



Case No: C1/2006/1938

Neutral Citation Number: [2008] EWCA Civ 1402
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 25th November 2008

Before:

LORD JUSTICE LONGMORE

INDEPENDENT MEDIA SUPPORT LTD

Appellant

- and -

OFFICE OF COMMUNICATIONS & ORS

Respondent

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr R Thompson QC (instructed by Messrs Davenport Lyons) appeared on behalf of the **Appellant**.

Mr R Williams (instructed by Messrs Travers Smith) appeared on behalf of the **Respondent**.

Judgment

(As Approved by the Court)

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Lord Justice Longmore:

1. This is an application for permission to appeal in a competition matter in relation to a contract by which Channel 4, pursuant to its statutory obligations, contracts for the catering for the needs of deaf, blind and visually impaired people by providing such things as subtitles, signing and audio access services to their programs. The thrust of the permission to appeal application is that both OFCOM and the Competition Appeal Tribunal, whose determination is the subject of the permission to appeal, failed to take into account the appropriate European jurisprudence on Article 81, and in particular the proper width of the Delimitis condition 1, named after the name of the relevant case, namely that “it is difficult for competitors who could enter the market or increase their market share to gain access to the national market”. A second ground is that both OFCOM and the Tribunal have ignored the European Commission pronouncement in the form of the notice called Guidelines on Vertical Restraints (2000/C291/01).
2. The Delimitis condition is known in the jargon of the trade as the “foreclosure effect”; in particular, it is said that the characterisation by OFCOM of the market as similar to a bidder’s market does not deal satisfactorily with the fact that a competitor, such as the applicant in this case, is effectively foreclosed because agreements made for these kinds of services are, or tend to be, exclusive agreements for comparatively long periods of time.
3. In fact, OFCOM did consider those arguments in paragraphs 723 to 724 and 769 and 816 of their own determination, but very briefly, no doubt because many points were at that stage being argued, and the point now sought to be isolated is given such detailed consideration by Mr Rhodri Thompson QC as to amount almost to a new argument, as one can see from paragraphs 10 and 11 of the Tribunal’s own response to the application for permission to appeal.
4. It is said that the Competition Appeal Tribunal itself has applied the Delimitis condition as if it were limited in its application to the market power of the most powerful single competitor. For my own part, that is not how I read the Tribunal’s decision. The degree to which in any one market with its special characteristics competition can be said to be effectively foreclosed is essentially a question of fact for the tribunal of fact. If condition 1 of Delimitis or the European Commission notice had been ignored or manifestly misconstrued, there might be a question of law which might be appropriate for consideration by the court. But in my view this is very little more than a case where on the facts it might be possible to say that the tribunal of fact could have reached a different conclusion.
5. It is said by Mr Thompson this morning that, while in paragraph 114 of the determination the Competition Appeal Tribunal criticises OFCOM for treating the Article 81 issue which they had to determine as a “read across” from Article 82, the Competition Appeal Tribunal has itself made the same error. I do not accept that, and if one looks at the relevant paragraphs of the Competition Appeal Tribunal, paragraphs 111 to 117, and reads those paragraphs fairly, it seems to me

that the Tribunal has applied the correct principles of law, although the present application is, as Sir John Chadwick observed when refusing permission to appeal on the papers, a case where the Tribunal received a much less detailed analysis than that which is now being sought to be put forward.

6. It is in my judgment not appropriate for a point to be taken shortly before OFCOM and the Competition Appeal Tribunal, and then to be addressed in very substantial detailed argument in applications for permission to appeal. This is not a case where there is an isolated, clear point of law; it all depends on how you see the facts.
7. I for my part agree with Sir John Chadwick that this really is an attempt to dress up as a point of law what is a matter of fact for the Competition Appeal Tribunal, and for that reason this application should be refused.

Order: Application refused.