Neutral citation [2024] CAT 54

Case No: 1567/3/3/22

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 September 2024

Before:

THE HONOURABLE MR JUSTICE MORRIS
(Chair)
JANE BURGESS
ANNA WALKER CB

Sitting as a Tribunal in England and Wales

BETWEEN:

SKY UK LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

Heard at Salisbury Square House on 1 February 2024

JUDGMENT (REMEDY)

APPEARANCES

Tim Ward KC, James McClelland KC and Richard Howell (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellant.

Josh Holmes KC and Nikolaus Grubeck (instructed by Office of Communications) appeared on behalf of the Respondent.

A. INTRODUCTION

1. On 15 November 2023, the Tribunal gave judgment ([2023] CAT 70) (the "Main Judgment")[1] in respect of Sky's appeal made on 18 October 2022 under section 192 of the Communications Act 2003 ("the 2003 Act")[2] contending that Ofcom in the Decision had erred in law in its application of section 32 of the 2003 Act. In respect of the issues identified at paragraph 100, the Tribunal unanimously concluded, at paragraphs 176 and 177 of the Main Judgment, as follows:

    (1) On Issue 1, Ofcom did not err in law in its construction of section 32(2) and (2A) and to that extent Sky's appeal fails.

    (2) On Issue 2, Ofcom erred in not considering in the Decision whether the element of conveyance of signals predominates over the Other Non-Content aspects of the Sky Pay TV service; but that in any event that element does so predominate and thus the Sky Pay TV service is an ECS and that the overall conclusion in the Decision was correct.

2. In light of these conclusions, at paragraphs 178 and 179, the Tribunal invited the parties to provide post-judgment submissions on the appropriate remedy that the Tribunal should grant. The issue, as it has developed, is whether we should dismiss Sky's appeal outright or, rather, remit the Decision to Ofcom with a direction to reconsider and make a new decision in accordance with our ruling in the Main Judgment.

3. By letter dated 15 November 2023 enclosing the Main Judgment, the Chair also directed that the time limit applicable under Rule 107 of the Competition Appeal Tribunal Rules 2015 in respect of any requests for permission to appeal against the Main Judgment be extended to within three weeks of the notification of the Tribunal's decision on the appropriate remedy.

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[1] The terminology and definitions used in the Main Judgment are adopted in this Judgment on remedy.
[2] Unless otherwise stated, all statutory references in this Judgment are to the 2003 Act.

4. On 29 November 2023, Sky and Ofcom each filed submissions on the appropriate remedy. A hearing was held on 1 February 2024 and skeleton arguments were filed by each side in advance of the hearing. Following the hearing, we received brief written submissions from Ofcom on the Court of Appeal's subsequent judgment in the *Cérélia* case (see paragraph 8(2) below).

5. This is the Tribunal's unanimous decision on the appropriate remedy.

B. THE TRIBUNAL'S POWERS IN RESPECT OF REMEDY

6. As pointed out at paragraph 63 of the Main Judgment, Sky's appeal falls to be determined by applying the same principles as would be applied by a court on an application for judicial review: section 194A(2). Section 194A(3) sets out the Tribunal's powers on such an appeal as follows:

> "(3) The Tribunal may—
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> (a) dismiss the appeal or quash the whole or part of the decision to which it relates; and
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> (b) where it quashes the whole or part of that decision, remit the matter back to the decision-maker with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal."

7. Provisions in substantially the same terms apply to proceedings brought before the Tribunal under the Enterprise Act 2002 ("EA 2002") to review a merger decision made by the Competition and Markets Authority ("CMA"): see section 120(4) (judicial review principles) and section 120(5) (the Tribunal's powers in respect of remedy).

8. In such proceedings under EA 2002, the Tribunal has considered the scope of its remedial powers:

   (1) In *Meta Platforms, Inc. v Competition and Markets Authority* [2022] CAT 26 ("*Meta*") the Tribunal considered that, whilst section 31(2A) of the Senior Courts Act 1981[3] does not apply to the determination of

[3] Section 31(2A), which was added to the Senior Courts Act 1981 by the Criminal Justice and Courts Act 2015, provides that the High Court (a) must refuse to grant relief on an application for judicial review,

judicial review applications before the Tribunal under section 120 EA 2002, the common law test articulated in *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P & CR 306 at 327 and 329[4] does apply: see *Meta* paragraphs 165(2), 167 to 171.

