



Neutral citation [2011] CAT 20

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1146/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

13 June 2011

Before:

MARCUS SMITH QC
(Chairman)
PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

CABLE & WIRELESS UK
VIRGIN MEDIA LIMITED
GLOBAL CROSSING (UK) TELECOMMUNICATIONS LIMITED
VERIZON UK LIMITED
COLT TECHNOLOGY SERVICES

Interveners

RULING (PERMISSION TO APPEAL)

1. On various dates in October 2010, the Tribunal heard an appeal by British Telecommunications plc (“BT”) against a determination by OFCOM (“the Determination”) contained in a document entitled “Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and Colt and BT regarding BT’s charges for partial private circuits”.
2. The Tribunal determined this appeal in a judgment handed down on 22 March 2011 ([2011] CAT 5, “the Judgment”). The definitions and abbreviations used in the Judgment are adopted here.
3. Previous to the Judgment, the Tribunal had determined two preliminary issues in a judgment dated 11 June 2010 ([2010] CAT 15, “the Preliminary Issues Judgment”). In respect of the second of these preliminary issues, BT sought an extension of time for permission to appeal until one month following notification of the Judgment. This was because of the connection between this preliminary issue and the matters that were likely to be considered at the substantive hearing in October 2010. BT’s application was granted in a ruling dated 9 July 2010 ([2010] CAT 18).
4. On 26 April 2011, BT made a written request for permission to appeal the Judgment and the second preliminary issue in the Preliminary Issues Judgment (“BT’s Request for Permission to Appeal”). BT’s Request for Permission to Appeal was circulated to OFCOM and to the Altnets (as the Interveners were known) for their comments. On 16 May 2011, OFCOM responded, saying that it did not intend to submit any comments in relation to BT’s request. On 13 May 2011, the Altnets submitted written observations in respect of BT’s request (“the Altnets’ Observations”).
5. We have considered BT’s Request for Permission to Appeal and the Altnets’ Observations. This is our decision regarding BT’s request for permission to appeal under rule 59(2) of the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372).

6. Decisions of the Tribunal made (as was the case here) under section 192(2) of the Communications Act 2003 (“the 2003 Act”)¹ can be appealed pursuant to section 196 of that Act, which provides:

- “(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 or to the Court of Session; 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.
- (5) In this section references to a decision of the Tribunal include references to a direction given by it under section 195(4).”

7. Three points must be noted:

- (1) First, an appeal is against a decision of the Tribunal, as opposed to the reasoning by which that decision was reached. This is clear from section 196(2). The Court of Appeal considers appeals against orders, and not the reasoning by which an order is reached: *Lake v Lake* [1955] P 336 at 342, 343-4 and 346-7.
- (2) Secondly, the appeal must relate to a point of law arising from the Tribunal’s decision. The Tribunal must be vigilant to prevent issues that are not points of law being dressed up as points of law in an attempt to obtain permission to appeal: *Hutchison 3G UK Limited v Office of Communications* C1/2008/0203, 20 February 2008.
- (3) Thirdly, permission to appeal should be granted sparingly: *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 at paragraph 15; *Albion Water Ltd v Water Services Regulation Authority* [2007] UKCLR

¹ The 2003 Act has been recently amended by the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011 No 1210) which, inter alia, makes certain changes to the dispute resolution provisions in the 2003 Act. For the avoidance of doubt, all references in this ruling to the 2003 Act are to the Act in its form at the time of the Determination.

1577. Permission will usually be granted where there is a real prospect of success or there is some other compelling reason why the appeal should be heard: *IBA Health Limited v Office of Fair Trading* [2003] CAT 28, especially at paragraphs 4 and 5.

8. BT's grounds of appeal are grouped under three main heads:

- (1) *Jurisdiction*. First, BT contends that the Tribunal erred in holding, in the Preliminary Issues Judgment, that OFCOM had jurisdiction to determine "historic" disputes.
- (2) *Cost orientation*. Secondly, BT contends that the Tribunal erred in finding that OFCOM had applied the cost orientation obligation contained in Condition H3.1 in accordance with its true construction, and that BT had no reason to expect that Condition H3.1 would be applied in any other way.
- (3) *Remedy*. Thirdly, BT contends that the Tribunal erred in holding that OFCOM had correctly applied its powers under section 190(2)(d) of the 2003 Act by ordering BT to repay to the Altnets the entire amount of BT's overcharge.

9. These matters were all extensively considered in the Preliminary Issues Judgment and the Judgment. We shall not repeat our reasoning here, and will deal briefly with BT's grounds of appeal in the order set out in paragraph 8 above.

Jurisdiction

10. OFCOM's jurisdiction to resolve, by way of the Dispute Resolution Process, so-called "historic" disputes, was considered by us in paragraphs 54 to 111 of the Preliminary Issues Judgment and, incidentally, in paragraphs 156 and 164 to 170 of the Judgment. We considered not only the provisions of the 2003 Act, but also the provisions of the EU's Common Regulatory Framework, which provides the source for the Dispute Resolution Process provisions in the 2003 Act.

