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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1245/3/3/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 February 2016

Before:

HERIOT CURRIE QC
(Chairman)
PROFESSOR GAVIN REID
BRIAN LANDERS

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Applicant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

GAMMA TELECOM HOLDINGS LIMITED
CP GROUP

Interveners

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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

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Robert Palmer (instructed by BT Legal) appeared on behalf of the Applicant.

Mr. Josh Holmes (instructed by Ofcom Legal) appeared on behalf of the Respondent.

Mr. Tim Johnston (instructed by Charles Russell Speechlys) appeared on behalf of Gamma
Telcom Holdings Limited.

Mr. Alan Bates (instructed by Towerhouse LLP) appeared on behalf of CP Group.

1 THE CHAIRMAN: Good afternoon. To some extent, the issues that we have to decide are
2 dictated by practical considerations affecting the availability of the Tribunal. I thought I
3 might just make you aware of that at the outset. If you could have BT's adapted timetable,
4 which I think is at para.8 of their note for this hearing, I will just explain where we are on
5 that. The Members of the Tribunal have conferred, and it looks to us as if the earliest that
6 we can have a hearing of five to six days is 18th May, and we would propose sitting for six
7 days from 18th to 25th May inclusive. If that is going to work, then we would be minded to
8 propose the following modifications to the timetable which I will use for convenience. We
9 would allow Ofcom an extra week to serve its defence, so its defence under item (a) would
10 be by 1st March. We would then allow the interveners to file and serve statements of
11 intervention and any evidence by 4 pm on 22nd March. Then BT would file and serve its
12 reply and any evidence, if so advised, by 4 pm on 5th April.

13 Modifying para.(d), the hearing is to be set down for six days, and we think that it would be
14 helpful to stagger the dates at which parties serve their skeleton arguments, so under (e) BT
15 is to file and serve its skeleton argument 21 days before the hearing, Ofcom to serve its
16 skeleton 14 days before the hearing, and the interveners seven days before the hearing.

17 Unless there is any substantial reason why that is not acceptable to parties, with that as the
18 timetable then we are minded to set down.

19 MR. HOLMES: Sir, there is just one point: Ofcom has been making very good progress, as I was
20 just telling my friend Mr. Palmer, and it may be that we can get our defence in earlier than
21 that date. We are very happy with the timetable, and we would fully adhere to your
22 suggestions. Obviously, if we can go any faster, we will.

23 THE CHAIRMAN: That is fine, thank you. That then will be the timetable.

24 MR. PALMER: Sir, may I make just one observation about the timetable? As we made clear, we
25 are perfectly content for a reply and any evidence, but once one sets back the timetable to
26 that extent, that period would fall bang over the Easter weekend. Having laboured over the
27 Christmas weekend, that would be less than welcome. If, politely I might ask, it looks like
28 on that timetable that there would be sufficient flexibility to allow 21 days for BT's reply
29 and any evidence, to delay that for a further week?

30 THE CHAIRMAN: Which item would it be?

31 MR. PALMER: It would be (c), sir, instead of being 5th April, it would be 12th April.

32 THE CHAIRMAN: Is there any objection to that?

33 MR. HOLMES: No, sir.

1 THE CHAIRMAN: Under (g), the joint bundle of authorities to be filed and served seven days
2 before the hearing.

3 I think the next matter that arises relates to Gamma's intervention, and as I understand it
4 there is no objection in principle to Gamma intervening, but there is an issue as to whether it
5 should be allowed to make oral submissions at the hearing, and whether it should be
6 allowed to lodge expert evidence, and I would like to hear from the parties on this. Could I
7 start with Gamma, and I will give other parties an opportunity to respond? What, in
8 particular, we are interested in is in relation to your written submission that you may wish to
9 lead oral evidence about Gamma's conduct and Gamma's business model. The Tribunal
10 would like to be advised in more specific terms of what issues you think you may need to
11 make oral submissions on and why these will not be covered by Ofcom?

12 MR. JOHNSTON: Sir, in terms of oral submissions, three very brief points: firstly, perhaps very
13 obviously, this is a decision in respect of a dispute between my client and BT. Of course,
14 my client has played a very active role throughout the process to this point.

15 Secondly, as has already been canvassed, we are anticipating filing witness evidence. That
16 being the case, it is likely, perhaps inevitably, that my client is going to be cross-examined
17 at the hearing, and in those circumstances, if for no other reason, we would need to be there
18 for witness handling purposes.

19 Thirdly, and very simply, obviously my client has not seen what Ofcom has to say yet. So
20 plainly we are not in a position to identify what we would be saying that would not be what
21 Ofcom would say. By way of a preliminary point, our understanding from the notice of
22 appeal, and we have not read BT's evidence, we have not had BT's evidence yet, is that
23 there are matters addressed in BT's evidence that relate to Gamma's business model
24 agreements that we have entered into, or allegedly entered into. So we would anticipate
25 making at least some factual submissions in relation to those questions.

26 Then, of course, any submissions on questions of law, we would want to supplement
27 whatever it is that Ofcom said. Of course, we would anticipate being very cautious and
28 careful not to duplicate.

