon the proposed grounds of appeal. In particular it disputes the other parties' contention that some of the grounds fail to identify any point of law.
7. In respect of none of the proposed grounds (which all reflect arguments made to the Tribunal) does the Tribunal consider that an appeal would have any real prospect of success, for the reasons set out at length in the Main Judgment. Nor does the Tribunal consider that there is some other compelling reason why an appeal on any of the grounds should be heard. The following additional points are without prejudice to that conclusion.

8. As to the grounds relating to the intensity of review, aside from the lack of merit in Sky's arguments on this, the principles to be applied in review applications under section 120 of the Act have been rehearsed in detail by the Court of Appeal in *IBA Health*. There is therefore little purpose in asking the Court of Appeal to consider those principles again.
9. As far as the standard of proof ground is concerned, the applicable standard (balance of probabilities) was common ground between all the parties, and the Tribunal does not consider that the application of that standard to the particular circumstances and evidence in this case raises a point of law for the purposes of subsection 120(6) of the Act. Many of the points made in the application for permission to appeal under the heading of standard of proof (paragraphs 25 to 48) appear to us to relate to the assessment of, and weight to be attributed to, the evidence.
10. Nor, in relation to the standard of proof ground, does the Tribunal consider that at paragraph 72 of the Main Judgment (which should be read with paragraphs 73 and 74) it has misstated Sky's arguments in relation to what the Commission must prove (paragraph 30 of Sky's request for permission).
11. As to the proposed ground of appeal relating to the counterfactual used by the Commission in its assessment of SLC, the counterfactual is an analytical device used to assist the Commission (and other decision-makers) in deciding whether and to what extent competition is likely to be affected by a completed or anticipated merger. There are no rules of law specifically governing the use of a counterfactual. Sky's points on the counterfactual, which were part of its case alleging irrationality by the Commission, were in the Tribunal's view without substance. The allegation of inconsistent use of the device by the Commission was not made out. The Tribunal does not consider that the proposed grounds raise any question of law. Nor do they have any significance beyond the particular circumstances of this case.
12. Similarly Sky's proposed grounds of appeal in respect of remedies represent a re-run of arguments before the Tribunal relating to the Commission's assessment of the alternative remedies proposed by Sky. In the Tribunal's view, these grounds have no real prospect of success and no important point of principle or point of law arises.

13. As to the plurality issue sought to be appealed, the Tribunal's judgment on the interpretation of the relevant statutory provisions does of course represent a point of law. The point is novel, in the sense that the provisions in question have not been the subject of any prior judicial interpretation, and it is also *potentially* important. However, even if we had considered that there existed a real prospect of success on appeal we would still have refused permission in the light of the Further Relief Judgment, which Sky has not sought permission to appeal. In that judgment the Tribunal found that it would serve no useful purpose to remit the plurality issue to the Commission as, even if on a remittal the Commission were to find plurality to be insufficient as a result of the Acquisition, there would be no realistic prospect of a different outcome in terms of the remedy imposed by the Secretary of State. For the same reason no purpose would be served by granting permission to appeal the Tribunal's judgment on the plurality issue independently of the other points raised by Sky. If doubt exists as to the correctness of our interpretation it would be better for it to be resolved in the context of a case where it would make a difference to the outcome.
14. For these reasons the Tribunal unanimously refuses Sky's request for permission to appeal.
15. Sky may, if so advised, renew its application for permission 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 Sky's request for permission to appeal dated 28 November 2008, of the observations of the Commission, the Secretary of State and Virgin opposing Sky's request, and of Sky's reply thereto should be placed before the Court of Appeal.

Virgin's proposed grounds of appeal

16. As stated above, Virgin seeks permission to appeal against the Further Relief Judgment, and does so contingently on Sky's application for permission to challenge the Main Judgment being granted. Virgin is concerned that if Sky were to be granted permission to appeal, and were to succeed on appeal in respect of the competition and/or remedies issues, this could affect the remedies imposed on Sky and it would be unfortunate in those circumstances if the Tribunal's decision not to remit the plurality issue were not able to be revisited.

17. It follows that as we have refused Sky permission to appeal we should now also refuse Virgin's application, and we unanimously do so.
18. We would add that even if Virgin's application for permission had not been contingent we would have refused it, given our refusal of Sky's application. Absent permission being given to Sky, we do not consider that Virgin's proposed appeal would have any real prospect of success or that there would be any other compelling reason to allow it to go forward. However, had we granted permission to Sky we would also have granted permission to Virgin on the basis that if there were any possibility of a different outcome as to the remedy imposed on Sky, the plurality issue should be preserved.
19. Virgin may, if so advised, renew its application for permission 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 Virgin's request for permission to appeal dated 28 November 2008 and of the Commission's and the Secretary of State's observations on Virgin's request should be placed before the Court of Appeal.

The Honourable Mr Justice Barling

Peter Clayton

Peter Grinyer

Charles Dhanowa
Registrar

4 December 2008