

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1152/8/3/10 (IR)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 November 2014

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

BRITISH SKY BROADCASTING LIMITED

Applicant / Respondent in the Interim Application

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC

Intervener / Applicant in the Interim Application

VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
TOP-UP TV EUROPE LIMITED

Interveners

EE LIMITED

Intervener in the Interim Application

*Transcribed by Beverley F. Nunnery & Co.
(a trading name of Opus 2 International Limited)
Official Court Reporters and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
(info@beverleynunnery.com)*

HEARING

APPEARANCES

Mr. Meredith Pickford (instructed by Herbert Smith Freehills LLP) appeared for British Sky Broadcasting Limited.

Miss Sarah Ford and Mr. Gerry Facenna (instructed by BT Legal) appeared for British Telecommunications PLC.

Mr. Simon Leathley (of the Office of Communications) appeared for the Office of Communications.

1 THE PRESIDENT: Yes, Miss Ford.

2 MISS FORD: Sir, I appear for BT with Mr. Facenna, and Mr. Pickford represents Sky. We hope
3 that we have been able to reach agreement, and I wonder if I may pass up the latest version
4 of the order. (Same handed)

5 THE PRESIDENT: Thank you.

6 MISS FORD: This version still contains rather a lot of highlighting, but that reflects the final
7 issue which we think has now been resolved. Can I take you through it?

8 THE PRESIDENT: Yes, please.

9 MISS FORD: The first four recitals are standard form. On the basis of what we now understand
10 to be the position, the recital in pink will no longer be an issue.

11 THE PRESIDENT: That remains in or out?

12 MISS FORD: No, it is coming out. The next recital is BT's undertaking, which is intended to
13 reflect the undertaking mentioned in paragraphs 70 and 75 of your judgment.
14 We then have the body of the order. Paragraph 1, the amendments to the existing interim
15 relief order are set out in the schedule to the order. Paragraph 2 deals with costs. Paragraph
16 3 is liberty to apply.
17 The schedule to the order then sets out the amendments that are to be made to the schedule
18 to the original interim relief order. Paragraph 1 is the amendment to the definition of
19 "Qualifying Platform", and that is now agreed on the basis of the correspondence that has
20 been exchanged most recently yesterday evening and this morning.
21 The remaining highlighting in sub-paragraphs (2) and (3) ----

22 THE PRESIDENT: Was that amended following the Real application, the definition of
23 "Qualifying Platform"? You will remember that Real applied subsequently. I do not think
24 there was produced a consolidated order, but somebody might know.

25 MISS FORD: I think the Real order is in the bundle somewhere.

26 THE PRESIDENT: They were added, I think, through their application, but I do not know if they
27 were added to paragraph 2, or whether it was a separate paragraph.

28 MR. PICKFORD: Sir, if I may assist, what appears to have happened in relation to Real is that
29 there was separate provision made for it. So the schedule of the order following the
30 application by Real said that for the purposes of this order, Condition 14A is varied as
31 follows:
32 "Qualifying Platform mean Real's platform for distribution of channels to
33 residential customers in the United Kingdom via Direct to Home ('DTH')
34 satellite."

1 So it appears that effectively it was dealt with separately, so there are two orders, one for
2 Real and one for everyone else. That is my understanding.

3 THE PRESIDENT: I see. So there was a separate variation to Qualifying Platform under a
4 separate order.

5 MISS FORD: For the purposes of BT the Qualifying Platform now reads:

6 "... via DTT and/or Internet Protocol Television ('IPTV') to BT's set-top box-
7 based IPTV platforms (currently Cardinal and YouView), excluding over-the-top
8 internet supply in the case of BT ..."

9 So that is the definition that is now being inserted.

10 You will have seen in Sky's letter of yesterday evening that the wording in para.3 in yellow
11 was proposed. It makes reference to "existing service establishment arrangements". As to
12 what is meant by "service establishment arrangements", we understand and are told that that
13 is a reference to certain paragraphs in Ofcom's Pay TV statement, specifically paragraphs
14 10.354 to 10.357.

15 We understand that the wording which states that the "existing service establishment
16 arrangements shall be maintained" is intended to be a recognition that BT has already
17 undertaken a service establishment process, and that it does not need to undertake another
18 service establishment process.

