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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1063/3/3/06
1064/3/3/06

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27th June 2006

Before:
SIR CHRISTOPHER BELLAMY
(President)
LORD CARLILE OF BERRIEW QC
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

– v –

OFFICE OF COMMUNICATIONS

Respondent

And

BRITISH TELECOMMUNICATIONS PLC

Appellant

– v –

OFFICE OF COMMUNICATIONS

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Gerald Barling QC and Mr. Andrew Henshaw (instructed by Group General Counsel, BT Group Plc) appeared for the Appellant.

Mr. Christopher Vajda QC and Mr. George Peretz (instructed by the General Counsel, OFCOM) appeared for the Respondent.

Mr. Brian Kennelly (instructed by Olswang) appeared for The Number (UK) Limited.

Mr. Brian Kennelly (instructed by Clifford Chance LLP) appeared for Conduit Enterprises Limited.

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. The Tribunal standard form agenda has
2 been circulated. The first matter to regularise the procedure is the question of the
3 interventions. We have Conduit Enterprises Ltd and The Number (UK) Ltd. I gather there is
4 no objection to the interventions as such; I think there is one point on confidentiality that you
5 raise, Mr. Barling, for BT. I take it you have no point on that confidentiality issue, Mr. Vajda,
6 would that be right?

7 MR. VAJDA: That is a matter that arises out of BT's Notice of Appeal so we take an entirely
8 neutral view on that. The Tribunal will of course have had the benefit of reading our skeleton.
9 We would respectfully submit that the matter should be stayed and then one can ----

10 THE PRESIDENT: Yes, we have not got there yet, you have to let them in before they have any
11 status to comment on anything.

12 MR. VAJDA: Well we have proposed that it be stayed prior to the intervention and the question of
13 intervention can then be considered at a later stage, but I am not going to press the point any
14 further. I have made a point in the written submissions, and the Tribunal has the point.

15 THE PRESIDENT: Thank you very much. I think it is nonetheless appropriate to admit the
16 interventions. Yes, Mr. Barling?

17 MR. BARLING: Sir, it may be a question on terms, I do not know. Can I make it clear – I am now
18 referring to para.5.3 of our response to the agenda items – we do not for our part mind any
19 Interveners seeing the Thomson/BT documents that we refer to there. We were just being a
20 little cautious because of Thomson's position. As it turns out they have not made an
21 application to intervene themselves so they are not here. We raise only raise this, as it were,
22 for anyone to make a comment as to whether the documents, which would normally go to these
23 Interveners (if they are given permission) should go without Thomson having the opportunity
24 to make some comments as to whether it should be ----

25 THE PRESIDENT: Quite, well we do not have Thomson here and I think, Mr. Vajda, it would
26 normally be for Ofcom to be protecting the interests of parties who are not represented here?

27 MR. VAJDA: Certainly we can go and ask Thomson about it. The reason that we do not have a
28 particular concern about it is because these are documents that BT put in itself, but I am very
29 happy ----

30 THE PRESIDENT: The only question would be if there could be an objection from Thomson if
31 these particular documents went to either of these Interveners?

32 MR. VAJDA: Yes, well I am perfectly willing to undertake on behalf of my clients that if the
33 Tribunal is minded to accede to such an approach to write to Thomson to ascertain what their
34 views are on these documents, given that this Appeal is not so far as I can see going to be

1 proceeding at the speed of light, I am sure it is not going to delay things. Then Ofcom will
2 write to Thomson and then we will inform the Tribunal and the parties as to their position. If
3 there is an issue as to that that can be resolved in due course.

4 THE PRESIDENT: I think the right order at this stage is that these two parties should have leave to
5 intervene; that the Notices of Appeal and their attachments should be served on the Interveners
6 with the exception of the documents identified at para.5.3 of BT's submissions for this hearing,
7 and Ofcom will, in the meantime, contact Thomson to see if there is in fact any objection to
8 those documents reaching the Interveners.

9 I think, Mr. Vajda, on the general point, if I may just conclude the train of thought that you had
10 already raised – perfectly properly – whether this Appeal proceeds or not it is probably
11 desirable that the Interveners have sight of these documents and that is the main effect of the
12 intervention and probably at this stage the only effect of the intervention but they at least have
13 them, and that is probably a transparent way of dealing with the situation.

