



Neutral citation [2013] CAT 14

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

Cases No: 1152/8/3/10 (IR)
1156-1159/8/3/10
1170/8/3/10
1179/8/3/11

25 June 2013

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PROFESSOR JOHN BEATH
MICHAEL BLAIR QC (Hon)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
BRITISH TELECOMMUNICATIONS PLC
Appellants / Intervenors

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

TOP UP TV EUROPE LIMITED
RFL (GOVERNING BODY) LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Intervenors

RULING (PERMISSION TO APPEAL COSTS ORDER)

1. Ofcom has applied for permission to appeal the Tribunal's order for costs of 17 May 2013 ("the Costs Order") which was made for the reasons set out in the Tribunal's ruling of 9 May 2013 ([2013] CAT 9) ("the Costs Ruling"). The Costs Ruling and the Costs Order dealt with *inter alia* Sky's applications for costs in respect of its interim relief application (Case No 1152/8/3/10 (IR)), its appeal in Case No 1158/8/3/10 ("Sky's Main Appeal"), and its STB and CAM appeals (respectively Cases 1170/8/3/10 and 1179/8/3/11). Ofcom's application for permission to appeal concerns only those aspects of the Costs Order which relate to Sky's Main Appeal and the STB and CAM appeals.
2. Sky has filed written submissions on 18 June 2013 opposing the application.
3. Both Ofcom and Sky are content for the present application to be determined on the papers without an oral hearing.
4. Sky's applications for costs were made in the light of the Tribunal's judgment in Cases 1156-1159/8/3/10 *British Sky Broadcasting Limited & Ors v. Office of Communications* [2012] CAT 20 ("the Main Judgment"). This ruling should be read together with the Main Judgment and the Costs Ruling, and generally adopts the terms and abbreviations defined therein.
5. The effect of the Main Judgment was that Sky's Main Appeal, and the STB and CAM appeals were allowed.
6. Section 196 of the 2003 Act (as applied by section 317(7)) provides for appeal from a decision of the Tribunal to (in this case) the Court of Appeal. By virtue of subsections 196(2)(b) and 196(4) respectively, any such appeal must raise a point of law and requires the permission of the Tribunal or the Court of Appeal.
7. In considering whether to grant permission when, as in this matter, sitting in England and Wales the Tribunal applies the test in Civil Procedure Rules ("CPR") rule 52.3(6):

“Permission to appeal may be given only where –

(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason why the appeal should be heard.”

8. Ofcom contends that permission to appeal against the Costs Order should be granted on three grounds.
9. First Ofcom submits that the Tribunal erred in law in finding that there was not a consistent practice of the Tribunal of the kind urged by Ofcom, namely a practice not to award costs against Ofcom in an appeal under section 192 of the 2003 Act in the absence of unreasonable conduct by Ofcom. It is doubtful that this ground raises anything which could amount to a point of law. That apart, the Tribunal considered the authorities relied upon by Ofcom in some detail, and was unable to identify any consistent practice of that kind (see paragraphs 6 to 30 of the Costs Ruling). Had we found such a practice we would have been very reluctant to apply it in the particular circumstances of the present case, for the reasons set out in the remainder of the Costs Ruling.
10. Further or in the alternative to its first ground, Ofcom submits that the Tribunal erred in law in adopting as a starting point for its consideration of Sky’s applications for costs, that costs should follow the event. Again, this argument does not seem to amount to a point of law. Given the Tribunal’s admittedly wide discretion in relation to costs under Rule 55 of the Tribunal Rules, it is far-fetched to posit the existence of a principle of law precluding use of the starting point in question. As regards this ground the application simply repeats the points made by Ofcom at the hearing, which after full consideration the Tribunal had no hesitation in rejecting (see paragraphs 31 to 52 of the Costs Ruling).
11. Finally Ofcom submits that the Tribunal acted inconsistently and unreasonably, and erred in law, in (a) not awarding Ofcom its own costs of the issue of statutory interpretation on which it succeeded, and (b) awarding Sky the costs of the STB and CAM appeals in which Sky was successful. Neither submission raises a point of law, and both appear to us to be ill-founded.

12. As to (a), in the Costs Ruling the Tribunal expressly recognised that notwithstanding Sky was the overall “winner”, it should not receive the costs of the point of law on which it lost and, further, that Ofcom could be said to be entitled to some credit in respect of its own costs of arguing the point in question (although no application had been made by Ofcom in that regard). The Tribunal indicated that any such credit was fairly covered by the approach we proposed to take in respect of the relatively very much larger costs of Grounds 3 and 4 (see paragraph 61 of the Costs Ruling). The Tribunal’s decision to make no order in respect of the costs of those Grounds, which the Tribunal had not needed to decide, was more favourable to Ofcom than an alternative approach by which Sky, as the overall winner in the Main Appeal, might have been awarded those costs in addition. Such considerations, and the course adopted by the Tribunal in the light of them, were well within the Tribunal’s discretion under Rule 55.
13. As to (b), Ofcom compares the Tribunal’s order in respect of Grounds 3 and 4 of Sky’s Main Appeal (ie that the costs should lie where they fall) with the order that Sky should receive its costs of the STB and CAM appeals. Ofcom submits that the latter approach was inconsistent with the former, as in each case the issues of substance remained undecided. Ofcom’s comparison is not valid. Sky was successful in the STB and CAM appeals, as it was in the Main Appeal. In the Tribunal’s view it would not have met the requirements of justice, and would have been inconsistent, to deprive Sky of its costs in the STB and CAM appeals.
14. In the light of the above, we consider that none of Ofcom’s proposed grounds of appeal discloses a point of law with a real prospect of success, and that there is no other compelling reason why the appeal should be heard.

CONCLUSION

15. For these reasons, the Tribunal unanimously refuses Ofcom’s request for permission to appeal. Should Ofcom renew its application to the Court of Appeal, a copy of this Ruling should be placed before the Court of Appeal.

The Honourable Mr.
Justice Barling

Professor John Beath

Michael Blair QC (Hon)

Charles Dhanowa OBE,
QC (Hon)
Registrar

Date: 25 June 2013