Neutral citation [2009] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1100/3/3/08

Victoria House
Bloomsbury Place
London WC1A 2EB

24 February 2009

Before:

THE HON. MR. JUSTICE WARREN
(Chairman)
MICHAEL BLAIR QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) THE NUMBER (UK) LIMITED
(2) CONDUIT ENTERPRISES LIMITED

Appellants

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

BRITISH TELECOMMUNICATIONS PLC

Intervener

JUDGMENT (Permission to Appeal)

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1. Following handing down of our judgment in these proceedings in November 2008 ([2008] CAT 33) ("the main judgment"), we received an application from the Intervener, BT, for permission to appeal. This judgment should be read together with the main judgment and we adopt the same abbreviations. 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 this matter on the papers.

2. Although OFCOM do not themselves seek permission to appeal, they support BT's application for permission to appeal. Their concern, as regulator, is that legal clarity as well as certainty should be provided with regard to the points of law raised in the appeal and our judgment. They consider that there is sufficient doubt about our decision which risks such clarity and certainty going forward. We take that into account in reaching our decision.

3. BT identifies a number of areas in which it considers that we were in error. The Tribunal Rules (rules 58 and 59) do not lay down any specific test by which the Tribunal is to assess whether permission to appeal should be given. Section 196(2) of the 2003 Act provides that an appeal must relate only to a point of law arising from the decision of the Tribunal. The Civil Procedure Rules, applicable to an appeal in the court system and previously applied by the Tribunal by analogy, provide (in rule 52.3) in the case of first tier appeals that permission should be granted 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.

4. We are not persuaded by the submissions made on BT's behalf either that an appeal would have a real prospect of success or that there is any compelling reason why the appeal should be heard. Accordingly, applying that test, we would refuse permission. As to the first part of the test which is concerned with the strength of the appeal, we do not consider that the Tribunal should adopt a threshold lower than a real prospect of success as that phrase has been interpreted by the courts. As to the second part of the test, which is concerned with other circumstances which

might justify the granting of permission, it might be said that permission should be granted where there is a good reason for doing so even where that reason is not "compelling", whatever that word may mean in this context. In the present case, we do not consider that there is a good reason for giving permission to appeal.

5. In particular, although we acknowledge that our interpretation of the European legislation is not *acte clair* (paragraph [172] of the main judgment), we do not consider that that is a good reason for granting permission to appeal. The Court of Appeal (or the House of Lords) may consider that a reference should be made to the European Court of Justice because the matter is not *acte clair*, but that is not a ground for permission to appeal being given by us. Instead, we consider that BT, if it wishes to proceed further, should apply to the Court of Appeal for permission to appeal and to raise before that court the question of a reference. The Court of Appeal may, we acknowledge, take a different view about the need for a reference by it from the view which we took about a reference by us. If it does take a different view, it can itself make the necessary reference. Having said that, we do not consider that there is a real prospect of success for BT in an appeal from that part of our own decision where we refused to make a reference. In other words, if the Court of Appeal does itself make a reference it would be in the exercise of its own discretion and not by a reversal of our own decision.

6. Accordingly, the Tribunal unanimously:

ORDERS THAT:

(1) Permission to appeal be refused.

Mr Justice Warren Michael Blair Sheila Hewitt

Charles Dhanowa
Registrar

Date: 24 February 2009

Neutral citation [2009] CAT 5

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(1) THE NUMBER (UK) LIMITED
(2) CONDUIT ENTERPRISES LIMITED

Appellants

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

BRITISH TELECOMMUNICATIONS PLC

Intervener

JUDGMENT (Costs)

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1. Following handing down of our judgment in these proceedings in November 2008 ([2008] CAT 33), we received an application from the Appellants for an order that OFCOM pay their costs. This judgment should be read together with our earlier judgment and we adopt the same abbreviations. 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 this matter on the papers.

2. Rule 55 of the Tribunal Rules sets out the Tribunal's jurisdiction to award costs. It provides (so far as is relevant) as follows:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
> …"

3. This jurisdiction is well-known. The Tribunal Rules allow the Tribunal full discretion in awarding costs but contain no express provisions about how the power is to be exercised. How the Tribunal's discretion will be exercised is critically fact-dependent and will therefore depend on the circumstances of each case, although in each case the discretion should be exercised so as to deal with it justly. The position in relation to costs following proceedings under the Competition Act 1998 is summarised by the Tribunal in *Emerson Electric Co v Morgan Crucible Company plc* [2008] CAT 28 at paragraphs [44] and [45] (in respect of a private claim for damages under section 47A of the 1998 Act) and *Independent Media Support Limited v Office of Communications* [2008] CAT 27 at paragraph [6] (in respect of an appeal against a non-infringement decision). In those cases the Tribunal suggested that, while there is no automatic rule, the starting point for the exercise of its discretion in such cases should be that costs follow the event. However the Tribunal also recognises that the need to deal with each matter justly means that all relevant circumstances of each case will need to be considered.