19 THE PRESIDENT: That is right, is it, Mr. Pickford?

20 MR. PICKFORD: Yes, sir. The position that we have tried to articulate in the correspondence,
21 and which is certainly our position today, is that BT does not need to go through another
22 wholesale service establishment process. There may be very minor aspects that require
23 updating and clarification in the light of the fact that supply is now taking place, as opposed
24 to some months or years ago - for instance, updating the definition of the platform. What is
25 not envisaged is that there should be an entire new process. So the comfort that BT seeks
26 that it does not have to start again from scratch is what we have given in correspondence,
27 and I am giving again today.

28 THE PRESIDENT: Yes, thank you.

29 MISS FORD: Sir, on that basis, we are content to accept the wording in the yellow highlighting,
30 and so the wording in pink will then fall away.

31 THE PRESIDENT: So 3B becomes 3A, and the pink comes out, yes.

32 MISS FORD: Then the remaining paragraph is not in dispute. That simply modifies the original
33 provision under para.6 of the schedule to the IRO to provide that it is not necessary to make

1 this reference offer available to either Top-Up TV or Virgin, who you will recall were the
2 parties to the original IRO.

3 THE PRESIDENT: Yes. The only thing is, just as a matter of drafting, this is a variation of the
4 schedule. You have amended para.2, you have added para.3A. It does not actually vary,
5 “Paragraph 6 shall not apply”. What you really want to do is say there shall be added to
6 para.6 the sentence, “This paragraph shall not apply”. That should be inserted at the end of
7 para.6. I think it is how it would work.

8 MISS FORD: So on that basis the parties are now in agreement on the terms of the order.

9 THE PRESIDENT: Does that still leave the issue of Ofcom’s costs?

10 MISS FORD: I understand it does. I do not know whether Ofcom had envisaged addressing you
11 on that point.

12 THE PRESIDENT: They have asked for their costs, and I have indicated through correspondence
13 that that is something that should be capable of summary assessment. You have had a
14 schedule. They have asked for their costs from Sky, and I think Sky offered to pay half -
15 that was the letter from Sky’s solicitors of 10th November - the other half to be paid by BT.

16 MISS FORD: We have made our position clear in relation to that in correspondence.

17 THE PRESIDENT: You do not accept that you should pay. So at the moment there is an
18 outstanding issue and Ofcom wants it costs, and one has seen how much they are. Ofcom
19 has also said that they do not apply for them as against BT, so they are effectively asking
20 Sky to pay them. Are you resisting the other half, Mr. Pickford?

21 MR. PICKFORD: Sir, I do not intend to trouble the Tribunal for particularly long in relation to
22 this, but to explain our position very briefly, it is obviously not a matter we need to
23 deliberate at length. As the Tribunal recorded in its judgment, Ofcom expressly did not
24 adopt any position regarding the determination of BT’s application. Its attendance was
25 entirely neutral. In the correspondence leading up to the hearing, it was not invited by the
26 Tribunal or any particular party to attend. It did not appear opposing Sky’s position. We
27 say that logically the starting point for a neutral appearance in those terms would also be
28 cost neutrality. Certainly it is very difficult to see how we would have obtained against
29 Ofcom for any additional costs it had caused if we had won and Ofcom had been there on
30 the neutral basis that it was.

31 So we would say that a starting point, therefore, for costs in this situation would be
32 analogous to when, for example, a respondent appears at an oral permission in the Court of
33 Appeal, where ordinarily it does so and bears its own costs; or where perhaps, as an

1 intervener in public law proceedings, it does not have any particular necessity to be there,
2 but it also appears and bears its own costs. That would be the starting point.

3 As a pragmatic gesture we offered to pay half because the sums in issue are not very large.

4 We do not take any issue with the overall amount. That is our position.

5 THE PRESIDENT: Yes, thank you very much.

6 (For text of Tribunal's ruling on costs, see [2014] CAT 18)

7 THE PRESIDENT: There is someone here for Ofcom. It is right that Ofcom is not registered for
8 VAT, so you cannot recover your VAT?

9 MR. LEATHLEY: I think that is correct, Sir. I think, from memory from the last time round, we
10 can reclaim VAT, so we do seek VAT when we claim costs.

11 THE PRESIDENT: I shall say "plus VAT in so far as not recoverable". You can check the
12 position, because if you do recover it then it is not right that Sky should have to pay.

13 Is there anything else?

14 Thank you all very much. Thank you for your efforts to sort that out.

15 Could you, Miss Ford, through your clients, draw up the order including the provision about
16 costs. It is not necessary for me to fix a date by which those costs must be paid. I am sure
17 they will be paid promptly as the amount is very small.

18 _____