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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1111/3/3/09
1149/3/3/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 March 2010

Before:

VIVIEN ROSE
(Chairman)
THE HONOURABLE ANTONY LEWIS
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC

Appellant

- supported by -

BRITISH SKY BROADCASTING LIMITED

Intervener

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

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HEARING

APPEARANCES

Mr. Jon Turner Q.C. and Mr. Meredith Pickford and Ms Laura John (instructed by Osborne Clarke) appeared for the Appellant.

Ms Dinah Rose Q.C. and Mr. Josh Holmes and Mr. James Segan (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward (instructed by BT Legal) appeared for British Telecommunications plc.

Mr. John McInnes (of Herbert Smith LLP) appeared for British Sky Broadcasting Limited.

1 THE CHAIRMAN: Good morning ladies and gentlemen. We received yesterday afternoon a
2 draft consent order which reflects the agreement at which the parties to these appeals have
3 arrived to settle the non-price control matters in both the Local Loop Unbundling appeal,
4 and the WLR appeal.

5 The agreement is, if we may say so, an eminently sensible way forward and we commend
6 the parties and their advisers for coming to terms in this way.

7 We have seen an exchange of letters which took place yesterday between the parties. First,
8 there is a letter from Mr. Andrew Heaney to OFCOM in which he states that the appellants
9 are seeking a clear assurance that in future they will be provided with model disclosure and
10 transparency; para. 5 of that letter goes into more detail as to what the appellants mean by
11 this with a number of bullet points describing the way in which they would expect OFCOM
12 to conduct consultations in the future.

13 There was then a letter in reply from Mr. Stuart McIntosh of OFCOM stating that OFCOM
14 is happy to confirm that they agree that the framework set out in para. 5 of Mr. Heaney's
15 letter is the appropriate basis on which to approach disclosure and transparency in relation
16 to charge control modelling.

17 The two interveners in these appeals, BT and BSkyB have also indicated that they are
18 content with the proposed settlement.

19 The parties have now made a request to the Tribunal for an order under Rule 57 of the
20 Tribunal's Rules. That rule provides that if all the parties agree to the terms on which to
21 settle all or any part of the proceedings, they may request the Tribunal to make a consent
22 order. That rule also provides that before making a consent order the Tribunal must
23 consider a consent order impact statement provided by the parties. If the Tribunal considers
24 that a proposed consent order may have a significant effect on competition then the draft
25 order should be placed on the Tribunal's website so that third parties not involved in the
26 particular proceedings have an opportunity to comment. The Tribunal is then to consider
27 the comments of third parties and any representations made by the parties to the appeal
28 before deciding whether to make the proposed consent order. The Tribunal may then either
29 make the order in the terms proposed, or invite the parties to vary those terms or refuse to
30 make the order.

31 The parties in these appeals have provided the Tribunal with a draft consent order which
32 states that they have agreed that the non-price control matters should be settled on the terms
33 outlined in the exchange of correspondence. It also states that they do not consider that
34 there will be any impact on competition arising from a settlement of the non-price control

1 matters. The accompanying draft order also refers in one of its preambles to the Tribunal
2 having read the exchange of letters containing the terms on which the parties have agreed to
3 settle.

4 We have some doubts whether the Rule 57 publicised consent order is the appropriate
5 course for the Tribunal to take here. That rule is aimed at ensuring that an appeal against a
6 regulatory decision is not settled on terms which have significant implications for the
7 operation of a particular market without third parties who are affected by such a settlement
8 having an opportunity to comment. We agree with the parties' assessment in the consent
9 order impact statement that there is no impact on competition from this settlement, but we
10 do consider that it is important that the terms of this agreement are publicised in a way
11 which enables third parties to see and comment on what OFCOM has agreed, because
12 although they may not have a significant impact on competition as such, the terms may have
13 an impact on the future conduct of consultations in which many other companies are
14 involved.

15 A further concern that the Tribunal has is the need to avoid any suggestion that the
16 agreement evinced in Mr. McIntosh's letter is somehow enforceable via this order, or that
17 OFCOM has undertaken to the Tribunal that it will behave in the manner set out in para. 5
18 of Mr. Heaney's letter. This matter needs, in our judgment, to be resolved formally in a
19 way which does not leave it open for a consultee to say, in the course of some future
20 consultation, that OFCOM is in breach of the terms of the Tribunal's order or has failed to
21 comply with an undertaking given to the Tribunal if that consultee alleges that OFCOM has
22 not done what is set out in that para. 5.

