IN THE COMPETITION APPEAL TRIBUNAL Case No. 1007/2/3/02

[2003] CAT 6

New Court
Carey Street
London WC2A 2JT

Wednesday 16 April 2003

Before:

The President
SIR CHRISTOPHER BELLAMY
(Chairman)
PROFESSOR JOHN PICKERING
DR ARTHUR PRYOR CB

B E T W E E N:

FREESERVE.COM PLC **Applicant**

v.

DIRECTOR GENERAL OF TELECOMMUNICATIONS **Respondent**

supported by
BT GROUP PLC **Intervener**

Mr James Flynn (instructed by Messrs Baker & McKenzie) appeared for the applicant.

Mr John Turner (instructed by The Director of Legal Services (Competition) Office of Telecommunications) appeared for the respondent.

Ms Kelyn Bacon (instructed by the Head of Competition and Public Law, BT Retail) appeared for the Intervener.

JUDGMENT ON COSTS

Transcribed from the shorthand notes of
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THE CHAIRMAN: We have given a judgment today in the case of Freeserve.Com.PLC -v- the Director General of Telecommunications. In that judgment the Tribunal has set aside paragraphs 15 to 17 of the Director's Decision of 21 May 2002 rejecting a complaint by Freeserve of 26 March 2002 and dismissed the remainder of the appeal.

Paragraphs 15 to 17 of the Director's Decision, which have been set aside, deal essentially with that part of Freeserve's complaint that alleged that BT's pricing policy was in breach of the Chapter II prohibition imposed by the Competition Act 1998, in particular as regards an allegation of predatory pricing. It is, however, to be noted that the Tribunal's judgment is to set aside paragraphs 15 to 17 in their entirety.

Two consequential issues have arisen which we have had to consider this morning.

The first issue is what order, if any, the Tribunal should make about the further conduct of this case and, in particular, whether "the matter" should be remitted to the Director pursuant to paragraph 3(2)(a) of Schedule 8 of the 1998 Act. That is the first issue.

The second issue is the issue of costs.

We deal first with the further progress of this case. As the Tribunal noted in its judgment at paragraph 262, "there have been developments in the market in question since the Director took the contested decision. It is also open to Freeserve to submit a new and, if so advised, more fully supported complaint". It was in those circumstances that we have heard further argument as to what order, if any, we should make under paragraph 3(2)(a) of Schedule 8.

The Director in that connection has proposed that instead of the Tribunal remitting the matter, he, the Director, should give an undertaking that he would provide within two months a fuller statement of his reasoning on the issue of predatory pricing in the Decision. That indeed was the principal matter upon

1 which the Tribunal found that the Director's reasoning
2 was insufficient.
3 The statement by the Director of his reasoning on
4 this issue would take the form of a further decision on
5 Freeserve's complaint which would, at least in
6 principle, then be appealable to the Tribunal. The
7 Director's suggestion is focused on the principal
8 finding that the Tribunal made, which was indeed that on
9 the issue of predatory pricing the reasoning in the
10 Decision was insufficient.
11 It became apparent, however, that at least at this
12 stage the Director is, or at least was, predisposed to
13 reach the same conclusion that he had originally reached
14 in rejecting Freeserve's complaint, namely, that BT had
15 not infringed the Act by reason of its pricing policy,
16 in particular by reason of any allegation of predatory
17 pricing. The Director's view was that the only omission
18 on his part was in relation to the sufficiency of his
19 reasoning in support of his conclusion on predatory
20 pricing and his suggestion is that he should now provide
21 that reasoning.
22 In our view, that suggestion, although it does have
23 its positive elements, does not, at least in that form,
24 meet the requirements of the present case. The
25 position, as we see it, is that paragraphs 15 to 17 of
26 the Decision have been set aside. That is to say, the
27 Decision is set aside on the pricing issues raised in
28 Freeserve's complaint. In principle it is now for the
29 Director to reconsider "the matter" *ab initio*.
30 Without expressing a definitive view, we think
31 provisionally that the "matter" within the meaning of
32 paragraph 3(2)(a) of Schedule 8 is Freeserve's original
33 complaint as elaborated in its section 47 letter of 20
34 June 2002 and in its submissions to the Tribunal. It is
35 now for the Director, therefore, to reconsider the
36 issues raised by paragraphs 15 to 17 of the Decision and
37 most notably, but not necessarily exclusively, the
38 allegation of BT's predatory pricing. He should, in our

