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

Case No: 1079/3/3/07

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

16<sup>th</sup> July 2007

Before:  
LORD CARLILE OF BERRIEW QC  
(Chairman)

ANN KELLY  
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**BRACKEN BAY KITCHENS LIMITED**

Appellant

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

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Mr. Edward Mercer (of Taylor Wessing) appeared for the Appellant.

Mr. Tim Ward and Mr. Ben Lask (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

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**HEARING**

1 THE CHAIRMAN: We have some preliminary and housekeeping points. This is the first occasion  
2 on which the Tribunal has dealt with case management of an appeal on the papers, as we have.  
3 We would like to thank the parties very much for their co-operation in this regard. The  
4 Tribunal considers that in cases like this appeal this kind of approach is both cost effective and  
5 a proportionate use of the Tribunal's time.

6 I am grateful too – as is the whole Tribunal – to the parties, particularly to OFCOM who I  
7 think produced it, for this agreed bundle of authorities. I do have a brief comment, however,  
8 about that which is slightly less felicitous. When I received the bundle of authorities last week  
9 I took the time to go through it and it was quite a lengthy process. It was a lengthy process  
10 because no particular parts of almost all the cases had been flagged up for a special  
11 consideration and it made it a much more laborious process than might otherwise have been  
12 the case. Had we been, which of course we are not, the Court of Appeal or the Divisional  
13 Court then there would have been something approaching a modest intellectual riot from the  
14 court at being forced to go through a process demanding many hours of time when perhaps  
15 looking at flagged parts might have taken just a couple of hours; so that is a plea from the  
16 trenches, as it were, for the future and I am sure it will be taken on board.

17 MR. WARD: It most certainly will, Sir.

18 THE CHAIRMAN: Thank you very much, Mr. Ward. We would like to thank the parties for the  
19 written submissions that you have lodged and you must assume that the Tribunal has read  
20 those submissions. We would like to thank OFCOM also for the consolidated index – again  
21 you can assume the Tribunal is familiar with the contents of both the appeal and the defence  
22 bundles. If there is any additional material that either party wants to insert into the authorities'  
23 bundle I am sure it will be handed to us at the outset.

24 Next, I want to turn to the fax from OFCOM to the appellant's solicitors sent at 7.55 p.m. on  
25 12<sup>th</sup> July in respect of the erroneous turnover figures contained in the Carphone Warehouse and  
26 Toucan penalty notices, those notices having been issued we believe on 30<sup>th</sup> January 2007. A  
27 number of issues arise on which the Tribunal would be willing to be addressed arising from  
28 that although we are always more than willing not to be addressed on something too.

29 (1) Arising from that correspondence does anyone want us to have regard to those  
30 figures in this hearing?

31 (2) If so, why? What is the relevance (if any) of the Carphone Warehouse and  
32 Toucan turnover figures to the current appeal and if so is there any further process  
33 that needs to be done in relation to those figures.

1 (3) Are there any issues as to third party confidentiality in respect of the contents of  
2 the OFCOM letter? I feel reasonably sure that that will have been considered, but  
3 we might like some reassurance on that.

4 (4) It is apparent from the consolidated index that even the non-confidential i.e. the  
5 published versions of those penalty notices were not put before the Tribunal. We  
6 now have copies of the published versions of those penalty notices, but we have  
7 not all had the opportunity of reading them in advance of the hearing today and  
8 we need to know whether you want us to read them in advance, reluctant as we  
9 are to adjourn for any purpose.

10 (5) It seems to us from the conclusion of the *Makers* and *JFE Engineering* Judgments  
11 in the authorities' bundle that OFCOM may have been in a position to inform the  
12 appellant and the Tribunal earlier of the errors and if there is any argument about  
13 that issue we would be happy to hear it.

14 I understand there may be some brief preliminary submissions to be made but I would urge  
15 upon the parties that we really did intend to case manage this case in the way in which we have  
16 and we hope that there is not going to be any undue delay before we start to deal with the very  
17 deliberately time limited arguments. Mr. Mercer?