14 MR. VAJDA: Yes, obviously a concern of the Office is to ensure that costs are kept to a minimum.

15 THE PRESIDENT: Yes, of course, very well. I think it is probably equally non-contentious that
16 insofar as these Appeals do go anywhere they proceed in parallel. They raise similar issues,
17 but the main question is what do we do now with these particular Appeals? On that point, Mr.
18 Barling, I wonder if you could, by way of background, help us on two issues just so that we
19 can try to understand what is going on in this case?

20 MR. VAJDA: Yes.

21 THE PRESIDENT: It may be useful certainly if there are any further proceedings in due course.
22 Your position, as I have understood it at least, is that as far as the legal basis of this dispute
23 investigation is concerned, you apparently accept that Universal Service Condition 7 is *ultra*
24 *vires*, as Ofcom has apparently been advised, and you contend that General Condition 19 for
25 various reasons is not a legal basis for proceeding with an Ofcom investigation or a dispute
26 resolution.

27 MR. BARLING: There is a nuance in the Conduit case.

28 THE PRESIDENT: There may be a difference between the two, I accept that.

29 MR. BARLING: But basically that is the argument, yes.

30 THE PRESIDENT: So I suppose the first question that occurs to anyone coming fresh to this case is
31 on what basis is this administrative procedure continuing at the moment, and is there any legal
32 advantage in determining what that basis is before one gets into the substance, that is the first
33 question. Related to that, I think, is the second question, namely, how do you see the purpose
34 of having started these Appeals?

1 MR. BARLING: Yes.

2 THE PRESIDENT: The Tribunal, of course, being conscious that one does not want to have
3 unnecessary litigation but, on the other hand, the definition of “decision” seems to be fairly
4 widely drawn under the Act. So I do not know if you can just help us in general on those
5 background matters?

6 MR. BARLING: If I could take the second point first. Sir, as you rightly say “decision” appears to
7 be very wide under the Act. We could not persuade ourselves therefore that this particular
8 decision (i.e. the decision to extend the scope of the original dispute, which was admittedly
9 under Universal Service Condition No.7 and a “dispute” under General Condition No.19)
10 could be possible; we could not persuade ourselves that that was not a decision ----

11 THE PRESIDENT: That it was not a decision within the meaning of ----

12 MR. BARLING: Yes.

13 THE PRESIDENT: I have got it. It is s.192(1)(a) and 7(a). It is useful to explore these things
14 because this is a jurisdiction with which we are all developing our familiarity, so we might as
15 well profit from the occasion to deepen our knowledge.

16 MR. BARLING: We could not, as it were, decide that it was safe to assume – perhaps I can put it
17 that way – that it was not a “decision”. Certainly, it did not appear to be a decision specified in
18 Schedule 8, and it did appear to be a decision loosely so-called “under this Part”.
19 Of course, that raises a concern on everyone’s part, obviously not least our own. We do not
20 want to have to go appealing every conceivable decision procedurally in the course of a
21 procedure Ofcom has to make. This seemed to be in a rather different category from many of
22 those types of decisions because it appeared to be definitive in certain factual respects, e.g.
23 precedent fact appeared to be the springboard – having made certain findings – from which
24 they leapt to the conclusion that they could extend the dispute to cover GC19 and also because
25 the position seemed to be so clear, in our view, that there having been no request under GC19
26 there could not be therefore any obligation in respect of The Number – The Number is the
27 most obvious case here.

28 THE PRESIDENT: Yes.

29 MR. BARLING: There has never been a request to provide information under GC19.

30 THE PRESIDENT: No, there may have been at least a later request in the case of Conduit.

31 MR. BARLING: So Conduit raises a similar issue because of the back dating point which I do not
32 think we need to go into at the moment.

33 THE PRESIDENT: Yes.

1 MR. BARLING: So not having been able to decide and convince ourselves that it was not an
2 appealable Decision and having regard to the Rules – just running your eye down s.192(4):
3 “The Notice of Appeal must be sent within the period specified in relation to the Decision
4 appealed against”, that then is specified, of course, in the Tribunal’s own Rules which provide
5 for a period of two months from the date of the Decision.

