Neutral citation [2012] CAT 30

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1180/3/3/11
1181/3/3/11
1182/3/3/11
1183/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

12 November 2012

Before:
MARCUS SMITH Q.C.
(Chairman)
BRIAN LANDERS
PROFESSOR COLIN MAYER

Sitting as a Tribunal in England and Wales

B E T W E E N:

(1) BRITISH TELECOMMUNICATIONS PLC
(2) EVERYTHING EVERYWHERE LIMITED
(3) HUTCHISON 3G (UK) LIMITED
(4) VODAFONE LIMITED

Appellants

-and-

OFFICE OF COMMUNICATIONS

Respondent

-and-

TELEFÓNICA O2 UK LIMITED

Intervener

Heard at Victoria House on 21 September 2012

RULING ON COSTS

APPEARANCES

Mr. Michael Bowsher Q.C. and Mr. Nicholas Gibson (instructed by Legal Advisers, Competition Commission) appeared for the Competition Commission.

Mr. Julian Gregory (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr. Murray Rosen Q.C. and Miss Pia Mithani (of Herbert Smith LLP) appeared for Vodafone Limited.

I. INTRODUCTION

1. In a judgment dated 3 May 2012 ([2012] CAT 11, the "Judgment"), the Tribunal determined four appeals (the "Appeals") in relation to a decision of the Office of Communications ("OFCOM") contained in a statement entitled "Wholesale Mobile Voice Call Termination", published on 15 March 2011 (the "Statement"). It was common ground between all the parties that the issues arising out of the Appeals were – in their entirety – "price control matters" within section 193 of the Communications Act 2003 (the "2003 Act"). In accordance with section 193, the various price control matters arising out of the Appeals were identified in the form of seven "reference questions" and these were referred by the Tribunal to the Competition Commission (the "Commission") for determination. In a determination dated 9 February 2012 (the "Determination"), the Commission determined these reference questions.

2. The effect of section 193 of the 2003 Act is that the Tribunal, when deciding an appeal on the merits under section 195, must decide any price control matters arising out of the Appeals in accordance with the Commission's determination (section 193(6)) unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination would fall to be set aside on such an application (section 193(7)).

3. Before the Tribunal, Everything Everywhere Limited ("EE") and Vodafone Limited ("Vodafone") contended that, applying the principles applicable on an application for judicial review, the Determination did indeed fall to be set aside. The Commission, amongst others, resisted that contention. For the reasons set out in the Judgment, the Tribunal unanimously concluded that the Determination would not fall to be set aside when applying the principles applicable on an application for judicial review and so, pursuant to section 193(6), decided the Appeals in accordance with the Determination.[1]

4. The Commission now seeks its costs of and arising out of defending its Determination before the Tribunal. It is to be emphasised that the Commission

[1] For the purposes of this Ruling, the terms defined in the Judgment and set out in the glossary annexed to the Judgement, are used.

does not seek to recover the costs it incurred in actually arriving at the Determination. The Commission draws a very clear line between those costs (which it does not seek to recover) and the costs of defending the Determination before the Tribunal on the section 193(7) challenge (which costs it does seek to recover). We shall refer to these latter costs – which the Commission does seek to recover – as "post-determination costs".

5. EE and Vodafone take a number of points in relation to the Commission's application for its costs. Most fundamentally, however, it is contended that the Tribunal does not have jurisdiction to award post-determination costs to the Commission, essentially because the Commission "is one of the appeal bodies and not a party to the proceedings" (see paragraph 3(a) of EE's written submissions on costs of 29 June 2012; see, to similar effect, paragraph 8 of Vodafone's written submissions of 29 June 2012). This is a question of general importance in all appeals concerning price control matters.

6. We received detailed written submissions from EE and Vodafone, and briefer observations from BT in support of EE's and Vodafone's contentions, on the question of costs in general, and this issue in particular. Additionally, given the difficulty and importance of the question of whether, as a matter of principle, the Commission is a party to the proceedings, we gave permission for further written submissions to be filed on the point and listed an oral hearing, which was held on 21 September 2012. We are most grateful for all the written and oral submissions we received, in particular in relation to the question of jurisdiction to award post-determination costs. It is to this question that we turn first.

II. IS THE COMMISSION A "PARTY" TO THE PROCEEDINGS?

(1) Rule 55 of the Tribunal Rules

7. Rule 55(2) of the 2003 Tribunal Rules provides that "[t]he Tribunal may at its discretion … at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the

proceedings." Rule 55 is in Part V of the 2003 Tribunal Rules. By Rule 3, unless the context otherwise requires, Part V applies to all proceedings before the Tribunal.

