Neutral Citation: [2017] CAT 4

Case No: 1246/8/3/16

IN THE COMPETITION APPEAL TRIBUNAL

2 February 2017

Victoria House
Bloomsbury Place
London WC1A 2EB

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PROFESSOR COLIN MAYER
CLARE POTTER

Sitting as a Tribunal in England and Wales

B E T W E E N:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

SKY UK LIMITED

Intervener

RULING (PERMISSION TO APPEAL)

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1. On 21 December 2016, the Tribunal handed down its judgment in these proceedings ([2016] CAT 25) (the "Judgment") dismissing an appeal brought by BT against OFCOM's decision contained in the 2015 Statement to remove the WMO. This ruling adopts the same defined terms as are set out in the Judgment.

2. On 11 January 2017 BT applied for permission to appeal the Judgment to the Court of Appeal.

3. OFCOM and Sky each filed written observations on BT's request for permission to appeal. None of the parties requested an oral hearing and in light of the helpful written submissions we have received from the parties, the Tribunal is able to deal with the matter on the papers.

4. A judgment of the Tribunal in a case such as this can be challenged under section 196 of the 2003 Act (as applied by section 317(7)) which provides for appeals to (in this case) the Court of Appeal. Any such appeal requires the permission of the Tribunal or the Court of Appeal and must raise a point of law.

5. In considering whether to grant permission when, as in this case, sitting in England and Wales, the Tribunal applies the test set out in Civil Procedure Rules rule 52.3(6):

> "Permission to appeal may be given only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
> (b) there is some other compelling reason why the appeal should be heard."

Grounds of appeal and the Tribunal's conclusions

6. BT sought permission to appeal the Judgment on four grounds. BT claimed that the grounds raised arguable points of law, the appeal had a real prospect of success and the case raised an important question as to the scope and interpretation of s.316 of the 2003 Act, such that there was a compelling reason why the appeal should be heard by the Court of Appeal.

Ground 1: The Tribunal's interpretation and application of section 316

7. BT submitted here that the Tribunal erred in concluding that section 316 imposes on OFCOM no more than a *"a duty to give full and proper consideration to the possible need for inclusion of conditions, rather than a duty to include a condition unless there is no possible condition that could remove or attenuate the risk"* (Judgment paragraph 89). BT argued that where there are appropriate and proportionate conditions capable of addressing identified risks to fair and effective competition, these should be imposed.

8. BT submitted in particular that the Tribunal erred in accepting that OFCOM could adopt a 'wait and see' approach and said that section 316 is a competition power which requires OFCOM to act so as to ensure fair and effective competition in the provision of licensed services. BT further argued that OFCOM was not entitled to limit its assessment to Sky's willingness to enter into commercial supply arrangements, or to decide that it would only take regulatory action if future agreements were not concluded but had to address the objective question of whether Sky's terms of supply ensure fair and effective competition; OFCOM had decided to remove the WMO without concluding that there was no longer any concern about supply on terms that prevent fair and effective retail competition.

9. BT further submitted that the Tribunal erred in its conclusions on proportionality. In particular, the Tribunal was wrong in deciding that the proportionality test set out in *Tesco plc v Competition Commission* [2009] CAT 6 at paragraph 137 was not relevant; in seeking to distinguish a 'balancing exercise' from a structured proportionality assessment; and in finding that a proportionality assessment could be implied in this context. BT submitted that OFCOM failed to carry out any identifiable proportionality assessment or 'balancing exercise', failed to consider any alternative conditions, and did not adduce any evidence suggesting that such an analysis had been carried out; and that that the Tribunal was wrong to conclude otherwise.

