Neutral citation [2020] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1299/1/3/18

Salisbury Square House
Salisbury Square
London EC4Y 8AP

10 January 2020

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
TIM FRAZER
PROFESSOR DAVID ULPH CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

ROYAL MAIL PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

WHISTL UK LIMITED

Intervener

RULING (PERMISSION TO APPEAL AND COSTS)

A. BACKGROUND

1. On 12 November 2019 the Tribunal handed down its judgment in these proceedings ([2019] CAT 27) (the "Judgment"). This Ruling adopts the same defined terms as are set out in the Judgment.

2. In the Judgment the Tribunal upheld the Decision under appeal and confirmed the level of penalty (£50 million) imposed on Royal Mail by Ofcom.

3. On 3 December 2019 Royal Mail applied for permission to appeal in respect of the Judgment ("the Application"). On 12 December 2019 Ofcom filed its Response inviting the Tribunal to reject the Application. Whistl also wrote to the Tribunal on 12 December 2019 agreeing with, and adopting, Ofcom's submissions that the Application should be refused.

4. On 3 December 2019 Whistl also applied to the Tribunal for the payment by Royal Mail of part of its costs. On 12 December 2019, Royal Mail made submissions in response inviting the Tribunal to refuse Whistl's request or, alternatively, to limit Whistl's recoverable costs to a nominal or very small amount. Whistl submitted a further letter in reply on 16 December 2019.

5. No party has sought an oral hearing and the Tribunal considers that it is able to deal with the matters before it on the papers.

6. We consider first Royal Mail's request for permission to appeal.

B. PERMISSION TO APPEAL

7. A judgment of the Tribunal in a case of this kind can be challenged under section 49 CA 98, which provides for appeals to the Court of Appeal. Any such appeal requires the permission of this Tribunal or the Court of Appeal and must either be as to the amount of any penalty or be on a point of law.

8. In considering whether to grant permission to appeal to the Court of Appeal in England and Wales, the Tribunal applies the test in what is now CPR Rule

52.6(1): such that permission may only be granted where (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.

(1) The parties' submissions

9. Royal Mail claimed its grounds of appeal satisfied CPR Rule 52.6(1)(a) and raised important points of principle in relation to the correct standard to be applied when assessing the anti-competitive effect of pricing conduct by dominant undertakings and the obligation on the Tribunal to set workable thresholds for assessing novel forms of pricing conduct such as price notification. Royal Mail said the role of the 'as-efficient competitor test' raised important, and current, questions of law.

10. Under its Ground 1, Royal Mail argued that the Tribunal's approach to the test for competitive disadvantage and/or the capability to produce the alleged foreclosure effects, and in particular to the necessity and/or relevance of an as-efficient competitor ("AEC") test, was wrong in law. Royal Mail disagreed, first, with the Tribunal's view that there was no legal requirement to conduct such a test and, secondly, with its view that there were no compelling reasons of economic principle either. Thirdly, Royal Mail said that the Tribunal should at least have regarded an AEC test as relevant to its analysis and disagreed with the Tribunal's criticisms of the test it had put forward, which it said were not open to the Tribunal to make "on the basis of the evidence before it."

11. Royal Mail said, fourthly, that the Tribunal was wrong to find that Ofcom had given the question of an AEC test sufficient consideration and, fifthly, in applying a 'competition on the merits' standard the Tribunal had not properly considered the position of an as-efficient competitor, had paid too much attention to anti-competitive intent and its Judgment was therefore 'uncertain'.

12. Sixthly, Royal Mail said the Tribunal was wrong to uphold Ofcom's assessment of the anti-competitive effects of Royal Mail's conduct by wrongly considering the approach to foreclosure and competitive disadvantage; in its assessment of the counterfactual absent the price differential; by upholding Ofcom's

materiality test; by not regarding Mr Harman's evidence as relevant to the materiality assessment; in finding that the Decision did not rely on the impact of Royal Mail's conduct on Whistl; by not hearing Mr Harman's evidence; and by upholding the Decision for reasons that were not contained in the Decision.