8. Self-evidently, this provision confers a wide discretion on the Tribunal. However, one clear limit on this discretion is that the Tribunal may only make orders requiring the payment of costs by one "party" to another. No-one has suggested that the Tribunal has a power to order that costs be paid by or to a non-party. The clear wording of Rule 55(2) strongly suggests that there is no such power under Rule 55.

9. The question which therefore arises is whether the Commission is a "party" for the purposes of Rule 55 when it appears before the Tribunal in defence of a determination that it has been required to make pursuant to section 193. The term "party", it should be noted, is not one that is further defined in the 2003 Tribunal Rules. In these circumstances, we consider that this question must be considered in light of the Commission's role under section 193 of the 2003 Act.

(2) Earlier stages of the proceedings

10. After the Determination was published on 9 February 2012, two case management conferences were held (on 10 and 24 February 2012). The Commission was represented at both of these hearings and the orders made by the Tribunal were clearly made on the assumption that the Commission was a party to these proceedings. Thus, by way of example, paragraph 3 of the order of 10 February 2012 refers to "the Competition Commission and any other party", and made provision for the Commission to respond to any section 193(7) challenge that might be brought in respect of the Determination.

11. Equally, the Judgment (although not the other orders preceding the Judgment nor those made to date since Judgment was handed down) refers to the Commission as the "Respondent".

12. We stress that this was not because the Tribunal had pre-determined the question of the Commission's status in these proceedings. Until EE's and Vodafone's objections to the Commission's costs application were made, no-

one raised any question as to the Commission's participation or status in the proceedings, and certainly no-one objected to the Commission making submissions in response to the section 193(7) challenges to the Determination made by EE and Vodafone. The Commission made plain that it intended to take an active part in the proceedings and defend the Determination. No-one objected to this.

13. With the benefit of hindsight, the status of the Commission in proceedings such as these is a matter that should probably have been raised earlier for the Tribunal's consideration and determination (although we express no criticism in this regard). If that had happened, then both the orders of 10 and 24 February 2012 and the Judgment would have been able to reflect the point that EE and Vodafone are now taking regarding the Commission's status as a party.

14. We do not, however, consider that simply because all of the persons represented before the Tribunal, as well as the Tribunal itself, proceeded on the basis that the Commission was a "party", that that should in any way preclude EE or Vodafone from taking the point now.

(3) The role of the Commission

15. The Commission's role under section 193 was considered in some detail in the Judgment, in particular in paragraphs 47 to 59, 111 to 118 and 203. The Tribunal concluded that when determining price control matters that had been referred to the Commission by the Tribunal pursuant to section 193, the Commission acted as an "administrative appeal body" (paragraphs 118 and 203). That role ends when the Commission notifies the Tribunal of the determination it has made pursuant to section 193(4) of the 2003 Act. At that point the Commission is *functus officio*.

16. We consider that the Commission is entirely right not to seek an order in respect of costs it has incurred when acting in this capacity. This is for two reasons:

    (1) First, the Commission's determinations of price control matters bind the Tribunal in the manner prescribed by section 193(6) of the 2003 Act (see paragraph 114 of the Judgment). Thus, although appeals under section 192

of the 2003 Act are appeals to the Tribunal, in the cases relating to price control matters, the Tribunal's competence and jurisdiction is in effect split between it and the Commission. The Commission determines the price control matters and its determination amounts to the Tribunal's decision on the merits (see sections 195(2) and 193(6) of the 2003 Act), unless the Tribunal decides that the determination would fall to be set aside applying the principles applicable on an application for judicial review (see section 193(7) and paragraph 116 of the Judgment). The Tribunal (like any other court) cannot recover the costs it incurs in determining a dispute,[2] and the same rule must apply to the Commission when acting as an administrative appeal body.

(2) Secondly, where an administrative body makes a decision which is then the subject of review, it is generally the case that, whilst that body may recover its costs of defending its decision on review, it does not recover the costs of making the decision itself. Thus, for example, where OFCOM decides a dispute referred to it under section 185 of the 2003 Act, and that decision is appealed to the Tribunal pursuant to section 192, OFCOM may recover the costs it has incurred in defending its decision before the Tribunal, but it will not recover the costs of making the decision in the first place. Similarly, the Commission cannot – as it accepts – recover the costs of making the determination, at least as the law currently stands.[3]

