Neutral citation [2008] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1083/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

15 January 2008

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

with

O2 (UK) LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

BRITISH TELECOMMUNICATIONS PLC

Interveners

RULING ON APPLICATION FOR PERMISSION TO APPEAL

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1. The Appellant ("H3G") has requested permission to appeal against the Tribunal's decision, set out in its letter of 6 December 2007, rejecting H3G's application to amend its Notice of Appeal and/or to serve a Reply to the Respondent's Defence on price control issues. The application to amend was made in relation to an appeal brought under section 192 of the Communications Act 2003 ("the Act") and is therefore governed by section 196 of the Act and by Rules 58 and 59 of the Tribunal's Rules (S.I. 2003 no. 1372).

2. Section 196 provides

> "**196. Appeals from the Tribunal**
>
> (1) A decision of the Tribunal on an appeal under section 192(2) may itself be appealed.
>
> (2) An appeal under this section-
>
> (a) lies to the Court of Appeal or to the Court of Session; and
>
> (b) must relate only to a point of law arising from the decision of the Tribunal.
>
> …
>
> (4) An appeal under this section requires the permission of the Tribunal or of the court to which it is to be made.
>
> …"

3. The Tribunal interprets section 196 as applying to appeals against interlocutory decisions made in the course of an appeal brought under section 192(2) as well as to appeals against the Tribunal's final disposal of the appeal. The Tribunal also applies CPR 52.3(6)(a) and (b) by analogy so that permission to appeal is granted only where the appeal would have a reasonable prospect of success or where there is some other compelling reason why the appeal should be heard.

4. The Notice of Appeal was lodged by H3G on 23 May 2007. Some of the background to the case has been set out in the Tribunal's previous interlocutory rulings and judgments in the matter and need not be repeated here. It suffices to say that the appeal is complicated procedurally for a number of reasons. First, the appeal falls to be

determined using the procedure set out in sections 193 – 195 of the Act. Broadly speaking, that procedure requires the Tribunal to identify whether the appeal raises any "specified price control matters" as defined. If it does, then those matters are to be referred by the Tribunal to the Competition Commission for its determination. Matters raised by the appeal which are not price control matters are to be decided by the Tribunal. Once the Competition Commission has notified the Tribunal of its determination of the price control matters referred to it, the Tribunal must decide the appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the Competition Commission, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the Competition Commission's determination would fall to be set aside on such an application. H3G's appeal raises some non-price control matters and some price control matters and so will involve both proceedings before the Tribunal to determine the former and proceedings before the Competition Commission to determine the latter. Ultimately the Tribunal will dispose of the whole appeal in accordance with section 195 of the Act.

5. Secondly, there is another appeal brought by British Telecommunications plc ("BT") against the same decision of the Respondent ("OFCOM") which is under challenge in the H3G appeal. The appeal brought by BT comprises entirely price control issues and it is accepted on all sides that the reference to the Competition Commission of the price control issues in both appeals should be combined and dealt with by the Competition Commission at the same time. Thirdly there are five interveners in the H3G appeal and the same undertakings are also parties to the BT appeal. Finally, there is another set of appeals, referred to by the Tribunal as the "Termination Rate Dispute Appeals", which raise issues which overlap with the issues raised in the BT and H3G appeals and in which, to a large extent, the same parties are all involved. These appeals do not engage the section 193 – 195 procedure and thus are to be determined by the Tribunal without reference to the Competition Commission.

6. H3G made its first application to amend its Notice of Appeal by letter to the Tribunal dated 12 October 2007. The application covered a number of different amendments, some of which were not contested by the parties. All of the contentious amendments

proposed in that application related to the parts of the Notice of Appeal that dealt with non-price control matters to be determined by the Tribunal.

7. Amendment of pleadings in Tribunal proceedings is governed by Rule 11 of the Tribunal Rules. This provides

> "11(1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
>
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.
>
> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless—
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> (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or
>
> (b) it was not practicable to include such ground in the notice of appeal; or
>
> (c) the circumstances are exceptional"

8. The procedure governing the amendment of pleadings in proceedings before the Tribunal differs significantly from the Civil Procedure Rules which apply in proceedings before the High Court and limits the possibilities of amendment after an appeal has been introduced. This difference derives from the fact that the Tribunal's emphasis is on written procedure and an appellant is expected to set out his arguments on appeal as fully as possible in writing at an early stage: see *Floe Telecom Limited v Office of Communications* [2004] CAT 7 paragraphs 33 – 37. The Tribunal has a wide discretion over whether to allow amendments which fall within Rule 11(1) of the Tribunal Rules (that is amendments which do not raise a new ground for contesting the decision).