23 The Tribunal is therefore seeking a way forward which avoids the incorporation of the
24 terms of the letters into an order but at the same time ensures that the terms of the settlement
25 receive the publicity that they merit. We also consider that it is really for OFCOM to
26 publicise what they say they intend to do in future rather than for the Tribunal to do so.

27 We therefore invite the parties to consider whether a possible way forward is for the
28 Tribunal to make a simpler order, permitting the withdrawal of the appeal under Rule 12 of
29 the Tribunal's Rules, insofar as it relates to the non-price control matters, and for the parties
30 to agree on some other method by which, at the same time as we make the order, the terms
31 of the settlement are made public by OFCOM in an appropriate manner.

32 So that, ladies and gentlemen, is where we are at the moment in relation to this. It might be
33 helpful for either Miss Rose or Mr. Turner to address us on how you envisage this working

1 or if you would prefer we could rise briefly for you to discuss it amongst yourselves,
2 whichever would be the most helpful.

3 MISS ROSE: Madam, I can certainly tell you what OFCOM envisages would be the position in
4 terms of publicity. OFCOM will shortly be conducting a new consultation in relation to the
5 next charge control, and the intention of OFCOM was to publicise this process on its
6 website in that context, in the context of the next round of consultation.

7 THE CHAIRMAN: But would that make clear that that is linked in some way to the resolution of
8 the non-price control matters in these appeals?

9 MISS ROSE: Madam, we do not consider that that is a matter that is of any materiality. The
10 position is that OFCOM is not entering into any sort of binding agreement, because of
11 course as a Regulator it could not fetter its discretion and neither is it giving an undertaking
12 to the Tribunal. It will probably be *ultra vires* for OFCOM to bind itself in that way. What
13 OFCOM is doing is acknowledging that it will act in accordance with its public law duties
14 and its statutory duties in conducting future consultations and, in particular, in relation to
15 what would be to an extent conflicting duties of transparency and fairness and the duty to
16 ensure and maintain competition.

17 So that is the way we see it. We certainly did not envisage that there would be any question
18 of undertakings, we would be perfectly content to deal with it under Rule 12. I think we
19 had some question mark because Rule 12 only talks about withdrawing the appeal, and of
20 course here there is not a withdrawal of the whole of the appeal, but only withdrawal of the
21 non-price control matters in the appeal. That was our thinking behind using Rule 57.
22 The other possibility would have been to use Rule 11, which would be that the Tribunal
23 would give permission to amend the notice of appeal by withdrawing the identified
24 paragraphs in the notice of appeal. We considered those three options. I think we felt in the
25 end that Rule 57 most clearly expressed what the parties were actually doing, which was
26 settling this part of the appeal, and that of course does refer specifically to all or part of the
27 proceedings. So that was the thinking behind the consent order under Rule 57, but we do
28 not feel strongly about it.

29 THE CHAIRMAN: Mr. Turner?

30 MR. TURNER: Madam, may I say first of all that we welcome the Tribunal's indication that this
31 settlement was "eminently sensible" on both sides. I think I speak for the parties, because
32 as the Tribunal will appreciate, there are high feelings in the period leading up to a
33 contested witness action, and the parties overcame that in order to arrive at a constructive

1 settlement that both parties are happy with, so we are grateful to the Tribunal for that
2 indication.

3 Secondly, in relation to what has been agreed, as the Tribunal rightly points out there is a
4 clear assurance given. There is no question of a binding undertaking given to the Tribunal
5 or to Carphone Warehouse, but nonetheless that assurance is important and it relates to a
6 specific framework which has been agreed. Those two matters we think are important
7 because they go beyond merely OFCOM saying: “All we are doing is agreeing to comply
8 with our statutory duties which we already do”, and therefore we think it is important that
9 that point must be recognised as part of the settlement. We do not, however, consider that a
10 specific linkage to this settlement is necessary if OFCOM objects to that. We do think that
11 the question of the assurance and what it involves are important to specify.

12 So far as the mechanism is concerned, I endorse what Miss Rose says. Rule 57 is perhaps
13 the most suitable vehicle for this. As Miss Rose says, it relates to a settlement of all or part
14 of the proceedings, which is precisely what one does have here. In terms of the aim of Rule
15 57, I understand your point about the primary purpose of this sort of provision but para. 4 of
16 that Rule relates to the situation where there may be a significant impact on competition and
17 then there is a process which must be followed.

