



Neutral citation [2008] CAT 18

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Number: 1087/2/3/07

Victoria House  
Bloomsbury Place  
London WC1A 2EB

24 July 2008

Before:

VIVIEN ROSE  
(Chairman)  
MICHAEL BLAIR QC  
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

**INDEPENDENT MEDIA SUPPORT LIMITED**

Appellant

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

- supported by -

**RED BEE MEDIA LIMITED**  
**BRITISH BROADCASTING CORPORATION**

Interveners

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**RULING ON REQUEST FOR PERMISSION TO APPEAL**

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## ***Introduction***

1. We have before us an application from Independent Media Support Limited dated 19 June 2008 requesting permission to appeal from the judgment of the Tribunal handed down in Case no. 1087/2/3/07 *Independent Media Support Limited v Office of Communications* on 20 May 2008 ([2008] CAT 13) (“the Judgment”). The abbreviations used in this ruling bear the meaning given to them in the Judgment.
2. IMS’s appeal, filed on 29 June 2007, was, in part, an appeal against the Channel 4 Decision issued by OFCOM on 30 May 2007. OFCOM decided that BBCB’s contract for the exclusive supply of access services to Channel 4 did not infringe the prohibitions contained in Articles 81(1) and 82 EC and the equivalent provisions of the 1998 Act. For the reasons set out in the Judgment, the Tribunal dismissed the appeal against the Channel 4 Decision.
3. Appeals against decisions of the Tribunal under section 47 of the 1998 Act can be brought under section 49 of that Act which, so far as material, provides:

### **“49 Further appeals**

- (1) An appeal lies to the appropriate court—  
...
  - (c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47.
- (2) An appeal under this section—
  - (a) may be brought by a party to the proceedings before the Tribunal or by a person who has a sufficient interest in the matter; and
  - (b) requires the permission of the Tribunal or the appropriate court...
  - (4) In subsection (2)—  
“the appropriate court” means—
    - (a) in relation to proceedings before a tribunal in England and Wales, the Court of Appeal...”

4. The circumstances in which the Tribunal will grant permission are set out in the Civil Procedure Rules (“CPR”)<sup>1</sup>. The Tribunal has a discretion whether to grant permission to appeal. Permission to appeal may be given only where: (a) the appeal appears to have a real prospect of success or (b) there is some other compelling reason why the appeal should be heard (see CPR r.52.3(6)).
5. The part of the Judgment in respect of which IMS seeks permission to appeal is paragraphs [108] to [123]. This contains the Tribunal’s reasons for upholding OFCOM’s finding that the Channel 4 Contract did not infringe the prohibitions in Article 81(1) and Chapter I of the 1998 Act. IMS’s proposed grounds of appeal can be divided into three parts. The first ground concerns the application of *Delimitis* condition 1 and the reasoning by which the Tribunal upheld OFCOM’s finding that the Channel 4 Contract did not have an appreciable effect on competition. The second and third grounds are closely related to the first, and respectively concern a putative “recycling” of Article 82 analysis for the purposes of applying Article 81(1) and an alleged material error of factual appreciation by the Tribunal of the competitive conditions in the relevant market.
6. CPR rule 59(2) provides that where a request for permission is made in writing, the Tribunal shall decide whether to grant such permission on consideration of the party’s request and, unless it considers that special circumstances render a hearing desirable, in the absence of the parties. The Tribunal wrote to the other parties to this appeal inviting them to comment on IMS’s request for permission to appeal. The Tribunal received written observations from OFCOM on 2 July 2008 opposing the grant of permission on any of the grounds contained in IMS’s application. Both of the interveners strongly supported OFCOM’s opposition to the request. None of the parties requested an oral hearing and in the circumstances of this case the Tribunal does not consider that an oral hearing is necessary or desirable.

***Ground 1 – Application of Delimitis condition 1***

7. Before considering the first ground put forward in IMS’s application, it is important to set out briefly what was decided by the European Court of Justice (“ECJ”) in

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<sup>1</sup> By Order of 14 August 2007, the Tribunal determined that these proceedings are proceedings in England and Wales.