9. One of the amendments for which permission was sought was the introduction of an argument to the effect that the imbalance of call traffic between H3G and the other mobile network operators which H3G argued OFCOM had wrongly determined to be irrelevant was caused in part by the "on-net/off-net" pricing strategies adopted by the other operators. The application to amend was heard at an oral hearing on 6 November 2007 at which the seven parties to the appeal were represented. At the end of that hearing the Tribunal announced its decision, allowing some of the amendments but

refusing permission to introduce the on-net/off-net pricing point. The reasons for the decision were set out in the Tribunal's ruling handed down on 23 November 2007 reported as [2007] CAT 33 ("the First Ruling"). Paragraphs 33 et seq of the First Ruling explain further what is meant by the on-net/off-net pricing point and why the Tribunal refused permission to amend in relation to that point. H3G did not request permission to appeal against the First Ruling.

10. By letter dated 30 November 2007 H3G sought permission (i) to amend the Notice of Appeal to include the on-net/off-net pricing point; and/or (ii) to serve a Reply to that part of OFCOM's Defence on the price control matters which deals with traffic imbalance and its possible causes. The first part of this application differed from the application which had been rejected by the First Ruling because the part of the Notice of Appeal into which H3G sought to introduce the point was the part dealing with price control matters which would in due course be referred to the Competition Commission.

11. The Tribunal rejected the application to amend and the application to serve a reply by letter in short form since, in the Tribunal's judgment, the applications raised the same issues as had been determined against H3G in the First Ruling.

Application to amend the Notice of Appeal

12. The Tribunal's decision to refuse permission to amend was taken in the exercise of its discretion under Rule 11 of the Tribunal's Rules. The question determined by the Tribunal in the First Ruling was where the balance between the need to deal justly with H3G and the need to ensure the efficient performance of the Tribunal's case management functions lay in relation to a new argument which (a) had not been raised by H3G in its submissions to OFCOM or in its comments on draft determinations during the lengthy consultation period preceding OFCOM's decision and which (b) would require substantial further work and expense on the part of OFCOM and by those parties whose tariff structures would need to be examined. These were factors which the Tribunal was entitled to take into account in arriving at the conclusion set out in the First Ruling. The same factors apply to the application to amend made on 30 November 2007 and the Tribunal was entitled to exercise its discretion to reject the application.

13. In the Tribunal's judgment the appeal does not have a real prospect of success within the meaning of CPR r52(6)(a). There was no significant difference between this application and the application rejected in the First Ruling:

(a) *Timetable constraints* In the preliminary remarks at the opening of the hearing of 6 November 2007, the Chairman of the Tribunal referred to a hearing in January or February 2008 for, inter alia, the non-price control matters in the H3G appeal as having been mentioned. However the 24 January 2008 date for the start of the hearing of the non-price control matters had not been set down by the time the Tribunal gave its decision refusing permission at the end of the hearing on 6 November. That date was set by a later Order of 20 November 2007. It was not part of OFCOM's case that allowing the amendment would disrupt the proposed timetable or render a January hearing date impossible. None of the interveners argued that they would not be able to manage the January date if the amendment were allowed: e.g. see page 55 of the transcript of the 6 November hearing. Although the First Ruling therefore referred (paragraph 39) to the strict timetable being set for the service of further pleadings leading up to a hearing in the New Year this was not a major factor in the First Ruling. Rather a major factor was that OFCOM would have to undertake substantial work in gathering new information and then in assessing any effect on the price control determination. This point was independent of the question of whether the work could be concluded in time for the January hearing. Exactly the same point therefore applied to the renewed application.

(b) *OFCOM's positive case on traffic imbalance in its Defence* It was accepted by all parties that the issue of traffic imbalance and its causes was already raised by H3G's Notice of Appeal. OFCOM conceded that this proposed amendment did not raise a new "ground" for the purposes of Rule 11 of the Tribunal's Rules but was a new argument in support of an existing ground in that it put forward an additional explanation for the traffic imbalance alleged to exist between H3G and the other MNOs. H3G argued in its 30 November letter of application that OFCOM was now mounting a "positive case" on the causes of traffic imbalance, namely that a possible cause of traffic

imbalance may be H3G's commercial strategy of acquiring post-pay customers rather than pre-pay customers. OFCOM responded in its letter of 4 December 2007 stating that this was incorrect and the same point had been made in the decision which was challenged in the H3G and BT appeals. OFCOM's Defence makes it clear that its case is that the traffic imbalance experienced by H3G is not a directly relevant factor that should be taken into account in determining the levels of the charge controls (paragraph 80) so that, on that case, the causes of the traffic imbalance are irrelevant. The Tribunal does not consider that the Defence on price control issues raises any new issue which distinguishes this application from that rejected by the First Ruling.

