



Neutral citation [2006] CAT 32

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1071/2/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

20 November 2006

Before:

Marion Simmons QC (Chairman)
Professor Peter Grinyer
David Summers

Sitting as a Tribunal in England and Wales

BETWEEN:

CITYHOOK LIMITED

Appellant

-and-

OFFICE OF FAIR TRADING

Respondent

supported by

ALCATEL SUBMARINE NETWORKS LIMITED
BRITISH TELECOMMUNICATIONS PLC
CABLE & WIRELESS PLC
GC PAN EUROPEAN CROSSING UK LIMITED
AND
GLOBAL CROSSING EUROPE LIMITED
GLOBAL MARINE SYSTEMS LIMITED
NTL GROUP LIMITED
TYCO TELECOMMUNICATIONS (US) INC

Interveners

Heard at Victoria House on 14 November 2006

RULING (DISCLOSURE)

APPEARANCES

Mr. Ben Rayment (instructed by Edwin Coe) appeared for the Appellant.

Mr. Mark Hoskins (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Jon Turner QC and Mr. Meredith Pickford (instructed by Blake Laphorn Linnell, Charles Russell, Bridgehouse Partners and Beachcroft) appeared for the Interveners: Alcatel Submarine Networks Limited, Cable & Wireless Plc, Global Marine Systems Limited and Tyco Telecommunications (US) Inc.

Mr. Fergus Randolph (instructed by Eversheds) appeared for the Intervener, NTL Group Limited.

Mr Daniel Jowell (instructed by BT Legal) appeared for the Intervener, BT plc.

Miss Frances Murphy (of Mayer Brown Rowe & Maw) appeared for the Interveners, GC Pan European Crossing UK Limited and Global Crossing Europe Limited.

1. On 14 November 2006 the Tribunal heard an application by Cityhook Limited, the appellant, for disclosure from the OFT of certain documents on their file. That application is resisted by the OFT, supported by the interveners. At the conclusion of that hearing the Tribunal announced that it dismissed the application and that it would provide its reasons in due course. In this judgment the Tribunal gives those reasons.
2. The background to the application is that the OFT conducted investigations into two matters:
 - (a) first, an alleged collective boycott of Cityhook by the United Kingdom Cable Protection Committee and certain of its members in the market for submarine cable laying and landing. This has been referred to as the “collective boycott case”.
 - (b) secondly, an alleged collective setting of so-called “wayleave fees” by the UKCPC and certain of its members. This has been referred to as the “collective setting case”.
3. The first of these investigations commenced in August 2002; the second in about February 2004.
4. On 23 June 2006 the OFT issued a letter to Cityhook containing its decision to close its investigations. This was said to be on the basis the cases no longer constituted an administrative priority for the OFT.
5. By letter of 23 August 2006 Cityhook sought to appeal that decision. At the time, Cityhook was not legally represented. Included in the letter was the following:

“In the course of the appeal Cityhook seeks disclosure of the OFT’s documents. It is likely that Cityhook will wish to make further submissions based on that disclosure...”
6. By letter to Cityhook of 31 August 2006, copied to the Tribunal, the OFT intimated that it challenged the Tribunal’s jurisdiction to hear the appeal on the

ground that, according to the OFT, it had not taken an appealable decision within the meaning of sections 46 and 47 of the 1998 Act. This was confirmed by the OFT in its submissions for the first case management conference in these proceedings on 14 September 2006.

7. On 12 October 2006 the OFT submitted a witness statement by Mr Vincent Smith, Senior Director for Competition at the OFT, in order to assist the Tribunal in its consideration of whether the Tribunal has jurisdiction to hear the appeal. The witness statement, which runs to some 28 pages, explains that Mr Smith had overall responsibility for the management and progression of the collective boycott case and the collective setting case from 1 August 2003 until the final decision to close the investigations. Mr Smith explains the OFT's process for selection and prioritisation of cases, particularly following the National Audit Office report of November 2005. He explains that the priority to be accorded to cases is now reviewed at "key milestones".
8. Finally he devotes a considerable part of his witness statement to the process leading up to his decision to close the collective boycott case and the collective setting case. He sets out that the case team had been given authorisation to draft a statement of objections. That took place between December 2004 and August 2005. There then took place "internal review" by a "case review panel" ("CRP"). This in turn led to a case review meeting ("CRM") on 13 October 2005 between the case team and the CRP. In short, it appears that the CRP and the case team had strongly opposed views in relation to the case and that those views remained strongly opposed at the conclusion of the CRM, particularly on the issue of whether the alleged infringement should be categorised as an object or effects-based restriction.
9. Mr Smith then asked the new Branch Director, Mr Chris Mayock, to review the file. Mr Mayock was of the view that, purely on the substance, the SO should be issued, although with regard to "effects" the case team would have to supplement its arguments. Mr Smith records Mr Mayock as going on to state, however, that since there were concerns about the robustness of the two cases, consideration should be given to whether more promising cases should be pursued instead.

