Neutral citation [2010] CAT 22

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1151/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

9 September 2010

Before:

MARCUS SMITH QC
(Chairman)
PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

B E T W E E N:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

EVERYTHING EVERYWHERE LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED

Interveners

RULING (PERMISSION TO APPEAL)

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1. On 22 and 23 June 2010, the Tribunal heard various applications concerning the admissibility of evidence relied upon by British Telecommunications plc ("BT") in its appeal against a determination by the Office of Communications ("OFCOM") dated 5 February 2010 and entitled "Determination to resolve a dispute between BT and each of T-Mobile, Vodafone, O2 and Orange about BT's termination charges for 080 calls" ("the Determination").

2. The Tribunal determined these applications in a judgment handed down on 8 July 2010 ([2010] CAT 17, "the Judgment"). The abbreviations used in the Judgment are adopted here.

3. At the conclusion of the hearing on 23 June 2010, the Tribunal invited the parties to seek to agree a timetable running up to the substantive hearing of this dispute, listed to commence on 10 January 2011, rather than incur the cost of a further *inter partes* hearing. Although the parties formulated a timetable to trial that appeared to be sensible, OFCOM sought instead a stay of these proceedings. This request was considered, and refused, in a ruling made on 23 July 2010 ([2010] CAT 19, "the Ruling"). At the same time as the Ruling, the directions to trial that had been formulated by the parties were set out in an Order of the Tribunal.

4. On 5 August 2010, OFCOM made a written request for permission to appeal the Judgment ("OFCOM's Request for Permission to Appeal"). BT responded to OFCOM's Request for Permission to Appeal in written observations dated 25 August 2010 ("BT's Observations"). The position of the Interveners regarding OFCOM's request was set out in correspondence variously dated 23 August 2010 (O2), 24 August 2010 (Vodafone and Three) and 25 August 2010 (Everything Everywhere, formerly T-Mobile and Orange).

5. This is our decision regarding OFCOM's Request for Permission to Appeal under rule 59(2) of the 2003 Tribunal Rules.

6. Decisions of the Tribunal made (as was the case here) under section 192(2) of the Communications Act 2003 can be appealed pursuant to section 196 of that Act, which provides:

> "(1) A decision of the Tribunal on an appeal under section 192(2) may itself be appealed.
>
> (2) An appeal under this section –
>
> (a) lies to the Court of Appeal or to the Court of Session; and
>
> (b) must relate only to a point of law arising from the decision of the Tribunal.
>
> (3) An appeal under this section may be brought by –
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> (a) a party to the proceedings before the Tribunal; or
>
> (b) any other person who has a sufficient interest in the matter.
>
> (4) An appeal under this section requires the permission of the Tribunal or of the court to which it is to be made.
>
> (5) In this section references to a decision of the Tribunal include references to a direction given by it under section 195(4)."

7. Three points must be noted:

(a) First, an appeal is against a decision of the Tribunal, as opposed to the reasoning by which that decision was reached. This is clear from section 196(2), which (as was noted in paragraph 3 of BT's observations) is the general position. The Court of Appeal considers appeals against orders, and not the reasoning by which an order is reached: *Lake v Lake* [1955] P 336 at 342, 343-4 and 346-7.

(b) Secondly, the appeal must relate to a point of law arising from the Tribunal's decision. The Tribunal must be astute to prevent issues that are not points of law being "dressed up" as points of law in an attempt to obtain permission to appeal: *Hutchison 3G UK Limited v Office of Communications* C1/2008/0203, 20 February 2008.

(c) Thirdly, permission to appeal should be granted sparingly: *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 at paragraph

[15]; *Albion Water Ltd v Water Services Regulation Authority* [2007] UKCLR 1577. Permission will usually be granted where there is a real prospect of success or there is some other compelling reason why the appeal should be heard: *IBA Health Limited v Office of Fair Trading* [2003] CAT 28, especially at paragraphs [4] and [5].