29 So that is our position. If the Tribunal takes a view later on that it does not need to hear us,
30 then of course we would abide by that, but at this point our view is that it is highly likely
31 that we would need to be there.

32 THE CHAIRMAN: Thank you. Perhaps I could call upon BT to respond to that?

33 MR. BATES: Sir, if I could say before you call upon BT, on behalf of my clients we adopt the
34 same position as has just been put by my learned friend. What we have said in our

1 application to intervene is that it seemed to us that it might not be necessary for us to appear
2 at the hearing, but we sought permission to intervene generally. The reason why we did that
3 is because at the moment we simply have not seen all of the evidence from BT. We do not
4 know what is the precise scope of the factual evidence that we will be filing.

5 I take the same position as my learned friend, that if our witnesses are going to be cross-
6 examined, it would ordinarily be right that we should be there and be able to make
7 proportionate and focused oral submissions.

8 MR. PALMER: Sir, I am very grateful. I begin by observing that the submissions you heard
9 from Gamma, Mr. Johnston, did not involve any explanation of the scope or need of any
10 expert evidence from Gamma. Like the CP Group, who proportionately and reasonably,
11 have also stated that they do not intend to call expert evidence, we would ask that, if they
12 are permitted to intervene, which we do not oppose in principle, any application be made to
13 adduce expert evidence if and when they consider it necessary, the starting presumption
14 being that it should not be necessary.

15 So far as factual evidence is concerned, of course we have no evidence to factual evidence
16 being given. It is not inevitable that there will be cross-examination. Cross-examination
17 will only be necessary if the factual evidence which they give is in dispute. If it is in
18 dispute, then cross-examination will, of course, be required. It is too early to say at the
19 moment whether or not factual evidence will be in dispute. If it is short limited factual
20 evidence about their own business, it may be quite likely that it is not in dispute. We simply
21 do not know at the moment, but we cannot proceed on the basis or the assumption that their
22 attendance for witness handling purposes is necessarily required at this stage.

23 So far as legal submissions are concerned, once Ofcom has produced its defence and
24 produced its skeleton arguments, Gamma and CP Group will be able to see what legal
25 submissions are being advanced, and would be able to advance their own legal submissions.
26 It does not in the normal event require attendance in their own right. In so far as Ofcom
27 concur with the effect of those legal submissions and wish to borrow them, or supplement
28 its own legal submissions to support what is its own decision, then of course it is free to do
29 so and to develop those points. That does not require oral intervention on behalf of the
30 interveners.

31 So we recommend and request, sir, that if permission is granted to the proposed interveners
32 to intervene, it is at this stage on the basis of written intervention only, but permission to
33 adduce factual evidence in the form of witness statements, but application be made further
34 on down the line, once the issues have become clearer, should an active participatory role at

1 the hearing be sought and required. That would be the most proportionate response, in our
2 submission, at this stage in regard to their position.

3 THE CHAIRMAN: Your motion is that if permission is granted, at this stage it should be a
4 written representation only, that permission should be granted now or later to adduce factual
5 evidence?

6 MR. PALMER: We have no objection to permission being granted at this stage for short factual
7 witness statements to be adduced, and for written submissions and a statement of
8 intervention to be made, but at this stage the intervention be limited, but with liberty to
9 apply should there be good reason becoming apparent further down the line that greater
10 intervention is necessary.

11 So, the reason I say this is because we are already looking at a five to six day hearing and
12 Mr. Holmes and I have discussed, and we think we are agreed, that it is likely that a day will
13 be required for opening of what are quite technical subjects – we anticipate the Tribunal
14 will be assisted by an actual opening rather than just written submissions – and equally a
15 day at the other end for closing. Between us we have five witnesses which we would hope
16 to contain within three days comfortably, and that includes expert evidence as well as
17 factual evidence.

18 If there is general liberty for the interveners to participate fully in the hearing, cross-
19 examine as well, bring their own witness and make their own legal submissions, we are
20 looking at a hearing potentially which is extended even beyond six days. If that is required
21 at the end of the day in order for the just disposal of the case so be it, but at this stage that is
22 very far from being demonstrated.

23 THE CHAIRMAN: Mr. Holmes, do you want to add anything?

24 MR. HOLMES: Only that insofar as there is disputed factual evidence from the interveners it
25 seems inevitable that their counsel need to be able to attend for the purposes of oral
26 examination of the witnesses, but subject to that we are very happy to adopt a 'wait and see
27 'approach and an application can be made in due course when it becomes clear whether the
28 factual evidence will be disputed.

29 THE CHAIRMAN: Mr. Johnston, is there anything you would like to add?

30 MR. JOHNSTON: Mainly in respect of adducing expert evidence my client is content to apply
31 and we will happily adopt that in respect of the expert evidence. Nonetheless, obviously,
32 we remain of the view that it is sensible and necessary for my client to have permission to
33 make oral submissions, obviously with the standard proviso that nothing would be

1 duplicative, but it would be very surprising in the circumstances if my client did not need to
2 be there and did not need to make oral submissions.

