Neutral Citation Number: [2011] IEHC 265

THE HIGH COURT

2011 225 JR

BETWEEN

TELEFONICA O2 IRELAND LIMITED

APPLICANT

AND

COMMISSION FOR COMMUNICATIONS REGULATION

RESPONDENT

AND

MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES AND BT COMMUNICATIONS IRELAND LIMITED

NOTICE PARTIES TO THE MOTION

JUDGMENT of Mr. Justice Clarke delivered the 30th June, 2011

1. Introduction

1.1 This application relates to the potential disclosure of confidential documentation. In the underlying proceedings the applicant ("O2") seeks to quash a determination made by the respondent ("ComReg") fixing the price at which emergency calls which are free to the public are to be charged as and between service providers.

1.2 While it will be necessary, in due course, to say a little more about the regulatory regime which governs such emergency calls, there is an obligation, as a matter of European Union law, to permit members of the public to make such calls free of charge. The regime which applies in Ireland is that a single service provider is nominated to handle all such calls by the provision of call centres. The decision as to who should provide such services is made after an open tendering process. At the present time the second named notice party ("BT") holds the contract. The contract itself is between BT and the first named notice party ("the Minister").

1.3 In simple terms, all emergency calls are, under that contract and the relevant law, handled by BT. Insofar as the caller may be a BT customer, then BT bears the cost of that emergency call. Insofar as the caller may be a customer of another telephone service provider (such as O2), then BT is entitled to charge for the handling of the relevant emergency call at a rate to be fixed by ComReg. The relevant service provided by BT is described as the Emergency Call Answering Service ("ECAS"). ComReg's entitlement to determine the maximum call handling fee that the ECAS operator can charge is made under s. 58D of the Communications Regulation Acts 2002-2010 ("the 2002 Act").

1.4 There is a sense in which the provision of such free emergency calls is the price paid by service providers for operating in the Irish marketplace. The price is paid, in relation to all providers other than BT, by paying an appropriate proportion of the cost of maintaining the relevant call centres and, in the case of BT, by it bearing its own proportion of those costs.

1.5 There is a mechanism for determining the amount to be charged. There is no suggestion made by O2 in these proceedings that there is anything wrong with the overall architecture of the relevant scheme. It is accepted that it is permissible for Ireland to put in place a scheme whereby there is a single operator of emergency call centres who is entitled to pass on an appropriate share of the costs of maintaining those call centres to other service providers. O2, therefore, does not make any complaint about the principle that it should have to pay an appropriate share of the reasonable costs of providing a free emergency service to all phone customers (including its own). The challenge in the underlying proceedings refers to the amount currently fixed by ComReg for such charge.

1.6 In that general context, O2 seeks disclosure of certain documentation relating both to the process whereby the charge was fixed and the contractual arrangements under which BT provides the service concerned. ComReg opposes any greater disclosure than has already been made. In addition, both the Minister and BT were joined as notice parties to this application (even though they are not parties to the proceedings generally) for both the Minister and BT have an interest in arguing in favour of the confidential nature of the information sought to be disclosed.

1.7 In the course of the hearing before me it became clear that a central question which arises in these proceedings generally (being the question of the standard of review to be applied by the court) had the potential to be of significance in determining the relevance to the proceedings of at least some, and possibly all, of the information and material sought to be disclosed. In those circumstances it is appropriate to turn first to the issue of the standard of review which might be applied in these proceedings generally.