view, reconsider that matter, not only in the light of the considerations that he originally had in mind but (as he submits) failed to express in the Decision, but also in the light of the Tribunal's judgment and the material that is now before him, including the material that has been produced in the course of these proceedings.

The issue that needs to be addressed in that reconsideration is the Director's response to Freeserve's allegation that BT's pricing policy infringes the Chapter II prohibition. That may involve the Director distinguishing between margin squeeze, cross-subsidy and predatory pricing and expressing the Director's view as to the criteria to be applied in relation to these inter-related but distinct concepts. The Tribunal has not at this stage expressed any view on the merits of the case one way or the other.

It is apparent that the focus of the reconsideration will necessarily be the issue of predatory pricing, because that is the issue upon which the Tribunal's judgment focuses, but the relationship between predatory pricing and other concepts involved may need to be explained in any further decision that the Director chooses to take.

Such a reconsideration by the Director should, in our view, in principle be recommenced with an open mind. Despite the mental gymnastics that may possibly be involved, the Director should not, in our view, approach his reconsideration with a closed mind with a view to inevitably reaching the same conclusion.

As a safeguard on that point specifically, it seems to us that in the light of the further development of the argument that has taken place since the original decision, the parties involved, Freeserve and BT, should have an opportunity to put before the Director any material they wish before the Director reaches a concluded view. If on a reconsideration the Director were to come to the provisional view that, after all,

1 there may have been an infringement of the Chapter II
2 prohibition then, at least in normal circumstances, the
3 Director would follow the procedure provided under the
4 Act in accordance with section 26, namely the procedure
5 that applies in the case of possible infringements. If,
6 on the other hand, the Director should reach the
7 provisional view that there is no infringement, the
8 suggestion has been helpfully and responsibly made on
9 behalf of the Director that before coming to a final
10 conclusion he should put before Freeserve and BT the
11 draft conclusions to which he was provisionally minded
12 to come and give those parties the opportunity to submit
13 any observations that they may have.
14 We think that is a sensible suggestion. It is in
15 fact quite close to the procedure customarily followed
16 by the European Commission when rejecting complaints
17 under Article 6 of Regulation 99 EC.
18 If the matter reaches that stage, the Director will
19 then put his draft conclusions to Freeserve and BT and
20 they will be able to put their arguments to the
21 Director, drawing his attention to any matters they may
22 think are relevant, including the usefulness or
23 otherwise of the Director taking into account in his
24 decision on the original facts of the case any
25 subsequent developments which may throw light on the
26 original circumstances. It will, of course, be for the
27 Director to decide what is relevant and what is not. It
28 will also be for the Director to take into account the
29 relevant or otherwise of the forthcoming regime to be
30 shortly introduced by European directives and the
31 relationship, if any, between those directives and the
32 issue that the Director may be considering in reaching
33 his new decision.
34 The fact that, in our view, Freeserve and BT should
35 have the opportunity to comment on any provisional
36 conclusions the Director proposes to reach in possibly
37 rejecting the complaint, does not of course preclude
38 either Freeserve or BT from putting any matters to the

