

Neutral citation [2017] CAT 20

THE COMPETITION
APPEAL TRIBUNAL



B E T W E E N :

Case No.1260/3/3/16

BRITISH TELECOMMUNICATIONS PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

-and-

**CP GROUP (TALKTALK TELECOM GROUP PLC, VODAFONE LIMITED, COLT
TECHNOLOGY SERVICES AND HUTCHISON 3G UK LIMITED)**

VIRGIN MEDIA LIMITED

GAMMA TELECOM HOLDINGS LIMITED

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Interveners

Case No.1261/3/3/16

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC (“CityFibre”)

Appellant

- and -

OFFICE OF COMMUNICATIONS (“Ofcom”)

Respondent

-and-

**CP GROUP (TALKTALK TELECOM GROUP PLC, VODAFONE LIMITED, COLT
TECHNOLOGY SERVICES AND HUTCHISON 3G UK LIMITED)**

GAMMA TELECOM HOLDINGS LIMITED

BRITISH TELECOMMUNICATIONS PLC

Interveners

REASONED ORDER

UPON considering CityFibre’s application of 5 April 2017 (“the CityFibre Application”) to amend its Notice of Appeal in Case 1261/13/13/2016 (the “NoA”) and its Statement of Intervention in Case 1260/3/3/16 (the “SoI”) pursuant to Rules 12 and 16(10) of the Competition Appeal Tribunal Rules 2015 (SI. 2015 No. 1648) (the “Tribunal Rules 2015”)

AND UPON considering the CP Group’s application of 5 June 2017 for its costs resulting from the admission of Ms. Gita Sorensen to the confidentiality ring established by the Order of the Tribunal of 3 October 2016 and CityFibre’s response to that application

AND UPON there being no other objections to the CityFibre Application

IT IS ORDERED THAT:

1. CityFibre be permitted to amend its NoA and SoI so as to remove passages insofar as they relate to Ofcom’s decision on market definition made by Ofcom in a document dated 28 April 2016 and entitled “*Business Connectivity Market Review – Review of competition in the provision of leased lines*”.
2. There be no requirement for the parties to file amended pleadings or evidence.
3. CityFibre to pay the reasonable costs incurred by Ofcom in respect of the removed passages of CityFibre’s NoA and SoI. The amount payable to be assessed if not agreed.
4. The CP Group’s application for costs be dismissed.

REASONS:

1. The CP Group, an intervener in these proceedings, applies for an order that CityFibre, the appellant in Case 1261/3/3/16, pay its costs incurred of administering certain bespoke arrangements under the confidentiality ring established in these proceedings.
2. The bespoke arrangements concern Ms. Gita Sorensen, who is described as an external strategic adviser to CityFibre. CityFibre sought her inclusion in the confidentiality ring, on her giving appropriate confidentiality undertakings, despite her being neither a legal adviser nor an expert witness. The other parties agreed (or did not object) to Ms Sorensen being admitted to the ring on that basis, and to her having access to their confidential information. The CP Group was not, however, willing to allow Ms Sorensen access to its confidential information at all, and required a bespoke arrangement under which the documents in the case would be redacted to excise the CP Group’s confidential information before being passed to Ms. Sorensen.
3. On that basis, no dispute concerning Ms Sorensen’s admittance to the confidentiality ring came before the Tribunal for determination. As explained to the Tribunal at the CMC on 29 September 2016, the intention was that CityFibre’s lawyers would identify and redact documents to ensure that the CP Group’s confidential information

did not pass to Ms. Sorensen. In fact, it appears that the CP Group insisted that its lawyers should also review the redactions made by CityFibre's lawyers and it calculates that it incurred £24,000 in extra costs in doing so.

