Neutral citation [2014] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1205/3/3/13
1206/3/3/13
1207/3/3/13

Victoria House
Bloomsbury Place
London WC1A 2EB

11 March 2014

Before:

MR JUSTICE ROTH
(President)
STEPHEN HARRISON
PROFESSOR COLIN MAYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant: Case No. 1205/3/3/13
Intervener: Case Nos. 1206-7/3/3/13

(1) CABLE & WIRELESS WORLDWIDE PLC (2) VIRGIN MEDIA LIMITED (3) VERIZON UK LIMITED

Appellants: Case No. 1206/3/3/13
Interveners: Case No. 1205/3/3/13

(1) BRITISH SKY BROADCASTING LIMITED (2) TALKTALK TELECOM GROUP PLC

Appellants: Case No. 1207/3/3/13
Interveners: Case No. 1205/3/3/13

- and -

OFFICE OF COMMUNICATIONS

Respondent

RULING (APPLICATION TO AMEND)

APPEARANCES

Mr Rhodri Thompson QC, Mr Graham Read QC, Ms Sarah Lee, Mr Ben Lynch and Ms. Georgina Hirsch (instructed by BT Legal) appeared on behalf of the Appellant in Case No. 1205/3/3/13, British Telecommunications PLC.

Ms Dinah Rose QC and Mr Tristan Jones (instructed by Olswang LLP) appeared on behalf of the Appellants in Case No. 1206/3/3/13, (1) Cable & Wireless Worldwide plc, (2) Virgin Media Limited and (3) Verizon UK Limited.

Mr Meredith Pickford and Mr Julian Gregory (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Appellants in Case No. 1207/3/3/13, (1) British Sky Broadcasting Limited and (2) TalkTalk Telecom Group PLC.

Mr Pushpinder Saini QC, Ms Kate Gallafent QC, Mr Hanif Mussa and Ms Emily Neill (instructed by the Legal Department, Office of Communications) appeared on behalf of the Respondent.

INTRODUCTION AND SUMMARY

1. On 20 December 2012, the Office of Communications ("Ofcom") issued a determination ("the Determination")[1] of four disputes with British Telecommunications PLC ("BT"), raised by five communications providers ("the disputing CPs") concerning the charges levied by BT for the provision of transmission capacity over Ethernet-based lines. The disputing CPs alleged that BT had overcharged them, contrary to the cost orientation obligations previously imposed on BT by Ofcom. The disputes were referred to Ofcom pursuant to sect 185 of the Communications Act 2003 ("the CA").[2] Ofcom decided pursuant to sect 186 that it was appropriate for it to handle the disputes.

2. The dispute brought jointly by British Sky Broadcasting Limited ("Sky") and TalkTalk Telecom Group PLC ("TalkTalk") was referred by them to Ofcom on 27 July 2010, and the dispute brought by Virgin Media Ltd ("Virgin") was referred on 10 August 2010. Ofcom notified its decision to handle those two disputes on 13 September 2010. The two other disputes were referred by Cable & Wireless Worldwide plc ("CWW") and Verizon UK Limited ("Verizon"), and accepted by Ofcom, subsequently. Sky, TalkTalk, Virgin, CWW and Verizon are, accordingly, the disputing CPs. The Determination found that BT had indeed overcharged the disputing CPs by an aggregate amount of over £94 million. Ofcom directed repayment but without interest.

3. Following the issue of the Determination, and pursuant to sect 192(2), BT appealed, contending *inter alia* that the amount of repayment ordered by Ofcom was too high, while the disputing CPs appealed, contending *inter alia* that it was too low and that interest should have been awarded. Sky and TalkTalk brought a joint appeal, as did Virgin, CWW and Verizon. By direction of the Tribunal, the three distinct appeals were heard together and the various appellants were given permission to intervene to an extent in each others' appeals. The hearing commenced on 29 October 2013

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1 The Determination's full title was "Disputes between each of Sky, TalkTalk, Virgin Media, Cable & Wireless and Verizon and BT regarding BT's charges for Ethernet services: Determinations and Explanatory Statement".

2 All statutory references in this judgment are to the CA, save as otherwise stated.

and lasted 13 days. The Tribunal did not sit every day and the hearing concluded on 13 November 2013.

