Neutral citation [2021] CAT 32

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 October 2021

Before:

THE HONOURABLE MR JUSTICE WAKSMAN
(Chairman)
EAMONN DORAN
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN LE PATOUREL

Class Representative

- and -

(1) BT GROUP PLC
(2) BRITISH TELECOMMUNICATIONS PLC

Defendants

Heard remotely on 19 October 2021

RULING ON CONSEQUENTIAL MATTERS
(INCLUDING COSTS AND PERMISSION TO APPEAL)

APPEARANCES

Ms Ronit Kreisberger QC, Mr Nicholas Bacon QC, Mr Nikolaus Grubeck and Mr Jack Williams (instructed by Mishcon de Reya LLP) appeared on behalf of the Class Representative.

Ms Sarah Ford QC and Ms Sarah Love (instructed by Simmons & Simmons LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. On 27 September 2021, the Tribunal handed down judgment approving the Class Representative's application for a collective proceedings order ("CPO") under section 47B of the Competition Act 1998 ("the Act") and refusing the Defendants' cross-application for strike out and/or summary judgment: [2021] CAT 30 ("the Judgment").

2. This Ruling concerns (a) consequential matters following on from the Judgment, (b) costs, (c) an application by the Defendants ("BT") for permission to appeal against the Judgment, and (d) an application by BT for a stay pending appeal. The Tribunal heard oral arguments by counsel for each party at a hearing held remotely, and livestreamed, on 19 October 2021.

B. CLAIM FORM

3. BT submitted that the Tribunal should direct the Class Representative to provide a new Claim Form that sets out only the substantive claims and in an appropriate format.

4. The Tribunal does not consider it is necessary to direct that the Class Representative provide a new Claim Form on the basis that the existing Claim Form contains the application for the CPO. So it does, but it also sets out the elements of the claim sufficiently in order for BT to plead back to it. Where parts of the Claim Form do not now require to be pleaded to, BT can indicate accordingly.

C. COSTS

5. The Class Representative sought its costs of, and occasioned by, (i) BT's unsuccessful strike out/summary judgment application, and (ii) BT's unsuccessful opposition to the CPO application (on an opt-out basis or otherwise) incurred from 30 April 2021 (save for costs of and occasioned by the amendments and re-amendments to the CPO claim form, which the parties agreed shall be costs in the case).

6. BT accepts that it must pay the Class Representative's costs referable to BT's strike out/summary judgment application on the standard basis (in accordance with paragraph 16 of the draft CPO). Further, there is no dispute that the Class Representatives costs of, and occasioned by, the CPO application up until 30 April 2021 should be costs in the case.

7. There was, however, disagreement between the parties as to the costs of, and occasioned by, the CPO application from 30 April 2021 onwards. The Class Representative prepared a Statement of Costs and sought payment on account of 70% of those costs from BT pursuant to rule 104(2) of the Tribunal Rules, pending a detailed assessment of costs. BT did not agree that it should bear costs from 30 April 2021 and submitted that they should be costs in the case. BT submitted that the figures in the Statement of Costs were excessive and in no way reasonable or proportionate, in particular in relation to both counsels' fees and the solicitors' fees.

8. In our judgment, the right way to take account of the fact that there were some costs post 30 April 2021 which would have been incurred in any event, is to make some sort of percentage reduction from the costs of the CPO application which the Class Representative is entitled to from BT at this stage. The deduction we make is 20%.

9. The Tribunal directs that the draft CPO be revised accordingly to reflect that BT shall pay 80% of the costs of and occasioned by the CPO application from 30 April onwards and the balance of the 20% will be costs in the case.

10. We consider that there is significant force in the objections raised by BT, in particular in relation to the level of counsel's fees whether taken as a strict mathematical approach on hours, as Mr Bacon QC would have it, or on a broad assessment of how a brief fee is calculated, and also on the amount of solicitors' time, the number of solicitors involved, and the element of review and re-review.