(c) *OFCOM must already have undertaken the necessary research* The Tribunal similarly rejects the assertion that the way the Defence is pleaded indicates that OFCOM must have conducted the research needed to deal with the on-net/off-net point. As is made clear in paragraph 37 of the First Ruling, the research needed to counter the on-net/off-net point would be (i) an analysis of the tariff structures of the other MNOs to see if there is indeed a differential between the on-net and off-net retail price as H3G allege; (ii) an analysis of how far customers are affected by such a differential given their choice of tariff and pattern of usage; and (iii) an analysis of whether customers and potential customers are aware of this effect in a way that influences their choice of network: see pages 45- 47 of the transcript of the 6th November hearing. Nothing in the Defence indicates that sufficient research and analysis has been carried out.

(d) *Price Control Appendix is merely an outline* It is accepted that once the price control matters are referred to the Competition Commission, the parties will be able to make further submissions and provide further evidence to the Competition Commission to flesh out the points that are made in their pleadings. To that extent, the Price Control Appendix is an outline document. However, the fact that the pleading may be in outline does not entitle the party to adduce additional arguments which are not

raised at all in that pleading. A pleading, even in outline, is still intended to show the Tribunal and the parties what issues are raised by the appeal.

(e) *Reference in Price Control Appendix to on-net/off-net in relation to market shares* This point was first raised by H3G in its application of 21 December 2007 for permission to appeal. It was not mentioned by H3G in its letter of 30 November 2007 and it is therefore not a point that the Tribunal took into account in arriving at its decision of 6 December 2007. In any event, the point being made by the reference to on-net/off-net pricing in the Price Control Appendix is a different point from that now sought to be introduced. There, H3G refers to a pan-European data study in 2004 and a more recent theoretical economics paper as proposing that on-net pricing strategies may account for perceived long term differences in market shares between market participants who entered the market at different times. H3G refer to this in order to cast doubt on the accuracy of the market share forecasts used by OFCOM in the economic depreciation methodology incorporated in its long run incremental costs (LRIC) model. Countering this point would not require OFCOM to undertake the investigation and analysis referred to in paragraph (c) above.

14. H3G submit five reasons why the only rational conclusion open to the Tribunal would have been that the interests of justice required the grant of permission to amend. The Tribunal does not accept that the reasons put forward establish that the interests of justice could only be served by allowing the amendment. H3G is able on the basis of its pleaded case to argue before the Competition Commission (a) that the traffic imbalance is, contrary to OFCOM's case, a relevant factor in considering the price control and (b) that the traffic imbalance is at least in part a symptom of a structural problem which is beyond H3G's control and which OFCOM has failed adequately to address, namely the current arrangements for number portability which operate to H3G's disadvantage. The Tribunal does not accept that H3G suffers significant prejudice by being precluded from arguing in these proceedings an additional or alternative reason for the existence of the traffic imbalance.

15. The Tribunal also does not accept that the refusal to allow the introduction of this point will inhibit the Competition Commission from investigating and determining the "real issues" in dispute between the parties in these proceedings. The scope of the issues in dispute is set by the grounds of appeal set out in the notice of appeal, by reference to which the Tribunal must ultimately decide the appeal on the merits in accordance with section 195(2) of the Act. This applies as much to those aspects of the appeal which fall to be determined by the Competition Commission as it does to the non price control matters to be determined by the Tribunal.

16. Finally the Tribunal rejects the argument that there is no prejudice to OFCOM in allowing this amendment. In the Tribunal's judgment the prejudice suffered by OFCOM is the same as was considered in the First Ruling, namely the fact that the new point could not be countered without substantial further investigation and analysis. The fact that the specified price control matters have not yet been referred to the Competition Commission and that consideration of those matters is likely to take longer than is envisaged for the consideration of the non-price control matters by the Tribunal does not diminish this prejudice.

Application to serve a Reply

17. In its letter of 30 November 2007, H3G stated:

> "In order to ensure that it has an appropriate basis for making the on-net/off-net pricing differential argument before the CC, H3G submits that it should either be permitted to amend its Notice of Appeal and/or to file and serve a Reply addressing OFCOM's newly pleaded case referred to above. By way of such amendment or Reply, H3G would seek to explain how on-net/off-net pricing is among the principal reasons for the traffic imbalance."

18. H3G therefore applied for permission under Rule 19 of the Tribunal's Rules to serve a reply to OFCOM's outline Defence on the price control matters "in order to address OFCOM's pleas at paragraphs 81 and 87." The paragraphs referred to are those paragraphs of the Defence which H3G allege set out OFCOM's "positive case" on the reasons for traffic imbalance. It therefore appeared from that letter that the sole purpose of any such Reply would be to introduce the on-net/off-net price differential as a reason for the alleged traffic imbalance. H3G has not suggested that it wishes to raise any other points in such a Reply. Since the same points apply whether the point is

raised in a Reply or an Amended Notice of Appeal, there was no reason for the Tribunal to give separate consideration to the second application.

19. No other compelling reason why this appeal should be heard has been put forward by H3G.

20. For these reasons, the Tribunal refuses permission to appeal.

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa
Registrar Date: 15 January 2008