Neutral citation [2008] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1082/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

19 June 2008

Before:

LORD CARLILE QC
(Chairman)
PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

RAPTURE TELEVISION PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

BRITISH SKY BROADCASTING LIMITED

Intervener

REASONS FOR REFUSING PERMISSION TO APPEAL

INTRODUCTION AND PROCEDURAL BACKGROUND

1. The Appellant, Rapture Television plc ("Rapture"), requests the permission of the Tribunal to appeal the Tribunal's judgment of 31 March 2008 ([2008] CAT 6; the "Judgment"). In the Judgment, the Tribunal dismissed Rapture's appeal against a determination published by the Office of Communications ("OFCOM") on 9 March 2007 to resolve a dispute between Rapture and British Sky Broadcasting Limited ("Sky") relating to the provision by Sky of Electronic Programme Guide services ("EPG services") to Rapture. The facts of the case are set out in detail in the Judgment and this ruling should be read in conjunction with the Judgment and OFCOM's determination (the "Determination"). Terms defined in the Judgment have the same meaning in this ruling.

2. The application for permission to appeal was filed by Rapture's legal advisers on 30 April 2008. On 6 May 2008, the Tribunal received a letter (dated 2 May 2008) from Mr David Henry, the managing director of Rapture, in which Mr Henry sought to supplement Rapture's application for permission to appeal and raised a number of further points which, according to Mr Henry, remained unresolved. Mr Henry also sought an order for costs, requesting that the other parties be liable for Rapture's costs in relation to the unresolved points.

3. OFCOM and Sky were invited to submit written observations on Rapture's application and the points raised in Mr Henry's letter. Their written observations were filed on 15 and 16 May 2008, respectively.

4. On 20 May 2008, the Tribunal received a second letter from Mr Henry which set out further proposed grounds for an appeal and/or re-hearing, Mr Henry having previously contacted the Tribunal to inform the Tribunal that the legal advisers who had advised Rapture in the proceedings before the Tribunal up to that point were no longer acting for Rapture. Mr Henry sent a third letter to the Tribunal on 29 May 2008.

THE PROPOSED GROUNDS OF APPEAL

The application dated 30 April 2008

5. The application of 30 April 2008 identifies two main grounds of appeal. First, that the Tribunal erred in its application of paragraph 3.5 of Oftel's guidelines '*The terms of supply of conditional access: Oftel guidelines*' (the "2002 Guidelines"). Second, that the Tribunal erred in failing to take properly into account the nature and size of the Appellant. Each of these alleged errors is said to be a clear consequence of a failure properly to apply the EU requirement that the price charged for EPG services should be fair, reasonable and non-discriminatory ("FRND") and, in particular, a failure correctly to apply the 2002 Guidelines which govern the application of the EU principles to OFCOM's Determination.

6. In so far as the first of these grounds is concerned, the criticisms set out in the application are directed primarily at paragraph [56] of the Judgment. The Appellant states that the Tribunal correctly identified that the 2002 Guidelines require consideration as to whether the price charged for EPG services fell between the floor of incremental costs and the ceiling of the stand alone cost of providing the service but that, in the Appellant's submission, the Tribunal then erred (i) in concluding that any price falling within this range would be expected in a market where there was a competitive supply and (ii) in its analysis that the 2002 Guidelines did not require a separate assessment as to what would be expected in a competitive market.

7. This proposed ground of appeal repeats arguments made by Rapture in the proceedings before the Tribunal. Those arguments were considered by the Tribunal and rejected for the reasons set out in the Judgment. The analysis of whether the price charged fell between the floor and the ceiling was only one part of the overall analysis of whether the price charged was fair and reasonable (contained in paragraphs [50]-[91] of the Judgment). The Tribunal did not find at paragraph [56] that *any* price within the ceiling-to-floor range would be fair and reasonable but referred to the 2002 Guidelines, which state that a price within that range was the outcome that would be expected in a market where there was a competitive supply, and held that the 2002 Guidelines did not require a *separate* assessment as to what would be expected in a competitive market.

We therefore conclude that this ground of appeal has no realistic prospect of success, and accordingly we reject it.