6 THE PRESIDENT: Yes.

7 MR. BARLING: So the motivation for bringing the Appeals when we did was simply to prevent an
8 argument being put, either by Ofcom, or by anyone else who might intervene, that we were out
9 of time should we raise it later, and specifically in the context of any Appeal from the final
10 determination we were out of time to raise these particular points.

11 That, in a nutshell, was the motivation.

12 THE PRESIDENT: Did you wonder whether that could be sorted out in correspondence in some
13 way beforehand?

14 MR. BARLING: Well we did – I do not think there is any secret about this – we had discussions and
15 it may be that we could have got some comfort from Ofcom, but the feeling was that it would
16 be far too difficult not knowing who might intervene ultimately in any Appeal from the final
17 determination to try and get comfort in respect of anyone who might intervene in that way. So
18 the view was taken that the work probably would not be wasted because if there were to be an
19 Appeal by anybody from the final determination this work might have to be done in any event
20 and therefore for that reason would not be wasted and we would be protected in the meantime.
21 Therefore, it follows from that – dealing with your first point – that we for our part see no
22 particular benefit now in taking this matter forward separate from any Appeal from the final
23 determination.

24 THE PRESIDENT: Why are you going along with the procedure leading to the final determination
25 if, in your view, there is no legal basis for it whatever?

26 MR. BARLING: One reason of course is that there are three matters, there are the two alleged
27 disputes about GC19 but there is also a different animal, a complaint by Thomson.

28 THE PRESIDENT: Which we do not have in front of us.

29 MR. BARLING: No, and there may be other ramifications too but it seemed to us on any view that
30 Ofcom was going to be in a position where it was looking at the substantive questions and we
31 could not prevent that by challenging the legal base on these disputes at this stage.

32 THE PRESIDENT: Although the consequences that might flow from such an investigation might
33 vary according to which legal basis they are looking at under.

1 MR. BARLING: Sir, you are absolutely right, Ofcom does have slightly different powers depending
2 on whether it is resolving a dispute or resolving a complaint, but it did seem to us that the
3 matter one way or another was going forward. These points were important enough that one
4 should ensure that they could play a part and be resolved if necessary in any subsequent appeal
5 from that determination.

6 THE PRESIDENT: Just to help us (or help me) on that last point about the powers, the dispute
7 powers really arise under 185 through to 190 – is that right?

8 MR. BARLING: Yes.

9 THE PRESIDENT: Which include, under 190 in particular, various powers to order various
10 adjustments to payments and things of that sort?

11 MR. BARLING: Yes.

12 THE PRESIDENT: The other power you mentioned, not engaged apparently by this provision, is a
13 power we find where?

14 MR. VAJDA: It is s.94.

15 THE PRESIDENT: It is the general enforcement power?

16 MR. BARLING: Yes, thank you, I am grateful.

17 THE PRESIDENT: So it is the dispute power and the general enforcement power.

18 MR. BARLING: Yes, exactly.

19 THE PRESIDENT: Yes, we have the framework.

20 MR. BARLING: So for those reasons, and given also that they slightly point as to whether there is
21 anything now that should be tried, our feeling is that it is better in a way to roll these over.
22 Where we do perhaps have a slightly different take on it than the one that has been mentioned
23 by Ofcom in their written submission is as to precisely what the order would be. We would be
24 in favour of continuing whatever we have now as to whether it would be a stay or an
25 adjournment pending the final determination, because then there would be a two month period
26 where people would be looking at it and people could decide whether or not they want to
27 appeal it. Then, no doubt, there would be a CMC and in any appeal, by whoever the Appellant
28 might be, and we would have thought it would be appropriate that these Appeals should come
29 on at the same time, rather than as Ofcom appear to be suggesting in their written material, that
30 these Appeals be stayed until after any Appeal from the final determination has been resolved.
31 We see no reason why one needs to kick it into the long grass for ever; it would be better to let
32 every one look at it and decide on the best way to go forward once we know what the final
33 determination is.

