



Neutral citation [2018] CAT 14

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1280/3/3/17

Victoria House
Bloomsbury Place
London WC1A 2EB

12 June 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, Ms Fiona Banks and Ms Khatija Hafesji (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 an application about a confidentiality ring in this challenge by Viasat of an Ofcom ruling giving authorisation to Inmarsat to operate a system for providing internet or broadband connections to aircraft in the sky. It is unnecessary for me to go into the details of the nature of the appeal, save insofar as otherwise appears in this decision.
2. The issue which I have to decide is to whether a Mr Janka, a partner in the firm of solicitors instructed by Viasat, should be admitted to a confidentiality ring which is operating in relation to information provided by Inmarsat, as intervener in these proceedings, for the purposes of this appeal. The information is said to be commercially sensitive, and for the purposes of today Mr Bowsher QC, who appears for Viasat, accepts that all the information in question is confidential, although, as he would put it, not very confidential. In other words, it is said by him not to be information of the highest degree of confidentiality. Having seen a small sample of the information, it seems to me that that description is a justifiable description of some of it, but not all of it. Some of it seems to me to be of debatable confidence, but other parts of the information does seem to me to be information which has a genuine commercial confidentiality about it.
3. This is the second time that this point has arisen. It arose on the first CMC in this matter, when I ruled against Mr Janka being admitted to the confidentiality ring, principally on the footing that an appropriate evidential case had not been advanced. Mr Bowsher seeks to renew his application on the basis of some, but in my view not a lot more, evidence, but also, rather more critically, on the basis of a demonstration as to why it is said that Mr Janka is an appropriate addition to the confidentiality ring. At the moment, the confidentiality ring in relation to the confidential material on Viasat's side is Mr Bowsher, his two juniors, two or three members of his instructing solicitors, not including Mr Janka, and his expert.
4. The additional evidence that has been advanced appears in a witness statement from Mr Janka and from Mr Colahan, the other relevant partner in Mr Bowsher's instructing solicitors. Mr Janka is in fact a Washington DC partner in those solicitors. It is said that Mr Janka's input is required in respect of commercial-type judgements which may need to be made on the basis of the

confidential information; that is to say, judgement as to whether or not the offering of Inmarsat which has got authorisation by Ofcom is actually a genuine satellite-based offering, as opposed to some ground-based offering with a pretence of a satellite base.

5. It is also said that Mr Janka will be able to take a view as to some technical-related commercial matters, or perhaps some commercially related technical matters, notwithstanding the fact that Viasat already has available to it technical expertise in the form of an expert, Dr Webb. Mr Janka also claims an expertise in regulatory matters, and it is said that that will be a useful expertise for him to deploy, notwithstanding the fact that Viasat also has lawyers who are capable of dealing with regulatory matters.
6. Mr Janka's position, as it is set out in his own witness statement and which does not seem to be the subject of challenge, is that he is a very experienced solicitor in the general area of satellite-related communications in regulatory terms, technical terms and commercial terms. Looking at his CV as it is set out in his witness statement, that certainly seems to be true.
7. As I have indicated, Mr Bowsher has amplified his case for the need for Mr Janka's participation by pointing to certain parts of the confidential material and by seeking to demonstrate the need to refer to that material and to consider it in terms of commercial and practical matters. Part of Mr Bowsher's case for Viasat is that Inmarsat's offering as proposed to Ofcom for the purposes of getting its authorisation, and thence incorporated into the authorisation, is that that offering is not a genuine satellite-based system with an ancillary ground component, but is actually a ground-based system with some sort of artificial satellite system added on, but not as a central part and not as something which it can be expected would be adopted by airlines.
8. In order to assist in the making of his case, Mr Bowsher seeks the input of Mr Janka into the confidentiality ring regime so that Mr Janka can consider the confidential material and assist Mr Bowsher and his team to understand points that can or might be made. He says the nature of the confidential information is capable of going to the point I have described, but he does not necessarily

know to what extent at the moment without Mr Janka's input; nor does he know precisely how it can be deployed, again without the assistance of someone with at least Mr Janka's expertise, who can, for example, to take an extreme and imaginary case for the purposes of illustration, say that a technical proposal or offering to an airline is not something which any airline is likely to accept for commercially related reasons. He illustrated this by reference to certain confidential material which I will not set out in this judgment.