11. We then take into account, simply as a comparator, BT's own costs figure, which is about £300,000, which of course is not determinative. Then we

consider it right to take into account the cost of the preparation of a response by BT occurring prior to the 30 April date, which would be likely to be considerable (but we do not have that figure) so we estimate that to be £200,000, bringing the total figure for BT's costs to approximately £500,000. That would not still be an appropriate starting point for a comparison since there was additional expense that BT did not incur, being further expert evidence and solicitors' and counsels' costs in relation to that. This would push any comparative starting point up to about £642,000, rather than the £800,000 put forward by Mr Bacon QC. We then take 70% of that figure. Having reduced the starting point, we do not consider it necessary to reduce the percentage down from 70%.

12. Accordingly, we award the Class Representative an interim payment on account of costs of £450,000 for its costs from 30 April 2021 onwards.

D. PERMISSION TO APPEAL

13. By an application dated 11 October 2021, BT applied for permission to appeal the Judgment ("the PTA Application"). BT also applied for a stay of the CPO pending the resolution of that appeal pursuant to rule 85(1) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules"). On 15 October 2021, the Tribunal received a written response from the Class Representative to BT's PTA Application ("the Response to the PTA Application").

14. After consideration of BT's PTA Application, written submissions from each party, and after hearing oral argument at the hearing on 19 October 2021, the Tribunal refuses BT's permission to appeal. The decision is unanimous.

15. As far as Ground 1 is concerned, there is no error of law on the basis that the Tribunal misdirected itself as to rule 79(3) of the Tribunal Rules. This ground is really just a disagreement with our decision that the opt-out basis is more appropriate than the opt-in. All the relevant legal provisions were stated (paras. 20 to 24 of the Judgment) and then the reasoned multi-factorial assessment (itself contemplated by Rule 79(3)) was conducted (paras. 110 to 125 of the Judgment). The scope of the relevant assessment is reflected in the observations

of the Supreme Court in *Mastercard v Merricks* [2020] UKSC 51 ("*Merricks*") as to the overall "value judgement about suitability" and the "wide discretionary power" in relation to certification which is conferred upon the Tribunal (*Merricks,* paras. 61 and 63) which apply here as well as in the context of Rule 79(2).

16. We consider that we were entitled, on the material before us, which included the Ofcom material on levels of engagement, to conclude that opt-out was more practicable than opt-in, paragraph 6.39 of the CAT's Guide to Proceedings 2015 ("the Guide") itself referring to "all the circumstances" of the case before the Tribunal to determine what is "workable and in the interests of justice".

17. There was no error of law in referring to the putative lack of third-party funding, if the basis were to be opt-in, because that goes directly to whether, in such circumstances, the claimants would have any access to justice, as to the ability to bring this claim, and it was merely one of a number of factors pointing to opt-out.

18. As for Ground 2, there is no error of law in postulating that a method of distributing damages could be by payment to each class member by means of an account credit, which is not suggested to be a separate head of relief but just how damages are ultimately distributed, if necessary through a claims administrator instructed by the Class Representative (see paras. 112 and 115 of the Judgment). This was in the context of dealing with a jurisdiction point raised by BT noted at paragraph 117 of the Judgment, in which no concluded decision was made and was not necessary at this stage.

19. Furthermore, the final point made at paragraph 119 of the Judgment was that, in any event, there remained the difference in principle between the two stages of potential engagement – at the outset and on collecting damages. The fact that more contact might be necessary where a pass-on defence is relevant (up to 17% of class members) or in respect of customers now deceased, is not material.

20. As for Ground 3, there is no error of law in the Tribunal's reference to merits again, in this context at paragraph 124 of the Judgment. We had already cited

the extent to which merits could be relevant, under paragraph 6.39 of the Guide, and here the merits have been gone into in detail because of the cross-applications. The Tribunal, having found that the claim had a real prospect of success (in respect of which no permission for appeal has been sought), was entitled to say that, in this case, the claim would nonetheless have to be very weak for the merits to have any further impact on the opt-in/out decision.

21. BT did not, in fact, make any lengthy submissions on merits at this stage anyway. It pointed to what it said were the fundamental deficiencies of the case, and that it would be weak, and simply said that for that reason opt-in should be deemed more suitable. We disagreed and were entitled to deal with merits to the extent that we did, in the way that we did, at that stage, especially given all of the other factors.