(2) In *Cérélia Group Holding SAS and Cérélia UK Limited v Competition and Markets Authority* [2023] CAT 54 ("*Cérélia*") the Tribunal considered that the CMA had "special reasons" under section 39(3) EA 2002 and went on to consider, *obiter*, what would have been the legal consequences in the event that it had found otherwise. The Tribunal took the view that section 120 EA 2002 is very explicitly drafted in permissive terms (i.e. the Tribunal "may") and, therefore, it would have a discretion whether to grant a remedy: see *Cérélia* at paragraphs 339 and 340. On appeal, the Court of Appeal endorsed this analysis of section 120 and supported the Tribunal's conclusion on this issue: [2024] EWCA Civ 352 at paragraphs 122 and 127-128. At paragraph 124, it pointed out that, under judicial review principles, a court has a discretion as to remedy including in relation to an unlawful decision and that section 120 EA 2002 replicates that common law jurisdiction.

C. SUMMARY OF THE PARTIES' SUBMISSIONS

9. Sky accepts that the Tribunal has discretion as to relief and submits that the Tribunal should quash the Decision and remit the matter to Ofcom for the following reasons:

(1) As the Tribunal found that Ofcom had erred in law, it would not be a proper exercise of the Tribunal's discretion to refuse to quash the Decision: *R (on the application of Edwards) v Environment Agency* [2008] UKHL 22 per Lord Hoffmann at paragraph 63.

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and (b) may not make an award of damages, restitution or recovery of a sum due if it appears to the court to *be highly likely* that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

[4] The "*Simplex*" test is that the Court may refuse to quash the decision where the outcome of the appealed decision would *necessarily* have been the same, had the error not been made.

(2) Although the Tribunal found in the Main Judgment that the Sky Pay TV service is an ECS, the Tribunal does not have power under section 194A to substitute its own decision for that of Ofcom. A qualitative assessment is required to apply the legal framework to the facts and it is for Ofcom to exercise its regulatory judgment afresh in light of the correct approach in law, as set out in the Tribunal's Main Judgment.

(3) If the Tribunal simply quashes the Decision by an order, Sky would have no basis for bringing an appeal in respect of Issue 1 because, in simple terms, Sky would have "won". That would be contrary to the interests of justice as it would likely leave Sky with no avenue of legal redress other than to return to the Tribunal after Ofcom has made a further decision, should it prove unfavourable.

(4) In the Decision, Ofcom did not apply the legal test identified by the Tribunal to the facts. Ofcom should now consider those facts in the light of that legal test. This would enable Sky to make representations to Ofcom as to the application of that test to the facts. To date Sky has been deprived of the opportunity to address the regulator on the evaluative matters, applying the correct legal test. Ofcom would then exercise its evaluative judgment in the light of those representations. The Tribunal has found that the issue is one of qualitative assessment; that amounts to an evaluative judgment, which is for Ofcom.

(5) In general a court on review cannot hold that a public authority should have carried out its task in a particular way by constituting itself a substitute decision-maker on the facts, except where the court is able to conclude that "only one result was legally open to the body in question": see *R v Ealing LBC ex parte Parkinson* (1995) 29 HLR 179 at 185-186**.**

(6) If there is a material error, then the court must remit the matter to the decision maker. Every error is material unless the decision would inevitably have been the same.

(7) The approach set out in *EE* relied upon by Ofcom (see paragraph 11 below) does not apply to the present case. It only applies to a full merits appeal and not to an appeal decided on judicial review grounds.

10. Ofcom submits that the Tribunal should decline to grant any remedy and should dismiss the appeal. It puts forward two submissions, in the alternative.

