Neutral citation [2011] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1151/3/3/10
1168/3/3/10
1169/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

3 October 2011

Before:

MARCUS SMITH QC
(Chairman)
PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

- and -

EVERYTHING EVERYWHERE LIMITED

Appellants

- v -

OFFICE OF COMMUNICATIONS

Respondent

TELEFÓNICA O2 UK LIMITED
VODAFONE LIMITED
CABLE & WIRELESS UK
HUTCHISON 3G UK LIMITED
OPAL TELECOM LTD

Interveners

RULING (APPLICATION FOR A STAY)

INTRODUCTION

1. On 1 August 2011, the Tribunal gave judgment in three appeals to the Tribunal, under Case Number 1151/3/3/10, Case Number 1168/3/3/10 and Case Number 1169 ([2011] CAT 24, the "Judgment"). At the same time, a draft Order was circulated to the parties, which sought to give effect to the directions contained in Section N of the Judgment. The parties were invited to comment on the terms of the draft Order, and they did so. Following these comments, the Tribunal issued a Ruling ([2011 CAT 26, "the Ruling"), dealing with the points raised by the parties, and made a final order ("the Order") on 12 August 2011.

2. This Ruling takes the Judgment, the Ruling and the Order as read and adopts the terms and abbreviations used in the Judgment, the Ruling and the Order.

3. By an application dated 12 September 2011 ("the Application"), O2 applied for a partial stay of the Order. This application:

   (1) Was not consented to by EE, who considered that "[O2] bears the onus of making out its grounds and that this should be considered in the light of the market as a whole and not [O2]'s position alone".

   (2) Was not opposed by OFCOM or Opal (who both adopted a "neutral position").

   (3) Was not opposed by Vodafone and H3G, provided (if a stay were to be granted) a stay in similar terms was extended to them.

   (4) Was consented to by BT, provided that certain conditions are met. These conditions – which are important – are set out in O2's letter of 1 September 2011, an email from O2 dated 8 September 2011, a letter from BT dated 12 September 2011 and a letter from O2 dated 20 September 2011. Rather than set out the terms of this correspondence in this Ruling, this correspondence (redacted to exclude confidential parts) is appended to this Ruling as Annex 1. Ultimately, BT's conditions were dealt with in a draft order, the terms of which we shall consider further below.

4. The stay sought by O2 is a stay of paragraph 5(2)(ii) of the Order until either permission to appeal against the Judgment has been refused by both the Tribunal and the Court of Appeal or the Court of Appeal has handed down its

final judgment on appeal. Alternatively, on the basis that the Tribunal is not minded to grant a stay, O2 seeks a stay until the Court of Appeal has ruled on a renewed application for a stay by O2.

THE NATURE OF THE STAY SOUGHT BY O2

5. In the Judgment, the Tribunal found that NCCN 956, NCCN 985 and NCCN 986 were fair and reasonable and that BT had the right to introduce them (paragraph 450 of the Judgment). The right to introduce the NNCNs arose:

   (1) On 3 June 2009 in the case of NCCN 956; and

   (2) On 2 October 2009 in the case of NCCN 985 and NCCN 986 (paragraph 452 of the Judgment).

6. The Tribunal found that there had been a failure by the MNOs to pay BT in accordance with the NCCNs, and OFCOM was directed to require the MNOs to pay to BT in accordance with section 190(2)(d) of the 2003 Act such amounts as were due under the NCCNs (paragraph 454 of the Judgment).

7. Before considering precisely how these amounts were to be calculated, it must be noted that these amounts all relate to the termination of calls by BT in the past ie between the date the NCCN was introduced and the date of the Judgment (1 August 2011). No direction to OFCOM was required with regard to sums payable by the MNOs to BT prospectively: the obligation to pay simply arises through the NCCNs. As was made clear in paragraph 11 of the Ruling, "[t]he Determinations having been found to be wrong, for the reasons given in the Judgment, the NCCNs apply with full effect in the period following the Judgment. In the period following the Judgment, therefore, the NCCNs operate according to their terms, and the MNOs must pay according to the terms of those NCCNs".