22. *Merricks* may not have covered absolutely every point, but the Supreme Court, in our judgment, gave more than sufficient guidance on collective proceedings for present purposes. If the Court of Appeal takes a different view, that will be a matter for the Court of Appeal.

23. Accordingly, the Tribunal considers that the appeal has no real prospect of success in relation to any of the three grounds and there is no other compelling reason for an appeal.

E. APPLICATION FOR A STAY

24. Having refused permission, the Tribunal considers BT's application for a stay of next steps of the CPO until the hearing of an application for permission to appeal by the Court of Appeal, and should that application be successful, until the appeal itself is decided.

25. We can reject the second element there immediately. If the Court of Appeal were to grant permission, then it would be a matter for the Court of Appeal how to deal with any question of a stay, not for the Tribunal.

26. We consider the question of stay against the background that we now have refused permission. Even if we had granted permission, no automatic stay follows. On the question of a stay, it is a question of whether there is a risk of injustice if no stay is granted.

27. Here, the Tribunal considers there is a difference between the procedural step of serving the Defence (and then the Reply) and the question of notification to the class. So far as the service of a defence is concerned, we do not see that there is any injustice to BT in serving its Defence. For the reasons we have already given, BT is in a strong position to progress with the preparation and service of a Defence, hence the service date of 3 December.

28. Sometimes a party will say that there is an injustice, because they have to incur costs, and if it turns out they win the appeal, and the case is dismissed or abandoned, they will never get the costs back from the other party. Quite rightly, because of the insurance provisions applicable, here, that is not a point which has been made against the Class Representative. Therefore, all that is really said is that there is some more time spent on the exercise of serving a Defence, which it might turn out, was not necessary.

29. That can be said in the case of any application for a stay pending appeal in any case where there are further steps to be taken, and we do not see that there is a balance of injustice in favour of the BT which would allow that argument to succeed. The procedural steps as far as the Defence and Reply are concerned will remain therefore as they are. For the reasons given in paragraph 34 below, it is important that this claim is progressed as expeditiously as possible and keeping the timetable as to the service of further statements of case maintains this objective.

30. After careful consideration, however, we do take a different approach so far as notification of the class is concerned. Ms Kreisberger QC is quite right that the notification can be issued now. It need not make any reference to an appeal, and if the Court of Appeal does not grant permission, then everything remains as it was. But we are troubled by a potential level of complexity so far as the class is concerned. While we are by no means encouraging a further application for

permission to appeal, we have to postulate what possibly could happen, where the class members are now asked to consider the question of opt-out by a certain date in April 2022, and then the position is subsequently altered if the Court of Appeal were to grant permission.

31. Of course, the Tribunal Rules provide that the Tribunal can, and should, ensure that the class members are kept up to date by reference to any decision or judgment, and it was not suggested that the Tribunal would not be able to make some adjustments here, but that is usually in the context of what is happening as the case is progressing, rather than a question of an appeal.

32. On balance, and looking at the members of the class, the Tribunal considers that the preferable option is to make this process as clean as possible, bearing in mind the demographic, to avoid the possibility of a start/stop situation.

33. For that reason, we direct that there should be a stay on the issue of the notice to the class members until the Court of Appeal has decided the question of permission. If the Court of Appeal grants permission, then it will make such further directions as it thinks are appropriate. In the event that permission is not granted, the parties have liberty to apply to the Tribunal to amend the opt-out dates as appropriate. If there is a delay so far as notification of the class is concerned, by a couple of months, the Tribunal does not consider that to cause a position of injustice, having regard to the litigation as a whole.

F. EXPEDITION

34. The question of expedition of the appeal is a matter for the Court of Appeal. We bear in mind that the Class Representative's original timetable was somewhat leisurely. However, the Tribunal considers that these matters should be progressed to trial as swiftly as is fair and possible. We also bear in mind in particular, the elderly demographic of at least a proportion of the class. We therefore request that any decision on permission to appeal be expedited by the Court of Appeal. Accordingly, this paragraph of our Ruling in particular should be drawn to the attention of the Civil Appeals Office when lodging any application for permission to appeal, with the Court of Appeal.

The Hon. Mr Justice Waksman Chairman

Eamonn Doran

Derek Ridyard

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

Date: 25 October 2021