11. First, Ofcom submits that the Tribunal found that Ofcom's overall conclusion in the Decision was correct: Main Judgment at paragraph 177. Since an appeal lies against the substantive decision, not the statement of reasons underpinning it, there is therefore no basis for relief to be granted: *Everything Everywhere Limited v Competition Commission* [2013] EWCA Civ 154 ("*EE*") at paragraph 24. The principle in *EE* applies to the present case of an appeal against a decision made under section 96C of the 2003 Act, decided on judicial review principles: see *Virgin Media Limited v Ofcom* [2020] CAT 5 ("*Virgin Media*") at paragraphs 57-58. There is no difference between "taking due account of merits on JR principles" (*T-Mobile (UK) Limited v Ofcom* [2008] EWCA Civ 1373 [2009] 1 WLR 1565 and *Virgin Media*, supra) and a "full merits appeal". If there is no *material* error in the decision, there is no jurisdiction to remit. In the present case, the error identified at paragraph 167 of the Main Judgment was *immaterial*. The Tribunal has effectively decided that there is, and was, only one result legally open to Ofcom.

12. Secondly, and alternatively, if it could be said that Sky succeeded in some part in its appeal, the Tribunal's power to grant relief is discretionary. The Tribunal should exercise such discretion so as to grant no remedy. There are a number of factors which militate against the Tribunal exercising its discretion to quash part of the Decision (and remit the matter to Ofcom).

(1) The Tribunal has already reached a conclusive decision on the matter that Ofcom would need to reconsider. In such circumstances, the referral back would be otiose since the ultimate outcome would be the same, whether or not a referral was made. Therefore, it would be not appropriate to remit the matter: *Tesco plc v Competition Commission* [2009] CAT 9 at paragraph 32.

(2) The error in the Decision was not material. The Tribunal concluded that the error had no impact on the correctness of the overall conclusion in the Decision.

(3) No prejudice or injustice is caused to Sky by withholding relief since the Tribunal upheld the substance of the Decision.

(4) In particular, Sky has not explained either in evidence or in submissions why it considers that the error found by the Tribunal could make a difference in relation to the Sky Pay TV service being an ECS, consisting wholly or mainly in the conveyance of signals.

(5) Instead, a remittal is likely to lead to delay in Sky's compliance with its obligation to send EoCNs, during which material prejudice would be caused to Sky's competitors and customers.

(6) A remittal would also risk further increasing costs and delay because it would mean that Sky would have an opportunity now to seek permission to appeal the Tribunal's Main Judgment on Issue 1 and a potential further opportunity subsequently to appeal in respect of Issue 2 in any reconsidered decision by Ofcom.

D. THE TRIBUNAL'S ANALYSIS

Three cases

13. In oral argument, there was much discussion of the three cases: *T-Mobile*, *EE* and *Virgin Media*. We summarise these cases in turn.

14. In *T-Mobile*, one question was whether judicial review to the High Court was an effective mechanism of appeal within Article 4(1) of the Framework Directive and, in particular, whether, in judicial review, the merits of the case are "duly taken into account". The Court of Appeal held that judicial review was compliant with Article 4(1). Whilst at that time an appeal against an Ofcom decision under section 192(2) of the 2003 Act to the Tribunal was an appeal on

the merits, the case before them did not fall within that subsection. The Court of Appeal held at §§31 and 34 that, whilst not required to be a duplicate of the regulator, the appeal body must be able to "look into whether the regulator had got something material wrong" (emphasis added).

15. In *EE*, Ofcom made a decision in relation to price controls on mobile communication providers. EE appealed against that decision to the Tribunal under section 192(2) of the 2003 Act. At that time, the position remained that an appeal against an Ofcom decision was an appeal on the merits. Under section 193, as a price control matter, that appeal was referred to the Competition Commission, which was to determine the referred appeal on the merits. Whilst the Commission found that Ofcom had erred in certain respects, it decided that Ofcom's conclusion was not ultimately wrong. EE then challenged the Commission's determination before the Tribunal on judicial review grounds (see section 193(6) and (7) of the 2003 Act, as it then was). The Tribunal found that the Commission's determination was lawful. EE then appealed against the Tribunal's judgment to the Court of Appeal, on the grounds the Commission had made a judicially reviewable error in misdirecting itself that it was bound to choose between two different cost measures and in failing to refer the matter back to Ofcom to obtain further evidence.