8. As regards the assessment of payments that the MNO's would be directed to make for the termination of calls by BT in the past, the Judgment identified two periods:

   (1) A First Period, or Period One, being the period between the introduction of the NCCN and the date of OFCOM's Determination that the NCCN was not fair and reasonable. Period One is specifically defined in

paragraph 1(10) of the Order. During Period One, the MNOs are to pay BT such additional termination rates due under the NCCNs calculated by reference to the actual prices charged to callers by the MNOs during this period (paragraph 455(1) of the Judgment). The rationale for this was expressed in paragraph 456(1) of the Judgment:

> "As we have found, BT had a right to impose the NCCNs, and it exercised that right. The mobile network operators were, of course, perfectly entitled to challenge this exercise of BT's rights under paragraph 12 of the Standard Interconnect Agreement, and they did so by way of the Dispute Resolution Process. What the MNOs were not entitled to do, pending the resolution of the Disputes, was to ignore the NCCNs. The MNOs should have complied with the NCCNs, whilst pursuing their challenge to them. This, accordingly, informs our direction as regards the First Period."

O2 pointed out in correspondence subsequent to the Judgment that it had in fact paid all of BT's charges until the dates of the Determinations, and that it was unfair for O2 to be "penalised" in this way (see paragraph 3(4) of the Ruling). The Ruling rejected, in paragraph 21, any suggestion of penalty in this case:

> "No penalty is involved: BT repaid any monies it received pursuant to the Determinations, and there is no injustice in obliging O2 to comply with NCCNs which have now been found to be legal and effective."

(2) A Second Period, or Period Two, being the period between the date of OFCOM's Determination that the NCCN was not fair and reasonable and the date of the Judgment. Period Two is specifically defined in paragraph 1(11) of the Order. For Period Two, the Tribunal considered that a different measure for assessing termination rates should apply (see paragraph 456(4) of the Judgment):

> "This position changed when the 080 and 0845/0870 Determinations were published by OFCOM. As we have noted, these Determinations had the effect of setting aside the NCCNs and requiring BT to revert to the *status quo ante*. Although we consider that these Determinations were wrong, for the reasons we have given, we do not consider that they can be left out of account. The successful MNOs were entitled to rely on the Determinations, even if BT was appealing those Determinations to this Tribunal. Accordingly, we accept the submission of the mobile network operators to this extent, namely that during Period 2 it would not be appropriate to require them to pay termination charges to BT calculated by reference to the actual prices charged to callers during this period."

This was because (as the Tribunal found: paragraph 379 of the Judgment) the likely effect of the NCCNs was to cause the call prices charged by MNOs for 080, 0845 and 0870 calls to fall, which would have the effect of reducing the sums payable to BT pursuant to the NCCNs. The problem was that the extent of the likely decrease in 080, 0845 and 0870 prices was (as the Tribunal found: paragraph 379 of the Judgment) impossible to determine. For this reason, the Tribunal ruled that the sums payable by the MNOs during Period Two should be calculated by reference to a future date, that is, a date when the MNOs had the opportunity of considering the effect of the Judgment and adjusting their prices in the light of this. The Tribunal provisionally determined this future date as 30 August 2011 (see paragraph 456(5) of the Judgment) but, following submissions from the parties, ruled that termination charges should be calculated by reference to the prices for 080, 0845 and 0870 calls as at the earlier of:

(i) 31 October 2011;

(ii) A date not later than 31 October 2011, being a date selected by an MNO and notified by that MNO to both OFCOM and to BT not less than 7 days before that date (paragraph 5(2)(ii) of the Order).

9. It is this paragraph in the Order (paragraph 5(2)(ii)) that O2 seeks to stay. The original draft order that accompanied O2's application provided as follows:

> "1. [Paragraph 5(2)(ii) of the Order is stayed in so far as it applies to Telefónica O2 UK Limited until either (a) permission to appeal against the Judgment has been refused by both the Tribunal and the Court of Appeal (including, for the latter case, for the avoidance of doubt, any renewed oral application for permission to appeal following a refusal of permission to appeal considered on the papers) or (b) the Court of Appeal had handed down its final judgment on appeal]; or
>
> 2. [Paragraph 5(2)(ii) of the Order is stayed until the Court of Appeal has ruled on a renewed application for a stay by Telefónica O2 UK Limited]
>
> 3. The steps set out in paragraph 6 of the Order to calculate amounts payable pursuant to paragraph 5(2) shall not apply in so far as concerns paragraph 5(2)(ii)."