Referring to Mr Priddis' advice (see below), Mr Mayock's overall recommendation was that the case should be closed on administrative priority grounds.

10. Mr Smith also asked Mr Simon Priddis, then Senior Director of Competition Casework, to consider the collective boycott case and the collective setting case against the OFT's administrative priorities. Mr Priddis' view was that the case should be closed on grounds of administrative priority.
11. Following a further meeting on 6 December 2005 involving Dr John Fingleton (the Chief Executive of the OFT), Mr Smith, Mr Priddis, Mr Mayock and members of the case team and CRP, the decision as to whether to proceed was left to Mr Smith. He explains that after considering all the relevant issues, he decided provisionally on 20 January 2006 that both cases should be closed.
12. On 24 October 2006, following a second CMC on 23 October 2006, Cityhook, by this stage legally represented, made its application for disclosure. The application requests disclosure of the following documents:
 - (a) the minute of the case review meeting
 - (b) Mr Mayock's memorandum regarding his review of the case
 - (c) Mr Priddis' memorandum
 - (d) The final draft of the case closure letter to be sent by Mr Mayock
 - (e) The draft summary of final comments from interested parties received in connection with the OFT's provisional decision to close its investigations.
13. Cityhook also seeks disclosure of any minute of the meeting of 6 December 2005; the views of the Chief Executive; original briefing papers prepared by the case team between August 2005 and January 2006 to address outstanding issues such as the effects of the parties' behaviour; and the minute, papers and explanation of the basis on which the OFT decided not to pursue what Cityhook described in its complaint as a "vertical restraint" imposed on Tyco, GMS and others.

14. The OFT resists this application. As part of its response, the OFT filed a second witness statement by Mr Smith on 2 November 2006 and a skeleton argument on 13 November 2006. Cityhook also filed a skeleton argument on 13 November 2006. The interveners, who all support the OFT, filed submissions on 6 and 9 November 2006.

The parties' submissions

15. Cityhook submits that an application for disclosure should only be granted if the disclosure sought is necessary, relevant and proportionate: *Claymore v OFT (Recovery and Inspection)* [2004] CAT 16 at paragraph 113. Cityhook accepts that Mr Smith has fulfilled the duty of candour to which he is subject. It also accepts that the general principles applicable to disclosure applications before the Tribunal are akin to those on a claim for judicial review. It submits, however, that the specific context is crucial. Cityhook points to what it characterises as the exceptional factual context, namely that the OFT conducted the investigation over four years, yet characterises the decision to close the investigation as not sufficiently referable to the merits of the case to amount to an appealable decision. In Cityhook's submission, a decision to close the file is particularly susceptible to mischaracterisation if an erroneous legal approach is taken to the situation in which the OFT finds itself. Thus, according to Cityhook, if the Tribunal is not satisfied that it has a sufficiently clear picture to determine the issue, it may order disclosure. Cityhook submits that the documents it seeks are required so that it can understand (a) what more information was needed before the OFT could make a decision of non-infringement or infringement and (b) whether the OFT's conduct amounted to a genuine abstention from making such a decision. In this respect, Cityhook submits that there is a lack of clarity. Cityhook submits that there is a genuine issue as to whether or not there is further information which would be of assistance to the Tribunal in deciding whether an appealable decision has been made.
16. As to the fact that the documents the subject of the disclosure request are internal documents, Cityhook submits that whilst there may well be public policy considerations to take into account, that does not rule out disclosure in appropriate circumstances, notably where it is required in the interests of justice. Cityhook

points to voluntary disclosure of such documents in past cases, submitting that the relevant authority did not purport to call into question its proper functioning as a result of such disclosure.