1 Director that they think fit before he reaches his
2 provisional conclusions. That is entirely a matter for
3 them. We see no basis upon which they could be
4 prevented from putting such observations to the Director
5 if they wish to do so.
6 It is true that if this procedure results in a
7 certain amount of further time being taken, it may be
8 that longer than the original two months suggested by
9 the Director is necessary. We think it is more
10 important for a sound conclusion to be reached on these
11 issues than it is for the matter to be rushed.
12 What we would propose is that any new decision
13 should be taken by the Director within three months of
14 today's date, but there should be a general liberty to
15 apply to the Tribunal for further time if that proves
16 necessary. The Tribunal is likely to be sympathetic to
17 any such applications.
18 The procedure that we have indicated does not
19 preclude the Director, if he so wishes and if he thinks
20 it is a matter of sufficient importance, to publish his
21 provisional views before he reaches a final conclusion
22 more generally so as to satisfy himself that all
23 considerations have been taken into account.
24 On this part of the matters we have to decide,
25 therefore, there will be no order under paragraph
26 3(2)(a) of Schedule 8 of the Act on the Director's
27 undertaking to adopt a further decision on the pricing
28 issues raised in Freeserve's complaint of 26 March 2002
29 and dealt with in paragraphs 15 to 17 of the Director's
30 Decision of 21 May 2002, the Director undertaking that
31 before rejecting Freeserve's complaint, were he minded
32 to do so provisionally, he would give Freeserve and BT
33 an opportunity to comment on any provisional conclusion
34 that he was minded to reach on that matter. Any further
35 decision by the Director should be taken within three
36 months of today's date, but with liberty to apply for
37 further time. There will be a general liberty to apply
38 under the Tribunal's order.

That takes us on to the second issue, which is the issue of costs in this case.

The position as to costs is that Freeserve asks for the costs of the preliminary issue as to the admissibility of the appeal, which was decided in an interim judgment of the Tribunal dated 11 November 2002 in accordance with a similar order that the Tribunal made in its decision in the **Bettercare** case. Freeserve submits that this is a stronger case than **Bettercare**, however, in that in **Bettercare** the applicant did not in the end recover its costs of the main proceedings, there being no order for costs.

Freeserve submits that it should have an order in its favour of at least 50 per cent of the costs of the main proceedings on the grounds that it has been substantially successful in the main proceedings and that its ability to put further matters to the Director before the proceedings commenced was rather closed off by the attitude that the Director took in response to Freeserve's section 47 letter. Freeserve resists the suggestion by BT that there should be any order for costs in relation to an application for discovery that was on the agenda of the Tribunal for a case management conference that was held on 17 December 2002 on the grounds that the work that BT did in that connection was something of an overreaction and based on a misunderstanding of Freeserve's position. The general rule, says Freeserve, is that interveners, such as BT, should normally bear their own costs.

The Director's position is that there should be no order for costs in relation to the proceedings looked at as a whole, albeit that the Director was unsuccessful at the stage of the admissibility judgment. The Director draws attention to Rule 26(2) of the Tribunal's Rules, which invites the Tribunal to bear in mind the conduct of the parties. The Director says that if one takes into account Freeserve's conduct, namely, that they were pursuing, until a late stage, an application that the

1 Tribunal itself take an infringement decision, that they
2 were pursuing an application for disclosure that was
3 subsequently abandoned, that their original application
4 had a number of poorly argued points, that they never
5 submitted the fresh evidence that had been promised, and
6 that they have lost on the substance, according to the
7 Tribunal's judgment, on at least three, if not four,
8 major issues and had only succeeded on one issue, the
9 predatory pricing issue, then there should be no order
10 for costs in relation to the proceedings as a whole,
11 bearing also in mind that, even on the admissibility
12 point, the Director did give voluntary disclosure and
13 his approach to that issue was of the highest standard.
14 Although, says the Director, he could claim a proportion
15 of his costs, he thinks the right order is that there
16 should be no order for costs.
17 BT, as the intervener, first of all claims costs
18 associated with the preparation for the discovery item
19 that was on the Tribunal's agenda for the case
20 management conference of 17 December 2002. BT's
21 essential case is that it was led to believe by letters
22 from Freeserve of 9 and 11 December that there would be
23 a substantial application for disclosure made at that
24 case management conference. BT therefore had to do a
25 lot of work to meet that possibility but that it became
26 apparent, either on the morning of the case management
27 conference or at the case management conference, that
28 the application had been abandoned and that therefore
29 BT's work was fruitless.
30 As regards the substance of the appeal, BT asks for
31 three-quarters of its costs, the costs of its
32 intervention, on the grounds that such an order would
33 generally reflect the degree of success that BT has
34 achieved on its intervention.
35 We have been helpfully referred to the Tribunal's
36 decision of 29 January in the **GISC** case, 2002 CompAR 141
37 at paragraphs 75 to 81, which dealt with the costs of
38 the intervener, **GISC** in that case. BT submits in the