8. Nor do we consider that there is any realistic prospect of success in the Appellant's arguments as to its nature and size. The Appellant submits that the Tribunal erred in paragraphs [148]-[149] of the Judgment by failing to take account of the statutory duties set out in sections 3 and 4 of the Communications Act 2003 in interpreting paragraphs 2.11 and 2.12 ('non-discrimination') and 3.7 ('willingness to pay') of the 2002 Guidelines. The Appellant argues that the fact that it is self-evidently both a start-up and a small company is of itself a sufficient reason, under the 2002 Guidelines properly construed, for charging it a different price to Sky's indicative rate card charge.

9. The 'willingness to pay' factor and the importance of 'non-discrimination' were considered in paragraphs [113]-[149] of the Judgment. The Tribunal found that Rapture's submissions on willingness to pay were not substantiated (see paragraph [131]) and that Rapture's approach to non-discrimination would, in effect, mean that any new entrant or small broadcaster would be subsidised to some extent either by Sky (as the platform provider) or other established or larger channels operating on the same platform (see paragraph [146]). In so far as the non-discrimination element is concerned, the Tribunal found that Rapture had not provided any sufficient evidence that it was in a different position to other broadcasters so that the charge to it should be different (see paragraph [149]). It is not enough for the Appellant to assert that it is "self-evidently" a start-up and a small company, and therefore deserving of a lower charge rate, when it has been unable to provide any evidence to OFCOM or to the Tribunal substantiating that assertion or justifying a lower charge. Accordingly, we also reject Rapture's second ground for seeking permission to appeal.

10. Rapture alleges that its proposed grounds of appeal flow from an overall failure properly to apply the EU requirement that the price charged is FRND. Having rejected the specific grounds of appeal raised in Rapture's application, it is not necessary for us to consider in more detail the general point of EU law on which they are said to be based.

The letters from Mr Henry

11. Mr Henry's three letters to the Tribunal raise several additional points. Those letters were received after the one-month deadline for applications for permission to appeal contained in rule 58 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) (the "Tribunal Rules"). However, the application of 30 April had been lodged in time, Mr Henry telephoned the Tribunal Registry to explain why he felt the need to write separately to his legal advisers prior to doing so, and his letters have been placed before us. Without taking any decision as to the formal status of those letters in these proceedings we have considered them *de bene esse* and, although we have not felt it necessary to address in turn each and every point, we comment below on each of the material points raised in those letters.

12. Mr Henry asks that Rapture be granted permission to appeal or, in the alternative, that the appeal be re-heard. The main underlying reason for this request appears to be that, according to Mr Henry, important documents and information relevant to the matters in issue in the case were not put before the Tribunal. Mr Henry refers the Tribunal in particular to certain Sky customer agreements and contracts which, in his view, demonstrate that the supply of Sky set-top boxes is tied to a subscription to Sky's digital television offering. Mr Henry considers that this evidence demonstrates that OFCOM failed properly to investigate the dispute between Sky and Rapture; and that having failed to do so, OFCOM could not properly have found that the charge for EPG services was FRND.

The letter of 2 May

13. The material points raised by Mr Henry in his first letter can be summarised as follows: (i) Rapture raised and submitted important documents to OFCOM to which OFCOM did not refer in its Determination; (ii) OFCOM failed to check whether Sky's published accounting information tallied with the figures in the Sky Platform Model; (iii) the Sky Platform Model failed to meet the requirements for accounting separation required by Article 13 of the Framework Directive (Directive 2002/21/EC); (iv) Sky's customer agreements and contracts show that the provision of the Sky set-top box ("STB") is dependent on the customer subscribing to Sky and the 2002 Guidelines stipulate that

Sky alone should bear the cost of the STB subsidy if the subsidy is tied to a subscription; and (v) the Sky EPG is not a form of conditional access.

14. Rapture's appeal to the Tribunal was made under section 192 of the Communications Act 2003 ("the 2003 Act"). Accordingly, the Tribunal's decision disposing of the appeal was made under section 195 of the 2003 Act and any further appeals against the Tribunal's decision are governed by section 196 of the 2003 Act. It is important to note from the outset that any appeal under section 196 must relate only to a point of law arising from the Tribunal's decision. Many of the points now raised by Mr Henry would require a new analysis or a re-analysis of the facts and/or evidence. They do not relate to points of law arising from the Tribunal's decision but rather point out alleged inadequacies with OFCOM's Determination which could have been but were not raised in the appeal before the Tribunal. As OFCOM rightly pointed out in their observations on Rapture's application for permission to appeal, there is a public interest in litigation being final. Rapture had the opportunity to bring its appeal before the Tribunal, the Tribunal and the parties have expended time and effort in considering the points raised in the appeal, and the Tribunal has given its final judgment on the matter. In the present circumstances, Rapture cannot be said to have been denied a fair and full hearing, and the Tribunal considers that it would be inappropriate for us to reopen the case on the basis of new points after the matter has been litigated fully. In any event, as is clear from this judgment, those points would not have affected the outcome of the case.

