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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1080/3/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15th May 2007

Before:
VIVIEN ROSE
(Chairman)
PETER CLAYTON
ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

**ORANGE PERSONAL COMMUNICATIONS
SERVICES LIMITED**

Appellant

- v -

THE OFFICE OF COMMUNICATIONS

Respondent

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Mr. Brian Kennelly (instructed by Field Fisher Waterhouse LLP) appeared for the Applicant.

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

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PROCEEDINGS

1 THE CHAIRMAN: Good afternoon, ladies and gentlemen. I will make some opening remarks
2 setting out how the Tribunal sees the hearing this afternoon.

3 This is an Appeal under s.192 of the Communications Act. The disputed Decision, which is
4 currently the subject of the Appeal, is whether or not OFCOM had jurisdiction to accept the
5 reference of the dispute between Orange and BT over termination charges. As we understand
6 it all sides are agreed that we should not consider that ground of appeal prior to OFCOM's
7 substantive decision which is expected to be published in mid-June – OFCOM have just
8 published draft determinations and are consulting on those.

9 We have received the notice of appeal but time for serving the defence has been extended –
10 that was by letter on 25th April. We have had three requests to intervene in this Appeal and we
11 have indicated that we do not intend to rule on those requests until after the full scope of any
12 challenge to the substantive decision becomes clearer, therefore we propose to adjourn those
13 requests and not to make any further order in relation to them.

14 It therefore remains how best to handle the Appeal at this stage. The Appellants suggested in
15 their letter of 9th May – picking up on a proposal made by OFCOM – that we extend time for
16 service of the Defence generally. They then propose that they be granted permission to amend
17 the notice of appeal to be filed not later than two months after the substantive Decision and that
18 we schedule a further case management conference thereafter. The Tribunal has indicated that
19 it is content with the extension of time for the defence but not with the grant of the permission
20 to amend. The Tribunal invited alternative proposals and it seems that that is the live issue to
21 be determined today.

22 As we understand it OFCOM are not opposed to the draft order suggested by the Applicant but
23 they are also willing simply to adjourn the proceedings. Therefore, I propose that we hear
24 Orange's submissions in relation to how we move forward from here.

25 MR. KENNELLY: Thank you, madam. I appear for Orange and Mr. Lask appears for OFCOM. It
26 is true our position remains that it is open to the Tribunal and it is appropriate to grant the
27 permission to amend so that both Appeals (if we are to appeal the final decision) are heard as
28 part of a single appeal; that is an option that is open to the Tribunal and it does not result in an
29 open-ended extension. As was indicated in the letter sent by Orange to the Tribunal this would
30 follow a strict timetable; the permission would be only for a period of two months following
31 the publication of OFCOM's final determination.

32 Having discussed future case management with my learned friend, Mr. Lask, we propose that
33 there be a CMC not before 16th August 2007 dealing with the matter then, so there is no
34 question of the case drifting. We believe that once it is within the Tribunal's jurisdiction to
35 have it as a single appeal the case management concerns expressed in the letter do not arise.

1 THE CHAIRMAN: I think when the Tribunal referred to it as being possibly an “open-ended”
2 permission to appeal that was not in a timing sense, but in a subject matter sense having regard
3 to the quite narrow grounds for amending the pleadings set out in the Tribunal Rules. It
4 seemed to us to be an unusual step to grant permission to appeal without having any idea as to
5 what the content of the amendments was going to be. I think it was in that sense that we
6 referred to it as open-ended rather than in relation to a concern as to timetable.

7 MR. KENNELLY: I appreciate that, and Rule 11 relating to amendments in my submission is
8 sufficiently broad to cover an anticipated appeal such as the one proposed today. I take the
9 point, madam, that it is very unusual for the Tribunal to grant permission to deal with a matter
10 which is not yet before the Tribunal in any form – not even in a draft form, nor can it be. That
11 is why we are not opposed – it is not our first choice – if the Tribunal is to omit paras. 2 and 3
12 from our directions and simply to adjourn the matter so that we would have to put in a further
13 notice of appeal on the substantive Appeal (if we chose to appeal) then that is not an option
14 that we are necessarily opposed to. The proposal made originally and OFCOM’s suggestion
15 we think is the sensible one; it is open to the Tribunal to make it and we think that rule 11
16 allows you to make that order. But if the Tribunal feels safer in suggesting that there should be
17 a second notice of appeal dealing with the matter then it makes very little difference in
18 practice, and that is certainly the position OFCOM have set out in their submissions and we are
19 not opposed to that.