9. The starting point in considering Mr Bowsher's application, as I observed in my previous judgment, is the principle that justice must be conducted openly and each side must know what the other side's case fully is. Each side must know in general terms and understand the case being advanced by the other side. However, in a large number of cases there are legitimate commercial concerns about the confidentiality of information which would otherwise flow between the parties, and it is now well accepted that those concerns can lead to a derogation from the normal principle of openness and cards on the table. Confidentiality rings, such as those rings that already exist in this case, are one way in which the conflict between those two principles or concerns can be and are addressed.
10. It is accepted in this case that there should be confidentiality rings. There is one applying to Viasat's information, but the one which concerns me is the one applying to Inmarsat's information in the hands of Viasat. It is by the existence of the current confidentiality ring that Inmarsat's commercial concerns have been addressed. There is no dispute about the appropriateness of the adoption of the technique of a confidentiality ring; the question is who should be in it.
11. Mr Bowsher says that Mr Janka should be in the ring as a matter of principle, as he firstly put it. I myself am unable to identify the principle which means that Mr Janka personally should be within the ring. The question of who should be within a confidentiality ring, once it is accepted that there should be one, is a question of balance, balancing the legitimate need for confidentiality on the one hand with the legitimate needs of the receiving side to be able to run the case fairly and in an informed fashion on the other. In my view, therefore, the question is all about practicality and fairness.

12. In favour of Mr Janka being admitted to the ring, Mr Bowsher urges on me that he needs assistance in running his case from someone with Mr Janka's expertise, and Mr Janka can provide that assistance. Mr Bowsher maintains, in effect, that he is making a concession by not proposing someone from his client to be a part of the ring. Mr Janka is an appropriate substitute because he has an appropriate amount of expertise; he is not the client; he understands and is accustomed to confidentiality obligations; and, as a solicitor or an American attorney, is subject to a professional enforcement regime to back up any confidentiality undertakings that he gives.
13. Mr Ward QC, for Inmarsat, disputes that. He questions the need to have any assistance from someone like Mr Janka, saying that, if assistance is required in relation to the significance or viability of any confidential material, then it can be sought from the client by asking appropriate questions, prompted by but not revealing confidential material which has been fed into the confidentiality ring. The need for Mr Janka or someone like him has not been made out evidentially, Mr Ward submits. Furthermore, Mr Janka is not in any event an appropriate person. Whilst he has the benefit of not being a Viasat employee or officer, he is nonetheless intimately connected with Viasat's regulatory and commercial affairs, in particular by virtue of his being deeply and intimately concerned with Viasat's pan-European litigation in relation to this sort of authorisation, in which litigation is of a similar character to the present dispute.
14. It is said that if Mr Janka sees the confidential material, he will be put in possession of confidential technical, and especially commercial, material, and once he has it in his head it will be impossible for it not to be present as part of his thinking when he is advising on and conducting the other pan-European litigation. Mr Ward makes it clear that he does not say that Mr Janka is likely to impart confidential information wilfully or knowingly, but it is suggested that Viasat will or might benefit from its presence in Mr Janka's consciousness or subconsciousness.
15. He takes the point that, despite the fact that the weakness of or the absence of a supporting evidential case for widening the ring to include Mr Janka was the basis of my previous decision, Viasat has still not made a proper evidential case.

Furthermore, it is said that Viasat has not met the flagged challenge based on Mr Janka's not giving any undertaking not to be involved in any matters in respect of which there is a risk he might accidentally or even intentionally make use of disclosed confidential matters. It is said to be unfair that Inmarsat, which has effectively been brought into these proceedings against its will as a quasi-respondent to the appeal, should be forced to reveal its commercial secrets to someone whom it would wish to conceal them from, that someone being a clear commercial competitor who, Mr Ward says, has an interest in sabotaging Inmarsat's attempt to launch its product.