2. The Standard of Review

2.1 O2 argues that it is appropriate that the court should exercise a standard of review using the "manifest error" or "serious and significant error" tests applied in respect of certain EU law matters. In particular, O2 argues that the requirement contained in Article 4(1) of Directive 2002/21 ("the Framework Directive"), which provides that there should be an effective mechanism available to any undertaking providing electronic communications networks, to appeal against a decision of a national regulatory authority, requires that the court apply what might loosely be called a European standard of review rather than the standard of review traditionally applied by the Irish courts in judicial review proceedings. Reference in that regard is made to *McQuen* (Case C-103/96). That proposition is strongly contested by ComReg. That issue would, ordinarily, come to be determined as part of the full hearing. However, the fact that that issue is live has the potential to have some significance for the way in which it is appropriate for the court to address the questions of disclosure which arise in these proceedings. In particular, it was quite properly conceded by counsel on behalf of O2 that the materials whose disclosure is sought in this application would not be relevant to an assessment of whether a test of irrationality (as identified in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39) had been met.

2.2 Put briefly, the factual position is that ComReg invited Howarth Bastow Charleton ("HBC") to produce a report to assist it in fixing

the relevant fee. The report in question is dated the 17th December, 2010. That report has been disclosed but in a redacted form. Strictly speaking O2 seeks, separately, disclosure and discovery. Disclosure is sought in respect of an un-redacted version of the HBC report (the report having been referred to in the evidence placed before the court on behalf of ComReg) and also in respect of the contract between the Minister and BT (similarly referred to in the evidence filed). In addition, discovery is sought of both of those documents together with certain drafts, working papers, and input documents, relevant to the HBC report. One of the principal objects of the application which O2 now makes is to seek to have disclosed the redacted portions of that report.

2.3 However, it is clear that the report recommends the call charge which was ultimately fixed on by ComReg. On that basis there clearly were materials before ComReg which would allow it to come to the view that the call charge which it actually fixed was appropriate. Also, at least at a general level, the methodology adopted by HBC is clear from the un-redacted portions of its report. To the extent, therefore, that it might be said that the broad methodology adopted was impermissible (for example, that relevant factors were not considered or irrelevant factors taken into account) then the detail of the redacted portions does not seem to be material. In those circumstances it seems clear that counsel for O2 was correct when he conceded that the material now sought to be disclosed would not be necessary to determine those aspects of these proceedings which seek to challenge the merits of the decision made by ComReg if the standard of review is *O'Keeffe* irrationality. However, it is argued on behalf of O2 that, in the event that O2 is correct in its submission that the standard of review is a stricter one having regard to Article 4 of the Framework Directive, then a wider range of materials would be relevant to the case and ought to be disclosed.

2.4 It should be noted that ComReg, supported in this respect by both the Minister and BT, argues that, even allowing for a more stringent standard of review, the materials sought are not relevant. It will be necessary to return to that aspect of the argument in due course. However, the fact that there is a dispute between the parties as to the appropriate standard of review is a matter which seems to me to be of some significant relevance to the proper approach which the court should adopt to this disclosure application. In that context it is appropriate to turn to the status of confidential documentation.

3. Confidential Documentation

3.1 In *Independent Newspapers (Ireland) Limited v. Murphy* [2006] 3 I.R. 566, I stated that:-

> "…it seems to me that the balancing of the rights involved also requires the application of the doctrine of proportionality. To that extent, it seems to me to be appropriate to interfere with the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing."

Earlier Lynch J., in *National Irish Bank Limited v. Radio Telefís Éireann* [1998] 2 I.R. 465, had noted a legitimate public interest in the maintenance of confidentiality in appropriate cases for the benefit of society at large. More recently in *Thema International Fund Plc v. HSBC Institutional Trust Services (Ireland) Limited* [2010] IEHC 19, I held that the principle of proportionality that applies to the breadth of discovery applies equally where discovery is being sought of highly confidential documents. In *Thema* I noted that:-

> "…it has already come to be recognised that there must be some proportionality between the breadth of discovery sought and the likelihood of the discovered category of documents having some meaningful bearing on the proceedings. Likewise, similar considerations have led to the view that where documents which have a significant confidentiality attaching to them are sought, same should only be discovered (again on the basis of proportionality) where it is necessary that they be discovered..."