1 THE PRESIDENT: Well let me share with you our provisional thinking and then Mr. Vajda can
2 come back in a moment. The procedural situation as of today is simply that the time has been
3 extended generally for the lodging of the Defences, that is the only procedural step we have so
4 far taken. We had thought that we would simply extend that order to some appropriate date
5 and then probably at an appropriate time have a further case management conference to review
6 the position. What we had in mind, I think, was extending time for the Defence generally up
7 until the date for a case management conference to be fixed and the date we had provisionally
8 in mind for that was Tuesday, 10th October which, assuming Ofcom adheres to the indicated
9 timetable, would give a period after the determination of this dispute before people came back
10 to the Tribunal and we saw where we were; that of course does not at all rule out the possibility
11 of people writing to us in the meantime to update us, to suggest changes, and generally to
12 avoid unnecessary too-ing and fro-ing. That is our provisional thinking at the moment.

13 MR. BARLING: Sir, we have no particular problem. I suppose the only thing that could be said,
14 assuming they keep to their timetable ----

15 THE PRESIDENT: Can I just remind myself what that timetable is at the moment?

16 MR. BARLING: I think it is about mid-September, is it not?

17 THE PRESIDENT: Yes, it would be about mid-September.

18 MR. BARLING: So assuming they keep to that timetable, and there is a final determination then,
19 people would not have had to take a final view on what (if anything) they want to appeal until
20 two months from then. The only question is whether it is beneficial to have a CMC, as it were,
21 before they have taken a view and put in their Notice of Appeals, or as the Tribunal is currently
22 minded have a CMC in these Appeals prior to people having to take a view.

23 THE PRESIDENT: Yes, I see that.

24 MR. BARLING: I suppose they will probably be able to give an indication of what they are minded
25 to do but they will not have done it. We just throw that in in case you feel that makes a
26 difference.

27 THE PRESIDENT: On this timetable, and the timetable of course is just an indicative timetable at
28 the moment, that would mean that any Appeals would be in by mid-November roughly
29 speaking.

30 MR. BARLING: Yes.

31 THE PRESIDENT: Which, in the normal course, would mean that we have a CMC three weeks'
32 after that to consider the situation generally both in the new Appeals and on to that we could
33 tack the existing Appeals.

34 MR. BARLING: Yes, and so you could look at everything then in the sure knowledge ----

1 THE PRESIDENT: Which takes us to December, which is quite a long way away from where we
2 are now.

3 MR. BARLING: It is, that is true, but of course if it turned out that everyone was terribly happy
4 with the final determination and there were going to be no Appeals ----

5 THE PRESIDENT: Yes, well there are always grounds for optimism I suppose. (Laughter)

6 MR. BARLING: -- we could write for an earlier CMC.

7 THE PRESIDENT: Yes, things can be done by consent, or whatever.

8 MR. BARLING: I have thrown it in just in case it makes a difference to your thinking.

9 THE PRESIDENT: Yes, thank you. Yes, Mr. Vajda, do you have any observations on the first two
10 points we made, or otherwise we can discuss the timetable?

11 MR. VAJDA: If I can make some brief observations on the first two points? This is not a case where
12 BT has sought effectively to stop the procedures of an *IBM*-type case, and indeed that was one
13 of the reasons that we wondered what the purpose of this Appeal is. As Mr. Barling has quite
14 fairly pointed out, and we pointed out in our skeleton – there was a meeting between BT and
15 Ofcom where we said there would be no point taking on BT's point, which I can understand at
16 present although we do not accept it is right – that even if Ofcom did not take the point one of
17 the Interveners might take the point.

18 THE PRESIDENT: Somebody might, yes.

19 MR. VAJDA: Somebody might. That is why I think all the parties agreed that really this case should
20 not go off on effectively admissibility issues and so on until we see what is happening on the
21 main case.