10. OFCOM submitted in reply that, to the extent that it made out errors of law, this ground of appeal was unarguable. The interpretation of section 316 advocated

by BT, if adopted, would mean that OFCOM was obliged to impose a licence condition whenever it had identified a risk to fair and effective competition. Not only was this contrary to OFCOM's general duties and obligations but did not take into account the requirement under section 317 to consider other forms of intervention before invoking section 316. BT's argument that OFCOM could not remove the WMO unless it had concluded that fair and effective competition was restored was also contrary to OFCOM's general duties and the principles of sound regulatory practice. OFCOM had concluded that in a changed market situation of wide supply it was appropriate to move to a less interventionist approach, whilst being ready to intervene if necessary. BT's claims on proportionality were similarly unarguable. The *Tesco/FEDESA* test (which involved asking if a measure was proportionate to its aim) could not be applied to a situation where a measure was being removed. OFCOM had clearly assessed the risks and advantages of removing the WMO and the Tribunal was right to conclude that this was justified.

11. Sky submitted that BT's case was hopeless. BT's interpretation of section 316 would mean that OFCOM was obliged to impose a condition if there was any risk of damage to competition, whereas the statutory regime clearly allowed OFCOM discretion. BT's claim that OFCOM could only remove the WMO after concluding that fair and effective competition was restored similarly imposed rigidity, whereas OFCOM was entitled to use its discretion in the light of the market conditions that it observed. Sky also considered BT's argument on proportionality to be without merit. OFCOM had weighed the risks and advantages of maintaining the WMO before removing it and the Tribunal was right to uphold that decision.

12. The Tribunal's view is as follows.

13. The conflicting interpretations of section 316 and its place in the scheme within the 2003 Act were fully aired in the case before us. In the Judgment we dealt with all of the points now raised by BT and see no reason to change our view that they must fail. In essence the matter boils down to a disagreement between BT and OFCOM, supported in this instance by Sky, about the existence and extent of OFCOM's discretion to act in pursuance of its regulatory powers. The

fact that, as we found, section 316 contains an element of compulsion going beyond a mere power to act, does not in itself mean that OFCOM is obliged to impose licence conditions in every case where there is a risk to fair and effective competition. Instead it is for OFCOM to decide, in its discretion, whether a licence condition is appropriate (in which case the conditions must address the practices in question), or whether some other measure is apposite, such as using its Competition Act powers, or its power under the Enterprise Act to call for a market investigation, or, as it did in this case, stepping back and observing the development of market conduct and market conditions.

14. Similarly, we examined carefully the question of whether OFCOM was obliged to conclude that there was fair and effective competition before removing the WMO. BT's argument here is not about the correct interpretation of section 316, but about our assessment of OFCOM's action, and we doubt that it discloses any question of law. In any case, we do not consider that BT's claim discloses any new reason, not already considered in the Judgment, why OFCOM's approach was incorrect.

15. In relation to proportionality, BT's claim for the application of the *Tesco/FEDESA* test, which was advanced fairly late in the proceedings, is in reality an appeal against our assessment of OFCOM's exercise of its discretion, in an area where we would expect the regulator to be given some margin of appreciation. In our view, the decision to remove a measure is quite different from a decision to impose one, the one being interventionist in nature, the other the opposite. The proportionality test adopted by OFCOM in this case was judged by us to have been sufficient and appropriate and BT's arguments to the contrary were fully argued before us. We see no issue of illegality.

16. We therefore do not consider this ground to have a real prospect of success.

Ground 2: Pricing

17. BT submitted here that the Tribunal erred in upholding OFCOM's decision not further to investigate pricing, and its conclusion that Sky's current wholesale pricing was not set at a level that prejudiced fair and effective competition. In particular that the Tribunal:

(a) wrongly characterised BT's appeal as a disagreement with the OFCOM's finding on Sky's pricing, rather than with its failure to carry out an analysis of Sky's pricing, or to gather the evidence necessary to conclude that Sky's current wholesale pricing did not prejudice fair and effective competition;

(b) was wrong not to have appreciated that the absence of effective retail competition indicated a need for further investigation of whether Sky's terms of supply were prejudicial to fair and effective competition, in particular by restricting the margin available to Sky's retail customers;