3.2 It must, of course, be recognised that the issue of the status of confidentiality in the discovery or disclosure process only arises where the materials sought to be disclosed are relevant to the proceedings. If the materials are not relevant then there is no basis for their disclosure in the first place. The first question must, therefore, be one of relevance. I have already noted that there is an issue between the parties as to whether the materials sought to be disclosed on this application would be relevant even on the basis of the standard of review which O2 contends for.

3.3 However, it seems to me that the overall approach to discovery or disclosure can perhaps be summarised in the following fashion:-

> 1. In order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.
>
> 2. If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.
>
> 3. The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight for it must be accepted that those parties who become embroiled in litigation will necessarily have to disclose information about their confidential affairs when that information is necessary to the fair and just resolution of the relevant litigation. See the discussion of the relevant authorities by Kelly J. in *Koger Inc v. O'Donnell* [2009] IEHC 385.
>
> 4. In attempting to balance those rights the court can seek to fashion an appropriate order designed to meet the facts of the individual case so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence asserted. *Thema*, *Yap v. Children's University Hospital Temple Street* [2006] IEHC 308 and *Hartside v. Heineken Ireland Ltd* [2010] IEHC 3. The discovery aspects of *Yap* are not addressed in the written judgment cited but involved a postponement of disclosure of confidential patient records until determined necessary by the trial judge.

3.4 In the context of the last point it should be noted that, in somewhat different contexts, I had occasion to make orders which were designed to ensure that documents would be available at trial if required, but were not to be immediately disclosed in circumstances where it was not by any means clear at the time when the disclosure application fell to be decided that the materials concerned would, in fact, be necessary to a proper resolution of the proceedings in question. In *Independent Newspapers* the underlying case involved an attempt to set aside a settlement of defamation proceedings in circumstances where the Flood Tribunal had made findings of fact which, it was said, suggested that the materials published by the newspaper concerned were truthful. The precise legal basis on which it would be appropriate for the court to set aside such a settlement was far from settled law. It followed that the precise factual materials that might be relevant to the consideration of the court were likewise far from clear at the time of the discovery application in question. What was sought were the records of communications made in confidence to journalists. As I pointed out in *Independent Newspapers* the balance, viewed at least at the stage of the discovery application, was between the

possibility that the documentation in question might be relevant as against the certainty that there would be a significant breach of confidence in its disclosure. In those circumstances I made an order designed to preserve the relevant documentation and to ensure that it would be available at the trial if, in the light of the case then made, the trial judge took the view that the information was relevant to the issues which needed to be decided. It does, of course, need to be reiterated that, if information is really of some significance to the fair determination of proceedings, then it is most unlikely that any confidentiality would be sufficient to outweigh the need for the proper administration of justice. At a general level, it seems likely that confidence will only come into play where there is a disproportion between the level of confidence which would be breached and a very limited potential relevance of the material concerned. Highly confidential information, which would only have a very tangential relevance to proceedings, might legitimately not be disclosed.

3.5 However, what cases such as *Independent Newspapers*, *Yap*, and *Hartside* were concerned with was the slightly different situation where the precise information that might be necessary for a fair resolution of the proceedings was not clear at the time when the discovery application was being made. For the reasons set out in those cases, it seems to me that the court has a jurisdiction to put in place an appropriate regime designed to minimise the risk that confidential information will be disclosed only for it to transpire later that the disclosure in question was unnecessary. The regime that may best achieve that end can, of course, vary from case to case. In those circumstances it is appropriate to turn to this case.

