Neutral citation [2013] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Cases No: 1156-1159/8/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

7 February 2013

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)
PROFESSOR JOHN BEATH
MICHAEL BLAIR QC

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE
BRITISH TELECOMMUNICATIONS PLC

Appellants / Interveners

- v –

OFFICE OF COMMUNICATIONS

Respondent

- and -

TOP UP TV EUROPE LIMITED
RFL (GOVERNING BODY) LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Interveners

RULING (PERMISSION TO APPEAL)

INTRODUCTION & PROPOSED GROUNDS OF APPEAL

1. BT has applied for permission to appeal the Tribunal's judgment of 8 August 2012 in cases 1156-1159/8/3/10 *British Sky Broadcasting Limited & Ors v. Office of Communications*, [2012] CAT 20 ("the Judgment").[1] This ruling should be read together with the Judgment, and it generally adopts the terms and abbreviations defined therein.

2. The Judgment concerned four separate appeals, brought by each of Sky, FAPL, BT and VM in respect of Ofcom's 2010 Pay TV Statement ("the Statement"). In the Judgment, while dismissing challenges by Sky and FAPL to Ofcom's jurisdiction to take action under section 316 of the 2003 Act, the Tribunal upheld Sky's challenge to the key findings on which Ofcom's exercise of that jurisdiction was based. In light of the Tribunal's conclusions in relation to these competition concerns of Ofcom, it was not necessary for the Tribunal to consider challenges brought by BT and others to the validity, effectiveness and proportionality of the WMO remedy imposed by Ofcom in order to address those concerns.

3. By its application dated 26 November 2012 ("the Application"), BT seeks permission to appeal on two grounds, namely:

   (a) The Tribunal erred in determining Sky's appeal on the basis of the Tribunal's interpretation of Sky's *past* conduct, when section 316 is a "forward-looking instrument" the focus of which is on the need to promote "fair and effective competition" now and in the future, by putting in place an *ex ante* remedy. Ofcom was not required to find that Sky had actually engaged in any practice that was liable to prejudice fair and effective retail competition in the supply of the CPSCs, in order to take action under section 316. Rather, Ofcom was seeking to address the continuing non-supply and restricted wholesale distribution of the CPSCs and avoid the indefinite continuation of fruitless negotiations. BT contends that Sky's successful

[1] By the President's Order of 10 August 2012, the deadline for requesting permission to appeal the Judgment was extended until one month from the date of publication by the Tribunal of a non-confidential version of the Judgment. The Tribunal published a non-confidential version of the Judgment on 24 October 2012.

challenge to Ofcom's factual conclusions about Sky's conduct in past negotiations did not undermine the core competition concern on which the WMO was based. The Tribunal was wrong to characterise that concern as relating exclusively to Sky's alleged ulterior intentions and conduct, and it should have gone on to consider whether, irrespective of Sky's motives and conduct, Ofcom was nevertheless still entitled to impose the WMO "given the other elements which required to be addressed". (See paragraphs 5-19 of the Application.)

(b) The Tribunal failed properly to consider Ofcom's "second competition concern", namely the effect of rate card prices on the ability of new entrants to compete effectively with Sky and/or reached a conclusion about Sky's negotiation position (in particular, that Sky was prepared to offer discounts from the rate card price to new entrants) that was not based on any or any sufficient evidence. The Tribunal only considered the effect of the rate card prices on VM. (See paragraphs 20-24 of the Application.)

4. A judgment of the Tribunal in a matter such as this can be challenged under section 196 of the 2003 Act (as applied by section 317(7)) which provides for appeals to (in this case) the Court of Appeal. Any such appeal requires the permission of the Tribunal or the Court of Appeal and, by virtue of subsection 196(2)(b), must raise a point of law.

5. In considering whether to grant permission when, as in this matter, sitting in England and Wales the Tribunal applies the test in Civil Procedure Rules ("CPR") rule 52.3(6):

> "Permission to appeal may be given only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

6. BT contends that permission should be granted because these grounds raise arguable points of law, the appeal has a real prospect of success within the meaning of CPR rule 52.3(6)(a), and the case raises important questions of principle as to the scope and interpretation of section 316 of the 2003 Act, such that there is a

compelling reason why the case should be heard within the meaning of CPR rule 52.3(6)(b).