13. Finally, Royal Mail said the Tribunal had not set out a workable test for assessing conduct of this kind, had acted contrary to established case law and had undermined legal certainty.

14. Ofcom said in response said the Tribunal had extensively and correctly analysed the relevant case law and had based its decision on well-established legal principles. There was no 'hard legal' requirement for an AEC test to be conducted in every case. As to the Tribunal's conclusions on the economic evidence submitted and in particular on the utility or relevance of the AEC test in this case, these were based on the Tribunal's own examination of the expert witnesses and were clearly 'open to it' on the evidence.

15. Ofcom further said that the Tribunal was clearly entitled to conclude, on the particular facts of this case, that an AEC test was not required, and that this finding gave rise to no appealable point of law. This was the case also for the Tribunal's assessments of Ofcom's consideration of the AEC test issue and of the anti-competitive effects of Royal Mail's conduct. These assessments were properly open to the Tribunal to make on the basis of the evidence before it and an appeal had no reasonable prospect of success. In any event, in a full merits appeal, it was open to the Tribunal to cure any possible deficiencies on Ofcom's own reasoning.

16. Under its Ground 2, Royal Mail claimed the Tribunal's approach to pricing conduct where prices had been announced then suspended was wrong in law. First, the Tribunal did not apply a workable test and therefore acted contrary to legal certainty; secondly, it did not correctly attribute uncertainty and/or anti-competitive effect to the price announcement itself, (despite claiming to do so); thirdly, it mis-characterised the effects of the almost immediate suspension of the price changes; and, fourthly, it relied on reasoning not mentioned in the Decision. In particular, the Tribunal wrongly ignored effects prior to the

relevant period, wrongly appreciated the significance of the formal announcement of the CCNs and did not attribute specific effects solely to the CCN announcement.

17. Ofcom said these claims revealed no arguable error of law in what was an orthodox application by the Tribunal of the principles of abuse of dominance law to the particular facts of this case. The Tribunal had given comprehensive reasons for rejecting Royal Mail's claim that the issuance of the CCNs *per se* had no anti-competitive effect.

18. Under its Ground 3, Royal Mail claimed that the Tribunal's approach to procedural fairness was "vitiated" by its misunderstanding of crucial evidence. In particular, Royal Mail claimed the Tribunal had misunderstood the relevance of Mr Harman's evidence and, in consequence, the relative importance of Ofcom's materiality finding. Royal Mail said that if Ofcom had not reneged on its explicit assurance that it would not rely on its analysis of the impact of the price differential, Mr Harman's evidence on materiality would have been submitted during the administrative procedure and would have been considered by Ofcom in the Decision.

19. Ofcom replied that this ground related to an issue of fact and that the Tribunal had correctly concluded that Royal Mail's rights of defence had not been impaired. The Tribunal's conclusions on this, and on the relevance of Mr Harman's evidence to the Tribunal's assessment of competitive disadvantage, were not something the Court of Appeal should revisit.

20. By its Ground 4, Royal Mail claimed that the errors of law it had identified meant that the Tribunal's upholding of Ofcom's penalty was also wrong in law. It said it was the second largest penalty imposed by a UK competition authority and was for an infringement of a kind not previously directly considered by the domestic or EU courts. Ofcom responded that Royal Mail raised no specific point against the calculation of the penalty itself.

21. Royal Mail also claimed that the existence of Whistl's private damages claim meant that there should be further scrutiny of the infringement finding by the

Court of Appeal. Ofcom said such a claim would be determined by the responsible court or tribunal and its existence did not justify an appeal in these proceedings.