10. It is clear from the correspondence referred to in paragraph 3 above that the stay sought is subject to a number of other conditions. This is clear from the following passage in O2's letter of 1 September 2011:

"The specific terms on which Telefónica will be requesting the stay of the Order will be that Telefónica will be paying BT the charges set out in the Judgment and Order on the basis of the broad principles outlined below:

1. Telefónica will pay all charges due to BT for Period One within the applicable timescale set out in the Order and, to the extent necessary, as determined by Ofcom.
2. Telefónica will pay all charges due to BT in accordance with all applicable NCCNs for Period Two and the period between 1 August and either the date that permission to appeal is refused or the date the Court of Appeal judgment is handed down based on its current retail prices.
3. Once either permission to appeal is refused or the Court of Appeal has handed down its judgment, Telefónica will make a decision on its retail prices and notify this to BT within three months of the date of the Court of Appeal judgment.
4. In the event that permission to appeal is granted and Telefónica is unsuccessful at the Court of Appeal, a refund of the difference in charges between what has actually been paid to BT and what would have been due had Telefónica changed its retail prices on or before 31 October 2011 will be due to Telefónica or BT with interest at the contractual rate.
5. In the event that permission to appeal is granted and Telefónica is successful at the Court of Appeal, BT will refund to Telefónica, with interest, all interconnect payments made to it by Telefónica prior to the Court of Appeal judgment with interest at the contractual rate.
6. Notwithstanding the above, if, following the Court of Appeal judgment, it is apparent that an under or over payment has been made by Telefónica a full refund with interest will be due to Telefónica or BT in accordance with all applicable NCCNs with interest at the contractual rate."

11. These terms were broadly agreeable to BT. In the period following the Application, those terms were the subject of further negotiation and agreement. The agreed terms were incorporated into a further draft order (the "Draft Order") that was sent to the Tribunal under cover of a letter dated 22 September 2011. This letter stated:

"As indicated in [O2's] letter of 20 September 2011, BT, [O2] and [H3G] were in the process of agreeing a draft order for a partial stay of the Tribunal's Order of 12 August 2011. The parties have now reached an agreement on the terms of the draft order and this is enclosed. This order has primarily been drafted by BT and is consented to by O2, BT and [H3G]."

This letter, which was the culmination of the correspondence described in paragraph 3 above (and which is at Annex 1 hereto), as well as the Draft Order it enclosed, is at Annex 2 hereto.

12. The Draft Order contains a mechanism (in paragraph 1) whereby any MNO may benefit from the stay provided for in paragraph 1 in the Draft Order, subject to certain conditions being met by that MNO.

13. The Draft Order also contains (in paragraph 2) a series of provisions describing "[f]or the avoidance of any doubt the effect of such stay" as is granted by the further draft order, and (in paragraph 4) a series of provisions which "shall apply" as part of the stay.

14. The effect of these paragraphs is to enable any participating MNO to put off consideration of whether and, if so, how, to adjust its prices for 080, 0845 and 0870 calls until after any appeal to the Court of Appeal, but with provision for:

    (1) Payment to BT in the meantime;

    (2) A right to claw-back any overpayments to BT should the appeal be successful; and

    (3) A right in the MNO to vary its prices after any decision of the Court of Appeal, with the sums O2 has paid to BT then being adjusted in order to reflect that variation.

15. These provisions are, on their face, complex, and it is evident that the Draft Order is an order providing for far more than simply for a stay of paragraph 5(2)(ii) of the Order.

16. Two questions arise:

    (1) First, does the Tribunal in fact have the jurisdiction to grant a stay of its own order?

    (2) Secondly, if it does, should a stay in fact be granted in this case?

    These two questions are considered in turn below.

JURISDICTION TO GRANT A STAY

17. In paragraph 4 of the Application, O2 states that "[i]t ought to be uncontroversial that the Tribunal can grant a stay of the operative part(s) of the Judgment as reflected in the Tribunal's Order of 12 August 2011". O2 relies upon Rule 61(2) of the Tribunal's rules of procedure.

