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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1025/3/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

9th December 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellants

and

THE OFFICE OF COMMUNICATIONS

Respondents

Supported by

THUS PLC AND BROADSYSTEM VENTURES LIMITED

And

N J ASSOCIATES

Interveners

Mr. Gerald Barling QC (instructed by BT Legal) appeared for the Appellants

Mr. Russell Richardson (instructed by the Director of Legal Services (Competition) OFCOM) appeared for the Respondent.

Transcript of the Shorthand notes of
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Hearing to hand down Judgment

1 THE PRESIDENT: In this Appeal, British Telecommunications PLC v Office of Communications
2 supported by Thus PLC and Broadsystem Ventures Limited and NJ Associates, the Tribunal
3 hands down Judgment today. For the reasons given in the Judgment BT's Appeal against
4 Ofcom's notification of 7th November 2003 is dismissed.

5 In case there are further applications or comments to be made now it seems to the
6 Tribunal that there are at least three outstanding points that we should deal with in some way at
7 some point. One is the Tribunal's comments towards the end of the Judgment about the
8 definition of marketing activity and what (if anything) should be done about that.

9 The second outstanding point is the one issue of confidentiality that arises which is in
10 relation to the confidentiality of the script of BT Save Calls which is excluded from the present
11 Judgment and about which the Tribunal has recently had further submissions from BT and the
12 Tribunal has to decide at some point whether in the final published version of the Judgment it
13 says anything about that.

14 The third issue is the matter of costs. It is not entirely accidental that the Tribunal has
15 not yet ruled on the issue of costs in another regulatory case (the case about Radio Station
16 Backhaul Circuits) in which BT was the successful Appellant, whereas in this case BT is the
17 losing Appellant. It seems to the Tribunal that in some ways there are parallel issues in these
18 two cases which do raise the rather general question of how we should approach the question
19 of costs in this particular regulatory framework. I think in this particular case we have invited
20 submissions on costs by a date in the New Year, but certainly what the Tribunal is wondering,
21 as it were, in the back of its mind, is whether the principles of costs that would apply in
22 orthodox litigation are wholly appropriate to this kind of regulatory litigation which is in a
23 sense an extension of the regulatory system; whether it would not be appropriate in most cases
24 for the various parties – whether regulator or regulated – to support their own costs unless
25 there is some particular reason for deviating from that rule because of the particular
26 circumstances of the case. That is simply a point that the Tribunal has in mind and if the
27 parties in this case would care to bear that in mind when considering the issue of costs in their
28 submissions in that case that, I think, would be helpful to the Tribunal.

29 Are there any applications?

30 MR. BARLING: I am grateful for those indications. I do apologise we did not actually give you
31 forewarning of a short procedural matter relating to time, that is all. Really, I suppose it is
32 brought into focus by the suggestion, or indeed indication, that the parties should put in their
33 submissions on costs and any other consequential matters – that would include, presumably,
34 the matters dealing with the definition of marketing and how one resolves the question that is
35 encapsulated in para.344 of the Judgment – which go to the substance of the case, not just to

1 the question of costs. That being so, we would respectfully ask the Tribunal to extend the time
2 for seeking permission to appeal – I am not saying there would be any Appeal, but it is simply
3 a matter of reserving the position given that in the absence of an extension as Rule 58 is
4 phrased, we would be under an obligation to put in a written application for permission by
5 approximately 9th January ----

6 THE PRESIDENT: You are pushing at an open door, Mr. Barling.

7 MR. BARLING: I am very grateful, Sir. I was hoping the door might be a bit ajar.

8 THE PRESIDENT: It is absolutely swinging on its hinges at the moment! [Laughter]

9 MR. BARLING: Good. Would it be sensible for there to be an extension so that we had a month, as
10 it were, beyond the final order because that would mean that it would encapsulate everything?

11 THE PRESIDENT: It would. We can always amend that later if we need to, but in principle I think
12 it would be right for the Tribunal to extend time for applying for permission to appeal to one
13 month after the Tribunal's final Order in the case.

14 MR. BARLING: I am very grateful.

15 THE PRESIDENT: I think that is a good idea.

16 MR. BARLING: Thank you very much.

17 THE PRESIDENT: Are there any other applications? (After a pause) Thank you all very much.
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