18 MR. MERCER: I have a couple of things to say, if we continue merely reduce the next few minutes  
19 off what I was going to say anyway, and the time I was going to use. My difficulty is this, Sir,  
20 you will notice that I am here practically alone, and that is because we have not had contact  
21 with this client since we finished the substantial rounds of pleadings, except for one letter that  
22 arrived not addressed to me but to my firm's accounts' department, and which probably  
23 explains their silence, and I have copies of that for the Tribunal. (Document handed to the  
24 Tribunal) I should say, Sir, at once that OFCOM have not seen this letter. That is deliberate.  
25 It was our original intention to send it to them, but we took the advice of the Solicitors'  
26 Regulatory Authority helpline whose view was in fact the same as ours in the end, which is  
27 that this is a matter of confidence, and we had no instructions to release it. My position, Sir, is  
28 this: I have no current instructions. I have not, on our understanding of things, been able to  
29 effectively terminate my retainer.

30 THE CHAIRMAN: Forgive me for interrupting you, Mr. Mercer, but I cannot see a date on this.

31 MR. MERCER: It arrived about ten days ago, Sir.

32 THE CHAIRMAN: Why was the Tribunal not told of this ten days ago?

33 MR. MERCER: Because we were trying to make contact with the client. The fact that the client  
34 has that difficulty would not necessarily, Sir, mean that we would have to withdraw.

1 THE CHAIRMAN: But, would it not have been a good idea for the Tribunal to be warned of this  
2 difficulty?

3 MR. MERCER: But we had no instructions to be able to do so, Sir. That is our difficulty. We could  
4 not be instructed to do so, and we could not do it of our own volition. The position is this:  
5 though the client has not been in touch with us, on one view we have not been effectively able  
6 to terminate our retainer, and therefore the most sensible position, having discussed this with  
7 the SRA, is for me to continue to this morning because I have no instructions either to  
8 withdraw or to seek leave to withdraw. The matter is current before the Tribunal, and in the  
9 light of my duties to the Tribunal and, indeed, to the client ----

10 THE CHAIRMAN: Are you in funds, or not?

11 MR. MERCER: No, sir.

12 THE CHAIRMAN: I am concerned whether OFCOM know even what we are talking about  
13 because if they do not -- this is a public court and at least a word or two needs to be said so that  
14 they know what submission they are meeting.

15 MR. WARD: Mr. Mercer said to me before you came in more or less what he has said openly this  
16 morning. We have not seen the letter. Obviously we are putting two and two together, but, no,  
17 we do not understand the position in full.

18 THE CHAIRMAN: Mr. Mercer, is it not right, that the first sentence of this letter, bearing in mind  
19 this is a public hearing, should be read out so that everyone understands what we are talking  
20 about?

21 MR. MERCER: Yes, sir.

22 THE CHAIRMAN: Your submission is based on a letter you received ten days ago from a director  
23 of the company, advising that Bracken Bay Kitchens Ltd. is unable to pay its debt due to your  
24 firm or to other creditors and that effectively it is insolvent. That is what we are talking about.

25 MR. MERCER: That is what we are talking about, Sir.

26 THE CHAIRMAN: You will be in a much better position to make representations as to this, but is  
27 it not implicit in the arrangements a solicitor has with his or her client that if the client fails to  
28 put them in funds or give instructions when reasonably required, then the solicitor is entitled to  
29 apply to come off the record?

30 MR. MERCER: That is so, Sir. You are entitled to terminate the waiver by notice. One of the  
31 difficulties in these circumstances for solicitors all the time is what is an appropriate period of  
32 notice in the circumstances, and, indeed, whether you have been able to effect notice simply by  
33 sending something to a registered office you know, in fact, is not indeed inhabited any longer.  
34 So though we have made strenuous efforts by contacting all of the directors at their home

1 addresses, and, indeed, having had letters courier-ed to their home addresses and delivered by  
2 hand and by person, we have had no response.