(c) found without any evidence that the wholesale price paid under Sky's agreements with Virgin Media and TalkTalk was set at a level that ensured fair and effective competition, ignoring evidence to the contrary from OFCOM's witness, Mr Matthew, that OFCOM had not carried out the necessary assessment;

(d) was wrong to rely on the absence of any significant comment on pricing from Virgin Media or TalkTalk, given the context of the consultation process and OFCOM's position prior to the 2015 Statement. The Tribunal also wrongly upheld OFCOM's failure to appreciate the impact of the WMO remedy as the backdrop to Sky's current wholesale pricing; and

(e) did not address OFCOM's failure to analyse the effect of Sky's wholesale pricing on the ability of new entrants to compete effectively with Sky.

18. OFCOM said in reply that BT had simply mischaracterised the Judgment. In concentrating on the statement in paragraph 205 as to what the Tribunal thought may have underlaid many of BT's criticisms, BT had ignored the previous 42 paragraphs of the Judgment in which those criticisms had been systematically examined and found in large measure to be without justification. The Tribunal had looked carefully at the evidence of Mr Matthew as to how OFCOM had approached the question of Sky's wholesale pricing and its effects on competitors such as Virgin Media and TalkTalk; it had not relied solely on the absence of complaints but had considered all the evidence; and that it had

correctly acknowledged that in the 2015 Statement, in light of the wide supply by Sky observed by OFCOM, the imposition of a remedy designed to encourage new entry by small "standalone" third parties was no longer as important as it had been in 2010. OFCOM saw this ground of appeal as raising no real questions of law and was more an attempt by BT to re-argue its disagreement with the Tribunal's assessment of facts and of the regulator's exercise of its discretion.

19. Sky made observations to similar effect. It was clear the Tribunal had fully understood the nature of BT's complaint but had rejected it. Similarly, it was not any lack of evidence for the Tribunal's conclusions that was apparent, merely that the Tribunal attached, to the evidence it considered, different weight from that in BT's own assessment.

20. The Tribunal's view is as follows.

21. We consider that this ground for seeking leave reveals no question of law; it is instead a disagreement with OFCOM's assessment of the market, the conduct of parties on the market and the appropriateness or otherwise of regulatory intervention. This disagreement was aired extensively before us and we found largely in favour of OFCOM. We do not think any useful purpose is served by airing this disagreement further before the Court of Appeal.

22. In particular we looked carefully at BT's argument that OFCOM should have conducted its assessment in a different way, should have started from the 2010 findings and should have conducted a detailed investigation of Sky's wholesale pricing similar to the examination it had conducted in 2010. However, we took the view that given the intervening events, including the Tribunal's 2012 Judgment on the appeal brought by Sky against OFCOM's 2010 Statement, OFCOM was fully entitled to change its approach and starting point and to examine the need for intervention in the light of current market conduct and conditions.

23. The emphasis placed by BT on our assessment of the positions of Virgin Media and TalkTalk is mistaken. The absence of a significant complaint from these companies was only one of several factors relied on by OFCOM and we

regarded it as a significant, but not in itself decisive. Other factors included the Tribunal's own earlier finding in relation to Virgin Media's position and evidence as to the commercial terms of Sky's agreements with Virgin Media and TalkTalk.

24. Similarly, the work done by OFCOM in 2010 to design a remedy, including a pricing mechanism, that would encourage new entry by a notional small "standalone entity" was much less important in 2015 market conditions. This was OFCOM's view and we agreed with it.

25. We therefore regard this ground as a disguised attempt to present as a question of law BT's disagreement with the exercise of the regulator's assessment of the facts and exercise of its discretion and with our own view of those matters, and we consider that it has no real prospect of success.

Ground 3 – The 'grant back condition'

26. BT submitted here that the Tribunal had erred in not distinguishing between the prejudice involved in Sky imposing a pre-condition of cross-supply and the factual possibility that some kind of reciprocal deal might nevertheless be entered into; even if the latter occurred, that was not a satisfactory basis for failing to address Sky's unequivocal practice of demanding the grant back condition as a precondition for wholesale supply of its key sports channels.