4. In the written closing submissions for BT, an argument appeared to be advanced raising a new ground of challenge ("the New Ground") that part of the Determination was outside Ofcom's jurisdiction. When this was pointed out by the Tribunal to Counsel for BT during their oral closing submissions on 22 November 2013, they very properly accepted that this was outside the scope of BT's Notice of Appeal. Accordingly, if the New Ground were to be advanced, permission to amend the Notice of Appeal would be required. Further, Ofcom as respondent and the disputing CPs as interveners would have to be given the opportunity to respond to the New Ground. The Tribunal gave BT time to consider its position, with a timetable for written submissions if BT decided to pursue an application to amend.

5. By letter dated 29 November 2013, BT formally applied for permission to amend its Notice of Appeal and enclosed a draft amendment pleading the New Ground. Ofcom and the disputing CPs sent submissions in response, opposing BT's application, by letters dated 13 December 2013. BT submitted written observations in reply on 20 December 2013.

6. For the reasons set out below, the Tribunal unanimously refuses this application. In our judgment, the circumstances here do not constitute exceptional circumstances of a kind that would justify such a very late amendment under rule 11(3) of the Competition Appeal Tribunal Rules 2003 (the "CAT Rules"). We note not only that the New Ground could have been raised at any time in the period of over eight months since BT launched its present appeal (which was filed on 20 February 2013) and then addressed in the course of the hearing, but also that in November 2010 BT brought an appeal before the Tribunal that challenged Ofcom's decision to handle the disputes referred by Sky/TalkTalk and Virgin, *inter alia* alleging a lack of jurisdiction. BT did not advance the New Ground, as it could have, in that previous appeal, which was heard and decided by the Tribunal in 2011: [2011] CAT 15. To permit the amendment raising the New Ground after the hearing of this complex case has concluded and, in effect, therefore, to reopen the proceedings, would undermine the orderly and efficient conduct of appeals before the Tribunal and be unfair to the other parties.

BACKGROUND

7. The legislative provisions in the CA concerning the imposition of the obligation on BT that gave rise to the disputes, and the responsibility of Ofcom to resolve disputes concerning that obligation, implement in the United Kingdom the EU regulatory regime for electronic communications, known as the Common Regulatory Framework ("the CRF"). The CRF comprises a Framework Directive, Dir. 2002/21/EC, and four "Specific Directives". For present purposes, the relevant Specific Directive is the Access Directive, Dir. 2002/19/EC. In brief outline, pursuant to art 8 of the Access Directive, when an undertaking providing a public communications network is designated by the national regulatory authority ("NRA") as having significant market power ("SMP") on a specific market, the NRA must impose one or more of the obligations set out in arts 9-13 of the Directive, as appropriate. Those obligations are accordingly referred to as "SMP obligations." Art 13 provides for the imposition of price control and cost accounting obligations. In the UK, the NRA is Ofcom and those provisions are implemented by sects 45 and 87-91.

8. On 25 June 2004, Ofcom issued its final statement following a review of the retail leased lines, symmetric broadband origination and wholesale trunk segment markets (the "2004 LLMR Statement"). Ofcom found that BT had SMP in the market for wholesale alternative interface symmetric broadband origination ("AISBO") at all bandwidths in the United Kingdom (excluding Kingston upon Hull, where Kingston Communications plc ("KCOM") had SMP), which market includes the provision of wholesale Ethernet services. Ofcom therefore imposed a number of SMP obligations on BT in that market. Those obligations included an obligation on BT to ensure and be able to demonstrate, to the satisfaction of Ofcom, that its charges for network access for AISBO services are cost oriented. This was termed Condition HH3.1, and the meaning and proper interpretation of Condition HH3.1 is one of the key issues in these appeals.

9. On 8 December 2008, Ofcom issued a statement setting out its conclusions following a further review of those markets, entitled "Business Connectivity Market Review" (the "2008 BCMR Statement"). That statement superseded the 2004 LLMR Statement. This later review concluded that BT, as before, had SMP in the

low bandwidth AISBO market but found that BT no longer had SMP in the high bandwidth AISBO market.[3] Among the SMP obligations imposed by Ofcom on BT in the low bandwidth AISBO market was a cost orientation obligation, again termed Condition HH3.1, in identical terms to that imposed by the 2004 LLMR Statement. Obviously, no such obligation was imposed in the high bandwidth AISBO market where BT no longer had SMP.