18. The Tribunal's rules of procedure are contained (in the case of appeals to the Tribunal under the 2003 Act) in two statutory instruments, the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No 2068). The former rules are made pursuant to powers conferred by section 15 of the Enterprise Act 2002; the latter rules, which amend and supplement the former in the case of appeals under the 2003 Act, are made pursuant to powers conferred by that section and various provisions in the 2003 Act. The latter rules are not relevant to the matters here under consideration: we shall refer to the applicable rules (that is, those made under SI 2003 No 1372) as "the Tribunal Rules".

19. Rule 61 provides for a power in the Tribunal to make interim orders and to take interim measures. The rule provides as follows:

> "(1) The Tribunal may make an order on an interim basis –
>
> (a) suspending in whole or in part the effect of any decision which is the subject matter of proceedings before it;
>
> (b) in the case of an appeal under section 46 or 47 of the 1998 Act, varying the conditions or obligations attached to an exemption;
>
> (c) granting any remedy which the Tribunal would have the power to grant in its final decision.
>
> (2) Without prejudice to the generality of the foregoing, if the Tribunal considers that it is necessary as a matter of urgency for the purpose of –
>
> (a) preventing serious, irreparable damage to a particular person or category of person, or
>
> (b) protecting the public interest,
>
> the Tribunal may give such directions as it considers appropriate for that purpose.
>
> (3) The Tribunal shall exercise its power under this rule taking into account all the relevant circumstances, including –
>
> (a) the urgency of the matter;
>
> (b) the effect on the party making the request if the relief sought is not granted; and
>
> (c) the effect on competition if the relief is granted."

20. It is clear that:

(1) The power conferred by Rule 61(1)(b) is inapplicable here: this is not the case of an appeal under the Competition Act 1998.

(2) The power conferred by Rule 61(1)(c) is inapplicable here: this is not a case where the Tribunal is being invited, prior to rendering judgment, to grant a remedy. Rather, having rendered the Judgment, the Tribunal is being asked to stay a part of that Judgment and a part of the Order implementing it.

21. That leaves the power conferred by Rule 61(1)(a). In our view, this provision is also inapplicable in this case. In our view, the "decision" referred to in this provision is the decision being appealed to the Tribunal (here: the 080 and 0845/0870 Determinations) and not the decision of the Tribunal itself. We do not see how the Judgment can be a decision "which is the subject matter of proceedings before [the Tribunal]".

22. Rule 61(2) is expressed to be "without prejudice to the generality" of Rule 61(1), but is itself confined to the giving of "directions". Rule 19 of the Tribunal Rules describes the directions that the Tribunal may give. In *BCL Old Co Ltd v BASF SE* [2010] EWCA Civ 1258, the Court of Appeal found that Rule 19(2)(i) of the Tribunal Rules, which refers to the "abridgment or extension of any time limits", did not empower the Tribunal to grant an extension of time in damages actions. In *Office of Communications v Floe Telecom Limited* [2006] EWCA Civ 768, the Court of Appeal held that the Tribunal did not have the power to impose a timetable on a regulator for a re-investigation because there was no continuing appeal in relation to which the Tribunal's Rule 19 powers were exercisable. These decisions demonstrate that there are limits to the "directions" the Tribunal can give. Thus, although on one reading, Rule 61(2) could mean that the Tribunal could direct anything, provided that it considered such direction necessary for the purposes articulated in Rule 61(2), we consider such an expansive reading to be unlikely. Moreover, the fact that Rule 61(2) is "without prejudice" to Rule 61(1) suggests that it is narrower in scope, and that it is simply a provision inserted for the avoidance of doubt, making clear that the Tribunal's existing powers (conferred otherwise than by way of Rule 61(2)) should be exercised in order to prevent serious, irreparable damage to particular persons or category of persons or in order to protect the public interest.

23. It is clear that Rule 61(3) describes the circumstances in which the Tribunal can or should exercise the powers described in Rules 61(1) and 61(2).

24. Although the matter is certainly not free from doubt, we do not consider that Rule 61 gives the Tribunal the power to stay the implementation of a final order made by it.

25. We have considered whether a power to stay exists by virtue of other provisions. Tentatively, we have concluded that such a power does exist:

(1) It is possible to appeal the Tribunal's decision to the Court of Appeal (where the Tribunal sits in England and Wales). The provision providing for this is contained in section 196 of the 2003 Act.