17. As we have noted, once the Commission notifies its determination of price control matters to the Tribunal, its role as an administrative appeal tribunal comes to an end. It is then for the Tribunal to consider the Commission's determination. The 2003 Act states that the Tribunal, when deciding an appeal on the merits under section 195, must decide any price control matters in accordance with the Commission's determination (section 193(6)) unless the

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[2] There is a limited exception in the form of Rule 55(5) of the 2003 Tribunal Rules, which provides: "The power to award costs pursuant to paragraphs (1) to (3) includes the power to direct any party to pay to the Tribunal such sum as may be appropriate in reimbursement of any costs incurred by the Tribunal in connection with the summoning or citation of witnesses or the instruction of experts on the Tribunal's behalf. Any sum due as a result of such direction may be recovered by the Tribunal as a civil debt due to the Tribunal."

[3] It was drawn to our attention that the Economic and Regulatory Reform Bill currently being considered by Parliament would alter this position if enacted in its current form.

Tribunal decides, applying the principles applicable on an application for judicial review, that the determination would fall to be set aside on such an application (section 193(7)). The 2003 Act, the 2003 Tribunal Rules and the 2004 Tribunal Rules are all silent as to the procedure according to which the Tribunal should approach the question of whether the determination should be set aside. They are equally silent as to the role the Commission should play in that process, if any. The only guidance that the Tribunal is given is that it must apply "the principles applicable on an application for judicial review" (section 193(7)).

18. In paragraph 111 of the Judgment, the Tribunal noted:

> "Self-evidently, this is not – in terms of procedure – a judicial review. Rather section 193(7) defines the standard of review that the Tribunal must apply to determinations of the Commission by reference to the standards that would pertain on an application for judicial review."

19. Although the procedure for the review of a Commission determination is left undefined, and so to the discretion of the Tribunal, there are certain, essential, procedural steps that have to be undertaken so as to enable the Tribunal to apply judicial review principles to the Commission's determination. In other words, the procedure applied by the Tribunal is informed by the nature and substance of the review being undertaken. One such procedural step is to require those parties minded to challenge the determination under section 193(7) to identify, in sufficient detail, the basis upon which, they say, the determination falls to be set aside. As is noted in paragraph 4(4) of the Judgment that is the course the Tribunal now takes in cases such as this. It is worth noting that the Tribunal's procedure in section 193(7) cases has evolved incrementally, with each successive section 193(7) challenge.

20. The question of whether post-determination costs can be awarded to the Commission requires us to determine whether or not the Commission is a "party". The positions taken were as follows:

    (1) The Commission contended that, once it has notified its determination to the Tribunal pursuant to section 193(4) of the 2003 Act, the Commission

was like any other administrative decision-maker whose decision is being challenged on a judicial review. It ceased to be what the Tribunal has termed an "administrative appeal body" and was then able to descend into the ring to defend the Determination from attack. In this particular case, it was submitted, in reliance on *R (on the application of Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, that the Commission made itself an active party to the litigation, and ought to be treated as if it were a party, so that in the normal course of things costs would follow the event.

(2) By contrast, EE and Vodafone contended that where the Commission appeared before the Tribunal after its determination had been notified, it was continuing in its role as an "administrative appeal body" and continued to be part of the appellate decision-making structure established by the 2003 Act. On this basis, the Commission's role was elucidatory, assisting the Tribunal in an "active but neutral capacity", similar to that "of an inferior court or tribunal" (to quote from paragraph 33 of Vodafone's 12 September 2012 submissions). As EE put it, the Commission participates "as one of the appeal bodies rather than as a party", more particularly as a "neutral second appeal body assisting the Tribunal, the primary appeal body" (see respectively paragraphs 3 and 13 of EE's 12 September 2012 submissions).

21. Both of these contentions as to the Commission's role are eminently arguable and, indeed, plausible. The role that the 2003 Act allocates to the Commission must, as is obviously the case, be determinative. If – but that is begging the question – the appropriate analogy for the Commission's position is that of a decision-maker whose decision is being challenged by way of judicial review, then it is self-evident that the decision-maker ought generally to be before the court carrying out the judicial review as the respondent, in order to justify or explain the decision taken. The commentary to CPR 54.1 in the 2012 edition of *Civil Procedure* states (at paragraph 54.1.13) that the "defendant [to a claim for judicial review] will usually be the public body whose decision, action or failure is under challenge". On a domestic judicial review, it is trite law that the court

or tribunal is principally concerned with the manner in which the decision was made and the procedure adopted, and not with the decision's substantive merits. The decision-maker itself is uniquely placed to assist the court or tribunal in considering those issues.

