



Neutral citation [2024] CAT 75

Case No: 1567/3/3/22

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

11 December 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

Determined on the papers

JUDGMENT (PERMISSION TO APPEAL)

A. INTRODUCTION

1. On 15 November 2023, the Tribunal gave judgment (“the Main Judgment”) in respect of Sky’s appeal under section 192 of the Communications Act 2003 (“the 2003 Act”), concluding that Ofcom did not err in its construction of section 32(2) and (2A) of the 2003 Act (Issue 1) and further that, although Ofcom had erred in its factual consideration, the overall conclusion in the Decision was correct (Issue 2). The issue of remedy was reserved for further argument. Time for permission to appeal was extended. Following such argument, on 12 September 2024 the Tribunal gave judgment (“the Remedy Judgment”) declining to quash the Decision and dismissing the appeal. In this ruling, we adopt the terminology and definitions used in the Main Judgment.
2. By its Written Submissions dated 3 October 2024, Sky now seeks permission to appeal to the Court of Appeal against the decision in the Remedy Judgment on the grounds that in the Main Judgment:
 - (1) The Tribunal erred in law in construing section 32(2) and (2A) of the 2003 Act, by holding that to determine whether a service is an “electronic communications service” (“ECS”), it is necessary first to exclude the element of a service which is a “content service” before considering whether the rest of the service falls within the definition of an ECS in section 32(2A)(c) as “consisting in, or having as its principal feature, the conveyance of signals”.
 - (2) Accordingly, Sky also challenges the Tribunal’s finding on Issue 2 (“Is the Sky Pay TV service an ECS?”), on the ground that in determining that issue, the Tribunal applied an erroneous approach to the law, as identified under Ground (1).
3. Appeal to the Court of Appeal lies only on a point of law: section 196(2)(b) of the 2003 Act. The test for permission to appeal requires that the Tribunal conclude that the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard: see CPR 52.6(1).

4. Since Ground (2) depends wholly on the Ground (1), we address the Grounds compendiously.

B. REAL PROSPECT OF SUCCESS

5. Sky essentially contends that the Tribunal's conclusion on Issue 1 as to the proper construction of section 32(2) and (2A) was wrong as a matter of law. It contends that the correct approach is to look at the unified service as a whole and then determine whether it should be regulated as an ECS according to the preponderance of its features. The Tribunal's approach (Main Judgment at paragraph 153), first to exclude the "content service" element and then to consider whether the rest of the service falls within the definition of section 32(2A)(c) is wrong.
6. Issue 1 was a matter of construction of the relevant statutory provisions (Main Judgment at paragraphs 100(1) and 132). Sky's above contention was advanced before the Tribunal (Main Judgment at paragraphs 102 to 104). However, that contention was rejected, essentially as a matter of construction: see Main Judgment, paragraphs 134 to 137 and 138 to 143. Sky's case on appeal does not engage with the essential reasoning underlying our conclusion on Issue 1. The Written Submissions do not address these central paragraphs of the Main Judgment, let alone suggest why the Tribunal's analysis was wrong. For this reason alone, we consider that an appeal has no real prospect of success.
7. Rather, Sky takes issue with paragraph 147 of the Main Judgment and the Tribunal's reference to "unreasonable outcomes". At paragraph 18 of Sky's Written Submissions, it is suggested that the "skewed outcome" referred to in the Main Judgment would arise "whether on Ofcom or Sky's analysis". However, that is not what paragraph 147 suggests. In the hypothetical example of a service which is 45% transmission/55% content, the position differs depending on whether Ofcom or Sky's analysis is correct. In such a case, on Sky's analysis, the service would be subject to content regulation alone. On Ofcom's analysis, the service would be subject to parallel regulation both as an ECS and as a content service. Whilst it is possible, that in such a case, within the "45% transmission element", the conveyance of signals does not

predominate (i.e. the Other Non-Content element predominates over conveyance of signals), this is largely theoretical, particularly given our unchallenged conclusions on Issue 2(b): Main Judgment, paragraphs 168 to 175. Further, the bald reference, at paragraph 16 of Sky's Submissions, to services which are 49% conveyance of signals takes the matter no further, without consideration of the nature of the rest of the services. The issue in the present case is the proper application of the Content Exclusion. The *Gmail* case, cited by Sky in support, is not on point. The Content Exclusion did not come into play, as there was no relevant content.

8. Moreover paragraph 147 of the Main Judgment is only one of four reasons why the Tribunal did not accept Sky's construction. Sky does not address the Tribunal's three other reasons for rejecting Sky's approach (at paragraphs 145 to 146, and 148 to 149 Main Judgment), nor the reasoning in paragraphs 150 to 152.

C. SOME OTHER COMPELLING REASON

9. Sky puts forward two "other compelling reasons for the appeal to be heard". In our judgment, neither is made out. First, as regards the suggested "need for regulatory certainty" (Written Submissions at paragraph 9), no other provider of pay TV services has disputed Ofcom's position on the application of the regulatory framework for ECS to their services. The fact that the regime might apply differently between different types of pay TV services is addressed at paragraph 150 of the Main Judgment. As there pointed out, such differential application might equally arise on Sky's approach to construction. Secondly, Sky refers to the enactment of the Digital Markets and Competition and Consumers Act 2024 ("the 2024 Act"), and in particular Chapter 2 of Part 4 in relation to "subscription contracts" (Submissions, paragraph 11). (We considered the draft of this legislation at paragraph 150 of the Main Judgment). Different statutory or regulatory obligations will apply to a person depending on whether a particular statutory definition is met. The fact that, when brought into force, that part of the 2004 Act will impose similar information and notification requirements in relation to subscription contracts for pay TV

services which are not an ECS means that the issue in the present case is likely to have less, rather than more, significance.

D. CONCLUSION

10. For these reasons, the Tribunal is unanimously of the view that the application for permission to appeal should be dismissed. The grounds of appeal do not, in the Tribunal's view, have a real prospect of success and there is no other compelling reason why permission to appeal should be granted.

The Hon Mr Justice Morris
Chair

Jane Burgess

Anna Walker CB

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 11 December 2024