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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1102/3/3/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 May 2008

Before:
VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

T-MOBILE (UK) LIMITED

Appellant

- v -

THE OFFICE OF COMMUNICATIONS

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Meredith Pickford (instructed by Lovells) appeared on behalf of the Appellant.

Miss Edyth Cormack (Solicitor, Baker & McKenzie) appeared on behalf of the Intervener Hutchison 3G UK Limited.

Mr. Thomas de la Mare (instructed by Ashurst LLP) appeared on behalf of O2 UK Limited.

Mr. Paolo Palmigiano (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

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

1 THE CHAIRMAN: Good afternoon ladies and gentlemen. You will have all seen the Tribunal's
2 letter of 27th May, and I have seen some at least of the responses to that, and we do seem to be
3 making progress in relation to some of the issues. On the question of the timing of the hearing
4 on the jurisdiction point, assuming everyone is agreed that that should be heard as a
5 preliminary issue, we suggested a date in July and we understand that people are keen to have
6 the date brought forward from that. The Tribunal's current thinking, although this may involve
7 some change in the constitution of the Panel, is that the hearing will be at some point on the
8 days 16th, 17th, 18th June, depending in part on what the time estimate is, and we will come to
9 that shortly. It looks as though it is either then or the date that we initially set – 14th, 15th July.
10 Of course, if it is some time in 16th to 18th June that gives us quite a short period in which to
11 undertake the necessary steps to get ourselves ready for that hearing, but it is by no means
12 impossible.

13 The Rule 15 notice has not yet been published so we have not yet set a time for interveners to
14 make their requests for permission to intervene. Again we envisage that when we do shortly
15 publish the notice we will set a truncated time for interventions on the basis that those who
16 need to know about this probably already do know about it, but again we will need some
17 indication from any potential interveners here today as to whether they have an interest in the
18 jurisdiction point or only in relation to the substantive matters.

19 That is probably enough by way of introduction. Mr. Pickford, would you like to start?

20 MR. PICKFORD: On the issue of timing we are very grateful, clearly, to the Tribunal for seeking to
21 accommodate the express desire for these proceedings to be undertaken relatively quickly. The
22 dates which the Tribunal has just proposed, potentially 16th to 18th June, unfortunately are ones
23 – certainly from T-Mobile's perspective – which would cause considerable difficulty. I do
24 appreciate that ordinarily counsels' convenience is not an overriding factor in the Tribunal but
25 clearly where there is only a very short timetable and timescale in which to prepare for a case,
26 if one is not able to instruct counsel who are currently instructed in the case it may be quite
27 difficult to find someone else who is able to get up to sufficient speed and deal with all the
28 issues in a relatively short period of time prior to 16th to 18th. So certainly from our
29 perspective if it is not possible to find any other date other than the date originally suggested
30 by the Tribunal we would advocate the date originally suggested, the middle of July,
31 notwithstanding that that is perhaps later than would be ideal in all circumstances.
32 I can deal with the issue of interventions – we did have a few words to say about that, but it
33 may be more appropriate to deal with that after we have got to grips with the really pressing
34 issue at the moment, which is when we will have a hearing on the issue of jurisdiction.

1 THE CHAIRMAN: Can you bring me up to date with what is happening in the High Court
2 proceedings?

3 MR. PICKFORD: Yes, madam, the situation there currently is that those proceedings are not stayed.
4 Ofcom has requested that they continue on the basis that obviously Ofcom believes that
5 ultimately that will be the forum in which we hear these issues. We are currently waiting for
6 directions from the Administrative Court in relation to those proceedings. What would clearly
7 be desirable is that the hearing on jurisdiction in this Tribunal is clearly prior to any hearing in
8 the Administrative Court, but I think it is very unlikely, even if the hearing on jurisdiction went
9 until the middle of July, that that would impact at all on any hearing in the Administrative
10 Court. The timetable that is currently envisaged by the parties certainly is not for a substantive
11 hearing in the Administrative Court in July as I understand it.

12 THE CHAIRMAN: And if we decide we have jurisdiction what then happens to the High Court
13 Proceedings?

14 MR. PICKFORD: The High Court proceedings I imagine will be withdrawn and dismissed by
15 consent of all the parties.

16 THE CHAIRMAN: And if we decide that we do not have jurisdiction then that goes on without
17 having to have troubled itself with what was happening here?

18 MR. PICKFORD: That is right madam – at least so far as our appeal and application for judicial
19 review are concerned. The grounds differ to an imperceptible degree, only to the extent that is
20 required for the different forums in which the claims are brought; in essence it is the same
21 claim brought in each forum.