10. Para 8.30 of the 2008 BCMR Statement is as follows:

> "The [2004 LLMR Statement] imposed SMP conditions on BT and KCOM in a number of markets. In some of those markets, our analysis indicates that SMP no longer exists. In others, new SMP conditions are proposed, on the basis of either new or existing market definitions. In either case, all of the SMP conditions introduced by the [2004 LLMR Statement] should no longer apply, once this Statement is published."

11. The SMP conditions imposed by the 2004 LLMR Statement were formally revoked by para 12 of the Notification issued by Ofcom imposing new SMP conditions: see Annex 8 to the 2008 BCMR Statement. Pursuant to para 6 of that Notification, the 'new' SMP conditions became effective on the date of the 2008 BCMR Statement's publication, namely 8 December 2008.

12. The disputes referred by the disputing CPs to Ofcom contended that BT had failed to comply with Condition HH3.1 and had overcharged them. The various disputes concerned different, but overlapping, periods. In particular, Sky/TalkTalk complained of overcharges between 24 June 2004 and 31 July 2009; Virgin complained of overcharges between 1 April 2006 and 31 March 2009; and CWW and Verizon both complained of overcharges between 1 April 2006 and 31 March 2011. Each of the disputes therefore concerned compliance with Condition HH3.1 as imposed by the 2004 LLMR Statement and by the 2008 BCMR Statement.

13. By the Determination, Ofcom found that there had been overcharging by BT, in breach of Condition HH3.1, in respect of certain services supplied to Sky and TalkTalk from 1 April 2005, and in respect of the other disputing CPs from 1 April 2006.

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[3] Low bandwidth refers to speeds up to and including 1Gbit/sec.

DISPUTE RESOLUTION – THE LEGISLATIVE FRAMEWORK

14. The requirement for each Member State to provide for a dispute resolution procedure conducted by its NRA is set out in art 20 of the Framework Directive. For the UK, that has been implemented by sects 185-191. On 25 November 2009, the European Parliament and Council adopted Directive 2009/140/EC, which amended, *inter alia*, art 20(1) of the Framework Directive. However, the transposition provisions of Dir 2009/140 provided that the amended measures are to apply from 26 May 2011: see art 5(1). By the Electronic Communications and Wireless Telegraphy Regulations 2011, the CA was amended with effect from 26 May 2011 in order to implement the amendments made by Dir 2009/140.

15. To appreciate the New Ground, which BT seeks to advance, it is necessary to set out part of the legislative provisions in both their original and amended form.

16. Art 20 of the Framework Directive as originally enacted provides as follows:

> "In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party ... issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority. "

17. The amended art 20(1) reads as follows, with emphasis added to highlight the changes:

> "In the event of a dispute arising in connection with *existing* obligations under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State*, or between such undertakings and other undertakings in the Member State benefiting from obligations of access and/or interconnection arising under this Directive or the Specific Directives,* the national regulatory authority concerned shall, at the request of either party ... issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months, except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority."

18. As regards the UK legislation, it is sufficient to set out the material parts of sects 185-186. Prior to 26 May 2011, these provided as follows:

"**185 Reference of disputes to OFCOM**

(1) This section applies in the case of a dispute relating to the provision of network access if it is—

(a) a dispute between different communications providers;

(b) a dispute between a communications provider and a person who makes associated facilities available;

(c) a dispute between different persons making such facilities available;

...

(8) For the purposes of this section—

(a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case; and

(b) the disputes that relate to an obligation include disputes as to the terms or conditions on which any transaction is to be entered into for the purpose of complying with that obligation.

186 Action by OFCOM on dispute reference

(1) This section applies where a dispute is referred to OFCOM under and in accordance with section 185.

(2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.

(3) Unless they consider—

(a) that there are alternative means available for resolving the dispute,

(b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4, and

(c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,

their decision must be a decision that it is appropriate for them to handle the dispute.

..."

19. With effect from 26 May 2011, sects 185-186 were amended in certain respects. Insofar as material, the amended provisions read as follows:

"**185 Reference of disputes to OFCOM**

(1) This section applies in the case of a dispute relating to the provision of network access if it is—

(a) a dispute between different communications providers;

(b) a dispute between a communications provider and a person who makes associated facilities available;

(c) a dispute between different persons making such facilities available.