Case C-234/89 *Delimitis v Henninger Bräu AG* [1991] ECR I-935 (“*Delimitis*”). In that case the ECJ considered whether a beer tie in a lease of a pub may be in contravention of Article 81(1). The ECJ ruled that in considering whether an individual tie agreement falls within Article 81(1), two conditions have to be met:

“A beer supply agreement is prohibited by [Article 81(1)] if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.”

8. IMS submits that the Tribunal misdirected itself as to the application of *Delimitis* condition 1 and thereby failed to correct the same error made by OFCOM in the Channel 4 Decision. IMS suggests that OFCOM and the Tribunal erred by failing to consider the prevalence generally in this market of exclusive supply contracts between various service providers and their customers. IMS asserts that OFCOM and the Tribunal wrongly focused on BBCB’s contracts rather than on the fact that other suppliers in the market – not only BBCB – enter into exclusive supply arrangements with their customers. It is the general prevalence of similar agreements which is relevant, IMS argues, to a consideration of the first condition of *Delimitis*. If OFCOM and the Tribunal had applied the right test, they would have been bound to reach the conclusion that this market is foreclosed and that the first condition of the *Delimitis* test is satisfied.
9. OFCOM opposes the grant of permission to appeal on this ground on the basis that: (a) IMS had not raised this argument before the Tribunal, (b) it is a thinly-disguised attempt to challenge the Tribunal’s conclusions on the facts under the guise of a point of law and, in any event, (c) the proposed ground has no prospect of success.
10. The Tribunal considers that there is considerable force in OFCOM’s submission that IMS is seeking to raise a new point which was not put in issue in the Notice of Appeal

and was not argued during the hearing. In paragraph 6.5 of its Notice of Appeal, IMS refers to a failure properly to apply the *Delimitis* test but there focuses on the second condition; whether the contract in dispute makes a significant contribution to foreclosure of the market. In the amended version of the Notice of Appeal, IMS may have broadened its attack by identifying as an error of law OFCOM's alleged failure "to carry out the analysis of foreclosing agreements insisted upon by the ECJ in *Delimitis*".

11. IMS's skeleton submissions lodged before the hearing that took place on 7-8 April 2008 refer to *Delimitis*, arguing that OFCOM erred in its analysis of the size of the overall market and BBCB's market share: see paragraph 34 of the skeleton. However, in paragraph 36 of the skeleton there is a more general statement that paragraph 8.16 of the Channel 4 Decision "discloses a failure to properly analyse agreements with a foreclosing effect as insisted upon by the ECJ in *Delimitis*". Nothing further was said as regards the first condition of *Delimitis* during oral submissions.
12. We would not in the circumstances of this case refuse permission solely on the ground that the point that the appellant seeks to raise was not a point raised, or at least not squarely raised, in the appeal to the Tribunal.
13. As regards the application of the *Delimitis* test by OFCOM and by the Tribunal, the Tribunal accepts that the consideration of the first condition in *Delimitis* requires a detailed examination of the contestability of a market. The effects of an agreement on competition have to be assessed in the legal and economic context in which it occurs and where it might combine with other agreements to have a cumulative effect on competition (see *Delimitis*, paragraph [14]).
14. But we do not consider that OFCOM fell into the error which IMS alleges. First, it is clear that OFCOM was well aware that it was a characteristic of this market that the major customers – and not only BBCB – entered into exclusive supply arrangements with their suppliers. For example:

- (a) in paragraph 5.17 of the Channel 4 Decision OFCOM states that “the demand for access services is characterised by large, irregular and infrequent contracts”;
- (b) in paragraph 5.25 OFCOM refers to “the fact that most broadcasters buy all their access services requirements from one supplier...” and in paragraph 7.23 to the fact that “most UK broadcasters prefer not to have more than one provider of all access services (i.e. they prefer to award exclusive contracts)”;
- (c) in paragraph 7.24 OFCOM states its view that the majority of the market is characterised by a few large contracts, even excluding the BBC and ITV contracts; and
- (d) in paragraph 7.69 OFCOM states that the evidence it has gathered suggests “that it is usually the broadcasters themselves which determine contract duration and terms in the first place. These broadcasters are sufficiently large undertakings, with sufficient experience in negotiating contracts, so as to be able to make informed decisions regarding contract duration”.

