Neutral citation [2010] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1156-1159/8/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

25 June 2010

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATON PREMIER LEAGUE
BRITISH SKY BROADCASTING LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants/Interveners

\- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

RFL (GOVERNING BODY) LIMITED
TOP UP TV EUROPE LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD
DAVID IAN HENRY (REAL DIGITAL)

Proposed Interveners

RULING (Interventions, confidentiality and permission to appeal)

APPEARANCES

Mr. Mark Hoskins QC and Mr. Gerard Rothschild (instructed by Ashurst LLP) appeared for Virgin Media, Inc.

Miss Helen Davies QC and Miss Maya Lester (instructed by DLA Piper UK LLP) appeared for The Football Association Premier League.

Mr. James Flynn QC and Mr. Meredith Pickford and Mr. David Scannell (instructed by Herbert Smith LLP) appeared for British Sky Broadcasting Limited.

Mr. David Anderson QC and Miss Sarah Ford and Miss Sarah Love (instructed by BT Legal) appeared for British Telecommunications Plc.

Miss Dinah Rose QC and Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Office of Communications.

Mr. Paul Harris and Miss Fiona Banks (instructed by the Legal Department, RFL, the Legal Department RFU, Bird & Bird LLP, Onside Law, Denton Wilde Sapte LLP) appeared respectively on behalf of RFL (Governing Body) Limited, Rugby Football Union, The Football Association Limited, PGA European Tour and the Football League Limited.

Miss Marie Demetriou (instructed by DLA Piper UK LLP) appeared for the England & Wales Cricket Board.

Mr. Timothy Ward (instructed by SJ Berwin LLP) appeared for Freesat (UK) Limited.

Mr. Julian Strait (of Milbank, Tweed, Hadley & McCloy LLP) appeared for Top Up TV Europe Limited.

Mr. David Henry appeared in person.

THE PRESIDENT:

1. This is the first joint case management conference listed by the Tribunal in these four related appeals brought under section 317 of the Communications Act 2003 ("2003 Act"). The four appeals are related because they all challenge in different respects a decision of Office of Communications ("OFCOM") on 31 March 2010, taken under section 3 of the Broadcasting Act 1990 ("1990 Act") and section 312 of the 2003 Act.

2. The effect of the decision is to vary the licenses granted to Sky under the 1990 Act in respect of Sky's pay TV channels, and in particular Sky Sports 1 and 2 and Sky Sports HD and Sky Sports 2 HD. The variation to the licences concerns conditions of the licence relating to supply by Sky of the programme content to other undertakings, and in particular imposes on Sky what is called a "Wholesale Must-Offer" obligation compelling Sky to offer those particular channels to any person who meets certain minimum qualifying criteria, for the retail by that person to residential customers in the UK. So far as Sky Sports 1 and 2 are concerned, they are to be supplied at charges which do not exceed specified prices set by OFCOM.

3. Following an interim relief application by Sky, I made an order, in terms which were agreed by the parties to that application, on 29 April 2010. For present purposes I do not need to detail the terms of that order, which are set out on the Tribunal's website.

4. Today's case management conference was listed at an early stage in order to resolve a number of questions, including (1) whether the proposed interventions should be permitted, (2) how to deal with the confidential material that is included in OFCOM's decision and other connected documents, and (3) the future course of the proceedings including whether the four appeals should be heard together, whether there should be any further pleadings and evidence, the timetable and likely length of the hearing if all the appeals are heard together.

5. In the event, thanks to the good offices of the parties and potential parties, most of these matters have been clarified, and indeed resolved to a considerable extent.

6. First of all, I should record that none of the participants in this case management conference has suggested other than that these appeals should be treated as proceedings in England and Wales for the purposes of rule 18 of the Competition Appeal Tribunal Rules (S.I. 1372 of 2003), and the order which follows this case management conference will make the appropriate provision.

7. Secondly, I record that there is general consensus that the four appeals should be heard together.

8. However, a number of matters have not been entirely resolved. These relate in particular to the question of interventions and to the terms on which the confidentiality ring, which is going to be necessary, should be constituted.

