

**IN THE COMPETITION COMMISSION**  
**APPEAL TRIBUNAL**

Case No. 1007/2/3/02

New Court,  
Carey Street,  
London WC2A.2JT

11 November, 2002

Before:  
SIR CHRISTOPHER BELLAMY  
(President)

PROFESSOR JOHN PICKERING  
DR ARTHUR PRYOR CB

BETWEEN:

FREESERVE.COM PLC

Applicant

and

THE DIRECTOR GENERAL OF TELECOMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC (instructed by Messrs Baker & Mckenzie) appeared for applicant.

Mr Jon 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.

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Transcribed from the shorthand notes of  
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**PROCEEDINGS**

THE PRESIDENT: The Tribunal is today handing down its Judgment on the preliminary issue of admissibility in this case. For the reasons given in the judgment handed down, we find that the Tribunal does have jurisdiction to hear this appeal and the case will accordingly continue.

Mr Green.

MR GREEN: Sir, there will at some point be an application by us for costs.

THE PRESIDENT: Yes.

MR GREEN: The question arises as to the timing of that. Our application will be for costs in any event. There are really three alternatives. We could deal with it today. We could deal with it in writing or we can adjourn the matter to be dealt with at the conclusion of the substantive hearing.

So far as Freeserve is concerned, we think we would prefer one of the latter two, in other words, either deal with it in writing or deal with it at the substantive hearing, but we are largely in the Tribunal's hands on that. We obviously see what happened in *Bettercare*, we intend to deal with it that way if that is convenient to the Tribunal.

THE PRESIDENT: Well let us see what Mr Turner has to say about that. We are inclined, Mr Turner, to reserve all questions of costs to the end of the case, as it were-

MR TURNER: That would be our submission, Sir.

THE PRESIDENT: ---when we can see the case in the round and then form a view on what the right order for costs is.

MR TURNER: That is our submission, Sir.

THE PRESIDENT: So I think on that point we will reserve costs. The only order we make is that costs are reserved.

MR TURNER: Sir, may I raise the issue of appeal, just to let the Tribunal know where the Director is?

THE PRESIDENT: Yes.

MR TURNER: As the Tribunal knows, under the rules request may be made orally today, or technically in writing within a month, and now that the judgment has been delivered there will be a need to consult before a final decision can be taken, and therefore we are today unable to say finally whether permission will be sought to appeal.

THE PRESIDENT: Yes.

MR TURNER: Having said that, the Director is, of course, fully conscious of the time constraints and that this is the preliminary issue in a now two-stage case.

THE PRESIDENT: Yes.

MR TURNER: With the Tribunal's leave we would desire to make one comment in any event and that is that there is one point of principle in the Judgment that is of particular importance and which may be controversial, and that is the central finding that the rejection of a complaint on the basis that the evidence presented in it is inadequate to establish an abuse may be viewed as a decision that the underlying conduct does not infringe the Act, and we have in mind in

particular paragraph 96 of the judgment and following.

However, the Director does note what the Tribunal has said at paragraph 125 of the judgment, because there the tribunal did lay emphasis on the point that the question of the adequacy of the Director's investigation and the appropriate level of scrutiny by the Tribunal in a case of this kind are matters which go to the merits, and you have indicated that you expect to hear argument on that aspect of the case in the further course, and that is an aspect on which the Tribunal certainly will hear argument.

Depending on the outcome on that aspect, and the Tribunal's view about the appropriate level of scrutiny in a case of this kind - and because we are only recently living in a post *Bettercare* world of the Regulators are finding difficulty in prioritising their case load effectively and concentrating on infringements - then it may be that a decision could be taken in a future case to challenge an application on admissibility grounds. Therefore, it is only to say that with those considerations in mind the matter cannot be regarded from the Regulator's point of view, I venture to suggest, as definitively settled at this time.

THE PRESIDENT: Yes.

