



Neutral citation [2010] CAT 19

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1151/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

23 July 2010

Before:

MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

EVERYTHING EVERYWHERE LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED

Interveners

RULING (STAY OF PROCEEDINGS)

1. On 22 and 23 June 2010, the Tribunal heard various applications concerning the admissibility of evidence relied upon by British Telecommunications plc (“BT”) in its appeal against a determination by the Office of Communications (“OFCOM”) dated 5 February 2010 and entitled “Determination to resolve a dispute between T-Mobile, Vodafone, O2 and Orange about BT’s termination charges for 080 calls” (“the Determination”).
2. The Tribunal gave judgment on these applications in a judgment handed down on 8 July 2010 ([2010] CAT 17, “the Judgment”). I adopt the abbreviations used therein.
3. At the conclusion of the hearing on 23 June 2010, the Tribunal invited the parties to seek to agree a timetable running up to the substantive hearing of this dispute, listed to commence on 10 January 2011, rather than incur the cost of a further *inter partes* hearing.
4. Although the parties have formulated a timetable to trial that appears to be sensible, OFCOM seeks instead a stay of these proceedings. The request for a stay was made in a letter from OFCOM dated 16 July 2010, which also explained the grounds for this request. Essentially, these grounds were twofold:
 - (a) First, OFCOM “having carefully considered the Tribunal’s judgment of 8 July 2010 (the Judgment) on the preliminary issue, Ofcom is minded to seek permission to appeal that Judgment. We are currently considering the grounds of any such request and intend to revert to the Tribunal with a request for permission in accordance with Rule 58 of the Tribunal’s rules.”
 - (b) Secondly, there is before OFCOM a dispute between the same parties to these proceedings in relation to termination rates imposed by BT for calls to its hosted 0845/0870 numbers (“the 0845/0870 Dispute”). The 0845/0870 Dispute is likely to be finally determined by OFCOM in early August. In OFCOM’s view, the 0845/0870 Dispute is very likely: (i) to raise the same or similar issues to this matter, presently before the Tribunal; and (ii) itself to be appealed to the Tribunal. In these circumstances, OFCOM suggested

that the most appropriate course would be to stay the present proceedings and to hear the present matter, and the 0845/0870 Dispute, in a single consolidated hearing. It is self-evident that such a consolidated hearing could not take place in January 2011, when the hearing of the present dispute is scheduled to take place.

5. On receipt of OFCOM's letter, the Tribunal invited the other parties to comment on issues arising out of this letter, and invited any further observations that OFCOM might choose to make. Responses were received from BT, Vodafone, Everything Everywhere (formerly T Mobile and Orange), O2 and OFCOM. It is clear from these communications that all parties agree that there is the potential for substantial overlap between the present matter and the 0845/0870 Dispute presently before OFCOM. However, BT and O2 (but not the other parties who responded) were very much opposed to staying the present proceedings.
6. Turning to the grounds advanced by OFCOM for a stay, the following preliminary point must be made. The Dispute Resolution Process by which the present dispute was determined by OFCOM, and which is being used to determine the 0845/0870 Dispute, is intended to be a speedy process, generally completed within 4 months. It follows that any appeal arising out of that process, such as the present, ought, if practicable, also to be speedily determined. In those circumstances, therefore, any stay of an appeal before the Tribunal ought – if that can be done consistently with the overriding objective – to be avoided if possible.
7. Turning to OFCOM's first ground for seeking a stay, it is premature to consider substantively OFCOM's proposed appeal of the Judgment. The grounds for appeal have yet to be formulated, and a request for permission to appeal to the Court of Appeal has yet to be made. Such a request may or may not succeed, but it cannot be presumed that such a request will be successful. To grant a stay simply on the ground that permission to appeal is going to be sought would be wrong. Were permission not given, then there is a risk the substantive hearing of this dispute might be derailed for no good reason. As was noted in paragraph [6], appeals arising out of the Dispute Resolution Process need to be dealt with quickly.

8. Turning to OFCOM's second ground for seeking a stay, it does seem clear that there is significant potential overlap between the present dispute and the 0845/0870 Dispute. Having two similar disputes proceeding before the Tribunal in parallel, without one paying heed to the other, and without a common approach being adopted, is clearly undesirable.
9. Had this matter been raised at the outset by OFCOM, for instance at the CMC on 13 May 2010, then a consolidated approach, such as that now suggested by OFCOM, could have been debated before the Tribunal. But that course – for whatever reason – was not taken, and a trial date, convenient to all parties, was fixed. Rather than adjourn that date, and have a later (possibly far later) consolidated hearing, by far the better approach is to hear this dispute in January 2011, as planned, and for it to form the “lead” case insofar as there are common issues between this case and any appeal (if any) arising out of the 0845/0870 Dispute. It is, of course, for OFCOM to decide how it proceeds with the 0845/0870 Dispute before it, but should an appeal to the Tribunal arise out of it, then it can be case managed either so that it comes on as soon as practicable after a substantive judgment has been handed down in this dispute or so that any common issues are dealt with together.
10. Accordingly, the OFCOM's application to stay these proceedings is refused. The directions to trial formulated by the parties will be set out in an order of the Tribunal.

Marcus Smith QC

Charles Dhanowa
Registrar

Date: 23 July 2010