(1A) This section also applies in the case of a dispute relating to the provision of network access if—

(a) it is a dispute between a communications provider and a person who is identified, or is a member of a class identified, in a condition imposed on the communications provider under section 45; and

(b) the dispute relates to entitlements to network access that the communications provider is required to provide to that person by or under that condition.

(2) This section also applies in the case of any other dispute if—

(a) it relates to rights or obligations conferred or imposed by or under a condition set under section 45, or any of the enactments relating to the management of the radio spectrum;

(b) it is a dispute between different communications providers; and

(c) it is not an excluded dispute.

...

186 Action by OFCOM on dispute reference

(1) This section applies where a dispute is referred to OFCOM under and in accordance with section 185.

(2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.

(2A) In relation to a dispute falling within subsection 185(1), OFCOM may in particular take into account their priorities and available resources in considering whether it is appropriate for them to handle the dispute.

(3) In relation to a dispute falling within section 185(1A) or (2), unless they consider—

(a) that there are alternative means available for resolving the dispute,

(b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4, and

(c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,

their decision must be a decision that it is appropriate for them to handle the dispute.

..."

20. A "condition set under section 45" for the purpose of the amended sect 185 includes an SMP condition: see sect 45(2)(b)(iv) and (7)-(9).

BT'S PRELIMINARY ISSUES APPEAL

21. Following Ofcom's notification on 13 September 2010 of its decision pursuant to sect 186 that it would handle the disputes referred by Sky and TalkTalk (jointly) and by Virgin, on 15 November 2010 BT appealed that decision to the Tribunal. Because it advanced similar grounds, the appeal was heard together with BT's appeal against the decision by Ofcom to handle a separate dispute concerning the charges that BT had set for mobile network operators for the termination of calls to numbers starting with "080". With permission of the Tribunal, Sky, TalkTalk and Virgin intervened in support of Ofcom in the first appeal.

22. In its judgment, delivered on 3 May 2011 ([2011] CAT 15), the Tribunal summarised the basis of the appeal as follows:

> "1. ... Broadly speaking, BT argues that OFCOM were wrong to decide that they had jurisdiction to determine the alleged disputes, either because the issues referred to them were not really "disputes" within the meaning of section 185 of the CA 2003 or because, if they were disputes properly so called, OFCOM should have declined jurisdiction on the grounds that there were alternative means available for the resolution of those disputes."

23. In particular, ground 1 of BT's appeal against the decision to accept the Ethernet disputes, which by the time of the hearing was advanced on the same basis in the other appeal, was that there was no "dispute", within the meaning of sect 185, in existence between BT and the three disputing CPs who purported to refer the matter to Ofcom. This was accordingly a direct challenge to the jurisdiction of Ofcom to determine the dispute. For reasons explained in the Tribunal's judgment, which it is unnecessary to go into here, the narrow construction of sect 185 urged by BT was rejected and both appeals were dismissed on the basis that Ofcom had been correct to accept the relevant disputes for resolution.

BT'S MAIN APPEAL

24. Following the Determination, BT submitted its Notice of Appeal on 20 February 2013. The appeal covers all four disputes brought by the five disputing CPs. The Notice of Appeal extends to 154 pages (excluding annexes) and comprises 474 paragraphs.

25. In its Notice of Appeal, BT advanced six grounds of appeal. For present purposes, it is only necessary to refer to Ground 5, the one ground that raised an issue as to Ofcom's jurisdiction. This was entitled: "Ofcom has no power to impose a specific obligation on BT requiring repayment of charges that were paid without dispute." The precise content of this ground fluctuated somewhat over the course of the appeals but, as developed in BT's skeleton argument and opening submissions, the contention was essentially that Ofcom's remedial powers set out in sect 190(2)(d), interpreted in the light of the provisions of the CRF, did not entitle it to direct repayments relating to a period prior to the dispute being raised. In other words, BT contended that Ofcom's power to order any adjustment was limited to the period following the date when an aggrieved party called on Ofcom to resolve a dispute. BT notably did not contend that Ofcom had no jurisdiction to investigate and determine whether there had been overcharging by BT in the period covered by Condition HH3.1 as imposed by the 2004 LLMR Statement (i.e. overcharging alleged to have taken place prior to 8 December 2008), which represented the majority of the period in dispute. BT's position was, rather, that Ofcom could investigate and determine whether there had been overcharging but, if BT's charges prior to the dispute being raised were found to breach the cost orientation obligation, then the remedy for the disputing CP was by way of a civil action in the courts, in which case it would have to prove damage (and, therefore, could be met by the defence that the overcharge had been passed on to its customers).