22. Whistl said that it supported Ofcom's position but made no specific submissions of its own.

(2) Our Decision on permission to appeal

23. We deal first with Royal Mail's general observations. We agree that the legal issues discussed in the Judgment are important but do not consider that this in itself justifies granting permission to appeal. The essence of the Judgment is the application of established case law to the particular facts of this case and the Tribunal's conclusion in favour of Ofcom rests in very large measure on its appreciation of the particular facts. Royal Mail's criticism of the Tribunal for not providing sufficient legal certainty, or workable, principled tests, is misplaced. This is because the Tribunal's role is, wherever possible, to apply the existing law to the facts and the specific circumstances of the case before it, rather than to elaborate general tests for the benefit of other parties in other situations.

24. We note the existence of a claim by Whistl for damages but do not see this as a reason for further scrutiny on appeal of this infringement finding. As Ofcom said, the competent court or tribunal will determine that claim on the evidence before it.

25. On Royal Mail's Ground 1, it is certainly the case that some of the legal issues referred to by Royal Mail are hotly contested. This does not, however, point to there being an error of law in the Tribunal's approach, merely that Royal Mail disagrees with it.

26. On the issue of legal certainty, it is not the case that this will come from the application of an AEC test to all pricing situations. The Judgment explains with some care why such a test is not necessary in this case, and why Ofcom was justified to find that it would not assist the Decision. Royal Mail is also wrong

to suggest that an AEC test is something fixed and generally applicable and the Judgment explains why the doubts revealed during the Tribunal's process about constructing a suitable test in this case would make its use unhelpful. Indeed, the Tribunal examined the AEC test advanced by Royal Mail with great care and decided it would not be helpful in this particular case.

27. On Ofcom's own discussion of the utility of an AEC test for its assessment, the Tribunal correctly concluded that there was no error in Ofcom's approach, even if its treatment of the issue might have been more detailed.

28. On the correctness of the Tribunal's assessment of competitive effects, Royal Mail appears to conflate 'competition on the merits' with the application in all cases of an AEC test. The Tribunal was fully entitled to consider the effects of the particular form of market entry that was shown to be plausible in this case, even if Ofcom had not expressly done so (although we consider that, impliedly, it had). The Tribunal was, in particular, strongly of the view that an assessment of Royal Mail's anti-competitive intent was central to its findings on other aspects of the case. That assessment was carefully made and should stand.

29. The same considerations apply to the Tribunal's assessment of the anti-competitive effects of Royal Mail's conduct. The matters referred to as being in error were matters fully within the scope of the Tribunal's field of assessment. In relation to the evidence of Mr Harman, the Tribunal gave careful consideration to his written evidence in the Judgment and its reasons for not requiring oral evidence following his unexpected illness are fully explained in the Tribunal's ruling refusing an adjournment ([2019] CAT 19) - which Royal Mail did not contest and to which it makes no reference.

30. Royal Mail again appears to criticise the Tribunal for not promulgating workable or principled tests. But this criticism misses the point made above that the Tribunal's essential task is to apply existing, established, law to the facts of the case before it rather than to promulgate new general rules.

31. Royal Mail's claim under Ground 2 would appear to be simply a re-presentation of the case made before the Tribunal but which ignores the careful consideration

given by the Tribunal to the particular effects of the announcement of the CCNs, to the events leading up to that announcement and the subsequent events including the suspension of the CCNs. Royal Mail may disagree with this assessment but this does not give rise to a valid ground of appeal.

32. Royal Mail's claim under Ground 3 is confused and difficult to interpret. It is not an appeal against the Tribunal's finding that there was no procedural error, but instead appears to be an attempt to bring together a misplaced complaint about the Tribunal's assessment of Mr Harman's evidence (already considered under Ground 1) with a new complaint, not previously aired before the Tribunal, about the consequences of Ofcom's treatment of redacted material during the administrative procedure. It clearly does not, in our view, justify granting permission to appeal.

33. Finally, under Ground 4, Royal Mail objects to the upholding of the penalty. Apart from asserting that the amount is high and repeating its claim that the finding of infringement is novel and unprecedented, Royal Mail makes no specific argument in relation to the detailed calculation of the penalty or the Tribunal's assessment of it. Accordingly, we do not consider that the Application discloses any valid ground for requiring the Court of Appeal to reconsider the penalty in this case.

