



[2005] CAT 24

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1026/2/3/04

Victoria House
Bloomsbury Place
London WC1A.2EB

14th June 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)

Sitting as a Tribunal in England and Wales

BETWEEN:

WANADOO UK PLC
(formerly FREESERVE.COM PLC)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC and Mr. Keith Jones (instructed by Baker & McKenzie) appeared for the Applicant.

Mr Stephen Morris QC and Mr Meredith Pickford (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr Gerald Barling QC, Miss Sarah Lee and Mr. Paolo Palmigiano (instructed by BT Legal) appeared for the Intervener.

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

RULING

THE PRESIDENT:

- 1 This afternoon I have been considering the situation in the present Appeal, which is listed for hearing on 4th July next, against the background of an application by the Appellants, Wanadoo, to introduce into the Appeal the Statement of Objections that has been served in parallel administrative proceedings that are being conducted by Ofcom against BT, which concern the same subject matter but a different time period. The present Appeal is limited at the moment to the period April/May 2002, whereas the Statement of Objections covers the period from at least June 2002 to 2004, although – so it is asserted – there is information in the Statement of Objections that relates back to the months of April/May 2002.
- 2 Wanadoo has wanted to introduce the Statement of Objections into the appeal since (according to Wanadoo) that document throws considerable light on the correct approach to be adopted to the issues in this case and is, in material respects (says Wanadoo) inconsistent with the approach Ofcom adopted in the Decision appealed against. Ofcom denies any such inconsistency and BT for its part argues, among other things, that the Statement of Objections is without relevance, that it is not evidence, that it is strongly contested, provisional in nature and concerns only a separate administrative procedure that has nothing to do effectively with the present Appeal.
- 3 For reasons that I do not need to go into in detail this afternoon it seems to me that there is some risk of unfairness to BT if the Statement of Objections is introduced into the Appeal. There is indeed a practical problem in addition, that the existing Statement of Objections is due to be replaced by a further document to be issued by 24th June, a non-confidential version of which will only be available by 1st July, which means that it is extremely tight for anyone to absorb such further document before this case commences to be heard on the existing date of 4th July.
- 4 On the other hand, Wanadoo in its various arguments has put forward a submission to the effect that it would equally be unfair to Wanadoo for this case to proceed without Wanadoo being able to refer to the Statement of Objections. Although, in addition, attempts have been made – not least by the Tribunal – to identify particular issues in this Appeal that could be decided without trespassing on the existing administrative procedure, the discussion before me this afternoon reveals that there is, to put it at its lowest, a very considerable risk that the hearing of this Appeal would spill over into factual and other issues that are really being

canvassed in considerable detail and at a high level of sophistication in the existing administrative procedure.

5 The situation therefore that I find myself in is that, at least provisionally, I am of the view that there would be an injustice to BT if the Statement of Objections was allowed in, whereas, on the other hand, there would be an injustice to Wanadoo if the Statement of Objections was kept out. In addition, there does seem to me to be a considerable down side risk from the Tribunal's own point of view in attempting to decide some of the issues in the first Appeal without having the full picture, and without being able to see the matter in the round. There is in particular the risk that the Tribunal might inadvertently decide some point on the basis of what it had in front of it to the detriment of one party or the other in the pending proceedings in a way that might pre-empt or limit the issues that are currently being canvassed in the administrative procedure.

6 Against that background I had provisionally come to the view that it was appropriate to reopen the decision that was taken at the last case management conference on 18th March 2005, which was to the effect that the case should proceed to a hearing as planned. As it transpires all three parties before me are now agreed that the best course is to adjourn the hearing date so that the various risks and disadvantages to which I have just referred are avoided and, in particular, to allow the administrative proceedings, which are expected to be complete by the end of this year, to catch up with a view to the two appeals coming on together and for the matter to be heard in the round. Therefore I have, in effect, an application by all three parties to adjourn this matter, and everybody is agreed more or less, for the reasons that I have given that that is the right thing to do.

7 In those rather particular circumstances, and having regard to the fact that I have had the chance to see provisionally the Statement of Objections, I am now very much better informed than the Tribunal was on 18th March; and those circumstances lead me to the conclusion that the right thing to do in this case is to vacate the hearing date set for 4th July and to adjourn the hearing in this Appeal to a date to be fixed. In practical terms that means the hearing will go off until later and the Registry will be in touch with the parties in due course to explore what sensible further arrangements should be made for the planning of this Appeal in the light of progress in the parallel administrative proceedings.

I think that probably deals with the matter.