THE NEW GROUND

26. The New Ground sought to be introduced by the amendment contends that Ofcom had no jurisdiction to resolve a dispute in relation to a cost orientation obligation which had lapsed. The contention is expressed as follows in para 409C of the draft Amended Notice of Appeal:

> "BT submits that, both in their original form and in light of the apparently clarificatory amendment to Article 20(1) [of the Framework Directive], the temporal scope of the dispute resolution powers of NRAs is limited to the period during which the obligations relied on in a dispute remain in force, from which it necessarily follows that the dispute must be raised with the NRA at a time when the obligations remain in force."

And similarly at para 409H:

> "... the powers of the NRAs to resolve disputes relating to "specific obligations" imposed on undertakings found to have SMP on a relevant market ... are limited in their temporal scope to the period during which the obligations on which a party to such a dispute relies are in force, in practice dating back to the date on which the relevant SMP obligation was imposed in the context of a current market review."

27. Accordingly, BT seeks to contend that, since at the time all these disputes were referred to Ofcom and considered by them, the SMP obligation then in force was that imposed on 8 December 2008 by the 2008 BCMR Statement, Ofcom had no jurisdiction to investigate the complaints relating to any earlier period, and, thus, in relation to the periods covered by the cost orientation obligation imposed by the 2004 LLMR Statement.

28. This ground of challenge rests in part on the new wording of art 20(1) of the Framework Directive and its reference to "existing obligations." But BT contends that that was only a "clarificatory amendment" and seeks to draw support also from art 13(3) of the Access Directive. BT further contends that sect 185 can, and should, be interpreted consistently with this interpretation of the CRF.

29. The New Ground is set out in the draft amended pleading in the context of Ofcom's power to impose an obligation to require repayment of charges. However, it is clear from the substance of the New Ground, as set out above, that, if correct, it would mean that Ofcom had no power to investigate and make a declaration of non-compliance, let alone direct any remedy, relating to that earlier period at all. Accordingly, this is a much more fundamental challenge to Ofcom's jurisdiction than Ground 5 in the existing Notice of Appeal, which goes to Ofcom's jurisdiction to impose a repayment remedy. We therefore reject the assertion in BT's application to amend (para 10) that the New Ground is put on a "narrower basis" than Ground 5.

THE CAT RULES

30. An appeal against a determination of a dispute by Ofcom must be commenced by sending a notice of appeal within two months of notification of the determination: sect 192(4) and rule 8(1) of the CAT Rules. The notice of appeal must set out the grounds of appeal: sect 192(5). Rule 8(4) provides:

> "The notice of appeal shall contain -
>
> (a) a concise statement of the facts;
>
> (b) a summary of the grounds for contesting the decision, identifying in particular:
>
> (i) under which statutory provision the appeal is brought;
>
> (ii) to what extent (if any) the appellant contends that the disputed decision was based on an error of fact or was wrong in law;
>
> (iii) to what extent (if any) the appellant is appealing against the respondent's exercise of his discretion in making the disputed decision;
>
> (c) a succinct presentation of the arguments supporting each of the grounds of appeal;
>
> (d) the relief sought by the appellant, and any directions sought pursuant to rule 19; and
>
> (e) a schedule listing all the documents annexed to the notice of appeal."

31. Amendment of a notice of appeal is addressed in rule 11 of the CAT Rules:

> "**Amendment**
>
> **11.** - (1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
>
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.
>
> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless -
>
> (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or

> (b) it was not practicable to include such ground in the notice of appeal; or
>
> (c) the circumstances are exceptional."

32. It is appropriate to quote also from the Tribunal's *Guide to Proceedings* (2005), (which constitutes a Practice Direction pursuant to rule 68(2) of the Rules). The *Guide* states at para 6.20:

> "The two-month period allowed under the 1998 Act for appealing to the Tribunal is significantly more generous than the period allowed for appeals to some other appellate tribunals or to the Court of Appeal, precisely so as to give the appellant sufficient time to prepare a detailed written argument, and to assemble any evidence not already presented during the procedure before the OFT."

Although expressed by reference to appeals under the Competition Act 1998 and the Office of Fair Trading, these observations of course apply equally to appeals under the CA and to Ofcom.