8. The decision that OFCOM seeks permission to appeal against is the Tribunal's decision (in paragraphs [89], [107]-[108] and [116(a)]) not to exclude, alternatively to admit, what is described in paragraph [15] of the Judgment as the Category 1 and Category 2 evidence. As is described in paragraph [9] of the Judgment, there was some debate before us as to whether this was a case where BT was applying to admit evidence or OFCOM and the Interveners were applying to exclude evidence under rule 22(2) of the 2003 Tribunal Rules. The Tribunal directed, on 13 May 2010, that this should be regarded (or "deemed") as OFCOM's (and, to extent they maintained objections to BT's evidence, the Interveners') application to exclude BT's evidence.

9. The Tribunal unanimously concluded that there was no basis on which the Category 1 or Category 2 evidence could be excluded under rule 22(2) of the 2003 Tribunal Rules, and rejected OFCOM's contentions regarding the limits on an appellant's ability to adduce evidence in a section 192 appeal to the Tribunal. This is referred to as "Issue 1" in OFCOM's Request for Permission to Appeal and in BT's Observations. Alternatively, the Tribunal exercised its discretion to admit the Category 1 and Category 2 evidence pursuant to rule 22(2). This is referred to as "Issue 2" in OFCOM's Request for Permission to Appeal and in BT's Observations.

10. The Tribunal thus reached its decision regarding the Category 1 and Category 2 evidence by two different routes. As BT rightly points out (in paragraph 3 of BT's Observations), "[a]bsent the Court of Appeal overturning both Issues 1 and 2, the order made by the Tribunal would remain in force".

11. Issue 1 turns on the question of whether there is an "implicit restriction on the evidence that may be admitted on an appeal under section 192" (paragraph 8 of OFCOM's Request for Permission to Appeal). The nature of the restriction

contended for by OFCOM before the Tribunal is set out in paragraph [14] of the Judgment. In OFCOM's Request for Permission to Appeal, the argument appears to have developed. Paragraph 9 states:

> "Ofcom contends that the true position in law is the same as that obtaining in respect of appeals to the Court of Appeal (being appeals on the merits) under rule 52 of the Civil Procedure Rules 1998..."

As is clear from paragraph 14 of OFCOM's Request for Permission to Appeal, it is OFCOM's contention that the reception of fresh evidence is governed by the rule in *Ladd v Marshall* [1954] 1 WLR 1489.

12. We should observe that this was <u>not</u> the way in which the argument was put before the Tribunal. Nevertheless, however the point is put, the fundamental difficulty in OFCOM's position remains the same. As is described in paragraphs [51]-[65] of the Judgment, the statutory provisions concerning the making of section 192 appeals (including the evidence that may be adduced on such appeals) are extremely clear. To accede to OFCOM's argument (whether as put before the Tribunal or as put in OFCOM's Request for Permission to Appeal) would be to re-write section 192 to import into the 2003 Act restrictions which Parliament never made.

13. We do not consider that the points raised by OFCOM in respect of Issue 1 have any real prospect of success. Nor do we consider that there is some other compelling reason why the appeal should be heard. The approach to admissibility hitherto taken by the Tribunal has not raised the sort of practical difficulties suggested by OFCOM (as is noted by BT in paragraph 16 of BT's Observations). Indeed, for the reasons given in paragraphs [79]-[86] of the Judgment, it was the Tribunal's unanimous conclusion that OFCOM's approach to admissibility would itself create difficulties in practice.

14. Turning to Issue 2, as was noted in paragraph [87] of the Judgment, rule 22(2) of the 2003 Tribunal Rules provides a broad discretion to the Tribunal regarding the admission or exclusion of evidence. If, contrary to the primary conclusion reached by the Tribunal, the Category 1 and Category 2 evidence was indeed served too late to be admitted as of right, then the Tribunal concluded that it should exercise its discretion under rule 22(2) to admit this evidence nonetheless.

15. We do not consider that this question raises any issue of law. Rather, it is an example of the sort of case management power that the Tribunal exercises on a regular basis. In *Hutchison 3G UK Limited v Office of Communications* C1/2008/0203, 20 February 2008, Buxton LJ refused permission to appeal in the following terms:

> "...it would be entirely inappropriate save in the most extreme case to seek to contest before this court case management decisions made by a specialist tribunal that has the continuing conduct of a major and specialist piece of litigation."

We do not consider this to be a "most extreme case" warranting an appeal to the Court of Appeal.

Marcus Smith QC Peter Clayton Professor Paul Stoneman

Charles Dhanowa
Registrar Date: 9 September 2010