



Neutral citation [2016] CAT 18

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1259/3/3/16
1260/3/3/16
1261/3/3/16

Victoria House
Bloomsbury Place
London WC1A 2EB

29 September 2016

Before:

MR JUSTICE SNOWDEN
(Chairman)

Sitting as a Tribunal in England and Wales

B E T W E E N:

TALKTALK TELECOM GROUP PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

A N D B E T W E E N:

BRITISH TELECOMMUNICATIONS PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

A N D B E T W E E N:

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

RULING (CONFIDENTIALITY RING)

1. I have to resolve a dispute which has arisen as to the terms of the confidentiality ring that will exist in relation to the various appeals which are before the Tribunal. The issue has arisen over whether confidential information in the Ofcom Statement and its appendices should be anonymised so as not to reveal the identity of the particular operator to whom it refers, in the copies of the documents which are to be provided to two in-house lawyers at BT. BT wishes to include these lawyers in its legal team dealing with the case. The concern raised by other operators is over inadvertent leakage of their confidential information to the strategic and operational side of BT's business.
2. Nobody appearing before me has suggested that it is necessary for a similarly anonymised document to be provided to the external legal advisers acting for the various parties. The only argument to that effect was made by Surf Telecom in correspondence with Ofcom. In that respect, however, Surf Telecom stands in splendid isolation amongst 31 of their fellows as the only operator which suggests that there should be a blanket anonymisation in the documents provided to all lawyers. Ofcom suggested in submission to me that this precaution was unnecessary to protect the interests of those who had provided the information to Ofcom on a confidential basis and that I should not be guided by Surf's minority position. I think that is correct.
3. The question thus resolves itself into a question of whether it is appropriate for the Tribunal to permit the in-house lawyers for BT to receive the same document as received by all external lawyers - including those acting for BT - or to require them to work from a different document with operator details anonymised.
4. One obvious difficulty that the Tribunal faces at this stage of the case is that neither it, nor the parties themselves, have seen the specific context in which any of the confidential information appears in the Ofcom Statement and its appendices. It is, therefore, extremely difficult to judge accurately the extent to which it would be possible for BT to conduct its appeal appropriately and in its best interests if its in-house lawyers cannot see that which all of the external lawyers can see.

5. I recognise that this is an area where confidential information is jealously guarded and parties are extremely sensitive. However, predicting as best I can the nature of the documents with which we are likely to be concerned, and in particular the tables of data which are referred to in the appendices to the Ofcom Statement, it seems to me almost inevitable that in order for them to understand the case properly, it is going to be necessary for those two BT in-house lawyers to have the same information as BT's external lawyers. If I were, as Ofcom suggests, to require a version to be produced which redacted all references to operators and replaced them with a "scissor" symbol rather than simply referring to operators by letters (e.g. "operator A"), I think that the result might well be largely meaningless, and would almost inevitably lead to a series of satellite disputes about whether the BT team could properly function without full information. It seems to me that given the limited timetable that the parties are all desirous that we should work to in this case, that risk - which I regard as a real risk - is one that I should seek to avoid if possible.
6. These considerations, together with the practical problems which would be caused were it to be necessary for BT's team to maintain a distinction between the full and redacted reports in conversations between their internal and external lawyers, has narrowly persuaded me that I should not start down the track of requiring an anonymised version of the Ofcom Statement be provided to the BT in-house lawyers.
7. In reaching that decision, I have balanced the need to ensure that BT can participate properly in these proceedings with the need to provide suitable protection for the commercially confidential and sensitive information of others. In that regard I place considerable weight upon the fundamental point that Mr. Beard makes for BT, namely that its internal lawyers are experienced specialists in the area who are, by reason of BT's role in the market, quite accustomed to operating under terms of enhanced confidentiality. I believe that reliance can properly be placed on their professional standing and abilities to give full effect to the confidentiality undertakings that they will be giving, supplemented, in the draft order which I have seen, by additional restrictions relating to the treatment of the information as 'customer confidential' information (within the meaning of

undertakings previously given by BT to Ofcom under Part 4 of the Enterprise Act 2002) and the provision of IT ring-fencing and password protection.

The Honourable Mr Justice Snowden
Chairman of the Competition Appeal Tribunal

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 29 September 2016