16. The Court of Appeal dismissed the appeal. Its underlying basis for doing so is set out at paragraphs 23 and 24 of the judgment of Moses LJ:

> "23. It is for an appellant to establish that Ofcom's decision was wrong on one or more of the grounds specified in s.192(6) of the 2003 Act: that the decision was based on an error of fact, or law, or both, or an erroneous exercise of discretion. It is for the appellant to marshal and adduce all the evidence and material on which it relies to show that Ofcom's original decision was wrong. Where, as in this case, the appellant contends that Ofcom ought to have adopted an alternative price control measure, then it is for that appellant to deploy all the evidence and material it considers will support that alternative.
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> 24. The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate

decision is based are wrong, and second, it must show that its proposed alternative price control measure should be adopted by the Commission. If the Commission (or Tribunal in a matter unrelated to price control) concludes that the original decision can be supported on a basis other than that on which Ofcom relied, then the appellant will not have shown that the original decision is wrong and will fail." (emphasis added)

17. At paragraph 39 Moses LJ went on to cite paragraph 31 of *T-Mobile* with approval, making no distinction between an appeal on the merits (as in *EE*) and judicial review, taking due account of the merits (as in *T-Mobile*).

18. In *Virgin Media*, Virgin Media appealed under section 192 against a confirmation decision of Ofcom made under section 96C of the 2003 Act. Ofcom found that Virgin Media had contravened two regulatory obligations and imposed a penalty related to its early termination charges. Virgin Media challenged the decision on infringement and penalty. In its judgment, the Tribunal pointed out (at paragraphs 30 and 31) the change in the basis of an appeal against an Ofcom decision, as now provided for by section 194A – from "appeal on the merits" to "judicial review principles". At paragraph 52, it noted that although the appeal was on judicial review principles, the merits must be "duly taken into account". The Tribunal continued at paragraph 53 that, whilst care was needed in considering earlier case law (when appeals were "on the merits"), the earlier case of *T-Mobile* was particularly relevant because it was a claim for judicial review and expressly endorsed the approach to the standard of review set out at paragraph 31 of *T-Mobile.* After considering two further cases, the Tribunal continued at paragraphs 57 and 58 as follows:

> "57. … The role of the Tribunal is not one of rehearing the case on its merits. Proper respect must be accorded to Ofcom's role as a specialist regulator, and the expertise of Ofcom's staff. As explained by Green J in R (Hutchison 3G UK Limited) v Office of Communications [2017] EWHC 3376 (Admin) ("Hutchison") at [40], the focus is Ofcom's decision and whether Ofcom got their decision materially wrong. It is that decision that is being challenged. The question is not what decision the appellate body might itself have reached if it had started afresh.
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> 58. It is also worth making the point that it is not enough to identify some error in the reasoning of a decision. An appeal can only succeed if the decision cannot stand in the light of the error: [*EE* supra] at [24]. This is consistent with the test in T-Mobile. Errors in reasoning which do not affect the result will not be material." (emphasis added)

In relation to penalty, the Tribunal found that Ofcom's approach to penalty fell short of best regulatory practice, but that the failure was not sufficiently material to impugn the decision: see paragraphs 145 and 146. Sky submits that this is a good example of an immaterial error and that the present case is to be distinguished.

Discussion

19. The question is what is the effect of the error made by Ofcom identified in paragraphs 167 and 177 of the Main Judgment. We make two preliminary points.

20. First, there is a degree of overlap between Ofcom's first and second submissions. The dividing line between there being no basis for relief at all and refusing relief as a matter of discretion is not as bright as Ofcom suggests. In particular, issues of the materiality of an error of law appear to arise under both aspects.

21. Secondly, under both aspects, we observe that there is some doubt as to whether the correct question is "would the Decision have been the same, had the error not been made?" or rather, on remittal, will the decision be the same, now that the error has been identified and the correct approach is adopted? Both Mr Ward and Mr Holmes submitted that the latter (prospective) approach is correct. However, on analysis of *Simplex* and the *T-Mobile*, *EE*, and *Virgin Media* cases, and of *Cérélia*, the former (retrospective) question would seem to be correct. Nevertheless, in the present case, we do not consider that this issue is decisive.