27. BT further submitted that Sky's insistence on the grant back condition did not only 'raise an issue' for BT, but acted as a disincentive for any (actual or potential) competing pay TV provider to compete with Sky for attractive sports content, and therefore had an impact on competition, innovation and consumer welfare generally.

28. Finally, BT submitted that the Tribunal erred in concluding that, whilst a grant back requirement might raise concerns in principle, no relevant issue had yet 'crystallised'. The clear evidence before the Tribunal, from BT and from Sky, was that the relevant issue had indeed 'crystallised'.

29. OFCOM submitted in reply that the Tribunal had considered whether a demand for reciprocal supply was in itself anti-competitive, without any agreement having been concluded, and had decided that this could not be pre-judged in the absence of any final agreement; it further judged OFCOM right to have found no issue had crystallised as the terms of any reciprocal agreement were unknown. As with other aspects of BT's application, including the question of whether BT was the only company affected by Sky's practice, there was no apparent error of law, merely a disagreement with the Tribunal's assessment.

30. Sky similarly submitted that this ground was a "series of disagreements with the Tribunal's factual finding". Sky also observed that BT's claim that Sky's practice had a "chilling effect" on the industry as a whole (which BT said the Tribunal ignored) had not been pleaded by BT and no evidence on it was provided.

31. The Tribunal's view is as follows.

32. This ground corresponds to BT's original appeal ground 5 and was examined carefully and thoroughly in the Judgment. In particular, BT's claim that the practice engaged in by Sky, which was freely admitted, of seeking reciprocal supply as a condition for the supply of its key sports channels was in itself prejudicial to fair and effective competition was expressly considered by the Tribunal and rejected.

33. The Judgment found that the anti-competitive nature of such a practice in this case could only be judged in the light of all the circumstances, after "a complex assessment of the reasonableness of each party's position, the nature of the key content in question and what content each party holds." (Judgment paragraph 255). The Tribunal held that it was for OFCOM to make such an assessment and also agreed that it was for OFCOM to decide whether any prejudice to fair and effective competition of the kind BT claimed was apparent in this case in the absence of any agreement.

34. In our view, that is not a question of law susceptible of appeal to the Court of Appeal but is instead a disagreement with the Tribunal's assessment of the facts of this case and its view of the regulator's discretion. The same goes for BT's

suggestion that the Tribunal erred in concluding that the only company for which Sky's practice was currently an issue was BT, because it held key sports content that Sky wished to access. The Tribunal considered the parties' claims and the relevant facts at paragraphs 225-226 of the Judgment and decided accordingly.

35. We therefore do not consider this ground has a real prospect of success.

Ground 4 – Expert evidence

36. BT submitted here that the Tribunal was wrong to disregard some of BT's expert modelling (that is Compass Lexecon's "discrete choice" modelling and the Dryden-Padilla "dynamic bidding for content" model) on the basis that it was not addressed by Sky's expert witness and did not form part of the "hot tub" joint expert exercise. According to BT, the Tribunal's decision to exclude this aspect of the expert evidence from the joint expert session or from further cross-examination was an error of approach in relation to the evidence.

37. OFCOM pointed out that the part of the Judgment relied on by BT in support of this ground, (footnote 104 to paragraph 249) had been selectively quoted and when read in full gave a different explanation for the Tribunal's decision not to include the modelling evidence in question in the joint expert examination. This was because the theory it was meant to support had been considered elsewhere in the judgment and not found convincing. Sky made a similar observation saying further that BT had in any event had the opportunity to cross examine Sky's witnesses on the point.