34. We have considered whether there is any other compelling reason why permission to appeal should be granted in this case but have concluded that there is none.

35. For all these reasons we do not grant permission to appeal in this case and the Application is accordingly refused.

C. COSTS

36. We turn now to Whistl's application for Royal Mail to pay a portion of its costs as Intervener in this case. We do not have to rule on the issue of costs payable

by Royal Mail to Ofcom as the parties have reached an out of court agreement on the matter. [1]

37. The Tribunal's jurisdiction to award costs is governed by Rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Tribunal Rules") which provides, so far as is relevant:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England and Wales […].
>
> (2) The Tribunal may at its discretion […] at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> […]
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—
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> (a) the conduct of all parties in relation to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> […]
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount.
>
> (5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be—
>
> (a) assessed by the President, a chairman or the Registrar; or
>
> (b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales […]".

38. The Tribunal has a wide discretion under Rule 104 in relation to costs awards (see, for example, *Quarmby Construction Co Limited v OFT* [2012] EWCA Civ 1552 at [12] and [37][2]).

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[1] On 3 December 2019, Ofcom wrote to the Tribunal to explain that it has reached agreement with Royal Mail regarding costs.

[2] Pre-October 2015 case law refers to Rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003 No. 1372) which was in materially the same terms as Rule 104.

39. The general position is that interveners are neither liable for other parties' costs, nor able to recover their own costs: (see, for example, *Ryanair Holdings plc v CC* [2012] CAT 29 at [7]). However, the Tribunal has on occasion departed from this, as in *Independent Media Support Ltd v Ofcom* [2008] CAT 27 at [17]-[18] and *Ping Europe Ltd v CMA* [2018] CAT 9 at [14].

40. Whistl justifies its application on the grounds that it was the object and victim of Royal Mail's anti-competitive behaviour; that it was obliged to intervene in this case to protect its interests and to rebut mistaken allegations of fact about its situation and conduct; and that the factual evidence provided by its executives and the economic evidence provided by its expert witness Mr Parker were of material assistance to the Tribunal.

41. Royal Mail objects to being required to make any contribution to Whistl's costs, which it says are entirely at Whistl's own risk. Ofcom has made no submissions on the issue.

42. Whistl claims that its application would be consistent with the approach taken by the Tribunal in the *Aberdeen Journals* case ([2003] CAT 21), where an award of costs was permitted in favour of the victim of the anti-competitive conduct in that case.

43. In the event that the Tribunal were minded to allow a partial award in favour of Whistl, Whistl and Royal Mail demand mutual disclosure of each other's costs to enable some assessment to be made of their relative size and justification.

44. In the event, we are not so minded, so the question of further disclosure does not arise. The Tribunal's practice has developed since the time of the *Aberdeen Journals* case. Under the Tribunal's current approach, the normal practice is that intervening parties neither contribute to other parties' costs nor are they entitled to recover their own (see the cases referred to at para 39 above and para 8.10 of the Guide to Proceedings) There can be exceptions and, in appropriate circumstances, the Tribunal has a discretion to award costs to an intervening party.

45. We have considered carefully whether the circumstances are appropriate in this case but have concluded that they are not. Interveners are required to make their own assessment of the benefits or otherwise of seeking to intervene, and in this case Whistl would appear to have had a number of incentives to do so, including the existence of its damages claim to which we have referred. It should not, in our judgment, be allowed also to recover its costs of intervention in this case.

46. Accordingly, Whistl's application is refused.

D. CONCLUSION

47. For the reasons we have given, we unanimously refuse both the applications before us.

Peter Freeman CBE QC (Hon) Chairman	Tim Frazer	Prof. David Ulph CBE

Charles Dhanowa OBE QC (Hon)
Registrar

Date: 10 January 2020