15. It is clear therefore that OFCOM’s market analysis in this case was based on the fact that the exclusive supply arrangement between BBCB and its customers was typical of the way the market operates and that suppliers more generally and not only BBCB entered into exclusive supply arrangements for these services.
16. Further, the passage in the Decision (paragraph 8.15) that IMS relies on in its application for permission (see paragraph 15 of IMS’s application) is quoted out of context. In the preceding paragraph (paragraph 8.14) OFCOM clearly summarises the two stages of the *Delimitis* test, the first stage being an assessment of whether access to the market is impeded by the existence of a network of agreements and the second being whether the agreement in question (that is BBCB’s agreement) is one of a number of similar agreements having a cumulative effect on competition. In the paragraph after the passage quoted by IMS (paragraph 8.16) OFCOM refers to the

general market structure and to buyers and providers of access services in general rather than focussing on BBCB.

17. We do not consider that a fair reading of the relevant paragraphs indicates that OFCOM misunderstood what was required by the first condition of the *Delimitis* test or that it wrongly focused on the market position of BBCB rather than considering foreclosure in the market as a whole. OFCOM fully appreciated that the market was characterised by long term exclusive supply arrangements and it applied the relevant legal tests to the Channel 4 Contract on that basis.
18. The Tribunal also referred to the background facts concerning the market as a whole in paragraph [68] of the Judgment and referred to the two stage test in the *Delimitis* judgment in paragraph [111] of the Judgment:

“In order to determine whether the Channel 4 Contract falls within Article 81(1), it is also important to consider whether **all the similar agreements entered into in the relevant market** and the other features of the economic and legal context of the agreements at issue, show that those agreements cumulatively have the effect of foreclosing access to that market (*Delimitis*, paragraph 23: often referred to as *Delimitis* condition 1).” (emphasis added)

19. Paragraphs [113] to [123] of the Judgment explain why Article 81(1) does not prohibit the Channel 4 Contract in the particular circumstances of this case.
20. We do not accept therefore that the Tribunal misapplied the *Delimitis* test in confusing the issue of market foreclosure resulting from networks of exclusive agreements with the issue of the contribution made to that foreclosure by the agreement in question.
21. Further, we do not regard as helpful or correct the distinction which IMS seeks to draw between the issue of overall market foreclosure for the purposes of Article 81 and the analysis of market power on the part of BBCB for the purposes of Article 82. In order properly to assess whether the existence of a number of contracts for the exclusive supply of access services forecloses access to the market, the market position of the contracting parties in the market must be taken into consideration (see *Delimitis*, paragraph [25]). The ECJ did not itself use the words “market power” or the term used by IMS, “foreclosure”. Rather it spoke in terms of it being “difficult” for competitors to enter the market or increase their market share. The ECJ plainly did not intend

*Delimitis* condition 1 to be an abstract exercise. Whether the relevant market was sufficiently foreclosed for *Delimitis* condition 1 to be satisfied is a matter of fact and degree taking into account various factors including the duration of the agreements, entry barriers, and the countervailing power of broadcasters (see Judgment, paragraph [109]).

22. The Tribunal disagrees with IMS's assertion that, because the overwhelming majority of demand on this market is currently bound by exclusive purchasing obligations, "it is extremely difficult if not impossible for other suppliers to enter this market" (see paragraph 21 of IMS's application). This statement indicates that IMS has not fully appreciated an important part of OFCOM's analysis of the market structure. OFCOM's conclusion that the market has some of the characteristics of a bidding market has important implications for the assessment of the degree of market foreclosure. IMS posits the question whether, at any particular moment, there are opportunities for a new entrant to win business in this market. Clearly the answer to that may be that at any particular moment there are no such opportunities, because at that moment there may not be a tender procedure in train and the major customers may be bound by their contracts to their respective suppliers in a way which prevents them transferring any business to a new entrant.
23. But it does not, in our judgment, follow from this that the market is almost entirely foreclosed. Because of the structure of this market, that absence of opportunity at any one moment does not indicate anything useful, from a competition law perspective, about the degree of foreclosure or the existence of market power. The correct question in the market for the supply of access services is whether the market is foreclosed *at the point when a contract is put out to tender*. As OFCOM states (paragraph 7.21 of the Channel 4 Decision) "in a bidding market, if competition at the bidding stage is effective, having a high share of sales over a period of time may not be indicative of market power". OFCOM examined the evidence it had gathered and found that competition at the bidding stage was effective.
24. Thus IMS's argument that the first condition of the *Delimitis* test cannot be satisfied here because of the prevalence of exclusive supply agreements is misconceived. It fails to appreciate that the degree of market foreclosure must be assessed at the time