33. The *Guide* continues by stating, at para 6.21, that a consequence of this approach is that:

> "... appellants are expected to develop all the grounds of appeal relied on, together with any supporting documents, in the initial notice, and not to add wholly new grounds of appeal in the course of the proceedings ... [referring then to rule 11(3)]"

34. The *Guide* further provides, at para 11.11:

> "Rule 11 provides that a notice of appeal can be amended only with the permission of the Tribunal. Since the form of the notice of appeal is not that of a traditional pleading, such as a statement of case in High Court litigation, but rather a narrative presentation of factual and legal argument, the concept of 'amendment', as traditionally applied to civil proceedings, cannot be directly transposed to proceedings before the Tribunal. Thus it will not normally be necessary to apply formally to 'amend' simply to put into different words the written submissions made in support of a ground of appeal which is already set out in the notice of appeal. Permission to amend will however be necessary where the appellant seeks to raise a new ground of appeal that lies outside the four corners of the original appeal. In that event, the conditions of Rule 11(3) apply to the exercise of the Tribunal's discretion to permit the amendment ..."

BT'S APPLICATION

35. It is self-evident that the New Ground is not based on matters of law or fact that have come to light since the appeal was made and BT accepts that it would have

been practicable to include this ground at the outset. Accordingly, the only basis on which the application is made is pursuant to rule 11(3)(c): that the circumstances are "exceptional".

36. In that regard, all the parties refer to the decision of the Tribunal on amendment in *Floe Telecom Ltd (in liquidation) v Ofcom* [2004] CAT 7. That was an appeal against a decision rejecting a complaint of infringement of the Chapter II prohibition under the Competition Act 1998 by reason of the disconnection by Vodafone of certain GSM gateways offered by the complainant ("Floe"). Floe was placed in administration about a month before the decision was made. The Tribunal noted that the notice of appeal was apparently prepared by Floe's administrators without legal advice. After lodging the notice of appeal on 2 January 2004, the administrators obtained advice from solicitors and, at the first case management conference ("CMC") on 6 February 2004, an advocate from those solicitors indicated that Floe would seek permission to amend the notice of appeal under rule 11. The proposed amended notice of appeal was lodged on 15 March 2004. It sought to introduce an argument (referred to as the "Primary Argument") based on the proper interpretation of sect 1 of the Wireless Telegraphy Act 1949 ("the WTA").

37. The Tribunal considered that the Primary Argument constituted a new ground of appeal. It held, however, that it was at least arguable that it had not been practicable for Floe to include that ground in its notice of appeal, so as to engage rule 11(3)(b), by reason of the fact that Floe was in administration, which may have severely limited the ability of the administrators to obtain advice on how to frame the appeal in such a specialised field of law: see at [56]. However, the Tribunal determined that the circumstances were, in any event, "exceptional" within the meaning of rule 11(3)(c), stating at [57]:

> "The combination of circumstances which lead us to this view are: (i) it is implicit in the case as already pleaded that the Tribunal will have to address the true meaning and scope of section 1 of the WTA in any event; (ii) if the Tribunal were to deal with the First Alternative Argument while shutting its eyes to the Primary Argument, having refused permission to amend, there would be a real risk of the case being decided on a false basis, if the Primary Argument later turned out to be well-founded: that would be an affront to justice and waste costs; (iii) the Primary Argument will have to be decided at some stage, as it is bound to be raised in a further complaint to OFCOM if the Tribunal does not decide it now; (iv) it is in the

> public interest that a point as apparently fundamental as this is decided at the earliest possible moment; (v) the point does not appear to involve a fresh investigation or disputed facts; (vi) the appellant Floe, being in administration and not having legal advice when the appeal was prepared by an administrator who is not a lawyer, has given a reasonable explanation as to why the Primary Argument was not raised earlier; (vii) the point has been raised at an early stage in the appeal, prior to the defence; and (viii) OFCOM has not relied on a submission that the Primary Argument is frivolous or has no reasonable prospect of success."

38. BT of course accepts that many of the circumstances that applied in *Floe* do not apply in the present case; but it relies on the fact that here too the New Ground involves a pure point of law and does not involve any investigation of the facts. We do not consider that this, in and of itself, can constitute exceptional circumstances within the meaning of rule 11(3)(c). Were it otherwise, the rule would provide justification to introduce a new legal ground of appeal whenever it occurred to a party, at whatever stage the proceedings had reached. It should be emphasised that in *Floe* this was only one element in a "combination of circumstances" that led the Tribunal to find the condition of the rule satisfied. It is also a factor that goes to the exercise of discretion under rule 11(1), once exceptional circumstances are shown.