4. Application to this Case

4.1 In opening his application counsel on behalf of O2 put his argument in the following way. He suggested that there was at least an argument in favour of the proposition that, a standard of review beyond *O'Keeffe* irrationality was applicable. It is, of course, always open to any applicant in judicial review proceedings to place reliance on issues arising out of an allegation that improper factors were taken into account or proper factors were not considered. However, where all and only proper factors are considered, the traditional standard of review as to the merits of the judgment reached on those factors is, of course, *O'Keeffe* irrationality. In dealing with the standard of review to be applied in this case I am, it should be noted, concerned, therefore, with the extent to which it may be required of the court to analyse the merits of the decision reached by ComReg by reference to a higher standard of review than *O'Keeffe* irrationality. It is only in the context of such a higher standard of review being applicable that it would be necessary for the court to consider the detailed calculations and methodology to be found in the HBC report and the other documents which fed into the final version of that report. Counsel for O2 argued that, if he were successful in persuading the court at the full hearing that such a higher standard of review was to be applied, then the materials which he sought to have disclosed or discovered were likely to be relevant. In those circumstances it was argued that disclosure of those materials should be ordered for, it was said, such materials were relevant to an issue which, on the pleadings, arose in the case.

4.2 Counsel for the Minister was the first to broach the possibility that, in those circumstances, there was at least an argument in favour of the proposition that the question of the standard of review should be determined first in these proceedings as a stand alone issue on a modular basis with any question of disclosure being postponed until after that issue had been determined. It seemed to me that there was significant logic in the position adopted by counsel for the Minister which was supported by counsel for BT and ComReg and indeed was accepted, in reply, by counsel for O2 as having some merit.

4.3 Given that it was accepted on behalf of O2 that the disclosure sought would not be appropriate if the standard of review is found to be *O'Keeffe* irrationality, it seems to me that I am faced with a case where I am presently being asked to order the disclosure of what I am satisfied is significantly confidential commercial information against the possibility that the trial judge may be persuaded that a higher standard of review is appropriate and may, consequentially, come to view at least some of the information sought to be disclosed as being relevant. It might well be that, if there were no disclosure and confidence difficulties, the balance would not favour separating out the issue of the standard of review from all other issues in this case. That being said that balance, on the facts of this case, is, in my view, a fine one. It will be necessary to turn shortly to whether I am satisfied that the disclosure sought would not be relevant even on the basis of the standard of review contended for on behalf of O2. If that were to be the case, then the appropriate order to make would be to decline disclosure at this stage and allow the case to take its natural course. That course would, on balance, it seems to me, be a unitary trial of all issues including those issues concerned with the standard of review. However, in the event that I am not satisfied that the disclosure sought (or at least some of it) could not be relevant even on the basis of the standard of review contended for on behalf of O2, then it seems to me that the balance of justice would favour directing a modular trial with the issue of the standard of review being tried first and postponing the question of disclosure until after that issue had been determined. It is clear, for example, that if O2 fails in persuading the court that a standard more stringent than *O'Keeffe* irrationality is to apply, then the disclosure sought ought not be directed. In the event, therefore, that ComReg wins the standard of review argument, it follows that disclosure of what is undoubtedly confidential information will not need to occur.

4.4 In those circumstances, it seems to me that it would be appropriate to depart from what might otherwise be the normal way of dealing with all issues in this case at a unitary trial and separate out, on a modular basis, the standard of review issue from all remaining issues. In that context, I should add that counsel for O2 drew attention to the fact that there was a narrow and discreet fair procedures point made in the case which would also be capable of being dealt with without the need to enter into a final determination of the disclosure issues with which I am currently concerned.

4.5 Unless, therefore, it is clear that none of the confidential information sought would be relevant even on the basis of the standard of review contended for on behalf of O2, it seems to me that it would be appropriate to direct a modular trial with the standard of review and fair procedures questions being dealt with first and all other issues being dealt with at a subsequent hearing. In that eventuality it would be appropriate to adjourn a consideration of the disclosure issues now before the court until the standard of review issue had been determined.

4.6 In that context it is necessary to return to the question of the documents which might be said to be relevant having regard to the standard of review.

5. Relevancy and the Standard of Review

5.1 In order to assess this matter it is necessary to consider the argument put forward on behalf of O2 as to the appropriate standard of review. This application is not, of course, the place to reach a final determination on that question. What I am concerned with is whether there is any basis on which the result of the standard of review issue might affect the relevance of documents and materials for if it could not so affect the question of relevance then there is no reason to delay dealing with relevance at this stage.