22 THE CHAIRMAN: If we decided that we did not have jurisdiction, and when you arrived in the
23 High Court for the substantive hearing the court said to you: “Should this matter not be heard
24 by the Competition Appeal Tribunal?” and you would say: “They have decided they do not
25 have jurisdiction”, and in your view the High Court is bound by that, or is likely to accept that?

26 MR. HOLMES: Madam, if it would assist the Tribunal, in Ofcom’s view the High Court would, in
27 any event, have jurisdiction whether or not the Tribunal has jurisdiction, it is simply that it
28 would decline to exercise its jurisdiction which is inherent and can control any public body in a
29 situation where the Tribunal has statutory jurisdiction in accordance with the High Court’s
30 usual practice. So it would not be a case that the High Court has jurisdiction because the
31 Tribunal does not have jurisdiction, it is simply that if the Tribunal decides that it does not
32 have jurisdiction the High Court can then exercise its inherent jurisdiction.

1 MR. PICKFORD: We share that position, so we do not see that there should be a problem arising
2 from this Tribunal adjudicating on its own jurisdiction, indeed, we consider – as does Ofcom –
3 that it is desirable for this Tribunal to come to its own view about its own jurisdiction.

4 THE CHAIRMAN: Yes, thank you, Mr. Pickford. On the timing of the hearing perhaps we should
5 try and make some progress on that. Mr. Holmes, where do you stand on that?

6 MR. HOLMES: Madam, the parties canvassed possible dates before the hearing today on the
7 assumption that the defence would be served during the course of next week and, I understand
8 from my learned friend, Mr. de la Mare that O₂ will be lodging a notice of appeal to the
9 Tribunal during the course of next week, we would then propose that it might be appropriate to
10 serve a defence on the preliminary issue which arises in relation to both of the appeals during
11 the course of next week. We have seen the legal grounds that Mr. de la Mare and O₂ intend to
12 rely upon and they do not present any difficulties as currently formulated for Ofcom to respond
13 to them very quickly. We had then assumed that it might assist the Tribunal to have skeleton
14 arguments in a case like this and, assuming that T-Mobile were to put in its skeleton, and O₂
15 were to put in its skeleton at the end of the week after next, i.e. 13th June, Ofcom could then
16 serve its skeleton on 20th June, and we wondered whether the Tribunal might be able to
17 accommodate a date for a hearing on 26th or 27th, the end of the following week.

18 THE CHAIRMAN: Well that is the problem that we have. So you are thinking of 26th and 27th, and
19 is that convenient for you as well?

20 MR. PICKFORD: I should say, madam, that a full day would be quite sufficient, the points are
21 ultimately quite short points of law, but if there were any concern about that one could perhaps
22 set aside two days just in case.

23 MR. DE LA MARE: Madam, if I could just interject at this point?

24 THE CHAIRMAN: Yes, Mr. de la Mare?

25 MR. DE LA MARE: From O₂'s perspective we would entirely endorse that timetable as sensible.
26 We are in the position – myself and my leading counsel, Mr. Pannick, we could do those two
27 days, 26th and 27th, but unfortunately the week of 16th to 18th presents insuperable difficulties
28 for both Mr. Pannick and myself in terms of existing court commitments, so we would very
29 much support Mr. Holmes's proposal as to an orderly exchange of skeletons running up to a
30 hearing on 26th and 27th if the Tribunal could accommodate that.

31 THE CHAIRMAN: Your appeal – we have seen your letter setting out the likely grounds, in your
32 view is the jurisdiction point raised by your appeal on all fours with the jurisdiction point as it
33 has emerged from the T-Mobile appeal, or are there some similarities and some differences?

1 MR. DE LA MARE: We anticipate the point is either identical or very similar. There may be some
2 nuances to particular construction of particular exemptions in Schedule 8 that the basic
3 structure of the argument, namely the direct effect of Article 4(1), the purposive construction
4 of Schedule 8 and, if needs be, disapplication pursuant to superior Community law, but that
5 basic structure of argument is pretty much identical, so we do not really see it adding
6 materially to the complexity of the preliminary issue as already formulated between the two
7 parties as they stand at the moment.

8 THE CHAIRMAN: And are you intending to intervene in the T-Mobile appeal as well as bringing
9 your own appeal?

10 MR. DE LA MARE: That was one of the issues that I had on my menu which was to see if we could
11 negotiate a simple and expedited means to shortcut the usual operation of Rule 16 in terms of
12 declaring one's interest straight away. Of course, we are likely to be interested in T-Mobile's
13 appeal, and T-Mobile is likely to be interested in ours and it is obviously sensible, we think,
14 that the two cases should be joined henceforth from issue onwards, and the parties given some
15 form of sensible right to intervene in each other's appeals, so far as it is advisable to do so.