3 THE CHAIRMAN: I think your attitude is absolutely commendable.

4 MR. MERCER: It is not actually, Sir. Let me tell you what the problem is. I am afraid I am not  
5 quite as public-spirited as I may seem. I hate to shatter your illusion, but it goes like this: let us  
6 suppose that it is argued that I have not effectively terminated by retainer. Let us suppose that  
7 that company goes in the next couple of weeks into liquidation. It would unfortunately be open  
8 to the liquidator, possibly, to turn round and say, "You should have continued, Mr. Mercer,  
9 with that matter before the court because the creditors would be better off than they are" -  
10 supposing, of course, that there was any measure of success.

11 THE CHAIRMAN: It is a long shot, is it not? I understand your caution, but it is a pretty long  
12 shot. What liquidator is going to sue your firm over this?

13 MR. MERCER: I am tempted to say, Sir, "You would be surprised".

14 THE CHAIRMAN: Maybe you are right (After a pause): So, you are saying that you are simply  
15 informing us of this situation and you wish to continue as per programme?

16 MR. MERCER: That is correct, sir.

17 THE CHAIRMAN: Let us see what Mr. Ward wants to say, if anything?

18 MR. WARD: Sir, our immediate concern, obviously, arising from what we have heard is, "Will we  
19 ever recover this penalty even if we do successful defend it?" It has obviously been prepared  
20 on the basis that it would be fully contested and that there would be an entity to pay at the end  
21 of the day. Obviously, I have a great deal of sympathy for Mr. Mercer and the position he  
22 finds himself in. It is rather difficulty to know what more we can say, in a sense.

23 THE CHAIRMAN: I think maybe you ought to be proceeding - because I have seen the rest of the  
24 letter - on the basis that there is likely to be a compulsory winding-up of the company in which  
25 -- I do not know where OFCOM rank as preferential creditors, but if they do not - and I can see  
26 some heads being shaken in unison behind you - rank as preferential creditors, then their  
27 prospects of getting anything on the face of this letter -- which I think you ought to be show  
28 actually, if I may, Mr. Mercer, although I do not propose that more than the first sentence  
29 needs to be read out in court -- reveal that your chances of recovering anything, even if  
30 successful are slender, to put it at its highest. If you want to take instructions, you can  
31 certainly have time to do so.

32 MR. WARD: I will, if I may, in a moment, Sir.

33 THE CHAIRMAN: There is nodding again.

1 MR. WARD: I will observe at this stage that that may, of course, have had an impact on the  
2 resources that have been put into this case in the last ten days. I would like to take the  
3 opportunity to take the advice of the nodding.

4 THE CHAIRMAN: We will give you a quarter of an hour or as long as you reasonably need, given  
5 that if this case does go on as per programme it is desirable that we should get through the  
6 argument this morning, given that we have read everything and it has all been stated, if I may  
7 say so, so well on both sides.

8 (Short break)

9 THE CHAIRMAN: Mr. Ward?

10 MR. WARD: Sir, in a sense we have two points to make about this. If the appeal proceeds we have  
11 no choice but to defend it, obviously, but it is clear enough from this letter that we will never  
12 get a penny on the penalty if it is upheld, and we will never get a penny of our costs whether or  
13 not the Tribunal would be minded to make an order for our costs in principle. Of course, while  
14 the vast majority of costs have already been incurred there will still be some costs to come –  
15 more costs this morning and indeed some consequential costs depending on whatever decision  
16 the Tribunal produces.