38. The Tribunal's view is as follows.

39. The Tribunal conducted a joint expert examination in order to establish the importance and relevance of some of the modelling evidence advanced by BT and the critique of it provided by Sky, with OFCOM's acquiescence. All evidence, including the additional modelling evidence referred to by BT, was considered by the Tribunal. The modelling evidence provided by BT addressed two issues, the effect of the so called "grant back condition" (see ground 3 above) and the so called "vicious circle" theory of auction bidding advantages

advanced by BT. The joint expert examination was intended to deal with expert evidence in relation to the grant back issue, and did so to the Tribunal's satisfaction.

40. The Tribunal considered the "discrete choice" modelling extensively in the joint expert examination and noted in the Judgment that Dr Padilla had concluded that introducing a market elasticity in the context of a choice model "did not materially affect his results" (see paragraph 245 of the Judgment). Regarding the "dynamic" modelling, in their joint evidence both experts confirmed that the distinction between the static and dynamic models was one of timing between the short and long-run. It was therefore appropriate to consider the dynamic modelling in the context of investment incentives and the "vicious circle" issues, which the Tribunal did by reference to all the evidence, including the additional models, as noted in footnote 104 of the Judgment.

41. The Tribunal, did not, however, find the additional modelling evidence of great assistance in comparison with other evidence such as that given by BT's factual witness Mr Petter. The Tribunal also found that Dr Padilla's oral evidence, on which he was cross examined, and which included reference to the additional modelling evidence, suggested that the "vicious circle" theory, regardless of what any theoretical model might show, was over-stated and not borne out in practice, as also was BT's own view of its bidding disadvantages (see paragraphs 124-133 and 149 of the Judgment).

42. The Tribunal was entitled to consider the evidence at issue before it and to assign what weight it considered appropriate. This it did. In these circumstances it is hard to see an "error of approach to the evidence" from the suggestion that the additional modelling evidence referred to by BT was not included in the joint examination of experts at the trial.

43. We therefore think there is no substance to this ground and accordingly that it has no real prospect of success.

Other compelling reasons

44. We do not consider that any of the grounds for leave to appeal advanced by BT have a real prospect of success. We therefore consider whether there is any other compelling reason why we should grant leave to BT to appeal in this case.

45. BT pointed to the significance of section 316 and the broad discretion which it claimed our judgment confers on OFCOM. It argued that OFCOM may be less likely than hitherto to intervene pre-emptively and that this may be contrary to the intention of Parliament and to OFCOM's general duty to further consumer interests "where appropriate by promoting competition".

46. We consider these arguments to be over-stated. The Judgment does nothing more than recognise the important role that section 316 may play in circumstances where OFCOM considers that there is a need to intervene. We do not think it is helpful to the objectives of economic regulation to seek to impose overly rigid requirements compelling OFCOM to intervene in any particular case or requiring it to use any particular instrument if it does. In any event we do not consider the Judgment establishes any new principle that might need to be considered by the Court of Appeal.

47. We also note that a similar question of interpretation of section 316 was raised by BT in its application for leave to appeal in the predecessor case to this one (*BSkyB and others v OFCOM*). BT's first ground for leave to appeal was that the Tribunal had wrongly considered only Sky's past conduct "when section 316 is a 'forward looking instrument' the focus of which is on the need to promote 'fair and effective competition' in the future, by putting in place an ex ante remedy" (Tribunal judgment of 7 February 2013, [2013] CAT 2 at para 3). Whilst the Court of Appeal (Lewison LJ) granted BT leave to appeal on its second ground, it did not consider that BT's first ground justified granting leave to appeal.

48. We do not find there to be any compelling reason for this application for leave to appeal to be granted.

Conclusion

49. For the reasons set out above, our unanimous decision is that permission to appeal is refused in relation to all the grounds advanced by BT. Should BT wish to renew its application for leave to the Court of Appeal, a copy of this ruling should be placed before the Court of Appeal.

Peter Freeman CBE QC *(Hon)* Clare Potter Professor Colin Mayer

Charles Dhanowa OBE, QC
(*Hon*)
Registrar

Date: 2 February 2017