16 THE CHAIRMAN: And do you have any submissions to make on any other issues?

17 MR. DE LA MARE: No, we fully concur with the analysis as to the position of the Administrative
18 Court. It is a question of whether or not there are alternative statutory remedies which should
19 be exhausted before judicial review, and that is obviously something in respect of which the
20 Administrative Court will defer to the CAT; if the CAT says there is no remedy in the CAT
21 then the Administrative Court will then decide what relief it can grant in those circumstances.

22 THE CHAIRMAN: Thank you. Who is here from potential interveners?

23 MR. PALMIGIANO: Paolo Palmigiano on behalf of BT.

24 THE CHAIRMAN: And what is your position on this?

25 MR. PALMIGIANO: As far as time is concerned, the dates would be perfect for us. In relation to
26 the case we are intervening on the substantive issue, not on the procedural matter, because we
27 are keen that there is no delay to the auction. Our interest is not a point about jurisdiction, but
28 certainly a point on the substantive appeal.

29 THE CHAIRMAN: Yes, thank you.

30 MISS CORMACK: Madam, Edyth Cormack, Baker & McKenzie on behalf of H3G. We also
31 intend to make an application for permission to intervene. In terms of whether we are
32 interested in the jurisdictional issue, and at this stage H3G does not express a view either way,
33 but does anticipate that it would not wish to submit any statement of intervention on those
34 matters, although it would like to reserve its position as to whether it would be already

1 represented at the preliminary hearing, but obviously our main concern is for the substantive
2 issues in the appeal.

3 THE CHAIRMAN: Thank you, that is very helpful. I will rise for a few minutes to see what we can
4 do with regard to the dates, so I will come back at about 25 past 3.

5 (Short break)

6 THE CHAIRMAN: We will endeavour to hear this preliminary issue on 26th and/or 27th June,
7 although it will require some quite substantial restructuring of the Panel. So where we are then
8 as regards the timetable leading up to that date: Mr. de la Mare, I think it would help matters
9 considerably if the notice of appeal could be served on Monday rather than Tuesday of next
10 week – if you could use your best endeavours to make that happen, I think that would help
11 things along.

12 MR. DE LA MARE: Well, my weekend is already spoken for in terms of the case, we will be flat
13 out but I am not sure that we can guarantee to serve it on Monday, there are several further
14 stages, and iterations to go through before we feel we may be able to file, so I fear it will be
15 Tuesday morning, but we will do our level best, if the situation improves, to get it in on
16 Monday.

17 THE CHAIRMAN: Thank you. Mr. Holmes, did I understand that you were then content for Ofcom
18 to serve their defence on the preliminary point on both appeals by the end of next week?

19 MR. HOLMES: Yes, madam, subject to O₂'s submissions on the preliminary issue being no wider
20 than those foreshadowed in their letter of 28th May – a copy of which I believe was sent to the
21 Tribunal.

22 MR. DE LA MARE: I have just had a quick chat with my instructing solicitor and there may be a
23 middle way. We would be more than happy to put in our case on jurisdiction effectively by
24 way of excerpt from our notice of appeal and make that available to Ofcom and the Tribunal
25 and T-Mobile on Monday, that is eminently do-able; the thing that is holding us up is dotting
26 the “i’s” and crossing the “t’s” on the merits.

27 THE CHAIRMAN: Yes, I think that would be helpful then if you could do that.

28 MR. DE LA MARE: Of course, then it shall be done.

29 THE CHAIRMAN: And that will assist Ofcom. I do not think there is an order that we can make to
30 that effect but you have ----

31 MR. DE LA MARE: We are nice people we will do whatever we can to help.

32 THE CHAIRMAN: You are nice people. Excellent. So then the defence will be limited to
33 preliminary issues, and we will order the suspension of time in relation to the substance of the
34 matter until further order by 6th.

1 MR. DE LA MARE: I am grateful madam.

2 THE CHAIRMAN: Then T-Mobile and O₂ to serve their skeletons by 13th June. I am not sure
3 whether you are sufficiently *ad idem* to produce a joint skeleton – that may be a bridge too far
4 – but we will put in our usual wording about avoiding duplication so far as possible, and then
5 the Ofcom skeleton on both by 20th June.