7. The Tribunal invited observations from the parties in relation to the Application. Sky filed written submissions on 11 December 2012. Neither Ofcom nor any of the other parties filed submissions. However, in letters sent on 11 December 2012, VM confirmed its support for BT's submissions and FAPL confirmed its support for Sky's submissions.

TRIBUNAL'S CONCLUSIONS

BT's first ground

8. We accept, as BT points out under its first proposed ground, that section 316 is a "forward-looking instrument", enabling Ofcom to put in place an *ex ante* remedy to ensure fair and effective competition for the future. We are also prepared to accept for present purposes (and without deciding the point) that the provision would be capable of being applied so as to prevent or govern identified "practices" which would be prejudicial to fair and effective competition, even where those practices had not yet arisen or been established.

9. However these propositions do not provide any basis on which to appeal the Tribunal's conclusions in the present case. This is because Ofcom's core competition concern here was not based on a practice which had not yet arisen but on its conclusions about Sky's actual conduct. It was the nature of Sky's past and continuing conduct as interpreted by Ofcom, and the bearing this had on the likely position for the future, which led Ofcom to conclude that the WMO remedy was appropriate.

10. Thus, as we stated in the Judgment, the foundation for Ofcom's core competition concern was its conclusion that, in its dealings with other retailers who sought access to its premium channels, Sky had acted on certain strategic incentives unrelated to normal commercial considerations, and in consequence had not engaged constructively with their requests, had deliberately withheld wholesale supply of those channels, had chosen to forego the opportunity to earn the revenue

that such deals would have presented, and had preferred to be absent from the platforms in question rather than wholesale to them. We also stated in the Judgment: "Ofcom maintains that Sky's acting on strategic incentives is an inference to be drawn from the empirical evidence of Sky's "actual behaviour" in the course of the various bilateral negotiations which took place between Sky and certain retailers and potential retailers of Sky's CPSCs in the years leading up to the Statement…" (See, for example, paragraphs 20-23 of the Judgment.)

11. Once the Tribunal had found that the available evidence did not support the factual conclusions underpinning Ofcom's core concern, and indeed that those conclusions were inconsistent with the facts in important respects, such that the "practice" relied upon as justifying the remedy was not established, the foundation of the WMO as set out in the Statement was undermined.

12. We do not consider that BT's reference to the "self retail" issue (paragraph 19(i) of the Application) takes the matter further. It appears to reflect a misunderstanding of the Statement and the Judgment. Ofcom's core concern was the absence and (as Ofcom judged) likely continued absence, of wholesale supply of the CPSCs. As seen, an important finding of Ofcom underpinning that concern (and which the Tribunal found to be inconsistent with the evidence) was that if Sky was unable to negotiate self retail supply to a platform then Sky preferred to be entirely absent rather than wholesale to it. Thus, Ofcom's core concern as set out in the Statement was not based on the mere fact that Sky preferred (and had sought to negotiate) self retail deals, but on the conclusion that self retail was the only form of supply Sky was prepared to contemplate. Given that the Tribunal found this conclusion to be erroneous, and found that Sky was prepared to reach agreement on wholesale supply where self retail proved unattainable (as, for example, in the case of BT), the Tribunal did not need to "grapple" with any concerns about a hypothetical situation where Sky was self retailing on all platforms.

13. As to the points made in paragraph 19(ii) of the Application ("Effect of supply at rate card prices on competition"), the Tribunal does not consider that these are related to or support the proposed first ground. Nor do they appear to raise any point of law. In relation to paragraph 19(ii)(b), although in wholesale price

negotiations Sky's position was that the prices should be based on the rate card, the Tribunal found that Sky was open to agreeing discounts from those prices on the basis of penetration rates achieved by the counterparty. This last point is relevant also to BT's proposed second ground.