17 As to this letter, I am not here to make submissions on solicitors' conduct or indeed insolvency  
18 law, but looking at the first paragraph of the letter and in particular the words at the opening of  
19 the second line, it seems pretty clear that there cannot sensibly be said to be any continuing  
20 obligation on Mr. Mercer to act for his client if, indeed, the client still exists in any relevant  
21 sense. Now, he cannot withdraw his appeal without the Tribunal's permission, that is Rule 12,  
22 but I make no bones about the fact that we were very reluctant to stand here defending a  
23 penalty which cannot be enforced on behalf of a company that has effectively disappeared and  
24 may reappear in some different guise on another occasion, with or without the benefit of some  
25 kind of Ruling adverse to OFCOM arising out of this appeal.

26 THE CHAIRMAN: So do I understand you to be making effectively two submissions: one, the  
27 utilitarian or pragmatic submission that this is all a waste of time ----

28 MR. WARD: I am most certainly making that, Sir.

29 THE CHAIRMAN: Because in reality if this situation had crystallised the liquidator when appointed  
30 is going to say: "I am not prepared to expend any costs on this even if there is any money for  
31 those costs"; and secondly, you are asking really the question as to why it is at this eleventh  
32 hour that we are given this information?

33 MR. WARD: I raised that point before we rose, Sir. We do suggest there is a role here for the  
34 Tribunal perhaps taking a lead on whether or not there is any function in this, despite their  
35 perhaps theoretical misgivings of Mr. Mercer – I do not wish to exploit his discomfort which

1 must be very considerable indeed – but the rather hypothetical possibility he raised may not be  
2 a good enough reason for us all to spend a day and, indeed the Tribunal to spend its time  
3 deliberating in order to produce its decision.

4 THE CHAIRMAN: Mr. Mercer?

5 MR. MERCER: As far as I am aware from searches, the company has not been struck off the  
6 register, it still exists, and it is in liquidation or administration. As far as its legal  
7 characteristics are concerned, they are the same today as they were when the last set of  
8 pleadings were entered.

9 THE CHAIRMAN: But if this company is as it says in the words that have just been referred to by  
10 Mr. Ward, fourth paragraph: “The company has now ceased trading”, is the presentation of  
11 litigation a form of trading, or part of a trading of the company. What worries me is that by  
12 this going ahead, given what you have told us about seeking to inform the company and obtain  
13 instructions it may actually be unlawful vis-à-vis the company and the directors for this  
14 hearing to take place at all. I do not for the life of me at this stage understand why you have  
15 any problems about applying to be taken off the record if that is what you thought you should  
16 do, the decision not being yours but one for the Tribunal and therefore insulating you at that  
17 point from any criticism from elsewhere.

18 There is also in my mind a serious problem as to why we have really had to wait until this  
19 morning when we came ready for hearing – given that the Tribunal I know tried to contact  
20 your office and obtained no response on Friday – to hear this piece of undoubtedly sad news  
21 about your clients.

22 MR. MERCER: To deal with one issues first, Sir, which is that the duty of the directors of the  
23 company, it having ceased trading and being insolvent, their duties are now to the creditors. If  
24 this fine is reduced then they will have done their duty to the creditors because if there are any  
25 funds (they are saying there are not) the amount that is available for any distribution would be  
26 greater.

27 THE CHAIRMAN: But you know as well as I do that the decision as to whether or not to continue  
28 litigation once there is a liquidator is for the liquidator. They are also expending money – at  
29 least hypothetically – on your deploying your undoubted skills here today.

30 MR. MERCER: That would be a matter for the liquidator in their situation, Sir, yes. But there is no  
31 liquidator.

32 THE CHAIRMAN: But what is the purpose of these proceedings continuing today? Would it not be  
33 better for us to adjourn these proceedings for, say, a month so that the situation could be  
34 crystallised. Otherwise we are going to have an arid argument which could produce a decision  
35 which is not based on full instructions on your side; your lay clients may have something to

1 add in the light of events that have taken place since you last received instructions from them,  
2 and the Tribunal may then produce its first Judgment on an issue of this kind without being  
3 fully apprised of all the relevant submissions.

