Courts and Tribunals Judiciary

SUMMARY

NOTE: This summary is provided to help 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 available at: www.judiciary.uk and http://caselaw.nationalarchives.gov.uk/

11 July 2025

Phones 4U Ltd (in administration) v EE Ltd and others [2025] EWCA Civ 869

Appeal dismissed.

This was an appeal to the Court of Appeal by Phones 4U Ltd (in administration) ("P4u") against a decision of Mr Justice Roth dismissing P4u's claim that it had been the victim of collusive anticompetitive schemes in which senior executives of three mobile network operators ("MNOs") and their respective parent companies had participated between 2012 and 2014. P4u's claim was made against all three MNOs and against their parent companies. The appeal was heard by the Chancellor of the High Court (Sir Julian Flaux), Lord Justice Phillips and Lady Justice Falk. The leading judgment was given by Lady Justice Falk.

Prior to its collapse into administration in September 2014 P4u was a major "indirect" retailer of mobile phone connections, with over 700 retail outlets and some 5,600 employees, and the principal competitor of Carphone Warehouse ("CPW") in that market. The MNOs concerned were EE (owned at the time by Orange and Deutsche Telekom), Vodafone UK (owned by Vodafone Group) and O2 (owned by Telefonica).

The alleged collusion related to what were said to be coordinated decisions by the MNOs to cease supplying mobile connections for their networks via P4u. P4u sought damages from the MNOs and their parent companies for infringement of Article 101(1) of the Treaty on the Functioning of the European Union and made certain other claims, which were heard by Roth J in an 11 week trial in 2022. Roth J dismissed all the claims.

The core relevant allegations for the purposes of the appeal were as follows:

- In September 2012, O2 had sought to "de-risk" its provisional decision to exit P4u by collusion between its CEO and the CEO of EE at a lunch at the Landmark hotel in London.
- Around the same time, O2's CEO had similarly colluded with the CEO of Vodafone UK, and there had also been collusion between the CEOs of Vodafone Group and Telefonica.

- There was further collusion between Vodafone and O2 in September 2013, when there was a meeting in Madrid between the Europe region CEOs of Vodafone Group and Telefonica.
- In 2014 EE and Vodafone coordinated the decisions they reached to cease supplying P4u, specifically by a telephone call in early April between Vodafone Group's Europe region CEO and a senior Orange executive.

P4u maintained that what had occurred amounted to concerted practices between the MNOs which infringed Article 101. A concerted practice requires three elements: concertation, subsequent conduct on the market and a relationship of cause and effect between the two. The third element is subject to a presumption known as the "*Anic* presumption".

Permission to appeal was granted on six out of eight grounds for which it was sought (grounds 1 to 5 and 7). The first two raised questions of competition law. The remainder concerned the judge's factual findings and his approach to or analysis of the evidence, relating in part to the fact that there was a delay of 15 months between the end of the trial and Roth J's judgment being handed down.

Ground 1 was that the judge erred in failing to conclude that the exchange at the Landmark lunch was concertation as a matter of law, in particular by relying on the EE CEO's passive response to an anticompetitive approach by O2's CEO. This ground was dismissed on the basis that there was no error of law. The judge found that, on the facts, O2's CEO gleaned no encouragement or endorsement from that passivity. Further, the judge had been entitled, on the particular facts, to conclude that what O2's CEO had said was too vague to remove uncertainty for EE over O2's strategy and that the necessary consensus was lacking. While a "one way" disclosure of information might amount to concertation it will depend on whether there is tacit approval to its receipt.

Ground 2 related to the judge's conclusions about the *Anic* presumption, and in particular his conclusion that as far as EE was concerned it was capable of being rebutted by the fact that it signed a new deal with P4u after the Landmark lunch. This ground was also dismissed on the basis that there was no error of law.

Ground 3 related the judge's reliance on a "new case theory" by suggesting that CPW had been the source of confidential information referred to in an internal EE email, rather than Vodafone as P4u had alleged. This ground was dismissed on the basis that the error was not material.

Grounds 4 and 5 raised a number of detailed factual challenges, said to relate to the delay in handing down the judgment or a failure to consider the judge's findings in the round. Each challenge failed. Ground 7 related to the judge's approach to the question of whether adverse inferences should be drawn from Telefonica's failure to implement appropriate document preservation measures for a substantial period after the claim was first intimated. It was concluded that there is no error in the judge's approach.

The judgment includes commentary on the correct approach to appeals where judgments have been subject to material delay. Among other things, it emphasises that although an appellate court will apply an additional test in such a case to the usual one of allowing appeals against factual challenges only where the judge was "plainly

wrong", the court will be astute to ensure that the additional test does not provide a disappointed litigant with an uninhibited ability to pinpoint factual findings with which they disagree. The test is whether the judgment is safe, and that requires the whole of the judge's judgment to be considered carefully. There is also consideration of the general principle that judgments should be handed down within three months. (See in particular paragraphs 218-227 and 322-328.)