18 The rule also considers cases where there is not a significant impact on competition and we
19 fall within that, so we do think that the rule is suitable. If the Tribunal is considering an
20 alternative, again I agree with Miss Rose, we did consider this, we feel that Rule 11, which
21 refers to “amendment” may be more suitable than Rule 12, although as you can see it, itself,
22 is rather clumsy, because the primary thing that has been achieved here is a settlement, and
23 the primary feature of it is the assurance about the framework and we do feel that Rule 57
24 accomplishes the appropriate way of giving effect to that.

25 An alternative, which was used in one other case, I mention only for completeness, is in
26 2005, the former President of the Tribunal in a case called *Pernod* was faced with a
27 situation where the parties settled a Competition Act case – I am not sure whether Dr. Pryor
28 was actually a member of that Tribunal – but in any event he thought that the Rule 57
29 procedure appeared a little cumbersome, and there was a judgment in which he said that he
30 was not sure whether it was primarily suited to that sort of arrangement, and he came up
31 with his own solution, not reflected in the Rules at all, which is that the Tribunal would
32 make an order that there be no further order on that part of the case, or something of that
33 kind. I mention that merely for completeness.

34 Our position is that the Rule 57 procedure is the most appropriate vehicle.

1 THE CHAIRMAN: And you think that one can use that procedure without going through the
2 publicity paragraphs of it?

3 MR. TURNER: Oh yes. I think we are agreed on that.

4 THE CHAIRMAN: It is just that sub-rule 9 does seem to envisage that there will have been
5 comments from third parties, but there may not be comments from third parties even if you
6 do publicise it, I suppose. Well maybe that is the way to go. The Referendaire mentioned
7 to me that Rule 12 has been used once in the past to withdraw part of an appeal. I am a
8 little reluctant to use Rule 11 if that means, in fact, the pleading will have to be amended,
9 and then there will have to be a re-amended defence, on the basis that no further money
10 should be spent on this if it has been resolved. My concern is with the reference to the
11 correspondence in the terms of the draft order and the terms of the consent order impact
12 statement for the reasons that I have outlined, but if we remove them it then becomes
13 entirely opaque to anybody looking at those as to what has actually happened in this case,
14 except that I suppose the transcript of this hearing will be on the Tribunal's website.
15 Another alternative that we were considering was whether there could be a short reasoned
16 order produced, which sets out the bare bones of what has happened and then make the
17 order in the terms sought.

18 MR. TURNER: Madam Chairman, you have given a ruling at the outset of this hearing which
19 will be available to everybody which does accurately reflect what has happened, and also
20 makes the point, should there be any doubt, that OFCOM is not giving a formal undertaking
21 to the Tribunal or to the other party. In terms of the content of the order itself with which
22 both parties were content. I do not believe that the third recital, or any other part of this,
23 ought to give rise to a contention that a formal undertaking has been given to the Tribunal
24 and, at the same time we respectfully agree with you that it is important that the matter
25 should be transparent given the nature of this.

26 THE CHAIRMAN: To refer simply to the exchange of letters does not indicate what the
27 assurance given by OFCOM is.

28 MR. TURNER: I understand.

29 THE CHAIRMAN: But the risk of incorporating anything more detailed does then give rise...

30 MR. TURNER: I understand, yes. It may be that if OFCOM does give whatever publicity is felt
31 appropriate to the specific assurances in the way that the Tribunal feels is right, that will
32 accomplish the objective.

33 THE CHAIRMAN: We have made clear, I think, what our concerns are, and we have chewed
34 over the various possibilities, perhaps it would be a good idea rather than everyone thinking

1 aloud just to rise for a few minutes and see if you can work out something that meets the
2 various concerns that we have raised.

3 MR. TURNER: I understand. I am obliged.

4 (Short break)

5 THE CHAIRMAN: Yes.

6 MISS ROSE: Madam, we have had a discussion, and the position is that this is a deal that has
7 been hammered out over a number of days of intensive negotiations, obviously involving a
8 number of parties, including people who are not here today and not able to give instructions.
9 The balance of the deal is quite delicate and we are anxious not to disrupt its structure if we
10 can avoid it, not least because OFCOM does not have anybody here today who can give
11 instructions. We do not think there is a problem with the order as it is currently worded.
12 The third paragraph of the recitals does no more than to record the fact that the Tribunal has
13 read the letters, and we think that that is an entirely neutral statement which simply records
14 the fact that the CAT has read the letters, and we do not consider that that gives any
15 impression of an undertaking or anything of that nature.

16 So far as publicising the structure that OFCOM will apply to transparency issues in
17 modelling, as I have said our intention is that we will publish on our website a statement
18 that says this is the approach OFCOM will take to disclosure and transparency in relation to
19 charge control modelling and then setting out the various steps. We consider that that is a
20 more appropriate course than certainly any publication of the exchange of correspondence
21 by the CAT – some parts of these letters of course are personal to this litigation and do not
22 really impact on third parties. The important part is the structure that OFCOM is agreeing
23 that it will follow, and that part will be put on OFCOM's website.