22 THE PRESIDENT: Yes

23 MR. VAJDA: So far as timetable is concerned, if I could say two things. First, as you cautiously
24 indicated that is the 'indicative' timetable, and it is certainly the intention of the Office to stick
25 with this, but I was told shortly before coming into this room at 2 o'clock that there may be a
26 slippage of a week or two because, as you can imagine, this is a hotly contested matter and the
27 Office is receiving submissions from everybody left, right and centre. Certainly it is the
28 intention to hit the mid-September date, but it would be wrong for me to give the impression to
29 this Tribunal that the Office will, in fact, do so. It will certainly use its best endeavours but I
30 am flagging up that there may be a risk of a short further delay.

31 That brings me to the second point, and in that I agree entirely with the way Mr. Barling put it
32 in terms of timetable, because I would agree with what he said that it would be sensible for the
33 next CMC in this case to be after the Notices of Appeal are in in the substantive case, assuming
34 pessimistically that our Decision is not so perfect that nobody wishes to appeal it. That would

1 also have the advantage in so far as – if I can put it like this – an admissibility point is taken
2 by, say, one of the interveners, well it would not have that advantage because at that stage if
3 we just had the Notice of Appeal we would not actually know what the position of the
4 Interveners was, but no doubt the Interveners would be present at that CMC and there could be
5 discussion as to whether or not there was going to be an admissibility point because plainly the
6 real issue in this Appeal is really, if you like the admissibility point because all the other points
7 will be subsumed in any substantive Appeal. So I would support what Mr. Barling said in
8 terms of timetable. I might respectfully submit that it may be perhaps premature to actually fix
9 a date, although that is obviously a matter for the Tribunal, because any date should really be, I
10 would have thought, at least, say, two weeks after the two month period of putting in the
11 Notice of Appeal on the substantive matter. Of course, there are a number of possibilities.
12 One possibility is that in fact everybody will appeal on different grounds.

13 THE PRESIDENT: Yes, the possibility of there being Appeals from the Interveners in the case we
14 are concerned ----

15 MR. VAJDA: Indeed.

16 THE PRESIDENT: --or on part of the case, or something.

17 MR. VAJDA: Exactly. There is possibly a greater likelihood that the Interveners will actually be
18 Appellants in the main case. If that is the case and they raise an admissibility point of the sort
19 that troubles Mr. Barling then the Tribunal will be in a position to decide how that is to be
20 addressed in the substantive proceedings and how, if at all, these proceedings should be
21 allowed to proceed. I am sorry it is a rather long answer to the question.

22 THE PRESIDENT: No, no. I think in general we are always anxious to get dates into diaries, they
23 can always be provisionally changed later.

24 MR. VAJDA: On that basis I would respectfully submit that if we work on the sort of timetable that
25 Mr. Barling put forward, which would, in fact, take us to a date in early December – that is a
26 long way away, but one has to bear in mind is there any point in fixing a date earlier when
27 people are still busily drafting away? If there is further slippage and effectively that date may
28 not be as useful as we had anticipated we would wish to keep open the possibility that we
29 could notify the Tribunal.

30 THE PRESIDENT: Yes, well obviously you can always do that, keep us informed. Can I just ask
31 whether the proceedings that are going on involve the two Interveners we have here today but
32 also apparently a complaint from the Thomson organisation, is that right?

33 MR. VAJDA: That is right, yes, and the Office is seeking to deal with them all at the same time,
34 although it is a different regime, as Mr. Barling said, the substantive issue is the same.

1 THE PRESIDENT: So there maybe some proceedings involving Thomson that we do not yet know
2 about?

3 MR. VAJDA: Yes.

4 THE PRESIDENT: I think probably the only serious point that arises for decision at the moment is
5 whether to fix a date for a CMC and, if so, when?

6 MR. VAJDA: Yes, and we would certainly go along with your suggestion, Mr. President, that
7 probably the most convenient course is just to extend time generally for the Defence because
8 that gives the Tribunal and the parties maximum flexibility as to how one should deal with the
9 Appeal. We have obviously flagged up some points of principle but we do not need to deal
10 with them today and they may not arise, we just do not know.

11 THE PRESIDENT: No, quite, and similarly we extend the time generally for the Statements in
12 Intervention until after some indeterminate point after the Defence.