17. The OFT agrees that the Tribunal's approach in *Claymore*, cited above, is part of the test, but submits that demonstrating necessity, relevance and proportionality is not in itself sufficient for ordering disclosure. The OFT submits that the approach should be in accordance with that of the Administrative Court in judicial review cases. It submits that a respondent public body's duty of candour is to be fulfilled by way of a witness statement rather than by disclosure of documents. Referring to *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Limited* [1995] 1 WLR 386, 386-397, the OFT submits that where a witness statement has been filed it is improper to allow disclosure of documents unless there is some material outside that contained in the witness statement to suggest that the witness statement is either inaccurate or incomplete in some material respect. The OFT relies on *Aquavitae*, referring to the Tribunal's characterisation in that case of preparatory internal documents as "of limited evidential value" (paragraph 219). Finally, it adds that "fishing expeditions" are impermissible.
18. The OFT also refers to various legislation at national and Community level which, in its submission, recognise the need to protect internal documents.
19. Applying the principles it submits are relevant, the OFT submits that Mr Smith's witness statements are detailed and are frank. In the OFT's submission, Mr Smith has fulfilled his duty of candour to the Tribunal. In response to Cityhook's submission that Mr Smith's statements (and the decision letter) are unclear, to the extent that it remained unclear to what extent the OFT was not in a position to make a decision on the question of infringement, the OFT submits that Cityhook misunderstands the nature of the preliminary issue before the Tribunal. The material question is not whether the OFT had sufficient material before it to entitle it to have made a non-infringement decision had it decided to do so; it is whether, as a question of fact, the OFT made a decision as to infringement of the 1998 Act, either expressly or by necessary implication. The OFT submits that Cityhook has

not established that either of Mr Smith's witness statements is inaccurate or incomplete.

20. Moreover, says the OFT, in any event Cityhook has not provided any argument as to why, in its view, the need for disclosure outweighs the public interest in the confidentiality of internal debate and deliberation within the OFT.
21. The interveners support the OFT's position. The so-called "joint interveners" – Alcatel Submarine Networks, Cable and Wireless, Global Marine Systems and Tyco Telecommunications (US) – make similar submissions to those of the OFT. BT adopts those submissions and draws attention to jurisprudence of the Court of Justice and Court of First Instance of the European Communities, which, in BT's submission, makes clear that internal documents of the European Commission do not fall to be disclosed to applicants before the European Courts save in the exceptional circumstance that there is a serious *prima facie* case of misuse of powers. In this regard, BT refers to Cases 142 and 156/84 *BAT and Reynolds v Commission* [1986] ECR 1899 at paragraph 11 and Case 212/86 *ICI v Commission* [1987] 2 CMLR 500 at paragraph 15. NTL and Global Crossing in essence support the arguments put forward by the other interveners.

The Tribunal's analysis

22. The Competition Appeal Tribunal Rules 2003 (SI 2003/1372) provide, at rule 19, as follows:

“19. - (1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.

(2) The Tribunal may give directions-

...

(k) for the disclosure between, or the production by, the parties of documents or classes of documents...”

23. It is common ground that the Tribunal's general approach to disclosure is set out in *Claymore*, cited above, at paragraph 113:

“The general approach to discovery before the Tribunal is that it is not automatic. It needs to be ordered by the Tribunal, usually upon a request by a party to the proceedings. The Tribunal must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it.”

24. It is also common ground that when making a witness statement on behalf of the respondent public authority, the OFT, Mr Smith owed a duty of candour to the Tribunal and that he fulfilled that duty. Cityhook does not submit that he has misled the Tribunal.
25. In this jurisdiction Rule 19 gives the Tribunal power to make an order for disclosure to secure the just, expeditious and economical conduct of the proceedings. In *Claymore*, cited above, the Tribunal stated that it must be satisfied that the disclosure sought must be necessary, relevant and proportionate to determine the issues before it.
26. We have carefully considered the case closure letter and Mr Smith's two witness statements. These witness statements appear to us to be full and frank and to give a clear and transparent insight into the decision which the OFT made in this case. We are not satisfied that disclosure of any of the documents requested is necessary, relevant or proportionate to determine whether the OFT has taken a non-infringement decision. Nor do we consider that the disclosure is required to secure the just, expeditious and economical conduct of the proceedings. It seems to us that disclosure in this case may in fact have the opposite effect on the conduct of these proceedings. In particular, if disclosure were ordered it appears likely that certain documents would contain information which may be commercially sensitive to one or more parties. If so, further costs would be occasioned in the OFT's seeking those parties' consent to disclosure of unexcised versions of the documents and/or in a further round of submissions before the Tribunal on the question of confidentiality. That, in turn, would likely jeopardise the chances of the hearing on admissibility taking place on 30 January 2007, as is

currently envisaged. That would not be consistent with the objective of dealing with cases expeditiously, in our view.