Interventions

9. I deal first with the questions that have arisen in relation to interventions. There is general consensus here too, save in two main respects.

10. First, a number of sports bodies – I hope they will not regard it as disrespectful if I do not identify them individually, but they are the national governing bodies of a number of sports, including rugby (league and union), football, golf and cricket – have sought to intervene in the appeals or some of them on the basis that they are interested in the outcome, because of the effects which they submit the OFCOM decision will have on the value of the audiovisual rights which they, as governing bodies, seek to exploit on behalf of their respective sports. Virgin Media, Inc. ("Virgin"), in particular, objects to the intervention of these bodies on the basis that, given the interests of other parties, their intervention would be superfluous; alternatively, Virgin argues that if they are allowed to intervene then they should be allowed to do only on a limited basis.

11. Most of these bodies are represented by the same counsel team consisting of Mr. Paul Harris and Miss Fiona Banks. The exception is the England & Wales Cricket Board, which is represented by Miss Marie Demetriou. All the bodies in question appear to be seeking to intervene for the same reason, namely to underline the importance to their sport of being able extract full value from their respective audiovisual broadcasting rights. Also, they all point to their apprehension that Wholesale Must-Offer will, and any extension of it would, damage that value

significantly. It may well be that many of the generic points that they might wish to make will be covered by The Football Association Premier League in its appeal and its own interventions in the other appeals. Nevertheless, it does seem to me that the interests of the sports bodies represented by Mr. Harris and Miss Demetriou are real and are sufficiently substantial to allow them to participate. Mr. Harris has stated that their participation is envisaged as mainly amounting to putting before the Tribunal evidence relating to the specific position of each of these bodies, the value in each case of the audiovisual sports rights in question, and the extent of the damage they apprehend.

12. I emphasise however that there is ample scope for co-ordination between the sports bodies as to how they present their written submissions, and indeed their written evidence. They will need to give very careful thought to that presentation if they are not unnecessarily to increase what is already a substantial burden on the other parties and on the Tribunal. Wherever possible they must avoid the kind of duplication where you get five or six very similar documents with only a small tweak here or there to represent the differences between the bodies. That is understandable at this early stage, when everything has to be done by a short deadline and when there is little opportunity for advanced co-ordination. But it should not occur henceforth. It would of course be difficult for all the evidence to be included in one document because it is going to come from different witnesses in relation to different sports. But to the extent practicable the witnesses should cross-refer to each others' evidence rather than each making an identical point at length. Further, any submissions should be co-ordinated and wherever possible should be in a single document.

13. At this stage, so far as the non-appellant interveners are concerned, I am going to limit the intervention to written submissions and written evidence only, and we will decide at a later stage whether, and if so what, participation should be allowed at the oral hearing.

14. The second contentious intervention issue relates to Mr. Henry's application. Mr. Henry has applied to intervene in all four of these appeals; he does so, as he indicates in his application letters dated 18 June 2010, with a view broadly to supporting the approach of the appellants in Virgin's and BT's appeals, and OFCOM in Sky's and The Football Association Premier League's appeals. He also indicates, and has confirmed today, that his application is made in his own right and

not on behalf of REAL Digital EPG Services Limited, a company of which he is a minority shareholder as well as the managing director. In his letters dated 18 June the only interest identified was that he is a UK citizen and a stakeholder, in the sense of being a shareholder and a managing director in an undertaking which plans to offer a pay TV service to British and Irish consumers. The undertaking in question is of course the company to which I have referred.

15. Sky and The Football Association Premier League, in particular, object to the application on the ground that it discloses no sufficient interest and that Mr Henry's participation would add little, if anything, to OFCOM's submissions, but rather would add complexity to already complex proceedings. Virgin too notes the lack of any real explanation of Mr. Henry's specific interest.

16. Mr. Henry has sought to answer these points and to supplement the original explanation of his interests by a further letter to the Tribunal dated 23 June 2010, and also by his oral submissions to me this morning. He has referred to his "vast experience" of digital satellite broadcasting and in particular the technical workings of Sky's satellite technology. He also submits that his 25 per cent shareholding and his position as managing director of the company I have mentioned give him an economic interest in the outcome. He states that he has evidence that will help the Tribunal to, as he puts it, "drill down to the truth"; in addition he relies upon the fact that he is a consumer of pay TV and that the Sky and The Football Association Premier League appeals could, if successful, reduce the choice for consumers of pay TV.