39. It is of greater significance, in our view, that in *Floe* the appellant gave notice of its intention to apply to amend at the first CMC, only five weeks after the appeal was launched, and that the draft amended pleading was served in advance of the defence. The contrast with the circumstances in the present case, where the application for permission to amend was made after the main hearing had concluded, could hardly be starker.

40. Further, the Tribunal in *Floe* observed, at [50]:

> "While the Tribunal fully accepts the general need to maintain discipline in the appeals before it, in our view that objective has to be balanced with the need to deal with cases justly, and in particular to take account of the fact that not all appellants have access to specialised legal advice or extensive financial resources. In our view the Tribunal's Rules should in general be interpreted against that background."

Whereas in Floe the appellant was in administration and the administrators did not prepare the notice of appeal with the advantage of legal advice, BT has throughout its appeal against the Determination been well-resourced and represented by

experienced, specialised lawyers. Its Notice of Appeal records that it was represented by two QCs and two junior counsel.

41. BT also contends that the Tribunal could itself have invited the parties to make submissions on this point of its own initiative, under rule 19(3). That seeks to draw support for the present proposed amendment from the observations of the Tribunal to that effect in *Floe*. But there the Tribunal said that that is the course it would have adopted: see at [59]. Here, the issue sought to be raised in the New Ground is very far from being an obvious point, as is evident from the fact that no one in BT's legal team had apparently thought of it before preparing the closing submissions at the end of the hearing. If the Tribunal had wished the parties to address this point, it would have raised the point with them at one of the two CMCs held well before skeleton arguments were lodged and the hearing commenced: it is inconceivable that the Tribunal, which is required to determine the appeal "by reference to the grounds of appeal set out in the notice of appeal" (see sect 192(2)), would have raised this point at the stage of closing submissions.

42. BT further submits that, if this question of jurisdiction is not addressed, the decision of the Tribunal may be given on a false basis. We have carefully considered this argument as we accept that where there is a serious risk that a decision was given without jurisdiction, that could amount to an exceptional circumstance so as to open the way to a late amendment. However, we consider that the history of the present proceedings is significant. When Ofcom notified its decision to accept the Sky/TalkTalk and Virgin disputes, BT challenged that decision by way of the Preliminary Issues Appeal: see para 21 above. The New Ground clearly could have been advanced in that appeal: if the New Ground were correct, it would mean that Ofcom had no jurisdiction to handle those disputes insofar as they related to the period before 8 December 2008. In a much-cited statement of principle in *Henderson v Henderson* (1843) 3 Hare 100 at 115, Wigram V-C said:

> "... I believe that I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in

> special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ..."

43. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, Lord Bingham, giving the leading speech in the House of Lords (with which Lords Goff, Cooke and Hutton agreed on this point), stated (at 31):

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

See also the judgment of Lord Sumption SCJ (with which Lady Hale and Lords Clarke and Carnwath agreed) in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, at [19]-[25].

44. We do not consider that it would have amounted to an abuse of process for BT to have raised the New Ground in its original Notice of Appeal by reason of its previous Preliminary Issues Appeal. Apart from anything else, the decisions to accept the CWW and Verizon disputes were not the subject of that appeal (indeed, those disputes had not been referred to Ofcom at that time). But the fact that BT appealed the decision of Ofcom to handle the initial disputes and did not raise the New Ground in that appeal is a significant factor in determining whether there are exceptional circumstances justifying the introduction of the New Ground at the end

of the hearing of the main appeal. In that regard, "the broad merits-based" assessment enunciated by Lord Bingham appears applicable to the question in the present case.

45. Although BT suggests that any prejudice to the other parties can be addressed by "appropriate directions", including provisions as to costs, we do not think that is an adequate approach. There is a very real prejudice, both to the legitimate expectations of the other parties and to the principles of legal certainty, if an appellant is permitted to go through one appeal challenging a decision by the regulator to accept jurisdiction over a dispute, followed by another appeal, some two and a half years later, challenging the regulator's determination of that dispute and then, after the conclusion of a 13-day appeal hearing, reopen the proceedings for further pleading and oral argument of a new ground, which could – it is accepted – have been raised in the original challenge to the decision to handle the dispute.