1 light of that judgment that there is no rule that
2 interveners should not get their costs. They are in
3 principle, in a proper case, entitled to the costs, says
4 BT. BT further relies on the judgment of Mr Justice
5 Munby of 10 May 2002 in the case of **John Smeaton on**
6 **behalf of the Society for the Protection of Unborn**
7 **Children -v- The Secretary of State for Health**, with
8 **Schering Health Care Limited** as an intervener. In that
9 case Mr Justice Munby made an order for the interveners
10 to have their costs on the grounds essentially set out
11 at paragraph 436 of that judgment to the effect that the
12 intervener's interests were directly affected, that the
13 intervener required separate representation and that its
14 evidence was distinctive and useful and did not
15 duplicate the submissions of the Secretary of State. BT
16 invites us to draw an analogy with that case.
17 On the issue of costs, we have come to the
18 conclusion, first, that Freeserve should have its costs
19 on the issue of admissibility dealt with in the
20 Tribunal's judgment of 11 November 2002. Without
21 recapitulating the matters set out in that judgment, it
22 was the case that in a letter of 8 July 2002 the
23 Director denied that he had expressed a view on whether
24 there had been an infringement of the Chapter II
25 prohibition and indeed whether he had taken any decision
26 under the Competition Act 1998. In the course of those
27 proceedings it was quite quickly conceded by the
28 Director that the matter had in fact been considered
29 under the Competition Act, contrary to the view set out
30 in the letter of 8 July 2002, and it was shortly
31 afterwards conceded that at least in relation to one
32 issue, the telephone census point, there was an
33 appealable decision within the meaning of section 46 of
34 the Act.
35 In the Tribunal's view, in the light of the earlier
36 judgment in **Bettercare**, it was virtually inevitable that
37 the Tribunal would come to the view that the remainder
38 of the Director's decision in the present case was an

appealable decision and in those particular circumstances, which are specific to the facts of this case, we think that Freeserve should have its costs of the admissibility issue. We say advisedly and deliberately the costs of the admissibility issue. It is not a question, as in **Bettercare**, of all the costs up to the date of the admissibility judgment, because quite a few costs will have been incurred before that point in preparing arguments on the substance. It is only in relation to the admissibility issue as a discrete issue that we give Freeserve its costs of that issue.

On the question of the costs of the main proceedings, we take, first, the costs as between Freeserve and the Director.

It is true that Freeserve has succeeded on what was probably the main issue in the case, at least to the extent that the Tribunal found it necessary to set aside paragraphs 15 to 17 of the Decision on grounds of insufficiency of reasoning. On the other hand, we do see force in the Director's criticisms of Freeserve's presentation of its case in various respects - the abandonment of the request for the Tribunal to take an infringement decision, the abortive application for disclosure, a number of weak points taken on behalf of Freeserve and of course the fact that on at least three of the main points raised by Freeserve, namely cross-marketing, advance notice and the telephone census - the Director has been successful and the appeal has been rejected.

Taking those points in the round, we think the right order is that the costs should lie where they fall as between Freeserve and the Director and that therefore there should be no order as to costs as between Freeserve and the Director, other than an order that Freeserve should have its costs on the admissibility issue. Whether those costs are to be taxed or assessed, we will invite the parties in a moment to comment.