(2) The Tribunal Rules say very little about the conduct of such appeals (Rules 58 and 59 simply dealing with the process of requesting permission to appeal and the Tribunal's decision where such a request is made).

(3) In these circumstances, it may be helpful to have recourse to the Civil Procedure Rules (the "CPR"), the relevant provision being CPR Part 52. CPR Part 52.1(1)(a) states that "the rules in this Part apply to appeals to...the civil division of the Court of Appeal". Further:

(i) CPR Part 52.1(3)(b) defines "appeal court" as "the court to which an appeal is made", in this case, the Court of Appeal;

(ii) CPR Part 52.1(3)(c) defines "lower court" as "the court, tribunal or other person or body from whose decision an appeal is brought". That must include the Tribunal. This is confirmed – were such confirmation necessary – by the Practice Direction ("PD") that accompanies CPR Part 52, which expressly references appeals from the Tribunal (CPR 52PD 21.10 and 52PD 21.10A).

(iii) CPR Part 52.7 provides as follows:

> "Unless –
>
> (a) the appeal court or the lower court orders otherwise; or
>
> (b) the appeal is from the Immigration and Asylum Chamber of the Upper Tribunal,
>
> an appeal shall not operate as a stay of any order or decision of the lower court."

(iv) The implication is that the lower court has a power to stay; and although that power is (as we have found) nowhere articulated in

the Tribunal Rules, it is our (albeit tentative) conclusion that such power is conferred by CPR Part 52.7 itself.

26. We are confirmed in our conclusion by a *dictum* of Lord Nicholls in the Privy Council, in *Bibby v Partap* [1996] 1 WLR 931 at 934, where he stated that "[u]nder English law a court of first instance which grants relief, whether interlocutory or final, has an inherent power to suspend ("stay") its order until an appeal or would be appeal to the Court of Appeal is disposed of". Although Lord Nicholls clearly did not have the Tribunal, or any UK statutorily-constituted body in mind, we nevertheless attach some weight to this statement. It is consistent with Rule 68(1) of the Tribunal Rules, which provides that, subject to the provisions of the Tribunal Rules, the Tribunal may regulate its own procedure.

27. In conclusion, we consider (albeit tentatively) that the Tribunal does have jurisdiction to stay its own judgment or order in an appropriate case, and we proceed on this basis. The question then arises whether this is a case where a stay should be granted.

SHOULD A STAY BE GRANTED IN THIS CASE?

28. There is nothing in the Judgment, Ruling or Order that compels any MNO to make any changes to its prices for 080, 0845 or 0870 calls. MNOs (including, for the avoidance of doubt, O2 and H3G) are free to price as they choose. Although O2, in particular, has contended that the NCCNs constitute a form of price control, the Tribunal has rejected that argument (see, for example, paragraphs 234 to 238 of the Judgment). In the Tribunal's Judgment, the NCCNs do not amount even to an indirect form of price control.

29. The MNOs are entitled to set their prices for 080, 0845 and 0870 calls at whatever level their commercial interests dictate. In short, MNO's prices for 080, 0845 and 0870 calls will only change if they want those prices to change.

30. Of course, the Tribunal's findings as to the legality of the NCCNs affect the commercial environment in which the MNOs (including O2 and H3G) operate. That which OFCOM found to be not fair and reasonable, the Tribunal has found

to be fair and reasonable, and the MNOs must take account of, and deal with, this new development.

31. Just as BT chose to appeal the Determinations, so the MNOs are entitled to seek permission to appeal the Tribunal's Judgment and Order. Nothing we say in this Ruling is intended to pre-judge or otherwise comment on any appeal that any MNO might seek to make. Each MNO is equally entitled to seek to reach alternative arrangements with BT. (In this Ruling, we say nothing about the validity of any such arrangements, including in particular their compliance with competition law: these are matters not before the Tribunal, and not considered by it.) As has been described in paragraphs 9 to 14 above, by their negotiations with BT, O2 and H3G are seeking to achieve an outcome whereby they may leave their prices for 080, 0845 and 0870 calls unchanged pending any appeal of the Judgment and the Order (should permission to appeal be granted) to the Court of Appeal. If that appeal is successful, they want to be able to claw back what they have paid to BT. Equally, if the appeal is unsuccessful, they want to be able to vary their prices, and for the economic consequences of that variation to be retrospective. In order to achieve this end, they are prepared to pay BT, *pro tem*, as if the NCCNs were valid.