46. Moreover, although we have not reached a concluded view on the New Ground (which would be inappropriate without full argument), we consider that it would face significant objections. The jurisdiction of Ofcom to accept and resolve a dispute is founded on the CA, not the CRF. There is nothing in the language of sect 185, whether before or after amendment, that restricts its application to a dispute relating to rights or obligations under an SMP condition current at the time the dispute is referred. Accordingly, BT's contention involves "reading down" the language of sect 185 to correspond with BT's interpretation (which is disputed) of the provisions of the CRF. Putting to one side the question whether such a restriction of the express statutory language is permissible, it is unclear why it is necessary. Even if BT were correct in its argument that the provisions of the CRF, which require Member States to provide for their NRA to resolve disputes, apply only to disputes concerning "existing" obligations (as to which we express no concluded view), we see nothing in those provisions that precludes a Member State from enabling its NRA to resolve disputes concerning also expired obligations, i.e. to have a dispute resolution regime of broader scope than is required by the CRF.

47. As pointed out in the submissions of Ofcom opposing the application to amend, there are good reasons of policy why Ofcom's dispute resolution jurisdiction should cover expired obligations. In the context of cost orientation obligations, such as

Condition HH3.1, there is a time lag between BT's breach of the obligation (i.e. an instance of overcharging) and the availability of the cost data from BT, in its annual regulatory financial statements, necessary (for another communications provider or indeed Ofcom) to assess BT's compliance with that obligation. Thus, if BT were correct that no dispute could be referred after an obligation had ceased to apply, that would render nugatory the right to dispute BT's compliance for the final period of that obligation. Therefore, if the domestic legislation enables an aggrieved party to refer to Ofcom a dispute challenging compliance by communications operator with an SMP obligation irrespective of whether that obligation is still current or has expired, we do not see why that means, as BT submits, that EU law would not be "properly applied." On the contrary, the CA would be filling a lacuna that, on BT's case, exists in EU law.

48. Accordingly, we do not regard this as a case where the mere fact that the amendment raises a purely legal challenge to jurisdiction should, when considered with all the other particular factors, render the circumstances exceptional within the meaning of rule 11(3)(c). We recognise that it is possible that the point may arise in subsequent cases. Should it be raised, it will be a matter, in the first instance, for Ofcom to determine when deciding whether or not to accept the dispute. In the event that such a decision were appealed to this Tribunal, the point can be determined in the normal course, as part of the efficient and orderly conduct of proceedings. We do not think it is a point of such force that there is a wider public interest in the point being argued now in the context of these appeals.

49. Among the main principles governing the Tribunal's approach to proceedings are: the identification of, and concentration on, the main issues in a case at as early a stage as possible; the avoidance of delay; and ensuring that the hearing is conducted in an efficient manner within defined time limits: see the *Guide* at para. 3.4. It would be entirely contrary to that approach to permit the New Ground to be raised at this very late stage in these proceedings.

DECISION AND DIRECTIONS

50. Accordingly, BT's application for permission to amend its notice of appeal is refused.

51. Rule 58(1) of the CAT Rules requires that, where permission to appeal from a decision of the Tribunal is sought, the request may be made orally at any hearing at which the decision in question is delivered or in writing to the Registrar within one month of the notification of that decision. Rule 19(2)(i) provides that the Tribunal may give directions as to the abridgement or extension of any time limits, whether or not expired. We hereby extend the period for a written request for permission to appeal against this Ruling until one month after the date on which we hand down judgment on the appeals against the Determination.

52. BT's application for permission to amend states, at para 15:

> "As regards costs, BT accepts that the costs of dealing with an amendment application would not have been incurred by the other parties if BT had brought the point forward in its Notice of Appeal and that the Tribunal may wish to deal with that issue in any order for the future conduct of this appeal."

In its observations on BT's application, Ofcom sought a direction that BT pay its costs of dealing with the application in the event that it is refused, as did the disputing CPs. BT did not take issue with those submissions in its observations in reply and we accordingly direct that BT pays the other parties' costs of addressing its application for permission to amend, such costs to be assessed on the standard basis if not agreed.

Mr Justice Roth
President

Stephen Harrison

Professor Colin Mayer

Charles Dhanowa
Registrar

Date: 11 March 2014