



IN THE COURT OF APPEAL, CIVIL DIVISION

REF: C3/2012/1523/4



EVERYTHING EVERYWHERE LTD (appellant) –v– OFFICE OF COMMUNICATIONS AND OTHERS

ORDER made by the Rt. Hon. Lord Justice Lloyd

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: **granted, refused, adjourned.** An order granting permission may limit the issues to be heard or be made subject to conditions.

Refused

Reasons

Ground 1 is put forward in several ways. One is that, when the Competition Commission concluded that there was no reliable survey evidence addressing the magnitude of customer loss that would flow from the type of price changes that they would expect (paragraph 2.700), they should have referred the matter back to the Tribunal, in order that it should be remitted to Ofcom for the latter to conduct further investigations, on the result of which the appeal could then be determined by reference to more satisfactory evidence. That seems to me to be untenable. The Commission must answer the questions referred to it by the Tribunal one way or the other. It must say either that Ofcom was right or that it was wrong, and must do so on the material available to it. It cannot say that it does not know. If it were to find that Ofcom was wrong, it must say so, and it could then refer it back to the Tribunal on the basis that it should be remitted to Ofcom to work out the best way to correct the error. However, that would require a finding by the Commission that Ofcom was wrong. Without such a finding the appeal cannot be decided, and if it has not yet been decided, section 195 does not allow for a remittal to Ofcom.

The appellant's argument by reference to para 2.59 of the Commission's Final Determination is not convincing. The Commission stated the position correctly at paragraph 1.33. Clearly, despite identifying some errors in Ofcom's decision, the Commission held that there was no error sufficient, according to the test set out at paragraph 1.33, to vitiate the decision in this respect.

It seems to me clear that the issues arising on the appeal, as defined in the grounds of appeal, must necessarily be resolved on the basis of the material adduced upon the appeal. In an appeal of this kind there are or may be opportunities to adduce additional evidence, though not on an unlimited basis given, in particular, the pressure imposed by the timetable. In the end there is no alternative to having the appeal decided on the available material. It is not for the appellate body to call for further evidence of its own initiative, which is what the appellant seems to suggest.

As to the point referred to as the appellant being the author of its own misfortune, however one might put that point, it seems to me that the Tribunal's observations at paragraph 226 are convincing on the point.

As regards ground 2, alleging procedural error on the part of the Commission, this is not how the point was put in the appellant's judicial review grounds before the Tribunal. The way in which it was raised is accurately summarised by the Tribunal at paragraph 246. Accordingly, this point is not open on a further appeal. In any event it seems to me that the supply to the appellant of the transcript of the Vodafone hearing should have been sufficient notice, if needed, to the appellant of what was in the Commission's mind.

On ground 3, the suggested inconsistencies in the Commission's expression of the point are nothing like sufficiently significant as to offer any prospect of a successful appeal, even if they are read and understood in the way that the appellant submits they should be. They could not justify setting aside any aspect of the Commission's determination on judicial review grounds.

For these reasons I consider that there is no prospect of a successful appeal on any of these grounds.

Information for or directions to the parties

1. If the application is to be renewed at an oral hearing, the appellant should lodge, with the statement under the PD para 4.14A, a well-focussed reading list, showing what the judge hearing the application needs to read (besides the skeleton argument and the statement under the Practice Direction), in particular which parts (if any) of the Ofcom statement, and which parts of the Competition Commission's final determination and of the Tribunal's judgment, so as to make best use of the limited time available for preparation. If possible the oral hearing will be arranged on an expedited basis in the Long Vacation, but that will depend on judicial availability.

2. If the application is not to be renewed orally, the appellant must decide whether or not to pursue the appeal on the

point on which the Tribunal granted permission. This is not addressed in the present grounds of appeal and skeleton argument. The appellant must, in that event, file and serve a fresh skeleton argument dealing with that ground of appeal, and must do so no later than 31 August 2012, failing which the appeal will be liable to be dismissed without more.

This case falls within the Court of Appeal Mediation Scheme automatic pilot categories*. Yes No

Recommended for mediation Yes No

If not, please give reason:

By the Court

Where permission has been granted, or the application adjourned

- a) time estimate (excluding judgment)
- b) any expedition

Signed: *Timothy Lloyd*
Date: 27 July 2012



Notes

- (1) Rule 52.3(6) provides that 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.
- (2) Rule 52.3(4) and (5) provide that where the appeal court, without a hearing, refuses permission to appeal that decision may be reconsidered at a hearing, provided that the request for such a hearing is filed in writing within 7 days after service of the notice that permission has been refused. Note the requirement imposed on advocates by paragraph 4.14A of the Practice Direction.
- (3) Where permission to appeal has been granted, the appeal bundle must be served on the respondents within 7 days of receiving this order (see para. 6.2 of the Practice Direction to CPR Part 52). A letter of notification will be sent to the appellant or his solicitors, as soon as practicable (see para. 6.3).

**DATED 27TH JULY 2012
IN THE COURT OF APPEAL**

EVERYTHING EVERYWHERE LIMITED

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OFFICE OF COMMUNICATIONS & ORS

ORDER

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Lower Court Ref: 11803311/1181-83