5.2 The traditional standard of review (being *O'Keeffe* irrationality) which is argued for by ComReg as being the appropriate standard of review hardly needs to be analysed. On the other hand O2 argues that Article 4 of the Framework Directive requires that member states ensure that there be a right of appeal to an independent appeal body in respect of any decision of a national regulatory authority which affects an electronic communications network provider such as O2. O2 also draws attention to the provision in Article 4(1) of the Framework Directive which places an obligation on member states to ensure that the appeal mechanism is "effective". On

that basis it is argued that the remit of the High Court on a judicial review application concerning a decision of a national regulatory authority must necessarily be wider than *O'Keeffe* irrationality.

5.3 A number of points are made by ComReg against that proposition. First, it is pointed out that there is an appeal mechanism specified in the relevant domestic legislation which, it would appear, does not cover a decision of the type made by ComReg in this case. If, therefore, it is suggested, there is an EU law obligation to provide an appeal mechanism which is effective in a case such as this, then Ireland has failed to adequately implement the Directive. In those circumstances it is suggested that the remedy lies in an appropriate form of proceeding designed to ensure compliance by Ireland with its obligations under the Directive rather than with attempting to rewrite the scope of Irish judicial review. See, for example, the decision of Kelly J. in *Ryanair v. Commission for Aviation Regulation* [2008] IEHC 278.

5.4 In addition, it should be noted that, on the basis of an analysis of the Framework Directive, it is suggested on behalf of ComReg that ComReg is not itself acting as a national regulatory authority (in the sense in which that term is used in the Framework Directive) when it is making a decision of the type involved in these proceedings. ComReg draws attention to the provisions of Article 2(g) of the Framework Directive which defines national regulatory authority by reference to the tasks assigned in the Framework Directive and certain other specific Directives referred to. Thus, ComReg argues that, even though ComReg is a national regulatory authority for the purposes of the Framework Directive not all, it is said, of the statutory tasks given to ComReg fall within the scope of the Framework Directive. It is said that the decision under review in this case arises solely under s. 58D of the 2002 Act and is not, therefore, covered by the Framework Decision. In those circumstances it is said that the Framework Directive does not require that there be an effective appeal from a decision such as that with which I am concerned in these proceedings.

5.5 Furthermore, ComReg argues that there is an inherent difference between an appeal and a review. There is no doubt that this proposition is correct at the level of principle. However, even within what might generically be called "appeals" and "reviews" there are differences as to the scope of the matters which the appellate or review body can address or alter. It is unnecessary to go beyond the appeal mechanisms available in the courts to identify that appeals can range from what might be called a full re-hearing (such as that available to the Circuit Court in respect of most decisions of the District Court and, in civil cases, from the Circuit Court to the High Court) where the facts are reviewed afresh on the basis of evidence tendered anew to the appeal court. In those circumstances no real weight is placed on the decision of the lower court. On the other hand an appeal from this Court to the Supreme Court in civil proceedings involves a limitation on the scope of a review in respect of the facts found by this Court in accordance with the principles identified in *Hay v. O'Grady* [1992] 1 I.R. 210.

5.6 Likewise, the judicial review jurisprudence involves a range of cases which identify the possibility that there may be some variation in the precise scope of review that may be appropriate in different types of cases (see, for example, *Sweetman v. An Bord Pleanála* [2008] 1 I.R. 277). While it is true, therefore, to say that there is a distinct difference between an appeal and a review there are within each category a range of possibilities as to the jurisdiction of the appellate or review body to come to a different view from the body whose decision is under consideration.