4 MR. MERCER: I would find it difficult to oppose an application by Mr. Ward for an adjournment.

5 THE CHAIRMAN: Mr. Ward?

6 MR. WARD: Sir, our preference is that the appeal be discontinued for the reasons that we have  
7 outlined, but we of course prefer an adjournment rather than to proceed today with – I think  
8 you used the word, Sir, “arid” – what would undoubtedly be an arid exercise on present  
9 instructions. Of course, my clients will consider whether there is anything they can do to  
10 enforce the penalty which has not been enforced pending these proceedings – it may be that the  
11 opportunity has now been lost.

12 THE CHAIRMAN: Because in this species of proceedings the penalty is not suspended, is it ?

13 MR. WARD: In fact there was an agreement that it would not be enforced.

14 THE CHAIRMAN: But it could have been enforced.

15 MR. WARD: It could have been enforced, yes. But for a range of reasons it was not.

16 THE CHAIRMAN: There are many dissimilarities between this procedure and a fining procedure of  
17 which that is one.

18 MR. WARD: Yes.

19 THE CHAIRMAN: I think we will adjourn for a few minutes again – forgive me for doing it that  
20 way – so that we can have a discussion in private. We will tell you when we are ready.

21 (Short break)

22 THE CHAIRMAN: The Tribunal this morning, for the first time was handed a letter signed by a  
23 director of the appellant company, Bracken Bay Kitchens Ltd. That letter reveals that the  
24 company is unable to pay its debt due either to its solicitors appearing here today through Mr.  
25 Mercer or to other creditors. The company is described in the letter as being “insolvent within  
26 the meaning of the Insolvency Act 1986”. It says that the company is in no position to fund its  
27 liquidation. It has no assets with which to fund a liquidation. It has ceased trading and is  
28 sending a letter to the Registrar of the Companies, requesting that the company be struck off.  
29 It is a very unfortunate situation for the company and its directors.

30 As I have said, we were informed of this for the first time this morning. OFCOM, the  
31 respondents to this appeal, were informed of this for the first time when Mr. Weston rose to  
32 address the Tribunal this morning.

33 I speak for all three members of the Tribunal in expressing our strong concern that no  
34 information to this effect was brought to the attention of the Tribunal until this morning despite

1 attempts which I know have taken place during the course of last week to make contact by the  
2 Tribunal with Mr. Mercer's firm about this case.

3 Although Mr. Mercer, commendably, remains willing to continue with the appeal, he has told  
4 us that energetic attempts to obtain instructions from the directors of the company have failed  
5 to produce any response. He therefore appears here with old instructions, but without a client  
6 present and without new instructions which might reflect comments on material that has been  
7 submitted lately by OFCOM, the respondents. I expressed, and agree with, the view that there  
8 is a danger that this could turn into an abstract or arid hearing in which the appellant's case  
9 could not be fully presented, and in which the respondents might not be in a position to meet  
10 the full case, or to meet the existing case fully.

11 We are also concerned that in our view, as an officer of the court, any solicitor has a duty to  
12 ensure that any case before such a court or Tribunal is managed effectively and therefore to  
13 provide material information in good time before the listed hearing of a case. On the face of  
14 it, that just has not happened here. So, what we have determined is the following, and we so  
15 direct,

- 16 (1) that this matter be adjourned for thirty days;
- 17 (2) that the appellant's solicitors, within fourteen days, and in writing, clarify their  
18 position as to whether they wish to remain on the record and/or whether the  
19 appeal is to continue;
- 20 (3) that if they so wish OFCOM reply to those representations within seven days  
21 thereafter;
- 22 (4) that the appellants solicitors make submissions in writing to the Tribunal within  
23 twenty-one days concerning the costs of this hearing and, in particular, as to why  
24 a wasted costs order should not be made. OFCOM to have liberty to respond, if  
25 they so wish - not that they need it, but I thought we would express that;
- 26 (5) that any further case management directions will be given in writing at the end  
27 of that thirty day period to determine how, if at all, this matter proceeds.

28 We will adjourn this matter. I am grateful to you both.

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