24 THE CHAIRMAN: And that will relate to consultations generally?

25 MISS ROSE: Yes, but our intention is to publicise it as soon as possible, but certainly in advance
26 of the next consultation that is taking place on LLU within the next few months.

27 THE CHAIRMAN: Yes, thank you very much, that is very helpful. Yes, Mr. Turner?

28 MR. TURNER: Madam, if that meets the Tribunal's approval, then we would be content with
29 that. We have an alternative proposal, but I am not going to rock the boat.

30 THE CHAIRMAN: The only matter we were talking about is that in relation to the order it seems
31 that there needs to be some sort of reasoning attached to the order, even if only to say that
32 we have come to the conclusion that there is no significant impact on competition and that
33 therefore we are not going to go through the publication provisions of Rule 57. The
34 question is whether it would be helpful or unhelpful in those short reasons to set out in some

1 or all the detail the framework of what has been agreed in entirely neutral terms, but it may
2 be that that thought is now overtaken by what Miss Rose has said that OFCOM has
3 considered.

4 MR. TURNER: May I perhaps comment on that? That is what we had understood before we rose
5 for that short adjournment and, as I say, if for some reason this is unacceptable or is going
6 to cause terrific waves then we will not press it, but we had understood that to be the
7 Tribunal's concern, and were going to suggest that one way of dealing with it would be as
8 follows. If you have a copy of the draft consent order there ----

9 MISS ROSE: Madam, can I make it clear that this would not be acceptable to OFCOM.

10 THE CHAIRMAN: Right.

11 MR. TURNER: I will just outline this.

12 MISS ROSE: I am sorry, but we are in a very difficult situation, because my instructions are not
13 to do anything – it is this or nothing.

14 THE CHAIRMAN: Yes.

15 MISS ROSE: It is this or nothing.

16 THE CHAIRMAN: I think if you are content, Mr. Turner ----

17 MR. TURNER: Yes.

18 THE CHAIRMAN: -- it may be that all that needs to be done is to include as an extra preamble
19 “Upon the Tribunal having decided ...” or whatever the word is “... that there is no
20 significant impact on competition ...” – I think that statement does need to appear
21 somewhere in order to explain why we are not going through the consultation process which
22 is envisaged.

23 MR. TURNER: Yes.

24 THE CHAIRMAN: Something following the wording of Rule 57(4) and also “After hearing the
25 parties” to reflect Rule 57(9) and it may not then be appropriate to refer any further to
26 what Miss Rose has said about OFCOM's intentions to publicise this on their website.

27 MR. TURNER: That is a matter for the Tribunal. It is true that this is a settlement and therefore
28 the wishes of one party are all very well, there does need to be a balance, and from
29 Carphone Warehouse's point of view it needs to be the case that there is a reflection of the
30 settlement which is regarded as balanced.

31 THE CHAIRMAN: Well I think that probably enough has been said this morning, and the
32 transcript of this hearing will appear in the usual way. If someone is interested enough, they
33 may well, by reading this, and then by seeing what appears on OFCOM's website shortly

1 after, they may put two and two together, they may not, but I do not think there is anything
2 really the Tribunal can do to press the matter further than that.

3 MR. TURNER: I understand. I think that will be satisfactory then. Yes, we will agree extra
4 preambles which meet that objective.

5 THE CHAIRMAN: Thank you very much.

6 MISS ROSE: Just to be clear, as I understand it, it would be one preamble that says: "Upon the
7 Competition Appeal Tribunal having decided that there is no significant impact on
8 competition ..." and another one which simply says: "Upon hearing Leading Counsel..."

9 THE CHAIRMAN: Something along those lines, yes.

10 MISS ROSE: That is no problem, thank you very much. And there will be no reasoning or
11 further decision by the Tribunal?

12 THE CHAIRMAN: I think that is where we have arrived at, yes.

13 MISS ROSE: I am very grateful, madam.

14 THE CHAIRMAN: The draft order also deals with costs, does it?

15 MISS ROSE: It says each party will bear their own costs.

16 MR. TURNER: And that is the position the interveners have fallen in with as well.

17 THE CHAIRMAN: On a logistical basis, we will produce an order which probably for safety's
18 sake we will circulate amongst the parties before making it, but we hope that that then
19 resolves the matter to everyone's satisfaction. Thank you very much.

20