

PHONES 4U LIMITED (IN ADMINISTRATION) v EE LIMITED and OTHERS

SUMMARY

NOTE This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are publicly available. A copy of the judgment as handed down can be obtained after 14.00 on 10 November 2023 from the following website <https://www.judiciary.uk/judgments/>

The claim was brought by the administrators of Phones 4u Ltd (“P4u”) which, along with Carphone Warehouse, had been one of the two major ‘indirect’ retailers of ‘connections’ to mobile networks in the UK. Those connections were sold to customers (often together with mobile handsets) on the basis of agreements which the indirect retailers had with the operators of the networks. P4u went into administration on 15 September 2014.

The claimant alleged that the collapse of P4u was caused by anti-competitive collusion between three of the four operators of mobile networks at the time in the UK: EE Ltd (“EE”), Vodafone Ltd and Telefonica UK Ltd (“O2”), and their parent companies, either through bilateral arrangements or multilateral arrangements. The essential allegation was that when each of those three network operators informed P4u that it would not be extending or renewing its agreement whereby P4u supplied its customers with connection on its network, that decision was not taken wholly independently but followed exchanges between them regarding their future commercial strategy, or commitments which they had given to each other, either at the level of the UK operating company or at the level of their parent companies. EE at the time was a joint venture between Deutsche Telekom AG (“DT”) and Orange SA (“Orange”), and a claim was made in the same terms against these German and French companies.

The claimant also alleged that the decision by EE to inform P4u on 12 September 2014 that it would not be renewing its agreement after it expired in September 2015 was in breach of an obligation of good faith under that agreement. It was alleged that DT and Orange as the joint parents of EE, had procured that breach and/or conspired to injure P4u, so that they were liable for damages in tort.

The trial lasted almost 9 weeks and involved evidence from 41 witnesses from the various parties and 4 expert witnesses, and a vast volume of contemporary documentation, including emails and text messages. The Court rejected all the claims for breach of competition law and the separate claim against EE for breach of contract. The Court found that the then CEO of O2, Mr Ronan Dunne, had attempted in late 2012 to engage EE in collusion as regards O2’s intention to reduce its reliance on P4u by an approach to the then CEO of EE, Mr Olaf Swantee, but that Mr Swantee did not respond positively to this approach and that their discussions did not give rise to a violation of either EU or UK competition law,¹ nor did this influence O2’s decision to withdraw from P4u. The Court found, on the facts, that the other discussions or communications relied on did not, on the balance of probabilities, involve an anti-competitive

¹ Since the events all occurred before Brexit, EU competition law continued to apply.

exchange of confidential commercial information or any collusion, nor could collusion be inferred on the evidence. However, the Court was critical of the general approach of many senior executives in the defendant companies in failing to adhere to their own corporate guidance when meeting competitors, in that they frequently did not set out in advance the topics to be discussed or make any note afterwards of the discussion which had taken place.

As regards the separate allegation of breach of contract against EE, the Court concluded that no general duty of good faith arose under the agreement between EE and P4u; and, secondly, that even if there was such an obligation it was not breached by the conduct of EE in sending its letter to P4u on 12 September 2014, although EE knew that the consequence was likely to be the collapse of P4u. Since the claims in tort against DT and Orange were dependent on there being such a breach, those claims therefore fell away.