16. Having heard all the submissions in this case, and in particular Mr Ward's submissions, having considered the evidence and having considered Mr Bowsher's case as to why he needs the assistance of Mr Janka, I am satisfied, albeit with a degree of reluctance, that Mr Bowsher has made out his case of need, despite its not being made fully in a witness statement. I am satisfied that it is a legitimate requirement of Mr Bowsher that he should have some form of informed input into an analysis of Inmarsat's offering, in at least commercial and, to a degree, practical terms.
17. Mr Bowsher's need is not a fanciful or contrived need. It is a real need and it would be prima facie unfair to expect his client to litigate without input from a person appropriately placed to provide it. I am satisfied that Viasat's existing team may not have all the expertise required, and I am satisfied that Mr Ward's proposal for extracting assistance by asking appropriate questions without revealing confidential information is simply not a practical expedient. Apart from anything else, it suffers from the defect of it not necessarily being clear to the team what questions should be asked of the client.
18. Having been thus satisfied thus far, the next question is whether Mr Janka is the appropriate person to provide the assistance, or whether his status so compromises him as to make him inappropriate. Normally, the assistance which Mr Bowsher justifiably claims would come from his client, who, in a case like this, would have the, or some, necessary skill and expertise to be able to judge the force and nature of the confidential material and provide counter-material to the lawyers to assist in running the case. Viasat does not make the proposal that

someone from the client should be put forward for these purposes. I observe that Mr Ward of Viasat, who was at one stage proposed, is no longer advanced for this purpose; instead, Viasat proposes Mr Janka as a well-qualified and acceptable proxy who has an appropriate degree of expertise, an appropriate understanding of the need to comply with a confidentiality regime and an appropriate willingness to operate within that regime.

19. With, as I have indicated, a degree of reluctance, I accept that Mr Janka is an appropriate proxy. I agree that he is an appropriate substitute for a client who would otherwise provide the assistance, and is a person who does have the necessary understanding of the need for confidentiality, an ability to comply with the obligations and an appropriate incentive in terms of professional sanctions, if necessary, to make sure they are complied with. He is, for these purposes, more appropriate than the client in the particular circumstances of this case.

20. While I do not consider there to be a serious risk of risk of actual deliberate disclosure to the client or others, I acknowledge the possibility that in future litigation, and in the existing pan-European litigation, Mr Janka may find it difficult to unknow, or not to apply, at least subconsciously, what he has learnt in this case. However, I do not think that that danger is sufficient to disqualify him for these purposes, and there are two additional safeguards which ought to be capable of assisting in this respect. The first is that I shall require the addition of some express wording in the confidentiality regime so far as concerns him to put the matter beyond doubt, making it clear that he is to use the confidential material only for the purpose of assisting counsel and solicitors in preparing for and conducting the forthcoming hearing. That probably makes clear what the limits of his right to use the information would be, but it would be useful to spell that out in terms so that he and Viasat are under no illusions as to how far Mr Janka can go. Those are the reasons propounded by Mr Bowsher for admitting Mr Janka into the ring, and he cannot reasonably object to them being enshrined in part of the confidentiality ring, probably in the form of an undertaking, but that is a matter of drafting which can be dealt with by the parties.

21. The second is the possibility that, if he acts conscientiously in the future, Mr Janka may have to consider his participation in other cases, whilst he is at the same time under obligations of confidentiality in relation to material acquired in these proceedings. If he considers that he is or will be in such a position as to be uncertain as to whether he can safely act or advise in the other litigation bearing in mind what he knows from this litigation, then he will doubtless need to consider his position in relation to his so acting, like any solicitor faced with a potential conflict of interest.

22. It may be that, in the light of that potential conflict in the future and the risks that it might pose to his participation in other litigation, which will be primarily and firstly a matter for him, he might even wish not to know absolutely everything that might otherwise be contained in the confidential information. That might be a convenient way of his anticipating and avoiding at least some conflicts in the future. I do not particularly expect that to happen, but in case it does, and in case it is decided to avoid the possibility of any such conflict in the future by disclosing only some of the information to Mr Janka, then in the event that that happens, i.e. only some is disclosed to Mr Janka, then Viasat will make clear to Inmarsat what information has, and by implication what information has not, been disclosed to him, so that Viasat know the extent to which Mr Janka has been put in possession of that confidential information. It may be that nothing will come of that, but it may be a useful part of the regime should Mr Janka suddenly find himself concerned about the position he might be in in the future.

23. Accordingly, and subject to the variations to the confidentiality ring applying them to Mr Janka which I have indicated in this decision, Mr Janka will be admitted to the ring.

The Hon. Mr Justice Mann
Chairman

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

Date: 12 June 2018