32. We have considered very carefully the evidence adduced by O2 in support of its Application (namely, the witness statement of Mr Wardle). In that statement, Mr Wardle outlines the considerable prejudice that he says O2 would suffer, were it to change its prices for 080, 0845 and 0870 calls, only to change those prices back again to their higher level after a successful appeal. He suggests – and we see the force in this suggestion – that such changes up and down in pricing would alienate O2's customers.

33. We are prepared to accept everything that Mr Wardle says. Nevertheless, we are not prepared to grant a stay on either basis sought by O2, as set out in the Draft Order that has been agreed between O2, BT and H3G. This is for the following reasons:

    (1) O2 can avoid the prejudice described by Mr Wardle by <u>not</u> changing its prices. Of course, absent specific agreement with BT, that means that the

termination charges payable to BT by O2 in respect of Period Two will be calculated by reference to these unchanged prices.

(2) Were this Tribunal to impose a stay without BT's consent, it would extend the period in which O2 could decide whether or not to alter its prices. That would be grossly unfair to BT. The whole point of the use of future prices to calculate termination charges payable for Period Two was to avoid the harshness of calculating termination charges by reference to the prices actually charged by MNOs during this period. A stay, however, would mean no payment of any kind to BT.

(3) That, no doubt, is precisely why O2 has been negotiating with BT, and why an order agreed between O2, BT and H3G has been presented to the Tribunal in the form of the Draft Order. The Draft Order reflects a commercial arrangement whereby O2 and H3G (and any other MNO that seeks to participate in the scheme envisaged by the Draft Order) achieve their objective of being able to hold prices pending an appeal, whilst being able to (in effect) alter them retrospectively in the event of an unsuccessful appeal.

(4) We consider that the Draft Order seeks to put in place not a stay, but a regime different to that imposed by the Tribunal in the Judgment and the Order. There is, of course, nothing wrong in seeking to put in place such an alternative regime. But we consider that this is a matter for commercial negotiation and agreement, and not a matter for the Tribunal at all.

(5) There are elements of the Draft Order that go far beyond a mere stay. Thus, by way of example, paragraph 2(b) of the Draft Order provides:

> "For the avoidance of any doubt, the effect of such stay is as follows (but subject to any order that the Court of Appeal may subsequently make):
>
> ...
>
> (b) In respect of any applying MNO which complies with proviso (i) and (ii)(a) of paragraph 1 above, and the Tribunal grants permission to appeal but the Court of Appeal hands down a final judgment on appeal refusing the applying MNO's appeal and/or holding that the NCCNs were validly issued in respect of Period Two, each such applying MNO will then make a decision on the Prices Charged (as defined in paragraph 1(ii)(ii) of the [Order]) in respect of Period Two and that price shall be deemed to be the price set by the applicable MNO on 31 October 2011 for the purposes of paragraph 5(2)(ii) of

the [Order]. Each such notifying MNO shall notify the Prices Charged for Period Two to BT within three months of the Court of Appeal handing down such final judgment on appeal."

Paragraph 4 of the Draft Order provides:

"Further as regards any applying MNO the following terms shall apply as part of the Stay:

(1) Period Two in the interim

(a) notwithstanding paragraph 5(2)(ii) of the [Order] or paragraph 1 above, an applying MNO will, in the interim, pending any date that permission to appeal is refused by the Tribunal or Court of Appeal, or the handing down by the Court of Appeal of a final judgment on appeal refusing the applying MNO's appeal and/or holding that the NCCNs were validly issued in respect of Period Two (whichever is the later), pay to BT as follows ("the interim Period Two Charges"):..."

These charges are then set out.

These provisions, and others like them, appear in what is intended to be the operative part of the Draft Order. They represent orders of the Tribunal which, if made, are fundamentally inconsistent with the regime laid down in the Judgment, Ruling and Order. These orders are not orders for a stay, but orders that the "applying MNOs" and BT actually do the things laid down in the Draft Order. We have considerable doubts as to whether the Tribunal has any jurisdiction to make orders such as these – whether by consent or otherwise. (We note that, no doubt because the regime in the Draft Order is intended to be open to any "applying MNO", that the Draft Order is not expressed to be "by consent".[1]) We have no doubt that the Tribunal should, assuming it has jurisdiction, decline to make the order that it is invited to make, and we decline to do so.