15. The specific comments in the preceding paragraph dispose of points (i) and (ii) in Mr Henry's letter of 2 May. As to Mr Henry's third point, it is clearly wrong as a matter of law. Article 13 of the Framework Directive affords national regulatory authorities, such as OFCOM, the ability to impose certain price control and cost accounting obligations on certain electronic communications providers. However, no such obligations have been imposed by OFCOM on Sky. Article 13 of the Framework Directive therefore appears to be irrelevant to the facts of this case. As regards point (iv), the question of whether it was reasonable to require free-to-air channels with an EPG listing on the Sky platform, such as Rapture, to contribute towards the STB subsidy was considered both by OFCOM in the Determination (see paragraph 5.67) and the Tribunal (see paragraphs [34]-[44] of the Judgment). The Tribunal held that

OFCOM was correct to conclude that the STB subsidy was a common cost to which free-to-air channels like Rapture seeking an EPG listing on Sky's platform should contribute (see paragraph [42]). Even if Rapture's arguments on this point amounted to a point of law rather than a new or re-assessment of the evidence (which is debatable), they would, nevertheless, in our judgment have no realistic prospect of success.

16. As for the last point (which was developed further in Mr Henry's second letter), Mr Henry argues that the Tribunal should not have applied the 2002 Guidelines because they apply to and concern 'conditional access' services, and EPG is not a form of conditional access. The provision of EPG services is regulated by the 'EPG Conditions' which initially formed part of a Class Licence under the Telecommunications Act 1984 but which were subsequently contained in a Continuation Notice[1] which carried over certain provisions of the previous electronic communications regulatory regime when the new regulatory regime under the Communications Act 2003 was brought into force (see paragraphs [8]-[16] of the Judgment and section 4 of the Determination for a more detailed explanation of the applicable regulatory regime). The requirement that charges for EPG services be FRND comes from the EPG Conditions (and ultimately, is derived from an EU directive). The 2002 Guidelines primarily concern the meaning of FRND in the context of conditional access services. However, it was accepted by all parties at the hearing of the appeal that the 2002 Guidelines also apply to EPG services in so far as the meaning of FRND is concerned (see pages 1-2 of the transcript of the hearing on 18 December 2007). Indeed, in the application dated 30 April 2008, Rapture's legal advisers stated "there was no dispute that OFCOM was bound to apply [the 2002 Guidelines] in determining the dispute between the appellant and Sky." Had Rapture wished to challenge the applicability of the 2002 Guidelines it could have done so at an earlier stage of the appeal. In our judgment, it is too late to raise this point for the first time in an application for permission to appeal having previously expressly accepted that the 2002 Guidelines do apply. In any case, Mr Henry's argument that EPG services are not conditional access services, and that therefore the 2002 Guidelines do not apply to EPG services, is misconceived. The reason the 2002 Guidelines apply to EPG services is not

[1] *Continuation notice to a class of persons defined as the licensee for the purposes of the provision of electronic programme guide services under paragraph 9 of Schedule 18 to the Communications Act 2003*, 23 July 2003. Available on OFCOM's website, see http://www.ofcom.org.uk/static/archive/Oftel/publications/eu_directives/cont_notices/epg_class.pdf

because EPG services are or are not a type of conditional access service, but because the guidance on the meaning of FRND applies equally to both conditional access services and EPG services.