27. Cityhook submitted that it was making this application for disclosure of internal OFT documents because it was not clear how it is, after such a long period of investigation, that the OFT does not know whether there has been an infringement. Cityhook submitted that there are genuine issues which need clarification and that it, Cityhook, simply could not understand what more investigation could have been required, particularly on the so-called “object issue”, that is to say on the question of whether the conduct investigated by the OFT had as its object the restriction of competition. Cityhook accepts, however, that Mr Smith has made his witness statements entirely *bona fide*.
28. Cityhook has not been able to explain whether, and if so on what aspect, it challenges what Mr Smith has stated. It has not identified any inaccuracy or incompleteness in Mr Smith’s written evidence. The application appears to us to be a fishing exercise.
29. For completeness, we consider the individual documents the subject of the disclosure application, set out in paragraphs 11 and 12 above.
30. As for the minute of the case review meeting held on 13 October 2005, that meeting is dealt with in some detail by Mr Smith’s 1st witness statement at paragraphs 34 to 42. Mr Smith sets out the disagreement between the case team and the case review panel, which was debated at the case review meeting. It has not been suggested by Cityhook that Mr Smith’s account of the meeting is incomplete or inaccurate. We see no reason to order disclosure of that internal document.
31. As for the memoranda from Mr Mayock (regarding his review of the case) and Mr Priddis (reviewing the investigations against the OFT’s administrative priorities), these are dealt with by Mr Smith at paragraphs 45 to 49 (Mr Mayock) and 50 to 55 (Mr Priddis) of his 1st witness statement. The witness statement explains Mr Mayock’s views on (i) the question of whether the matters should be

categorised as falling into the “object” category; (ii) whether, on the substance, a statement of objections should be issued; and (iii) the robustness of the statement of objections in its (then) current form. It explains Mr Priddis’ views on (i) certain aspects of the state of the investigation, including certain evidential issues; (ii) the degree of resources which would be needed to take the cases forward; and (iii) whether these were the right cases for continued use of the OFT’s resources.

32. Mr Smith records Mr Mayock’s advice as being that, in the light of (a) the above considerations and (b) Mr Priddis’ advice, the investigations should be closed on grounds of administrative priority. Mr Smith records Mr Priddis’ advice as being that the collective boycott case and collective setting case should be closed on the basis that (a) both the collective boycott case and collective setting case would need to be developed considerably in order to run them, which in turn would require additional resources and (b) there were other higher priority cases which could be progressed more rapidly if the collective boycott case and collective setting case were to be closed.
33. Cityhook has not sought to suggest that Mr Smith’s record of these memoranda is incomplete or inaccurate. No convincing arguments have been put to us that it is relevant, necessary or proportionate to the question of admissibility to order disclosure of these internal memoranda.
34. As for the final draft of the case closure letter to be sent by Mr Mayock, Mr Smith’s 2nd witness statement confirms, at paragraph 25, that the final draft was for all material purposes identical to the version sent to the parties (including Cityhook).
35. As for the draft summary of final comments from interested parties received in connection with the OFT’s provisional decision to close its investigations, Mr Smith’s 2nd witness statement confirms, at paragraph 26, that that draft was identical to the summary attached to the final version of the case closure letter of 23 June 2006.

36. As for Cityhook's request for disclosure of any minute of the internal OFT meeting of 6 December 2005, held to discuss the way forward for the collective boycott case and the collective setting case, Mr Smith's 1st witness statement explains the nature of that meeting at paragraph 56. Once again, it has not been suggested by Cityhook that Mr Smith's account of the meeting is incomplete or inaccurate. We see no reason to order disclosure of that internal document.
37. As for the request that "the Chief Executive's views in whatever form they were given" be disclosed (application, paragraph, 10), no submission has been put to us by Cityhook that ordering disclosure of such "views", to the extent they exist, would be necessary, relevant or proportionate to determining the issue of admissibility.
38. As for any original briefing papers prepared by the case team between August 2005 and January 2006, no convincing argument has been presented in favour of ordering disclosure of such internal documents.
39. As for any minute, papers and explanation of the basis on which the OFT decided not to pursue a "vertical restraint" imposed on Tyco, GMS and others, Mr Smith's 2nd witness statement explains, at paragraph 28, that no investigation was opened under section 25 of the Act in respect of the complaint under which the allegation as to a "vertical restraint" fell, namely a complaint of 29 March 2002 alleging breach of the Chapter II prohibition. No submissions were made by Cityhook as to this at the hearing. There appears to us to be no basis on which to order the requested disclosure.

Judicial review and European court principles

40. We do not need to consider whether the disclosure principles applicable to judicial review or to proceedings for annulment before the European Courts bind this Tribunal, since the application fails on the basis of this Tribunal's rules and jurisprudence and would equally fail on the basis of judicial review and European Court principles.

Conclusion

41. For the above reasons we unanimously dismiss Cityhook's application for disclosure.

Marion Simmons

Peter Grinyer

David Summers

Charles Dhanowa
Registrar

20 November 2006