17. I should also perhaps add that there is before the Tribunal an outstanding application, not by Mr. Henry in his own right but by the company (represented by Mr. Henry), seeking to vary the interim relief order to which I have referred by making the company a beneficiary of the order. That application will be dealt with on another occasion.

18. However, neither the fact of that outstanding application, nor the points made in Mr. Henry's letters or indeed made by him in person today, in my view identify any interest in the outcome of these proceedings sufficient to justify his becoming a party to them. His interests as a shareholder and managing director of the company, or as a consumer of pay TV in the United Kingdom do not in my view amount to such an interest; and even if they did, given the number and variety of interests that

are represented by the appellants and the respondent, I would not, in the exercise of my discretion under rule 16, grant permission for this particular intervention. The proceedings are already very complex and crowded, and I believe that the Tribunal is likely to receive submissions and evidence on all conceivably relevant issues raised by the appeals. In contrast, the matters raised by Mr. Henry in his letters appear to be at best tangential and at worst irrelevant to the issues which the Tribunal is likely to have to decide. His interests as a consumer can be satisfied by informing OFCOM of any specific points that he feels should be made, so that OFCOM can make use of them if they see fit.

Confidentiality

19. I now turn to the other main issue upon which a ruling is required, which relates to confidentiality. It is almost inevitable in this kind of case that there will be reference to information of a highly sensitive nature. In the present case such data exists in the decision itself, and no doubt there will be confidential material in other documents. There is, therefore, need for a confidentiality ring; indeed the basic terms of a draft order to bring such a ring into effect have already been agreed between the various parties in terms which are now becoming conventional in the Tribunal.

20. Miss Helen Davies QC, who appears for The Football Association Premier League, has identified a number of items of information which, from her client's point of view, are regarded as of the highest possible sensitivity. This information relates to the details of auctions of the audiovisual rights of her clients, and includes the identification of the bidders, the particular rights for which they placed bids, and the actual amounts bid for those rights. These data are said to be of enormous value to any potential purchaser of the rights in question in the future.

21. The Football Association Premier League's specific concern relates to the position of the in-house solicitors which BT has proposed as members of the confidentiality ring. In the present case, as in several others in which it has been involved before the Tribunal, BT has chosen to use their in-house rather than external solicitors to instruct outside counsel. The concern is that because of the position of those in-house solicitors within the company, the risk of inadvertent disclosure of sensitive information is greater than it would be in the case of outside solicitors, and that that risk needs to be specially addressed.

22. I should emphasise at this point that neither Miss Davies nor her clients nor anyone else suggests that the individuals concerned are other than persons of the highest professional integrity, or that they might intentionally disclose confidential information in breach of the standard undertakings in the conventional confidentiality ring order, or in breach of their professional obligations. As has been underlined by Mr. David Anderson QC, who appears for BT, the in-house lawyers in question are subject to precisely the same stringent professional obligations and sanctions as those to which external solicitors are subject.

23. However, Miss Davies submits that it is simply a question of the enhanced risk, as perceived by The Football Association Premier League, of an inadvertent disclosure which, given the nature of the information, could be extremely damaging. The risk in question is enhanced by both the physical proximity of the in-house solicitors to their commercial clients and by their proximity in advisory terms.

24. In order to assuage The Football Association Premier League's concerns in this regard BT has been negotiating with them right up to the hearing this morning, and the two parties have gone a long way towards resolving the issue. The product of their negotiation is an additional undertaking which would be given by the BT in-house lawyers in question, together with some slight variations to the standard undertakings which are found in part B of the draft order for the confidentiality ring. The latter variations are mainly dealing with the physical proximity risk and provide for extra safeguards such as locking away documents in a specific way etc, and are not controversial.