3 THE CHAIRMAN: Would there be any practical difficulty at this stage if we adopted the
4 submission by counsel for BT that at the moment your intervention be limited but with an
5 opportunity for you to apply at a later stage when we see what is in various parties'
6 documents?

7 MR. JOHNSTON: It would not create practical difficulties in the sense it would be procedurally
8 difficult. My client's position, obviously being very realistic, they would want to book
9 counsel for that window on the presumption they are going to be needed, that may have
10 some costs consequences for my client. As I say, given the interest that my client has in this
11 matter this is, or at least began, as a dispute between my client and BT. In the
12 circumstances I think it would be an unnecessary additional step to place in the process to
13 say that we must apply. Needless to say we would obviously do what one would always do
14 as an intervener and ensure that we do not duplicate, but we would anticipate being there.

15 THE CHAIRMAN: Mr. Bates, is there anything you wish to add?

16 MR. BATES: Only to say, sir, that we submit it is important to attach considerable weight to the
17 fact that we were the complainant and the dispute is between BT and ourselves. Also, it has
18 been the standard practice, in my experience, in this Tribunal that in those circumstances the
19 parties to the dispute would be permitted to intervene generally, and one can draw an
20 analogy with other proceedings. If, for example, these were judicial review proceedings,
21 perhaps where the Environment Agency had taken a decision and then it were decided on
22 by a planning inspector, and the planning inspector's decision were then judicially reviewed
23 the Environment Agency would clearly, in those circumstances, be an interested party and
24 would be able to come along ordinarily and make proportionate submissions provided that
25 they did not duplicate submissions that had already been made by others. In my
26 submission, there is no reason to adopt a different approach in this case, and the correct
27 principled approach is to allow us to intervene generally and, if necessary, to look at issues
28 of case management and the extent of everybody's oral and written submissions if it proves
29 necessary to do so thereafter, because agreement about, for example, time allocation has not
30 been able to be reached between the parties.

31 THE CHAIRMAN: We are going to adjourn to consider our decision on this and other matters,
32 so we will bear your submissions in mind.

33 The next issue in my order is the request that there be a half day hearing for a preliminary
34 issue. I should say at the moment the Tribunal is minded to refuse that motion and have

1 what is known as the 'preliminary issue' determined as part of the main hearing. Would
2 anybody like to make any submissions on that at this stage?

3 MR. JOHNSTON: If that is your 'minded to' position, I do not propose to address you any further
4 on the point. The position is that this would turn a six day hearing into a three day hearing
5 if the point of law is correct, and therefore it would be proportionate to list the half day
6 hearing within a short window, but if the Tribunal is likely to be against me on that then I
7 will keep my powder dry as to the substance of the point and we are content to adopt that
8 position, and again to make written and oral submissions on the point at the hearing.

9 THE CHAIRMAN: We will consider that when we adjourn. The next issue then is CP's
10 submission that a rider should be placed on the orders relating to the confidentiality ring,
11 restricting the freedom of in-house solicitors to work on related matters for a period of 24
12 months, and perhaps is it for you, Mr. Bates, to address us on that?

13 MR. BATES: Yes, this is a suggestion that we put forward under the inspiration, in fact, of a
14 suggestion that BT had put forward in other proceedings as to the correct terms of the
15 confidentiality ring arrangement of this kind. We have noted BT's objection to it. We have
16 looked with our policy clients as to the nature of the confidential information itself and how
17 confidential it is, and we have come to the view that, given BT's objection, we are prepared
18 to withdraw our proposal.

19 THE CHAIRMAN: Thank you. Shortly, I will ask counsel whether there are any other matters
20 but on my list, at least, the final matter, which I do not think is contentious, relates to the
21 exchange of confidential versions of witness statements and so on, and will it be possible
22 for parties to agree a date by which that will be done? I do not think anybody is asking the
23 Tribunal to make an order.

24 MR. PALMER: As soon as the relevant confidentiality undertakings have been signed it can be
25 done without delay electronically in the first instance, with immediate effect.

26 THE CHAIRMAN: Yes. Can I then just ask counsel, starting with Mr. Palmer, whether there are
27 any other matters that you would wish the Tribunal to address in this hearing?

28 MR. PALMER: No, thank you, sir.

29 THE CHAIRMAN: Mr. Holmes?

30 MR. HOLMES: None for us, thank you.

31 THE CHAIRMAN: Mr. Bates?

32 MR. BATES: No, thank you.

33 THE CHAIRMAN: Mr. Johnston?

34 MR. JOHNSTON: No, thank you, sir.

1 THE CHAIRMAN: Thank you very much. In that case we will adjourn for a short period of time
2 to decide on the one remaining contentious issue.

3 (Short break)

4 THE CHAIRMAN: The one contentious issue remaining for our consideration was the ambit of
5 the interveners' intervention. Having listened to the submissions of counsel, we have
6 decided that the interveners should be permitted to make written and oral submissions,
7 subject to the obvious and overriding constraint that there should be no duplication. We
8 consider that if we permit the interveners to have those rights of intervention, if there is a
9 problem at a later stage, we can control that by making directions if and when they need to
10 be made.

11 So unless there is any other matter that the parties would like to raise, I think we can
12 conclude proceedings today. Thank you.

13 _____