(6) To put the matter another way, were BT opposed to O2's proposals, we consider that it would be wholly wrong to impose a stay of the sort contemplated by O2. To do so, would be to deprive BT of the judgment

[1] Consent orders before the Tribunal must comply with Rule 57 of the Tribunal Rules, which requires the parties to provide the Tribunal with a consent order impact assessment, providing an explanation of the draft consent order, including the circumstances giving rise to it, the relief to be obtained if the order is made, and the anticipated effects on competition of that relief (Rule 57(3)). Similarly, under the CPR, the parties to a consent order must provide the court with any material it needs to be satisfied that it is appropriate to make the order: CPR PD 23A.10.4. Specific provision for consent judgments and orders is made in CPR 40.6.

that the Tribunal has found, in all the circumstances, to be the just solution to the appeals before it. In other words, O2's application for a stay is inextricably linked to the commercial agreement that appears to have been reached between BT, O2 and H3G. The Tribunal considers that it is not appropriate for it to become involved in what is a purely commercial negotiation. Either the parties (ie BT, O2 and H3G) can achieve their ends though agreement (in which case the Tribunal's participation is unnecessary) or they cannot (in which case we consider that the Tribunal's judgment should stand and not be re-written, even if it could be by the Tribunal).

(7) As we have noted, rather than a stay by the Tribunal, this is more properly a matter for commercial negotiation and agreement between the parties, and not a matter for the Tribunal at all. In particular:

(i) According to the terms of the Draft Order, the MNOs are to pay (during the "interim Period Two") termination charges for 080, 0845 and 0870 calls "in accordance with the methodology described in...the [Order]" (see paragraph 4(1)(a) of the Draft Order). The Judgment, Ruling and Order already provide for this.

(ii) If BT and O2 really do not wish to go through the assessment process with OFCOM that the Tribunal has laid down in the Judgment, Ruling and Order, then O2 and BT are perfectly able, pursuant to the procedure described in paragraph 6 of the Order, to agree what must be paid. OFCOM does not have to be involved at all, unless the parties disagree.

(8) Given that O2 and H3G have the choice as to whether or not to change their 080, 0845 or 0870 prices, they can avoid the prejudice described by Mr Wardle by leaving those prices unchanged. Of course, if no alternative regime is agreed with BT, Period Two termination charges will be assessed by reference to those unchanged prices according to the terms of the Judgment, the Ruling and the Order. But, if the Court of Appeal overturns the Judgment, then the Court of Appeal has all the powers of the Tribunal (CPR Part 52.10) and will itself (if so advised) be able to order

34. We should note that the interest of callers has not been addressed before us. We considered OFCOM's policy preference as regards 080, 0845 and 0870 calls in paragraphs 213 to 238 of the Judgment, and concluded that OFCOM's policy preference was one that was open to it to adopt, and one that this Tribunal should be slow to overturn (paragraph 300 of the Judgment). Had we been minded to grant a stay (which, for the reasons given above, we are not), we would have wanted to have had this question argued before us. As it is, because of the conclusion we have reached, this is a point that does not have to be pursued any further.

35. In O2's letter of 22 September 2011, we were asked whether a hearing would be necessary in order for the Tribunal to issue an order. We consider that matters have been very fully and sufficiently addressed in the written materials before us. We do not, therefore, consider that an oral hearing would assist us.

36. As we have described, the stay applied for by O2 is a stay of paragraph 5(2)(ii) of the Order until either permission to appeal against the Judgment has been refused by both the Tribunal and the Court of Appeal or the Court of Appeal has handed down its final judgment on appeal. Alternatively, on the basis that the Tribunal is not minded to grant a stay, O2 seeks a stay until the Court of Appeal has ruled on a renewed application for a stay by O2. For the reasons we have given, O2's application for a stay (whether formulated widely or, in the alternative, narrowly) is dismissed.

Marcus Smith QC | Peter Clayton | Professor Paul Stoneman

Charles Dhanowa
Registrar

Date: 3 October 2011