13 MR. VAJDA: Yes.

14 THE PRESIDENT: Yes, thank you.

15 (The Tribunal confer)

16 THE PRESIDENT: What we are minded to do is to fix 12th December in lieu of the earlier date that
17 I mentioned, which I think was 10th October. That date can clearly be subject to change if
18 developments warrant it, but at least we have a date, albeit some time in the future, which will
19 constitute a certain focus for the further proceedings in this case and let us hope we can,
20 generally speaking, stick to the envisaged timetable as much as possible.

21 MR. BARLING: I am grateful, Sir. There is just one point I ought to mention before I forget. It
22 relates to a point we have already dealt with concerning the Interveners having the documents.
23 I should have mentioned that we do quote from those documents in the Notice of Appeal and
24 so it may be ----

25 THE PRESIDENT: The Thomson documents?

26 MR. BARLING: Yes, there is very little of it so it may be that redacted versions – we could point
27 out to Ofcom ----

28 THE PRESIDENT: Is there anything that you are quoting from that is actually confidential? The
29 document in itself might be confidential but is the quote?

30 MR. BARLING: It is very hard to know what Thomson would say, I suppose.

31 THE PRESIDENT: But it is difficult if they are not here, is it not? Are you able just to put your
32 finger quickly on what you have in mind?

33 MR. BARLING: Yes, it is really from para.73 onwards, I think.

34 THE PRESIDENT: Oh, this is the signalling to the industry?

1 MR. BARLING: Yes. There is a quote in para.77 from a Thomson letter and also in 82, and then
2 we quote from BT's reply in para.83, and refer to Thomson's reply in para.84. Now, it may be
3 that Thomson simply have no problem with those. Is one way forward this – would it be the
4 Tribunal who would normally send it to the Interveners?
5 THE PRESIDENT: Well we do on occasions – send it to the Interveners?
6 MR. BARLING: Yes. I am trying to think who normally supplies them with the documents.
7 THE PRESIDENT: We do, the Tribunal does.
8 MR. BARLING: So what we could do, as it were, is supply you with a redacted version just for this
9 purpose – I see Mr. Dhanowa is nodding.
10 THE PRESIDENT: Yes, we are probably bending over backwards to be kind to Thomson, but it
11 would probably be better to do it.
12 MR. BARLING: It will not require much redaction.
13 THE PRESIDENT: No, if you would send us non-confidential versions of the Notice of Appeal.
14 MR. BARLING: From the Thomson perspective, yes.
15 MR. VAJDA: We are very happy to do that but given that it will just involve further cost and effort,
16 we will write to Thomson – unless the Interveners need this document in the next week or two,
17 we may get an answer before then.
18 MR. KENNELLY: Sir, I appear for Conduit and The Number. We are content to wait for Ofcom to
19 carry out the discussion which they are proposing to carry out which seems to me to be
20 necessary in any event and so it seems, certainly from our point of view, that the best course of
21 action is that outlined by Mr. Vajda, namely to have that discussion with Thomson and then to
22 supply us with the documents.
23 THE PRESIDENT: Yes, thank you very much, Mr. Kenelly.
24 MR. KENNELLY: While I am on my feet ----
25 THE PRESIDENT: Yes please, I had not forgotten you.
26 MR. KENNELLY: -- just to confirm that permission to intervene seems to be unopposed ----
27 THE PRESIDENT: That is the case.
28 MR. KENNELLY: And also that the Appeals be heard together not consolidated.
29 THE PRESIDENT: Yes, that is right.
30 MR. KENNELLY: In terms of the timetable, for what it is worth, our voice is smaller than the parties
31 on either side, but we agree, we think it is sensible to have a CMC fixed in early December
32 once Notices of Appeal (if any) have been lodged.
33 THE PRESIDENT: Thank you very much indeed. Well let us proceed on that basis. We will not
34 serve the Notice of Appeal on the Interveners until we have heard from Ofcom, and if you

1 | would just keep us up to date with what is going on in that. If there is undue slippage we may
2 | have to revisit the problem but that can be done behind the scenes.

3 | MR. VAJDA: Yes.

4 | THE PRESIDENT: Is there anything else that we need to discuss? Anything else from the parties?

5 | Thank you all very much indeed.

6 | (The hearing concluded at 2.35 p.m.)