22. As regards Ofcom's first submission (paragraph 11 above):

    (1) We consider that the approach set out in paragraph 24 of *EE* applies in principle to the present case. There is no material difference, for present purposes, between a full appeal on the merits and a judicial review, taking due account of the merits (as in the present case). *Virgin Media* at paragraph 58 (and *T-Mobile* at paragraph 31) establish that the approach in *EE* applies in the latter case.

(2) Those cases establish that the issue is whether the decision of the regulator, here Ofcom, is *materially* wrong. Where the decision cannot stand in the light of the error, it should be quashed; but where it is not material, including where it can be supported on another basis not relied upon by the decision-maker, or where there is only one result legally open to the decision-maker, it should not be quashed. The error must be material in the sense that it affects the result.

(3) In the present case, we do not find it easy to reach a conclusion on this first submission. As we explain below, we are not satisfied that, in theory at least, if the matter were to be remitted to Ofcom, there is only one result *legally open* to it. For this reason, we do not decide the issue on the basis of Ofcom's first submission.

23. Rather, we make our decision on the basis of Ofcom's second submission, namely as a matter of discretion, arising under the express terms of section 194A(3).

24. First, it is common ground that it is a question of applying the legal principles we have found in the Main Judgment to the facts relating to the Sky Pay TV service, which facts are undisputed.

25. Secondly, in many cases, the application of legal principles to undisputed facts may admit of only one answer. However, in the present case, we are prepared to assume that that exercise involves an evaluative assessment and that, in principle, it is possible for different conclusions to be reached when applying the law to the facts. In so far as it is an evaluative judgment, then, in principle, it is a matter for the decision-maker, Ofcom. It is not for the Tribunal to substitute its own view: see *ex parte Parkinson*, supra.

26. Thirdly, we accept that in the Main Judgment we carried out our own analysis as to whether the Sky Pay TV service consists in, or has as its principal feature, the conveyance of signals and is thus an ECS. Applying the law to the facts, we found (at paragraph 175) that the Sky Pay TV service is an ECS. Nevertheless,

in principle, it would be open to Ofcom to reach a different evaluative judgment, having carried out its own assessment.

27. Fourthly, however, and critically in this case, on the facts, evidence and argument now before us, we can see no possible basis for Ofcom, on a fresh evaluation, reaching any different conclusion. We note Sky's submission of having been deprived of the opportunity to address the regulator. However, despite having been invited, and offered every opportunity, to do so, Sky has not given the Tribunal any indication at all (either as a matter of evidence or argument) of the basis upon which Ofcom, if it were to make its own evaluative judgment, could possibly conclude that, applying the legal principles to the undisputed facts, the Sky Pay TV service is not an ECS, applying the construction of section 32(2) and (2A) set out in paragraph 153 of the Main Judgment.

28. In oral argument[5], Mr Ward emphasised that if the facts had changed, then a different evaluative judgment on whether the Sky Pay TV service was an ECS might well be reached. He added that, if the facts were to change in the future, Sky would be at liberty to revert to Ofcom and ask for a fresh decision as to whether the service was an ECS. Mr Holmes accepted this. However, Mr Ward positively asserted that the undisputed facts, before Ofcom and before the Tribunal, have not changed. In these circumstances, Sky has not put forward any explanation as to why, on the basis of these facts, Ofcom would or might reach a different conclusion.

29. In these circumstances, even if in principle a different result were "legally open", we conclude that, since there is no reason to consider that the outcome would not be the same, there is no purpose in remitting the matter to Ofcom to take a fresh decision: see *Simplex* and *Tesco* supra. In the exercise of our discretion under section 194A(3), we decline to do so. In reaching this conclusion, we are not substituting our own decision for that of Ofcom; rather we are exercising our statutory discretion not to quash Ofcom's decision and then remit.

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[5] Transcript of hearing 1 February 2024 page 11, lines 8-26.

30. Finally, in reaching this conclusion, whilst we recognise that, were we to remit the matter to Ofcom now, it might cause complications and delay arising from further decisions and appeals, we do not consider this to be an overriding consideration. Had we thought it otherwise appropriate to remit, such matters would not have led us not to do so.

E. OVERALL CONCLUSION

31. For these reasons, we decline to quash the Decision and we dismiss the appeal.

The Hon Mr Justice Morris Chair	Jane Burgess	Anna Walker CB

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 13 September 2024