



Neutral citation [2015] CAT 16

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos.: 1156-9/8/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

2 December 2015

Before:

PETER FREEMAN CBE QC (Hon)

(Chairman)

Sitting as a Tribunal in England and Wales

B E T W E E N:

SKY UK LIMITED
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE
BRITISH TELECOMMUNICATIONS PLC

Appellants / Intervenors

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Intervenors

RULING (DISCLOSURE APPLICATION)

1. On 30 November 2015 the Tribunal received an application from British Telecommunications PLC (“BT”) for an order in these proceedings directing the Office of Communications (“Ofcom”) to make available the confidential version of Ofcom’s statement entitled *Review of the pay TV wholesale must-offer obligation* dated 19 November 2015 (the “2015 WMO Statement”) (the “Application”).
2. The Application is made in the context of BT’s skeleton argument, submitted in advance of the Case Management Conference (“CMC”) listed for 3 December 2015.¹ At that CMC the Tribunal will consider how to progress the proceedings (the “Remittal Proceedings”) which are the result of the Court of Appeal’s judgment of 17 February 2014 ([2014] EWCA Civ 133). That judgment relates to an appeal of the Tribunal’s decision of 8 August 2012 in the Pay TV appeals ([2012] CAT 20). The Court of Appeal’s judgment set aside the Tribunal’s Orders dated 6 March 2013 and 17 May 2013 and remitted certain matters to the Tribunal for further consideration.
3. BT contends that a fully un-redacted version of the 2015 WMO Statement is needed because there will be a discussion at the CMC about the overlap between the Remittal Proceedings and any potential prospective appeal against the 2015 WMO Statement. According to BT, the disclosure of the fully un-redacted version would allow the advisers of the parties to work from the same version as Ofcom rather than from their own confidential versions in which there are numerous gaps.
4. The reasons for the Application are further explained in BT’s skeleton argument; they are related to an earlier application by BT to adduce new evidence (in this context, evidence that was not before the Tribunal in the original Pay TV appeals) and to BT’s request for the Tribunal to delay consideration of the Remittal Proceedings.

¹ See order of the Tribunal dated 15 October 2015 (as amended on 3 November 2015).

5. BT argues, in summary, that an appeal against the 2015 WMO Statement could be on grounds that include pricing issues and that this might, in turn, require the Tribunal to consider these same issues, together with new evidence, in the Remittal Proceedings. Separately, BT contends that it would be premature for the Tribunal to decide how to progress the Remittal Proceedings before any decision by BT on whether or not to appeal the 2015 WMO Statement. In subsequent correspondence, however, BT clarified that it was not applying for a stay of the Remittal Proceedings.
6. On 1 December 2015, the Tribunal received observations on the Application from Sky UK Limited (“Sky”) and Ofcom; both opposed it.
7. Sky said the risk of unintended disclosure of commercially sensitive information was too great and that in any event BT’s requested disclosure was not necessary in these proceedings.
8. Ofcom noted that the confidentiality arrangements in place in the Remittal Proceedings do not extend to the 2015 WMO Statement. Moreover, since the 2015 WMO Statement – as is to be expected - contains commercially sensitive information that is confidential to a number of companies, including companies that are not represented in the Remittal Proceedings, and because the relevant companies have not consented to disclosure, Ofcom is under a statutory obligation under section 393 of the Communications Act 2003 not to disclose the redacted information.
9. On 2 December 2015, BT replied to the observations submitted by Sky and Ofcom. It reiterated points made previously and clarified that it had first asked Ofcom to make available to the confidentiality ring an un-redacted version of the 2015 WMO Statement on 26 November 2015. BT also suggested that Sky’s concern (see paragraph 7 above) could be addressed by disclosing the document only to barristers who are admitted to the confidentiality ring that applies to the Remittal Proceedings.

Tribunal consideration and conclusion

10. The Tribunal has power to order disclosure under rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372 / 2003) (the “2003 Rules”); a decision under rule 19 requires the Tribunal to consider whether disclosure is required “to secure the just, expeditious and economical conduct of the proceedings”.
11. Nevertheless, I do not think that it would be appropriate to grant the Application, for the following reasons.
12. First, whether or not BT is correct that any future appeal against the 2015 WMO Statement might be on grounds that include issues of pricing, no such appeal has at this point been brought, and whether it will is a matter of speculation. Consequently, the 2015 WMO Statement is not currently the subject of proceedings before the Tribunal.
13. There is a well-established process for disclosure, into an appropriately constituted confidentiality ring, of a confidential version (which may not be a fully un-redacted version) of any Ofcom statement which is the subject of proceedings before the Tribunal. This situation does not at present apply in respect of the 2015 WMO Statement.
14. Sky noted that the confidentiality ring in the Remittal Proceedings has, over the years, become very large and that disclosure to certain members of the ring may not be appropriate; I agree that is a concern in the context of recent, commercially sensitive information. I also note Ofcom’s objection that the current confidentiality arrangements do not extend to the 2015 WMO Statement and agree with Ofcom that it would not be feasible, in the time available, for Ofcom to contact the relevant parties to obtain consent, even if it were appropriate to do so. The latter concerns are relevant regardless of whether disclosure is made to all persons in the ring or barristers only.
15. Both Sky and Ofcom expressed the view, with which I agree, that BT has not adequately demonstrated that disclosure of the confidential version of the 2015

WMO Statement is necessary to secure the just, expeditious and economical conduct of the Remittal Proceedings. For the purpose of the CMC on 3 December 2015, the point that BT makes can be made sufficiently well by reference to the publicly available non-confidential version.

16. For the reasons given, I order that:

(a) pursuant to rules 19(1) and 19(2)(k) of the 2003 Rules, the Application be refused; and

(b) costs be reserved.

Peter Freeman CBE, QC (Hon)
Chairman of the Competition Appeal Tribunal

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 2 December 2015