22. In the case of appeals of price control matters, the decision that the Tribunal is reviewing is not the original decision of OFCOM, but the Commission's "on the merits" review of that decision, called the "determination". Section 193(7) makes absolutely clear that it is the determination, and not OFCOM's original decision, that is under review by the Tribunal. Under the scheme established by section 193 of the 2003 Act, it is only when a determination by the Commission would fall to be set aside applying the principles applicable on an application for judicial review, that the Tribunal might engage directly with OFCOM's decision.

23. In our judgment, it is an essential part of the section 193 process that, if an interested party chooses to challenge, on judicial review grounds, a determination of the Commission made under section 193(4) then, applying the principles applicable on an application for judicial review, the Commission should be entitled to appear before the Tribunal. We would note that we found the Commission's presence before us in these proceedings extremely helpful and that we have no doubt that in general it will be desirable in the future for the Commission to appear before the Tribunal in like proceedings.

24. Indeed, neither EE nor Vodafone argued that the Commission ought not to be entitled to appear before the Tribunal when its determination is being reviewed under section 193(7). Rather, the dispute was as to the capacity in which the Commission ought to appear.

25. That the Commission is entitled to appear does not necessarily mean, however, that the 2003 Act envisages the process of an actual judicial review being replicated before the Tribunal. All that section 193(7) requires is that the *principles* of judicial review be applied. The section says nothing as to the process. At the hearing on costs before us, Mr. Bowsher Q.C., for the Commission, accepted that there is "not ... an actual judicial review but it is in

all relevant respects run as such. It is a subjunctive judicial review" (see transcript, page 8, lines 11 and 12).

26. Although we can see force in the submissions of the Commission that, after notifying its determination, it becomes a party by analogy with judicial review proceedings, we consider that the legislation does not – or does not sufficiently – articulate that transition from the pre- to the post-determination status argued for by the Commission. It is clear that – for the reasons given in the Judgment and as summarized in paragraphs 15 and 16 above – until its determination has been notified, the Commission participates as one of the appeal bodies rather than as a party. We do not consider that section 193 of the 2003 Act contains any suggestion that that status changes once the determination has been notified. The 2003 Act says nothing as to this. We consider that there is no justification for reading into the section 193 procedure such a change of status on the part of the Commission. Although the Commission may play a role throughout the section 193 process, we consider that the Commission, at all times, acts as a part of the appellate process established by the 2003 Act, assisting the Tribunal. It is not a "party" to the proceedings.

27. There is nothing odd in the suggestion that the Commission – rather than descending into the fray as a party – should instead assist the Tribunal in an active but neutral capacity, and this, we hold, is what section 193 requires of the Commission. (For the avoidance of any doubt, we should say that when they appeared before us to defend the Determination, Mr. Bowsher Q.C. and Mr. Gibson performed this function admirably for the Commission, and certainly could not properly be accused of causing the Commission to exceed its brief. As we have already noted, we found the Commission's submissions extremely helpful.)

28. Had section 193 of the 2003 Act envisaged a different role for the Commission post the notification of its determination, then it could, and most likely would, have said so. Indeed, the 2004 Tribunal Rules were made specifically in exercise of the powers conferred by, among other enactments, sections 192 and 193 of the 2003 Act, and yet those rules are also silent on this important point.

29. We therefore conclude that the Commission was never a "party" to these proceedings, and that the Tribunal does not therefore have jurisdiction to make an order in respect of the Commission's costs under Rule 55(2) of the 2003 Tribunal Rules.

30. It is appropriate to add the following by way of addendum.

    (1) Neither the parties nor the Commission disputed that the Tribunal had a discretion to join the Commission as a party. Indeed, both EE and Vodafone positively contended that such a discretion existed.

    (2) In any event, whilst we accept that such a discretion does exist, we agree with the submissions of Mr. Rosen Q.C., on behalf of Vodafone, that this discretion can only rarely be exercised in order to make the Commission a party. It seems to us that, in general, the Commission's role is, and should be, that of a neutral assistant to the Tribunal, and that it would require exceptional circumstances for an application that the Commission be made a party to be granted. In other words, this is not a case where – had an application been made by the Commission to be joined as a party – that application would have been granted.

    (3) We should also stress that even were such an application made and granted, it cut both ways: whilst it is only a party that can recover its costs under Rule 55, a party can also be required to pay another party's costs. There is, to this extent, a symmetry in terms of the Commission's costs exposure: if it is a party, it may recover costs from other parties, but it can also be required to pay them; if it is not a party, it has no costs exposure, but also cannot recover its costs.