4. In the present case, the Appellants seek a costs order against OFCOM following the successful outcome of their appeal under section 192 of the 2003 Act against a decision of OFCOM in relation to the resolution of price disputes. OFCOM are, of course, in a unique position as regulator under the 2003 Act when dealing with the resolution of disputes under section 185. In addition, OFCOM have statutory duties to perform and fulfil a role as guardians of the public interest. They are called upon in the exercise of their functions to exercise judgments and to take positions on factual and legal issues. It is therefore strongly arguable that this puts OFCOM in a different position from other parties when it comes to making costs orders, whether against OFCOM or in their favour, in cases where the manner of the exercise of their functions is in issue. The Tribunal has taken this factor into account in other cases under the 2003 Act. For instance, in *Vodafone Limited v Office of Communications* [2008] CAT 39, the Tribunal appears to have attached considerable weight, in declining to make any costs order adverse to OFCOM, to the fact that OFCOM had acted as a reasonable regulator and in good faith.

5. It is, we think, important that differently constituted Tribunals adopt a consistent and principled approach if the discretion is to be exercised judicially, as it must be. It would, to put the matter at its lowest, be unsatisfactory if different Tribunals placed radically different weight (or perhaps no weight at all) on OFCOM's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow that the starting point will, in effect, be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith. Of course, the facts of a particular case may take the matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct; room must always be left for the exercise of the discretion in this way where the facts justify it.

6. So far as we are aware, the Tribunal has never awarded costs against OFCOM following an appeal under section 192 of the 2003 Act. We have not been taken in detail to the cases to see what, if any, weight has been attached to OFCOM's role as regulator in the decisions not to award costs against OFCOM in cases where it has lost. We cannot therefore conclude that any practice has been demonstrated to us that OFCOM should not, in an ordinary case, be subject to an adverse costs order.

However, in principle we think that that is the correct approach. OFCOM is a body charged with duties in the public interest (see, for example, section 3 of the 2003 Act); they should not be deterred from acting in the way which they consider to be in that interest – provided that they act reasonably and in good faith – by a fear that in doing so they may find themselves liable for cost. In particular, OFCOM should ordinarily be entitled without fear of an adverse costs order, to bring or defend proceedings the purpose of which is to determine the proper meaning and effect of domestic or European legislation. We include the word "ordinarily" because the Appellants submit that the present case is not an ordinary case, for reasons to which we now turn.

7. The Appellants point out that the appeal turned on a single point of law on which they succeeded. OFCOM's position was that the decision of Oftel to impose USC7 on BT was *ultra vires*. Oftel was, of course, OFCOM's predecessor so that OFCOM's decision represented a complete change of position from that of Oftel which had been fully considered and reasoned. The Appellants acted reasonably and proportionately in bringing the appeal, the outcome of which is relevant not only to itself but to other DQ providers and end users. All of that is correct. It is also correct that the reasoning of our decision did not depart radically from that which the Appellants had put forward; we described our conclusion as reached by "a slightly different route" (paragraph [119]).

8. OFCOM point out that having taken advice from leading Counsel, they found themselves in the position where they believed that the imposition of USC7 was invalid. Had they simply left matters where they stood, they could have found themselves open to criticism and attack from BT as the party in whose interests it would be to assert the invalidity of USC7. OFCOM's position is that they should be entitled reasonably to defend an appeal such as the present where they consider it to be in the public interest to do so without incurring the risk that substantial costs orders will be made against them if the appeal is successful.

9. We accept that OFCOM acted in good faith and reasonably. The fact that we have found against them on the appeal does not detract from that acceptance. But for one factor, we consider that this is a case where it is clear that we should not make an

adverse costs order against OFCOM. The one factor which causes us any reason to pause is that OFCOM have sought to go back on the actions of Oftel. However, even assuming that it had been OFCOM rather than Oftel who had made the original decision, their duty was to put right – as they saw it – that which they had got wrong. We do not consider it would be right to make an award of costs against OFCOM in circumstances where they were seeking to put right that which they mistakenly saw as wrong any more than it would be right in any other case where they had lost an appeal. The position is *a fortiori* given that OFCOM was not asserting that their own earlier decision was incorrect but that of Oftel, albeit their predecessor as regulator.

10. Accordingly, we reject the Appellants' application for costs against OFCOM and the Tribunal unanimously:

ORDERS THAT:

(1) Each party bear its own costs.

(2) There be liberty to apply.

Mr Justice Warren Michael Blair Sheila Hewitt

Charles Dhanowa
Registrar

Date: 24 February 2009