



Neutral citation [2018] CAT 5

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1280/3/3/17

Victoria House
Bloomsbury Place
London WC1A 2EB

14 February 2018

Before:

THE HONOURABLE MR JUSTICE MANN
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1)VIASAT UK LIMITED
(2)VIASAT, INC.

Appellants

- v -

OFFICE OF COMMUNICATIONS

Respondent

-and-

INMARSAT VENTURES LIMITED

Intervener

RULING (CONFIDENTIALITY)

APPEARANCES

Mr Michael Bowsher QC (instructed by Latham & Watkins) appeared on behalf of the Appellants.

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

Mr Tim Ward QC and Ms Anneli Howard (instructed by Jones Day) appeared on behalf of the Intervener.

1. This is a case management conference in this appeal brought by Viasat against Ofcom, challenging a decision of Ofcom to permit the use of certain parts of the mobile communication spectrum by Inmarsat. I do not need to go into the details of the appeal at all for these purposes. The principal issue which has arisen on this CMC is whether an interim confidentiality ring, which has already been established by agreement between the parties and sanctioned by an order of this court, should be extended to include another couple of individuals.
2. The ring as it is currently constituted consists of Mr Bowsher QC, who appears as the leader for Viasat, his junior, and a partner (Mr Colahan) and an assistant solicitor at his English instructing solicitors, Latham & Watkins. It has now broadened to include a Dr Webb, who is an expert in the field and who has provided an expert's analysis of the permission that has been given by Ofcom so far as he can do so bearing in mind the redactions that have taken place in that decision.
3. Mr Bowsher seeks to widen the ring to include two further individuals. The first is Mr Ward, who is in-house counsel for Viasat, working at what I take to be their head office in San Diego, and a Mr Janka, who is a Washington DC partner of Latham & Watkins, the same firm that instructs Mr Bowsher in this appeal.
4. The problem arises in relation to material which is either within the Ofcom award or is within documents referred to in that award, and which is said by Mr Ward QC (who confusingly appears for Inmarsat) to be commercially confidential material. Indeed, he says it is highly commercially confidential. That is the reason why the ring was constituted in the first place.
5. Mr Bowsher makes his case for widening the ring on the basis, putting the matter shortly, that it is necessary, or it may be necessary, for him to have input from the individuals concerned on technical matters arising out of the appeal, to place the appeal within a broader regulatory regime, and to deploy the expertise of the two individuals, and in particular Mr Janka, in relation to regulation and allied matters in this field. It appears from Mr Janka's CV that

he is a very experienced regulatory lawyer with a particular experience in the regulatory field involved in this case in an international sense.

6. Mr Bowsher also says that there is an inability on the part of the team within the present ring to understand how, as he put it, the market responds to spectrum auctions and how the market is developing, and what airlines can and cannot be expected to be looking for. In order to explain that last sentence, I should say that Inmarsat's authorisation from Ofcom, which is under attack, allows Inmarsat to use part of the spectrum which has been allocated to it by a previous EU Commission decision for the supply of wi-fi services to aircraft in flight over Europe.
7. Mr Ward for Inmarsat opposes the application to widen the ring on the basis that it has not been demonstrated to be necessary on the evidence and the disclosure sought is far too risky for his client, at least as matters currently stand. It is not clear what particular safeguards will be put in place in order to prevent material in the hands of Mr Ward in particular in San Diego from seeping further into the company.
8. In my view there is a short answer to Mr Bowsher's application. It is that this application has not been substantiated on the evidence and on the other material before me, and is arguably premature. There is an outstanding debate to be had between the parties, and, if necessary, resolved by this Tribunal, as to whether a lot of the material is indeed commercially sensitive material. That has not been gone into before me, and indeed the material has not even been studied at this hearing or for the purpose of this hearing. Some of the material has only very recently been revealed by Inmarsat into the existing confidentiality ring. Until one can see what that material really is and what the commercial considerations are which would affect its disclosure into a wider ring, one cannot properly consider whether it is necessary to widen the ring. One cannot form judgments about the sort of additional input which Mr Bowsher says he requires from those whom he seeks to introduce into the ring.