31. We note that a large number of authorities were cited to us by the parties and the Commission in the course of their written and oral submissions. It was common ground, however, that the process established by section 193 of the 2003 Act appears to be unique. Thus all of those authorities, whilst helpful in setting out a framework for argument before us, in fact advanced matters no further. We have not therefore found it necessary to refer to them in the course of this ruling but would express our gratitude to counsel on all sides.

32. Given our conclusion that we do not, in the circumstances of this case, have jurisdiction to award the Commission its costs, there is no need to consider the other points made by the parties in relation to the Commission's costs application. However, since this question may go further, we consider it appropriate to set out very briefly our conclusions on the question of costs assuming, contrary to our judgment, that the Commission is indeed a "party" to the proceedings.

III. THE APPROPRIATE ORDER UNDER RULE 55(3)

33. In cases where the Tribunal does have jurisdiction to award costs, it has – as we have noted –a wide discretion as to the order to be made. The Tribunal's starting point when exercising its discretion is that a successful party will normally obtain a costs award in its favour: *British Telecommunications plc v Office of Communications* [2011] CAT 35.

34. In this case, the Commission has succeeded and EE and Vodafone have failed. Thus, were the Commission a "party" (contrary to our judgment), we would have been minded to award it its costs. As paragraph 327 of the Judgment notes:

> "For the reasons that we have given, we do not consider that any part of the Determination would fall to be set aside on an application for judicial review under section 193(7) of the 2003 Act, and we reject EE's Grounds 1 to 5 and Vodafone's Grounds A and B."

35. It was suggested by EE (in paragraph 13 of its written submissions of 29 June 2012) that "[i]t is not appropriate, necessary or helpful for the [Commission] to play an active role when the Tribunal is determining matters under sections 193 and 195." Similarly, Vodafone suggested (in paragraphs 14 and 15 of its written submissions of the same date) that the Commission was not the "principal defendant" (that was OFCOM) and that the Commission was not "the primary decision-maker whose decision is subject to judicial review".

36. We do not agree with these submissions. Whilst OFCOM is the "principal defendant" to an appeal under section 192 of the 2003 Act, on a section 193(7) application it is the Commission's determination that is under review, not the

original decision of OFCOM. The review of OFCOM's decision is a function which the 2003 Act has, in the context of price control matters, delegated to the Commission. Contrary to EE's position we consider, therefore, that, in many cases, it will be both appropriate and helpful for the Commission to play an active, but neutral, role before the Tribunal when it reviews, pursuant to section 193(7), a Commission determination. That said of course, and for the reasons given above, we do not accept that section 193 of the 2003 Act permits us to treat the Commission as a "party" (absent an application of the sort outlined at paragraph 30 above) and the precise role that the Commission may take in any given case is one that we do not seek to anticipate.

37. Apart from these submissions, EE's and Vodafone's objections related to the amount of the Commission's costs.

38. But for the jurisdictional question addressed in Section II of this Ruling, we would have found that there was nothing to displace the starting point that the Commission is entitled to its costs, and we would have ordered that the Commission have its costs, payable equally by EE and Vodafone. Such an order would have directed that those costs should be subject to a detailed assessment on the standard basis by a costs judge of the Senior Courts, if not agreed.

39. We would only add this as regards the costs of the Commission's internal solicitors, which it seeks to recover:

    (1) In principle, we consider that such costs should be recoverable by the Commission, although we quite accept the note of caution sounded by the Tribunal in *National Grid v Gas and Electricity Markets Authority* [2009] CAT 24.

    (2) We consider that a fair approach would involve (as regards each in-house lawyer whose costs are sought to be recovered) an assessment of:

        (i) A realistic hourly rate for the lawyer in question. This involves assessing:

(a) the annual cost of that lawyer (taking account not merely the gross salary paid, but other costs, such as pension contributions, health insurance, *etc*); and

(b) the annual number of hours that the lawyer is contractually obliged to work (again, taking account of not merely the number of hours per week that are expected, but holiday entitlement, *etc*);

In this way, an average hourly rate can be obtained.

(ii) The number of hours actually worked on the case.

(3) Recoverable costs will then be the hourly rate multiplied by the reasonable number of hours worked by the lawyer in question.

40. This is the order we would have made, had we reached a different conclusion on the issue of who is a "party" in post-determination proceedings.

ORDER

41. In the event, however, it is our unanimous decision that we do not have jurisdiction to award the Commission its costs of defending the Determination and its application is refused.

Marcus Smith Q.C. Brian Landers Professor Colin Mayer

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

Date: 12 November 2012