The letters of 20 and 29 May

17. In addition, in his second letter of 20 May Mr Henry argues that Sky's STB is in breach of EU law requirements concerning the interoperability of consumer digital television equipment. So far as we are aware, this was not a point considered by OFCOM in coming to their Determination, and it certainly has not been raised in this appeal previously. It cannot therefore be a point of law arising from the Tribunal's Judgment capable of being appealed. In so far as Mr Henry raises new points outside the scope of the Determination and this appeal, it would seem that the most appropriate course of action would be to make a new complaint to OFCOM in relation to those new matters. In any case, however, and without considering the point in detail, the interoperability argument appears to be based on a misreading of the relevant provisions of EU law which require that all consumer digital television equipment intended for the reception of television signals is to *possess the capability* to display signals that have been transmitted 'in the clear'. At one time, the Rapture channel was indeed accessible via the Sky STB. The Sky STB is therefore clearly technologically capable of displaying the Rapture television channel. However, Sky cancelled Rapture's EPG listing because Rapture failed to pay the EPG listing charges. The provisions of EU law now prayed in aid by Rapture do not prevent a platform operator from delisting a channel that has failed to pay EPG charges, particularly in circumstances where the relevant national regulatory authority has investigated the dispute over the charges and determined that the charges are FRND.

18. Mr Henry also set out in more detail in his second letter his reasons for requesting a rehearing of the appeal. In particular, it is alleged that Rapture was prejudiced in that not all of the documentary evidence that should have been put before the Tribunal was included in the documents lodged with the Tribunal, and that Rapture was prevented from submitting economic evidence to the Tribunal (in which respect, see the Tribunal's ruling of 23 November 2007, [2007] CAT 34, in which Rapture was refused permission to make certain amendments to its notice of appeal and was refused

permission to adduce certain expert evidence). Mr Henry asks for the original hearing of the case to be declared void and for the case to be reheard.

19. The Tribunal's ruling of 23 November 2007 explains why the proposed expert evidence sought to be adduced by Rapture was rejected by the Tribunal (see paragraphs [123]-[126] of that ruling). In so far as decisions as to what documentary evidence to put before the Tribunal and whether or not to call Mr Henry as a witness are concerned, these were matters fully in the control of Rapture and its legal advisers. The fact that, with the benefit of hindsight, the Appellant could have provided more evidence or could have called a particular witness to give evidence in chief to the Tribunal is not a valid reason for giving permission to appeal or for allowing the appeal to be reheard. It is not the situation in this case that relevant new evidence has come to light since the hearing which, for whatever reason, could not have been put before the Tribunal at an earlier date. Furthermore, there is no provision in the Tribunal's rules that allows for a case to be reheard simply because the Appellant may be better able to present its case the second time round.

20. Mr Henry sent a third letter to the Tribunal on 29 May 2008. In that letter, Mr Henry reiterated his view that important information had not been taken into account in the Tribunal's Judgment, stressed the important public interest in the appeal and enclosed copies of recent correspondence between (i) Sky and its EPG customers, and (ii) Rapture and the Office of Fair Trading. Nothing in this letter or its enclosures amounts to a point of law arising from the Tribunal's decision capable of appeal or a legitimate reason for Rapture's appeal to be reheard. The correspondence between Sky and its other EPG customers concerns changes to Sky's process for launching services onto the Sky EPG implemented as from October 2007 is not relevant to the subject matter of the dispute considered by OFCOM (that being whether the price charged by Sky for EPG services provided to Rapture between November 2005 and November 2006 was FRND) or Rapture's subsequent appeal to the Tribunal against OFCOM's Determination. The correspondence between Rapture and the OFT appears to concern Mr Henry's argument that EPG services are not a form of conditional access service, which argument, for the reasons given above in paragraph [19], is not relevant to our considerations.

21. Finally, in his first letter of 2 May, Mr Henry requested that these applications be considered at an oral hearing. It is not the Tribunal's usual practice to hear applications for permission to appeal at an oral hearing and there is no automatic right to an oral hearing under the Tribunal Rules. In the circumstances of this case, where all of the points raised are manifestly without merit, we do not consider it necessary or appropriate to hold a further oral hearing.

CONCLUSION

22. Having considered all the material points raised in Rapture's application for permission to appeal and Mr Henry's letters, we unanimously reject Rapture's application for permission to appeal the Tribunal's Judgment of 31 March 2008 and reject Rapture's request for its appeal to be reheard.

23. Rapture's request for an order for costs would only have been relevant had we granted permission to appeal or ruled that the appeal be reheard. As we have rejected those applications, it is not necessary for us to rule on the request for a costs order.

ACCORDINGLY, we decide as follows:

(1) Rapture's application for permission to appeal the Tribunal's Judgment of 31 March 2008 is refused;

(2) Rapture's request that its appeal be reheard is refused; and

(3) Rapture's application for costs is refused.

Lord Carlile Paul Stoneman David Summers

Charles Dhanowa
Registrar Date: 19 June 2008