6 H3G, we will grant you permission to intervene – nobody objects to that? (*No response*) No,
7 and I note you reserve your right to make oral submissions. I am not enthusiastic about
8 receiving written submissions on the jurisdiction point from the interveners, so at the moment
9 if H3G feels it absolutely must put something in in writing they would need to ask for
10 permission to do that from the Tribunal.

11 MISS CORMACK: Noted madam, thank you.

12 MR. DE LA MARE: Madam, could I suggest in that context what is often helpful is to have a later
13 timetable for any intervener who wants to exercise that right, so that they can see the argument
14 as it has developed between the parties and then work out what it is that is the precise point and
15 they can actually add to the debate.

16 THE CHAIRMAN: Yes, I envisage what they will do.

17 MR. DE LA MARE: I am grateful.

18 THE CHAIRMAN: But I am saying that if they decide they do want to add something then they
19 must come back to us for permission – given the truncated timescales we want to keep things
20 as slim line as possible. That then deals with the exchanges leading up to the hearing. Of
21 course, there may be other interveners who make themselves apparent once the Rule 15 notice
22 has been published, but they will just have to slot in to this timetable, and again we do not
23 envisage granting them permission to make written submissions unless they expressly ask us.
24 The other issue is on the wording of the preliminary issue, and in particular the inclusion of the
25 words “or otherwise” to take account of the point Mr. Holmes ----

26 MR. HOLMES: Madam, if it would assist, Ofcom has no objection to the wording proposed by
27 T-Mobile.

28 THE CHAIRMAN: Yes, that is agree then – is that agreed?

29 MR. DE LA MARE: We have not seen the wording passing through the parties and I think it most
30 unlikely that it will not be satisfactory – I might as well have a look at it right now. (Document
31 handed) Problem solved.

32 THE CHAIRMAN: Good. Mr. Palmigiano, are you formally applying on behalf of BT for
33 permission to intervene at this stage, or are you going to wait until after the jurisdiction point is
34 resolved?

1 MR. PALMIGIANO: I think we will wait until the jurisdiction point has been decided.

2 MR. HOLMES: Madam, on that point, although I think in correspondence Ofcom suggested that the
3 timetable for the service of requests to intervene might be abridged generally, on reflection we
4 think it only necessary subject to the Tribunal's views, that the period for interventions in
5 respect of the preliminary issue be so abridged and it may be that interveners would wish to
6 come in on the substantive points and there may be no particular reason to abridge the period
7 for them.

8 THE CHAIRMAN: Yes, if we decide that the Tribunal does have jurisdiction my understanding was
9 that the urgency does not then completely go away, you do want this to be dealt with fairly
10 rapidly.

11 MR. HOLMES: No, madam, that is absolutely correct, and we are very grateful to the Tribunal for
12 pursuing a rapid timetable. It is obviously with the preliminary issue there may be very little
13 that the interveners could add in any event, it is basically a point of law that they have little to
14 bring, if anything, to the table. When it comes to the substance it might be thought perhaps a
15 little bit too strict an approach to exclude them unless they came forward in, say, a period of
16 seven days from the publication of the summary of the appeal as I think Ofcom originally
17 proposed. I think it was only that that we had in mind.

18 THE CHAIRMAN: Well we will take those points on board and see what we can do with regard to
19 the wording of the notice. Mr. Pickford, you were about to jump up?

20 MR. PICKFORD: Merely to say that we had originally agreed with Ofcom's proposal, but we
21 equally are content with their revised proposal.

22 THE CHAIRMAN: Are there any other matters that we need to deal with this afternoon.

23 MR. PICKFORD: Madam, I am aware of the difficulties that arise with regard to the timetabling of
24 trials, and with that in mind I wonder whether there would be any sense in exploring at this
25 stage against the possibility that the Tribunal is found to have jurisdiction that a date could be
26 set aside, but it may be impossible to do so now, I suspect, if the Tribunal is only now being
27 reconstituted.

28 THE CHAIRMAN: I think that probably is a bit difficult to do at this stage, but yes, we certainly
29 have in mind that the sooner one can start pencilling dates in the diary the better for all
30 concerned.

31 MR. PICKFORD: I am grateful.

32 THE CHAIRMAN: We will draw up and make that order in the usual course, and the Rule 15 notice
33 will appear early next week.

1 | MISS CORMACK: I am sorry, madam, but just to clarify whether H3G is being given permission to
2 | intervene generally, or whether we would also need to file a request for permission to intervene
3 | in relation to the substantive issues once the Rule 15 notice has been published?

4 | THE CHAIRMAN: No, I think you are being given permission to intervene generally.

5 | MISS CORMACK: Thank you.

6 | THE CHAIRMAN: Thank you very much.

7 |