5.7 The problem with which I am faced is that there is no definitive ruling which, in my view, would allow me to form, with any great confidence, a view as to the appropriate basis of review that is likely to be applied in this case. The range of possibilities is wide. It would be wrong, on the basis of a relatively brief hearing at a procedural motion, to express any view as to the standard of review which the trial judge will consider appropriate in all the circumstances of this case. I cannot rule out, therefore, the possibility that the trial judge may determine that some degree of analysis of the underlying factual basis for ComReg's decision in this case may be permissible and required within the confines of a judicial review. I am mindful in that context of decision of the European Court of Justice ("ECJ") in cases such as *Uniplex (UK)* (C- 406/08) in which the ECJ determined that procedural rules in the United Kingdom (which, as it happened, were mirrored in this jurisdiction) concerning time limits for judicial review had, insofar as it was within the relevant court's jurisdiction, to be dis-applied or moulded to ensure compliance with the European law on public procurement then under consideration. I am, of course, also mindful that the extent to which it may be permissible to mould procedural rules may not be the same as the extent to which it may be permissible to mould the question of the standard of review. There are arguments both ways on that issue. However, it does have to be noted that there are some authorities (for example my own decision in *Sweetman*) which imply that the standard of review in judicial review proceedings may at least be flexible enough to accommodate some of the requirements of EU law.

5.8 I have, therefore, come to the view that it is not possible at this stage to give a definitive ruling as to the standard of review which is properly applied in a case such as this. However, perhaps of even greater importance to the application with which I am now concerned, I have come to the view that there are a range of possible outcomes as to the precise basis on which the trial judge will consider it appropriate to review the impugned decision of ComReg. I do not believe that I can safely rule out, again at this stage, the possibility that at least some of the information sought to be disclosed in this application might be relevant to the court's consideration if the court were to take a more expansive view of the basis of review. In those circumstances, it would not seem to me to be appropriate to reject O2's application for disclosure at this stage. However, for the reasons which I have already sought to analyse, it seems to me that it would be disproportionate to allow O2 access to what is likely to be significantly confidential information at this stage against the mere possibility that some (indeterminate) part of that information might be relevant to the court's final determination, depending on the precise view which the court takes as to the basis of review.

5.9 In those circumstances it seems to me that it is appropriate to leave over for the moment any question of disclosure and to direct a modular trial of the substantive judicial review hearing with the questions concerning the standard or basis of review and fair procedures to be determined first and all other issues to be determined, if necessary, at a second hearing. In addition, it seems to me that no disclosure should be ordered at this stage but that O2 should be given liberty to renew the application for disclosure after the standard of review issue has been determined. It seems to me that it is the judge who ultimately has carriage of the substantive trial that should then address the question of whether any disclosure is appropriate for it is that judge who will, by that time, have reached a refined view as to the precise basis of review permitted, and who will be best able to decide whether any of the disclosure now sought is really likely to have a bearing on the case. Obviously if ComReg are correct in their assertion as to the standard of review then no disclosure is required. If, and to the extent that, O2 persuade the court to adopt a higher standard of review, then the court may have to balance the information which it considers to be relevant to such a review with the confidence asserted on this application (most particularly by BT and the Minister). However, at that time the court will have a much better view not only of the relevance of any of the material sought to be disclosed, but also the extent to which any such materials are likely to have anything more than a very marginal affect on the court's judgment. The court will, in those circumstances, be in a much better position to engage in the balancing exercise which is required by the authorities to which I have earlier referred.

6. Conclusions

6.1 It, therefore, follows that I will decline to make disclosure at this stage, but will adjourn the application for disclosure until after the first leg of the modular hearing which I am about to direct has been concluded.

6.2 I also propose to direct a modular trial at which the issue of the standard of review and the fair procedures issue, to which I have already referred, will be tried first with all remaining issues left over for a second module.

6.3 I will hear counsel as to the directions which should be put in place to ensure that that first module can be heard at the earliest possible time. As the issues are purely ones of law, it seems to me that O2 should be asked to file written legal submissions on those matters in early course with an appropriate time being given to ComReg for a response. I will then propose to make arrangements to allow for a hearing of the first module. I will also adjourn further consideration of the disclosure application to the judge who is ultimately assigned to hear that first module.