As regards the situation of BT as the intervener,

we are mindful of the dictum of Lord Lloyd of Berwick in **Bolton Metropolitan District Council v. Secretary of State** [1995] 1 WLR 1176 at page 1178E, where the learned Lord of Appeal said, on the question of costs, as follows:

> "What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and long-standing, must never be allowed to harden into a rule."

He then carried on to set out certain propositions.

In expressing views on the position of BT, we are not allowing the indications we are about to give to harden into a rule, but they do express our view in general on interveners in the situation of BT.

The general position, as far as the Tribunal is concerned, is that the costs of an intervention will very often in justice be allowed to lie where they fall. It is true that in some cases it will be proper to make orders either in favour of or against interveners, but in our view there should be no general expectation that a successful intervener is necessarily entitled to its costs.

In the specific case of a sector such as telecommunications, where there may be interveners who are likely to be regularly appearing before the Tribunal, we think the general practice is likely to be to allow the costs of the intervention to lie where they fall. We can see that if costs were awarded in every case where a complaint was brought against the dominant enterprise and there was later an unsuccessful appeal, the constant risk of having to pay the costs of the dominant enterprise could affect the balance of the system of appeal under the Act. As we said at paragraph 78 in **GISC,** a Tribunal differently constituted, in that particular circumstance:

> "We see force in the argument that it would be in

accordance with the objectives of the Act if the rule as to interveners were broadly cost-neutral."

In this particular case, however, it is unnecessary to further elaborate the general principle because, as with the position in respect of the main parties, BT has, as it were, been successful on some issues but unsuccessful on other issues, as we have already indicated. Bearing that in mind, we think the right general order is that BT should bear its own costs, because in any event it has been partially successful and partially unsuccessful and those two elements, in our view, cancel each other out.

That leaves the particular issue pressed by BT of the costs associated with Freeserve's apparent application for disclosure that was to be heard at the case management conference of 17 December 2002 but was abandoned shortly before that conference, leaving BT to incur, in BT's submission, unnecessary costs.

It is true that in this respect Freeserve's letters of 9 and 11 December in particular may well have led BT to believe that it would face a substantial application for disclosure at the forthcoming case management conference and did lead BT to do work that was in the event not immediately useful. However, having considered this aspect of the matter carefully, we have come to the view that we should not make an exception for the disclosure issue to the order that we propose to make about BT's costs. In our view there is a limit to the extent to which this Tribunal should "salami-slice" different issues and this particular issue is not one that we feel should be treated discretely from the generality of the costs incurred in this case. We suspect that the work done, although not of immediate value in the present case, will in general be of value to BT in the general context of the Act, and indeed in the further proceedings that may or may not eventuate in this particular case, so it is not, in our view, work that, from BT's point of view, has been wasted. In

1 relation, therefore to BT's intervention, there will be
2 no order for costs.
3 That concludes the matters that we need to decide.
4 MR TURNER: I am grateful, Sir. You did leave outstanding
5 the issue of assessment of costs.
6 THE CHAIRMAN: Yes, I did.
7 MR TURNER: I do not know whether that is something on
8 which you would like to be addressed now by the parties,
9 or whether that can wait?
10 THE CHAIRMAN: Well if you have something you were able to
11 tell us immediately, we might as well deal with it, but
12 if you prefer to deal with that in writing, I am equally
13 happy to deal with it in writing.
14 MR TURNER: Mr Flynn has just indicated that he would be
15 happy, if not agreed, for a summary assessment by the
16 Tribunal. For our part we were going to say that we
17 feel it would be more cost-effective, if the Tribunal
18 felt it appropriate, for the Tribunal itself to
19 undertake an assessment, as is possible under Rule
20 26(3), rather than to send it off for a detailed
21 assessment to a taxing master of the Supreme Court.
22 THE CHAIRMAN: In that case, the costs, if not agreed, will
23 be assessed by the Tribunal, subject to any other order
24 the Tribunal may make.
25 Very well. Thank you all very much indeed.
26 (The hearing concluded)
27 __________