



Neutral citation [2009] CAT 4

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1100/3/3/08

Victoria House
Bloomsbury Place
London WC1A 2EB

24 February 2009

Before:

THE HON. MR. JUSTICE WARREN
(Chairman)
MICHAEL BLAIR QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) THE NUMBER (UK) LIMITED
(2) CONDUIT ENTERPRISES LIMITED

Appellants

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

BRITISH TELECOMMUNICATIONS PLC

Intervener

JUDGMENT (Permission to Appeal)

1. Following handing down of our judgment in these proceedings in November 2008 ([2008] CAT 33) (“the main judgment”), we received an application from the Intervener, BT, for permission to appeal. This judgment should be read together with the main judgment and we adopt the same abbreviations. None of the parties requested an oral hearing and in light of the helpful written submissions we have received from the parties, the Tribunal is able to deal with this matter on the papers.
2. Although OFCOM do not themselves seek permission to appeal, they support BT’s application for permission to appeal. Their concern, as regulator, is that legal clarity as well as certainty should be provided with regard to the points of law raised in the appeal and our judgment. They consider that there is sufficient doubt about our decision which risks such clarity and certainty going forward. We take that into account in reaching our decision.
3. BT identifies a number of areas in which it considers that we were in error. The Tribunal Rules (rules 58 and 59) do not lay down any specific test by which the Tribunal is to assess whether permission to appeal should be given. Section 196(2) of the 2003 Act provides that an appeal must relate only to a point of law arising from the decision of the Tribunal. The Civil Procedure Rules, applicable to an appeal in the court system and previously applied by the Tribunal by analogy, provide (in rule 52.3) in the case of first tier appeals that permission should be granted 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.
4. We are not persuaded by the submissions made on BT’s behalf either that an appeal would have a real prospect of success or that there is any compelling reason why the appeal should be heard. Accordingly, applying that test, we would refuse permission. As to the first part of the test which is concerned with the strength of the appeal, we do not consider that the Tribunal should adopt a threshold lower than a real prospect of success as that phrase has been interpreted by the courts. As to the second part of the test, which is concerned with other circumstances which

might justify the granting of permission, it might be said that permission should be granted where there is a good reason for doing so even where that reason is not “compelling”, whatever that word may mean in this context. In the present case, we do not consider that there is a good reason for giving permission to appeal.

5. In particular, although we acknowledge that our interpretation of the European legislation is not *acte clair* (paragraph [172] of the main judgment), we do not consider that that is a good reason for granting permission to appeal. The Court of Appeal (or the House of Lords) may consider that a reference should be made to the European Court of Justice because the matter is not *acte clair*, but that is not a ground for permission to appeal being given by us. Instead, we consider that BT, if it wishes to proceed further, should apply to the Court of Appeal for permission to appeal and to raise before that court the question of a reference. The Court of Appeal may, we acknowledge, take a different view about the need for a reference by it from the view which we took about a reference by us. If it does take a different view, it can itself make the necessary reference. Having said that, we do not consider that there is a real prospect of success for BT in an appeal from that part of our own decision where we refused to make a reference. In other words, if the Court of Appeal does itself make a reference it would be in the exercise of its own discretion and not by a reversal of our own decision.
6. Accordingly, the Tribunal unanimously:

ORDERS THAT:

- (1) Permission to appeal be refused.

Mr Justice Warren

Michael Blair

Sheila Hewitt

Charles Dhanowa
Registrar

Date: 24 February 2009