20 THE CHAIRMAN: I do not think we are opposed to the idea of a future amendment of the notice of
21 appeal, simply to the grant of permission at this stage. If it was left open that would leave it
22 open to Orange at a future stage either to apply to amend the existing notice of appeal or to
23 issue a further notice of appeal and it is that decision which we think it is best to postpone until
24 a later stage.

25 MR. KENNELLY: Madam, that seems to be a sensible suggestion; the option is open and it is
26 something that we will have to revisit then in due course.

27 THE CHAIRMAN: We do want to ensure that the Tribunal and the potential interveners are kept
28 informed as to what is happening, or what is likely to happen once the substantive decision has
29 been issued. That could be achieved I suppose by setting a time for a case management
30 conference or by asking the Appellant to write to the Tribunal and the parties and potential
31 interveners as and when they have taken a decision as to what they plan to do once the decision
32 is issued. Could you suggest a way forward on that?

33 MR. KENNELLY: Yes, madam. Again, we are not opposed to the suggestion of sending a letter,
34 keeping the Tribunal and the parties informed. It may be more proportionate though to deal
35 with these matters at the next CMC so they can be dealt with fully when everyone is fully

1 informed as to the position and, as Mr. Lask and I discussed before this hearing, if that CMC
2 were to be put down at an early stage – subject to what Mr. Lask may say about OFCOM’s
3 timetable – not before 16th August 2007, at that stage we will have the final determination,
4 time to consider it and everybody will be in a position to put forward a considered view. Prior
5 to that it is difficult to see what Orange could sensibly be telling the Tribunal, and so it may be
6 better to wait until that CMC and the observations, for example, that would be put forward for
7 that CMC – that may be the best opportunity to deal with the issues. Certainly, subject to what
8 I hear from my instructing solicitor, that is what I would propose to the Tribunal.

9 THE CHAIRMAN: So you would prefer there to be a date fixed for a future CMC and then in the
10 run up to that effectively the usual exchanges take place between the parties and the Tribunal
11 as to what applications are to be made at that hearing?

12 MR. KENNELLY: Yes madam, precisely.

13 THE CHAIRMAN: Mr. Lask, what do you say about this?

14 MR. LASK: Madam, OFCOM’s position remains essentially as set out in the written submissions
15 submitted last Friday. The principal concern of OFCOM is that this Appeal, and any appeal
16 against the final determination proceed together in tandem, and I do not sense any resistance to
17 that thus far from any of the other parties or from the Tribunal.

18 It follows from that that insofar as listing a future CMC is concerned, OFCOM would prefer
19 that it did not take place any earlier than the middle of August; that of course is subject to
20 OFCOM sticking with its current intention which is to issue the final determination by 9th June
21 – that is the reason we have sought a direction that we have liberty to apply to reschedule the
22 CMC if so required.

23 In relation to the issue of whether the Appellant be granted permission now to amend its notice
24 of appeal or whether that matter be left open we are conscious that it was OFCOM that
25 suggested that course of action in the first place, and we do not wish to entirely abandon the
26 Appellant in that respect but we do appreciate the Tribunal’s concerns and we are fairly
27 relaxed as to the way forward. Indeed, at this stage we do not see any huge disadvantage in
28 simply extending time for service of a defence and scheduling a CMC now.

29 THE CHAIRMAN: Thank you. It might also help the Tribunal if you were able to indicate whether
30 OFCOM has an interest in having the jurisdiction point – by which I mean the question
31 whether a decision by OFCOM to accept a dispute for determination must be challenged
32 within two months to this Tribunal and if it is not so challenged whether it is still a point that
33 can be taken when the substantive Decision is challenged, whether OFCOM has an interest in
34 having that point determined by the Tribunal regardless really of what happens in the
35 substantive decision in this case.

1 MR. LASK: Madam, I understand the issue has arisen previously before the Tribunal and it is
2 OFCOM's position that it would be useful if that matter was addressed at some point by the
3 Tribunal within the context of these proceedings.

4 (The Tribunal confer)

5 THE CHAIRMAN: We will rise for 10 minutes.

6 (The hearing adjourned at 2.15 p.m. and resumed at 2.25 p.m.)

7 THE CHAIRMAN: The Tribunal will make the following orders:

- 8 (1) The time for the service of the Defence is extended until further order;
- 9 (2) Consideration of the requests for intervention will be adjourned until the next case
10 management conference;
- 11 (3) A further case management conference in this Appeal is fixed for 16th August at
12 2.p.m.; and
- 13 (4) Both parties have permission to apply in the event that something crops up between
14 now and then.

15 MR. KENNELLY: We have nothing to add to that, I am very grateful.

16 THE CHAIRMAN: Thank you very much, we will draw up an order in due course and let the
17 parties have it in the usual way.

18 (The hearing concluded at 2.30 p.m.)