9. Furthermore, Mr Bowsher's application is not evidence based in the sense that he does not indicate why it is that the particular individuals whom he proposes to include have something, as it were, to bring to the party and which it is necessary for them to bring to the party.
10. So far as he needs technical input, it is not apparent to me at the moment on the current state of the evidence why it is that Dr Webb, who is an expert himself, cannot provide that input. Mr Bowsher made some submissions about that, and he may or may not be right about it, but the fact of the matter is that the limited extent, if there are limits to it, of Dr Webb's expertise in this respect are not identified at all - in other words, Mr Bowsher has not demonstrated a current need for the two particular individuals to be included within the ring.
11. These applications have to be approached from the starting point that, prima facie, litigation, even of this nature, is supposed to be open and is certainly a procedure in which the client is entitled to expect to be fully involved in and in which a client would normally expect to see all the material that is being deployed in the litigation. That prima facie position gives way to the need to preserve the legitimate commercial confidences of a party to the litigation, particularly a party who is a respondent to an appeal and who has, therefore, been dragged here against that party's will. This Tribunal has to acknowledge that it may be quite wrong for such a party to have to give extensive revelations as to confidential material which it would not wish to give. Confidentiality rings are a way of squaring the particular circle which arises out of those two competing positions.
12. I accept that withholding information from a client and confining information to a confidentiality ring is something which must be done only to the extent to which it is necessary. The problem with this case at the moment and the current state of the evidence and the material before this Tribunal is that it is not possible to form a judgment as to that. I have to approach this decision on the assumption that there is sensitive commercial material in the documents which have been disclosed by Inmarsat for the purpose of these proceedings. The extent to which that is true may or may not have to be determined by the

Tribunal in due course, but that is the only assumption on which I can approach this decision, and Mr Bowsher did not contend otherwise. That being the case, and it being the case that some of it may be highly confidential, it becomes impossible to form a judgment based on that generality one way or another as to the extension of the ring.

13. In those circumstances, and because this dispute does not yet seem to me to be ready to be determined on the evidence before me, I shall not make any order about the extension of the confidentiality ring. It may or may not be that Mr Bowsher can in due course, and perhaps by reference to particular matters on which it is necessary to extend the ring, justify an extension. It may be that the ring can and should be extended by reference to particular limited matters only. It may be that other rather more sophisticated and refined weapons can be adopted in order to deal with particular problems that arise, but at the moment I am unable, on the material that I have, to decide in a broad brush way that all the confidential material should go to either one or both of the individuals to whom Mr Bowsher proposes it should go. I cannot do that without considering the nature of the information, and I cannot do that without considering why it is in the case of the information, either generally or particularly, necessary to disclose it to those gentlemen as well as to the existing confidentiality ring.
14. The San Diego Mr Ward's involvement in the ring presents particular problems because he is in-house. It may be that in due course Mr Janka's involvement, as being the lawyer with a closer direct client involvement and with some expertise which might be applicable, might be a rather easier target for Mr Bowsher to achieve. I make no judgment about that at this stage. I merely indicate that that is how I can see matters might well develop in case it assists the parties in resolving this matter in the future. I note that both gentlemen are qualified US attorneys, and I note that both of them have experience of, and are aware of, the need to respect confidence.
15. It seems to me that, for the future, it would be right to assume that both gentlemen would conscientiously seek to respect any confidences which are reposed in them. The difficulties that may arise in the future are, first, whether

it is actually necessary to allow them to see the material; and second, whether in practice they will find it very difficult to segregate the confidential material in their hands when dealing with legitimate matters in their heads when dealing with future matters, whether involving these particular parties or not. That seems to me to be a likely real problem, particularly in the case of Mr Ward. However, I say no more about those considerations because they will have to be dealt with in the future if and when the application is reformulated in a way which is more focused, first, on the nature of the material; second, the nature of the confidentiality; and third, the particular attributes of Mr Ward and Mr Janka if they are still proposed when it comes to the need to disclose the information to them. At the moment, a case for widening the circle has not been made out.

The Hon. Mr Justice Mann
Chairman

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

Date: 14 February 2018