25. The additional undertaking is the source of the point of principle upon which I have been asked to rule. I will read into the record the primary form of the additional undertaking – that is, if I can put it this way, the form to which BT is willing to agree. I include some amended wording which I am told has also been agreed. This primary version now reads as follows:

> "My activities in relation to BT Vision and any other television service that is or may be offered by BT, whether on its own or in conjunction with any other party ('BT Television'), will for the duration of these proceedings and a period of two years from their final conclusion by a judgment from any final competent Court of Appeal ('the Relevant Period') be limited to the conduct of these and any directly related proceedings, and to the provision of legal advice on competition and regulatory matters unconnected with the subject matter of these proceedings, but not including any future actual or contemplated investigation by OFCOM, or any other regulatory authority, or any actual or contemplated litigation by party

relating to the sale of the audiovisual rights to any sporting event(s) or competition(s).

During the relevant period I will have no involvement, whether by the giving of legal advice or otherwise, in the consideration or formulation of commercial strategy or policy in relation to BT Television. In addition, for the relevant period and for three years thereafter, I will not advise BT in relation to any bid or negotiation for movie rights or in relation to any actual or potential sale, acquisition or use of sports audiovisual rights by BT Television, including specifically the following in relation to sports rights:

(a) any future invitations to tender issued by sports rights holders in relation to any sports audiovisual rights; and

(b) any bid submitted or considered by BT Television in relation to the sale of any sports audiovisual rights."

26. As I have said, BT agrees (albeit reluctantly) to an undertaking in this form being given by its in-house lawyers. BT's preferred position is that there should be no difference of treatment as between its in-house solicitors and the other parties' external solicitors, given in particular that both are subject to the same obligations and sanctions, as I have indicated. However, BT is willing to compromise in this case by giving the additional undertaking in the terms quoted. What it is not prepared to do is to extend the scope of the undertaking in the second paragraph beyond the lawyers' employment by BT; in other words, BT does not agree that the undertaking should also cover the lawyers' employment with "any future employer offering a television service", as it is formulated in the non-agreed wording put before me.

27. Mr. Anderson's primary submission was that to require that extension of the undertaking would draw an unjustifiable distinction between a BT lawyer on the one hand and an external lawyer on the other, in circumstances where each left his or her present post and became an in-house lawyer elsewhere. The former BT lawyer would be subject to the restrictions in the additional undertaking, whereas the external lawyer, although he or she would be in what Mr. Anderson suggested was a precisely analogous position, would not be so subject. There could, he submitted, be no conceivable justification for this.

28. Mr. Anderson also said that the restriction of five years or more in that context would be likely to represent an unreasonable restraint of trade.

29. Miss Davies, in response, states that this distinction would be justified because of the BT lawyers' special position of having been ring-fenced whilst they were at BT.

She also, of course, re-emphasises the highly sensitive and potentially damaging nature of the information which her clients are seeking to protect.

30. It seems to me that there is no real distinction to be drawn between the position of the BT lawyers if they went to another employer as in-house lawyers, and external solicitors or indeed external counsel doing the same. Nor is the latter situation in any way theoretical - it happens not infrequently. It might be said that if there is any distinction at all to be drawn, the ex-BT lawyers could conceivably present slightly less of a risk by going to another company than would the external lawyers, because by reason of their additional undertakings the ex-BT lawyers would have been removed from advising or dealing with the injuncted areas of work during their remaining time with BT.

31. However, the real point is that both the ex-BT lawyers and the ex-external solicitors would go to a new employer knowing the confidential information in question. That is the source of the risk of inadvertent disclosure, and there is, in my view, no material difference between the two categories of lawyer in those circumstances as regards the extent of that risk or the sanctions which could be brought to bear should the risk materialise. It follows that the extension of the additional undertaking to cover future employment as an in-house lawyer with a different employer is a step too far and cannot be justified if it is to apply to BT lawyers alone.