11. We accept that the question of whether OFCOM has jurisdiction over “historic” disputes is one that turns on the true construction of the 2003 Act and the Common Regulatory Framework. However, for the reasons we gave in the Preliminary Issues Judgment, we consider that there is nothing in either the 2003 Act or in the Common Regulatory Framework that provides any basis for the sort of constraint contended for by BT. By way of example, section 185(1) of the 2003 Act provides that the Dispute Resolution Process “applies in the case of a dispute relating to the provision of network access”, without drawing any kind of distinction between “historic” and other sorts of dispute.
12. We do not consider that this point has any real prospect of success; nor is there some other compelling reason why the appeal should be heard. As we noted in paragraph 110 of the Preliminary Issues Judgment, we regard the true construction of sections 185 to 192 of the 2003 Act to be “clear”. Accordingly, we refuse permission to appeal in respect of these grounds of appeal.

Cost orientation

13. Before us, BT advanced two closely interconnected contentions regarding Condition H3.1. First, BT contended that OFCOM had misapplied Condition H3.1 because it had misconstrued it (“BT’s First Contention”). Secondly, BT contended that – even if OFCOM’s construction of Condition H3.1 was correct – OFCOM was obliged to enforce condition H3.1 in a manner different to the true construction of that provision (see paragraphs 194 to 195 of the Judgment, “BT’s Second Contention”).
14. BT’s Second Contention was based upon section 3(3) of the 2003 Act, legitimate expectation and (a rather distinct point) the suggestion that OFCOM’s application of Condition H3.1 amounted to a modification of that condition. BT’s points are described in paragraphs 205 to 207 of the Judgment.
15. BT’s Request for Permission to Appeal suggests that the Tribunal failed, in the Judgment, to pay sufficient regard to:

- (1) OFCOM's duties under section 3(3) of the 2003 Act (Ground 2(a) in BT's Request for Permission to Appeal);
 - (2) Documents – such as Ofel's "Guidelines on the Operation of the Network Charge Controls", published in 1997 and 2001 (Ground 2(c) in BT's Request for Permission to Appeal).
16. This suggestion is incorrect. The Tribunal considered the legal merits of BT's Second Contention in paragraph 207 of the Judgment. Although it is true to say that the Tribunal considered, in paragraph 207(7) of the Judgment, that section 3(3) "does not of itself create any additional obligations on OFCOM beyond those ordinarily conferred by public law", it is clear from paragraph 207(6) that the Tribunal took account of OFCOM's obligations under section 3(3).
17. More importantly, each of the aspects in which BT contended OFCOM had misapplied Condition H3.1 were considered by the Tribunal in turn. In each case, the Tribunal considered BT's First Contention (ie construction) and thereafter BT's Second Contention (ie section 3(3) and legitimate expectation). We refer, in general, to paragraphs 208 to 334 of the Judgment, and in particular to paragraphs 230 to 238, 307(2) and 308 to 312. These latter paragraphs make clear that BT's Second Contention was fully considered, and rejected, because it lacked factual basis. Accordingly, we do not consider Grounds 2(a) or 2(c) to raise points of law. Moreover, although BT's First and Second Contentions undoubtedly raised a multiplicity of points, which needed to be considered at length, at the end of the day, we do not consider that BT's grounds of appeal would have a real prospect of success; nor is there some other compelling reason why the appeal should be heard.
18. Condition H3.1 imported economic concepts that required careful articulation and consideration (see Section IV of the Judgment). But, in the light of these concepts, the construction of Condition H3.1 is straightforward and clear. BT suggests (in Ground 2(b) of BT's Request for Permission to Appeal) that the Tribunal failed properly to construe Condition H3.1, particularly in the light of the relevant factual matrix. The Tribunal gave due consideration to the factual matrix (see paragraph 203 of the Judgment), including the Common Regulatory Framework.

19. Given the nature of Condition H3.1, we consider the question of construction to be a mixed question of law and fact, in respect of which the Tribunal could give permission to appeal, were it appropriate to do so. However, for the reasons voluminously set out in Section VII of the Judgment, we do not consider that an appeal would have a real prospect of success; nor is there some other compelling reason why the appeal should be heard. Accordingly, we refuse permission to appeal in respect of these grounds of appeal.

Remedy

20. BT's contentions in paragraphs 40ff of BT's Request for Permission to Appeal (in particular, paragraph 44) represent a new point that was not (at least not in this form) made before the Tribunal. There is, of course, nothing to prevent BT from raising new points in this way, since (as we noted in paragraph 7(1) above) an appeal is against a decision of the Tribunal, as opposed to the reasoning by which that decision was reached.
21. However, the Tribunal must also be vigilant to prevent issues that are not points of law being dressed up as points of law in an attempt to obtain permission to appeal: see paragraph 7(2) above. Section 190(2)(d) gives OFCOM a discretion to follow through on the conclusions it has reached pursuant to the Dispute Resolution Process, which is not otherwise fettered: see paragraph 338(1) of the Judgment. For the reasons given in paragraph 338 of the Judgment, we considered that OFCOM exercised that discretion correctly.
22. As the Tribunal made clear in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 5 at paragraph 26, the distinction between questions of fact and questions of law is a difficult one. That is particularly so in cases of discretion. The distinction between questions of law and questions of fact was articulated in paragraphs 25 to 35 of the *Napp* decision. Here, we are not persuaded by BT's Request for Permission to Appeal that there was any incorrect exercise of discretion by OFCOM pursuant to its powers under section 190(2)(d), nor that paragraph 338 of the Judgment is wrong on a point of law. Accordingly, we also refuse permission to appeal on this ground.

Marcus Smith QC

Professor Peter Grinyer

Richard Prosser OBE

Charles Dhanowa
Registrar

Date: 13 June 2011