MR TURNER: Sir, that is all I desire to say on that point.

THE PRESIDENT: Thank you, Mr Turner. Perhaps I can make a comment which is a personal comment which I have not discussed with my colleagues, but I think it probably reflects our general view.

We are, as it were, collectively working out what the structure is under this Act in a way that reconciles a proper degree of scrutiny of what the Regulator does, with his legitimate desire to conduct his business in an efficient and resource effective way.

I think our view at the moment is that the debate as to whether it is a decision or not is a debate that is on the wrong track. The debate really is about what the Tribunal expects the Regulator to actually do when he has rejected complaints, which is a quite different issue and one that we very much want to explore with you and the parties in the further stages of this case, because it may well be that in that area the answer lies. So that is why paragraph 125 is there, as it were, advisedly, because it is an issue we very much want to explore and upon which we have no firm views at the moment - not only because we have had no argument on it, but also because it does seem to us to be a very important issue that does need to be looked at from every angle.

I do not know whether that helps you, but that is where we feel we are at the moment. I see my two colleagues nodding.

MR TURNER: On behalf of the Director I am certainly grateful for that indication, and that leads us therefore on to the next stage of the case, because it is not the Director's intention to hold that up in any way, but to plan for the next stage.

THE PRESIDENT: Thank you. Well if we can then move on to the next stage of the case, we were having a preliminary look at our diaries to see where we go next, and let me tell you how we

were seeing this case at the moment. I think on current timing the defence is due in on November 19th, and BT's intervention is due in a week later. Can I assume for planning purposes that that is still the case, the timetable you are working to?

MR TURNER: Well, Sir, we were going to ask for an extension of time on that, which I have only briefly mentioned to my learned friends. Would it be appropriate for me to mention our views, or should we wait for you....

THE PRESIDENT: Just let me sketch out our provisional ideas and then see how that fits in with what you have in mind.

Sitting here today it is quite difficult for us, until we see the defence and the statement of intervention, to see exactly what the shape of this case is going to be. What we would like to do ourselves in a perfect world is to meet, as it were, internally as a Tribunal really not later than the week beginning 9th December, to assess the pleadings that we have received up to then, and to see what further directions might be required for the further conduct of the case. There may be a question of a reply, there may be particular issues that can be dealt with, or particular issues that need to be further elaborated on. Depending on what view we take internally, we had it in mind to pencil in a possible directions' hearing - case management conference - around about 17th December, i.e. just before Christmas. That would be a stocktaking day to see where we were and where this case is actually going.

We would then, again provisionally, have in mind that we have a hearing at least on the issues that are ready for hearing somewhere in the second half of January, probably about the 20th - Monday, 20th January. Whether we have that hearing around that time, and on what issues will rather depend on what emerges from the directions' hearing and what emerges from the pleadings. That is as far as we have got in seeing how we can plan this case at the moment.

I do not know how that fits in with the application you are about to make for more time, Mr Turner?

MR TURNER: Sir, originally the thinking about the service of the defence was in the order of two weeks from delivery of judgment - that is what was set at the case management conference on 3rd October. Reflecting on the judgment it appears to us that we will need at least two weeks, and that is taking into account that work has already been done by Oftel, and I mentioned to the tribunal last time, that they have gone through the application and formed views about the merits of each aspect of it, although the market area is the most tricky part to get a handle on.

However, I would mention the following matters, if the tribunal would please take these into account.

THE PRESIDENT: Yes, of course.

MR TURNER: First, the focus of the effort inevitably has been heavily on the admissibility issue. That is where my effort has been and those of the small team who have been assisting.

Secondly, and this is a purely extraneous personal factor, the relevant case officer, Mr Russell, has just become a father for the first time and is on paternity leave, which presents some strategic difficulties.

Thirdly, the Ofcom chief economist has been, and continues to be, to some extent absorbed on other matters as I mentioned last time.