BT's second ground

14. It is correct that the Tribunal made specific findings about the effect of rate card prices on the ability of VM to compete effectively and did not make any such findings in relation to potential new entrants. We explain why at paragraph 821 of the Judgment:

> "We recognise that other retailers, and in particular BT, claim that they would not be able to compete effectively on the basis of Sky's rate card price. We have not found it necessary or appropriate to reach any specific conclusion about this. Although in negotiations between Sky and BT, Sky was insistent that wholesale prices of CPSCs should be based on the rate card prices, we have found that Sky was open to agreeing discounts from those prices, referable to penetration rates achieved by the retailer. We also found that the negotiations with BT were very significantly affected by the ongoing Pay TV review, and by the prospect of Ofcom imposing a regulatory price lower than the rate card. In these circumstances, when a favourable outcome of the Pay TV review appeared imminent, BT indicated that it was prepared to agree to wholesale supply at the rate card price provided that the agreed price would be changed in due course to reflect the regulatory price. In the event the regulatory outcome preceded the finalisation of the agreement with BT. There was therefore no negotiation on price between Sky and BT which was unclouded by likely regulatory action, and there is no way of knowing what the result of a genuinely commercial negotiation would have been. The same applies to negotiations with other retailers, actual or potential. The negotiations with TUTV and Orange did not founder because of the rate card price, but for other reasons, as discussed at length earlier in this judgment."

15. As to the contention that there was no proper evidential basis for the Tribunal's finding that Sky was prepared to offer discounts from the rate card price to a new entrant, the evidential basis is set out in considerable detail in the Judgment and for example is referred to at paragraphs 290-322 thereof. The Tribunal stated at paragraph 319:

> "It is true that the wholesale price arrangements proposed by Sky were for prices based on the cable rate card. However, as has been seen, Sky on several occasions indicated to BT that it would be prepared to discount those prices by reference to penetration levels on the BT platform. BT did not seem to pursue anything other than an unconditional (and substantial) reduction in that price subject only to an MRG reflecting low penetration of the premium channels."

16. Again, the Tribunal stated, at paragraph 339 of the Judgment:

> "…we do not consider that Sky's engagement in that regard was any less constructive than BT's. If anything it was more so. Sky was willing to supply by wholesale at the same price as other operators were already paying to Sky (or even at a discounted version of that price), whereas BT was only willing to take wholesale supply at a very much lower, and probably unrealistic, price. As already noted, we consider that BT's negotiating stance was likely to have been significantly influenced by the ongoing regulatory process."

17. Further, at paragraph 821 of the Judgment, cited earlier, the Tribunal said:

> "There was therefore no negotiation on price between Sky and BT which was unclouded by likely regulatory action, and there is no way of knowing what the result of a genuinely commercial negotiation would have been."

18. These passages are also relevant to BT's submission that there was no basis for the Tribunal to assume that any agreement would have been achieved in practice.

19. In our view these and other aspects of this proposed ground of appeal are in reality seeking to revisit the Tribunal's assessment of the facts rather than to raise a point of law.

Conclusion on prospects of success

20. We consider that neither of BT's proposed grounds of appeal discloses a point of law with a real prospect of success.

Other compelling reason

21. BT submits that a compelling reason exists by dint of the Tribunal's misunderstanding of Ofcom's competition concerns and the purpose and effect of section 316, and, because this is the first occasion on which Ofcom has exercised this jurisdiction, the Judgment will set a precedent for future cases. According to BT, it is important, given that section 316 exists to fulfil Ofcom's duties under section 3 of the 2003 Act in respect of markets for television services, that there should be clarity as to the precise scope and effect of the section, and the circumstances in which Ofcom can properly act to ensure fair and effective competition in the provision of licensed services.

22. In the Tribunal's view the Application reveals no compelling reason for the appeal to be heard. BT's first proposed ground is essentially based on a misunderstanding of the Statement and the Judgment. BT's second proposed ground seeks to re-argue factual issues. No genuine point of law is raised under either proposed ground.

Permission refused

23. For these reasons, the Tribunal unanimously refuses BT's request for permission to appeal. Should BT renew its application to the Court of Appeal, a copy of this Ruling should be placed before the Court of Appeal.

The Honourable Mr. Justice Barling | Professor John Beath | Michael Blair QC

Charles Dhanowa
Registrar

Date: 7 February 2013