when customers invite bids for a new or renewed contract rather than at a time when all the contractual relationships are in place. In paragraph 7.22 of the Channel 4 Decision, OFCOM says “The “winner takes all” aspect to a bidding market is an important factor in an assessment of competitive constraints”. There was therefore evidence on which OFCOM was entitled to rely in arriving at the conclusions stated in paragraph 8.16 (as quoted in paragraph [101] of the Judgment). We do not accept the argument now put forward by IMS in relation to the *Delimitis* condition 1.

***Ground 2 – The recycling argument***

25. The second proposed ground concerns the Tribunal’s rejection of IMS’s argument that OFCOM had simply “recycled” the facts relied on for the Article 82 analysis when applying Article 81(1): see paragraphs [114] and [119] of the Judgment and paragraphs 25 and 26 of IMS’s application.
26. In the contested decision OFCOM set out the results of its investigation as to whether the Channel 4 Contract was incompatible with Articles 81(1) and 82 EC, and the Chapter I and II prohibitions. It is therefore unsurprising that the available evidence and relevant surrounding circumstances for the analyses of OFCOM and the Tribunal under those prohibitions were closely linked. The market which OFCOM was analysing was the same market whichever legal provision was being considered. OFCOM was not required to keep the two aspects of the challenge to its decision entirely separate. The Tribunal considers that it was legitimate in this case to take into account findings of fact about the market which are relevant to the market power analysis under Article 82 when considering the question of market foreclosure under Article 81. IMS’s criticism of OFCOM’s reasoning is therefore unfounded.
27. As to the Tribunal itself, we noted the important difference between the assessment of market power under Articles 81 and 82: see paragraph [115] of the Judgment. We went on to assess the facts as set out in the Channel 4 Decision and concluded that the finding that there was no infringement of Article 81 should be upheld. We found that OFCOM had analysed the relevant market in the Channel 4 Decision and correctly concluded that, in light of the features of the access services market, the Channel 4 Contract and similar agreements did not have the effect of appreciably restricting competition in that market: see paragraph [113] *et seq* of the Judgment. No point of

law arises from IMS's complaint of "recycling" and we therefore reject this ground of appeal.

***Ground 3 – The alleged material error of factual appreciation***

28. The third and final ground for an appeal relates to an alleged manifest error of factual appreciation in respect of the Tribunal's conclusion on *Delimitis* condition 1. We accept the observation made by OFCOM (paragraphs 14 and 16 of its observations) that IMS has put forward no evidence to challenge OFCOM's factual findings with respect to the market or to show that the market was in fact foreclosed. In this connection, we refer to the judgment of the Court of Appeal in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] EWCA Civ 796, (CA). In relation to certain findings made by the Tribunal to the effect that Napp's pricing policy hindered competition and raised barriers to entry, Buxton LJ, with whom Brooke LJ agreed, said at paragraph [34]:

"These findings do not and could not involve points of law, at least unless it were to be contended that the conclusions had been arrived at on the basis of no evidence at all: something that is not and could not possibly be said. They cannot therefore be reviewed in this court. But even if we did have authority to review such findings, as the conclusion of an expert and specialist tribunal, specifically constituted by Parliament to make judgments in an area in which judges have no expertise, they fall exactly into the category identified by Hale LJ in *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, as an area which this court would be very slow indeed to enter."

29. We consider that those observations apply equally to the Tribunal's assessment of the competitive effect of the Channel 4 Contract. IMS accepts that this formulation of its attack on the Tribunal's alleged error is in effect an alternative way of formulating its first ground alleging an error of law (see paragraph 29 of the application). For the reasons already given in relation to the first ground, the Tribunal finds this ground fails because there was no error of appreciation as regards how this market operates either by OFCOM or by the Tribunal.
30. For all these reasons we unanimously refuse permission to appeal.

Vivien Rose

Michael Blair QC

Paul Stoneman

Charles Dhanowa  
Registrar

Date: 24 July 2008