Fourthly, at least so far as the market part of the defence is concerned, as to which no final view has been taken as to the detail that is needed, it is becoming clear - at least to me - that the regulatory regime in this area is heavily influenced by developments at the European level, leaving apart the Telecommunications Act side of things, and that establishing the position in relation to the emerging broadband market is far from straight forward, and certainly with a view to achieving a final defence in just over a week I would have thought is not possible.

The last factor is, I am afraid, a counsel factor which is that I myself am in court, essentially back to back on 22nd, which is a Friday, and then the first three days of the following week - as it happens against Mr Barling and Mr Green on different matters. So there are logistical difficulties in dealing with the case from that point of view.

We would propose, having said that, and hearing the tribunals' thoughts, that we should put in our defence on 29th November, that BT's statement of intervention should follow as currently envisaged a week afterwards on 6th December. That fits in with the tribunal's indicated timescale of a meeting to review the pleadings and so on in the week of the 9th December, with a case management conference on or around 17th.

If the hearing is to be on or around 20th January, that does leave, in my submission, ample time for dealing with any further matters that will arise between the written pleadings and the final hearing including the service of skeletons.

As to the service of skeletons we had in mind provisionally, and I have not discussed this with my friends, that there might be mutual exchange a week before the final hearing. So that if the hearing were to be on 20th January that there would be mutual exchange on 13th.

Sir, we are in the Tribunal's hands in these matters, but to do justice to the case, and to absorb the points that the Tribunal has additionally made about the merits in the judgment we will need a little more time than just over a week and a day. Although, as the tribunal will understand from my point of view at least, 29th November is not ideal it is considered to strike a reasonable balance between the needs for expedition and the needs to get a satisfactory document to the Tribunal and it will not, on this envisaged timetable, interrupt the proceedings or hold them back in any way. It does dovetail with the Tribunal's envisaged timetable.

THE PRESIDENT: Let us see what Mr Green has to say.

MR GREEN: Sir, can I just start with the question of extension and then work on from that?

THE PRESIDENT: Yes.

MR GREEN: If the Director General and BT have an extension of time that is going to create this problem which is that we will necessarily need to consider those documents in order to decide whether to apply to you for disclosure, in particular disclosure of documents relating, for example, to BT's business plan, and like documents.

If we need to make an application we are going to have to find time to make an application, to argue it and then to absorb any documents which are generated by a successful application and then be in a position to respond to them sensibly.

If the time table for service of pleadings goes back for nearly two weeks, it is going to put a great pressure on us in being able to work our way through that process, and that is given that there would be a hearing in the week of 20th January. That is my concern about putting back the date for reply pleadings. Obviously we hear what Mr Turner has had to say about the internal difficulties, paternal and otherwise of the Director General and his team, but with respect they have had a fair amount of time now to absorb our case. They have heard your comments about product to market when we had the first CMC some good month ago, and really they should be in a position to set out their case earlier rather than later. That is my concern. If the CMC is held on 17th then I am afraid I will not be able to be with you because I have closing submissions in my trial the whole of that week, but we would make arrangements obviously for someone to represent Freeserve, we will manage that in some way.

As far as the hearing date is concerned, if it is the middle of January, then we can cope with that but we would prefer the earliest possible sensible date for obvious reasons. My real concern is simply getting the procedure going as soon as possible because there may be the prospect of fairly heavy interlocutory disclosure applications, which we cannot judge until we have seen those pleadings.

THE PRESIDENT: No. Is BT here today?

MISS BACON: We will be happy with my learned friend's suggestions as to service of pleadings and the defence, and BT's statement of intervention. Our one concern was as to the actual hearing date. In a way we would actually agree with Freeserve on that, we would prefer the hearing date to be earlier if anything, for a purely personal reason I will not be available from 17th January onwards, I am getting married.

THE PRESIDENT: You will be back at some point! I think we will rise and think about the timetable.

**(Short break)**

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