4. Following the Tribunal's decision in April 2017 to split the hearing of CityFibre and BT's appeals into two portions (as to why, see [2017] CAT 17 at paragraphs 3 to 4), CityFibre applied to amend its Notice of Appeal to remove part of its appeal shortly before that portion was due to be heard in a window spanning April until May 2017. Correspondence between the CP Group and CityFibre concerning the costs of that application followed but the parties could not reach agreement.
5. The CP Group seeks an order for payment of its costs connected with the bespoke arrangement, but not its other costs of its intervention.
6. The CP Group argues that it is appropriate that the Tribunal depart from its usual stance of ordering that each intervener must bear its own costs of intervening because of what it describes as CityFibre's "unusual" step of seeking to include Ms. Sorensen, who is neither a lawyer nor an expert, in the confidentiality ring. It also argues that the costs relating to the bespoke confidentiality arrangements were "effectively thrown away" due to CityFibre's decision to withdraw part of its appeal. In support of its application the CP Group relies on *Messih v McMillan Williams & Ors* [2010] EWCA Civ 844 which confirms that where a claim is withdrawn before trial the starting point is that the withdrawing party pays costs and that it is for the withdrawing party to justify a departure from this position; and *BT v Ofcom (Ethernet Determinations)* [2014] CAT 20, a case in which an intervener successfully recovered its costs. In that case the Tribunal examined whether the intervener had acted reasonably and properly in intervening and whether the intervention was targeted and efficiently conducted. The CP Group argues that these criteria should apply in this case and are clearly fulfilled.
7. For its part CityFibre accepts that since it has withdrawn part of its appeal it must pay the reasonable costs of the respondent, Ofcom, but it resists the CP Group's application. CityFibre contends that its request to include Ms. Sorensen in the confidentiality ring was appropriate given her involvement in preparation of CityFibre's appeal, that none of the other parties objected to her inclusion in the confidentiality ring on the giving of suitable undertakings, that it was the CP Group's decision to insist that its own lawyers should double-check the redactions, and that these circumstances do not justify a departure from the standard position that interveners should bear their own costs irrespective of the outcome of the appeal.
8. The Tribunal enjoys a wide discretion in the award of costs – see Rule 104(2) to (4) of the Tribunal Rules 2015. The general rule that interveners bear their own costs exists because the the Tribunal seeks to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties (see *Ryanair Holding plc v Competition Commission* [2012] CAT 29 at paragraph 7).

9. In this case, I see no reason for departing from this general starting position. This is for the following reasons:

- (a) Where cost shifting is the starting point, it makes sense that in the event that a claim is discontinued, the discontinuing party should pay the defendant's costs and a departure from that position must be justified. However, where costs shifting is not the starting point, as is the case with interveners, the fact that an appeal is discontinued does not *of itself* provide any basis for changing the starting point that costs fall where they lie. Something more is required. The CP Group's reliance on *Messih v McMillan Williams & Ors* is therefore misplaced since that case concerned a case where the starting point was that of costs shifting.
- (b) I do not think that there is any reason to treat the CP Group's costs associated with the bespoke confidentiality arrangement concerning Ms. Sorensen any differently from the other costs which the CP Group does not seek to recover. Those costs were ultimately the product of the CP Group's decision to intervene and of the CP Group's choice (i) to raise an objection to Ms. Sorensen having access to its confidential information even though she had given confidentiality undertakings that were acceptable to the other parties, and (ii) to insist that the CP Group's solicitors should check the redactions made to the relevant documents by CityFibre's lawyers before they were provided to Ms. Sorensen. The CP Group can have had no general expectation of recovering its costs even if CityFibre had pursued and lost its appeal, and given the confidentiality arrangements which proved satisfactory to others, I cannot characterise CityFibre's approach in relation to Ms. Sorensen as unreasonable or out of the ordinary so as to require it to pay the costs of the additional arrangements which the CP Group alone insisted upon.
- (c) I consider the CP Group's reliance on the *Ethernet Determinations* case is also misplaced. That case concerned an appeal in the context of Ofcom's dispute resolution role under the Communications Act 2003. In such appeals an intervener may play a role much more akin to that of the respondent and Ofcom may play a less significant role (or none at all) in proceedings before the Tribunal. The fact that the intervention was reasonable and proper, targeted and efficiently conducted, does not assist me in deciding whether it is appropriate to depart from the normal position that interveners should bear their own costs. These matters would only be relevant to the amount of costs awarded had I considered that a departure from the starting position had been justified.

10. Accordingly, I dismiss the CP Group's application.