32. Miss Davies said that her fall-back position was a two-tier approach, with external counsel first of all seeing the confidential material in order to judge whether it was necessary for it to be disclosed to the in-house solicitors for the purposes of the proceedings. Mr. Harris, too, favoured a two-tier solution along the lines of Miss Davies' suggestion, and indicated that in the first instance that was how he and one of his clients, who was also using in-house solicitors, intended to proceed. However, as Mr Harris has said, the scope of his clients' intervention is relatively limited. BT on the other hand is an appellant as well as an intervener. In a technical and complex case of this kind the two tier approach would be likely to place a considerable burden on counsel, and it is almost inevitable that they would quickly need the assistance of their instructing solicitors in relation to any confidential material of the kind which has been mentioned.

33. During the argument I floated as a possible solution whether the information with which Miss Davies' clients are concerned, relating to the auctions of their audiovisual rights, might not be withheld from everyone. However Miss Dinah Rose QC, who appears for OFCOM, states that her client may well need to refer to that data in order properly to present its defence to one or more of the appeals. Therefore it appears unlikely to be a solution to the problem, at least so far as The Football Association Premier League's confidential information is concerned.

34. In any event, Mr. Mark Hoskins QC, representing Virgin, tells me that his client considers the additional undertaking by the BT lawyers, albeit in its primary form, to be necessary in order to protect Virgin's confidential information.

35. For the reasons I have given I do not consider that it is necessary, nor fair, reasonable or proportionate to require the additional undertaking, which is offered by BT alone, to be extended to cover future employment. This is the case regardless of whether Mr. Anderson's point about restraint of trade is a good one.

36. I consider that The Football Association Premier League and indeed any other party concerned about the risk of inadvertent disclosure of confidential data, must be content with the additional undertaking in its primary form.

37. My decision should not, I emphasise, be taken to indicate how I would have decided the matter if BT had taken a stand on there being no proper distinction to be drawn between its in-house lawyers and the external solicitors of other parties in relation to the undertakings to be given by members of the confidentiality ring. Thanks to a commendable spirit of compromise, that issue has not fallen for decision in this case.

Permission to appeal

MISS DAVIES: Sir, if I may raise one matter. Simply in relation to that ruling that has been made, given the importance of the information, I do make an application for permission to appeal. In our submission, it does raise an important point of principle where you cannot have appropriate ring-fencing in relation to in-house lawyers, or the two-tier approach that we suggested would be the alternative and for those reasons we do seek permission.

THE PRESIDENT: Does anyone want to comment?

MR. ANDERSON: I am not sure I want to comment, Sir, other than to oppose strongly the idea that at this very early stage of the proceedings we should all be off to the Court of Appeal. In our submission, there is nothing really in the point, it is an archetypal case management decision as to which the Court of Appeal is likely to say it is pre-eminently a matter for the Tribunal?

THE PRESIDENT: Anyone else? Mr. Harris?

MR. HARRIS: Sir, one slightly different point, I expect it will be in there anyway, but can I expressly ask for liberty to apply in respect of the confidentiality ring in the light of the fact that there are potentially in-house lawyers within my clients who may at some stage be in a similar position to the BT in-house lawyers.

THE PRESIDENT: Yes, Mr. Harris, I meant to mention in regard to your clients – if I did not mention it, I should have done, and I will add it to the ruling, and it is on the transcript – that you have indicated that, as the situation stands at the moment, you do not apply for your in-house solicitors to be part of the confidentiality ring and you are going to take a view on that and apply later, if necessary.

MR. HARRIS: Precisely, Sir, yes.

THE PRESIDENT: Therefore, the issue has not arisen. Miss Demetriou?

MISS DEMETRIOU: Sir, this may be implicit in what you have already said, but would you, please, in the order add us to the confidentiality ring since you have granted us permission to intervene in writing at least.

THE PRESIDENT: Yes, I think it is envisaged that all the external solicitors, plus the BT solicitors, subject to the additional undertaking, will be within the ring.

MISS DAVIES: Can I briefly respond to Mr. Anderson's point. This is not a run of the mill case management issue, certainly so far as my clients are concerned. Sir, as you identified in the judgment, potentially the consequences of the ruling are very damaging for my client and that is why – again, it is not an application that I make lightly – we do seek permission to appeal.

THE PRESIDENT: Miss Davies seeks permission to appeal the ruling which I have just made as to the extent of the additional undertaking which the BT in-house lawyers should provide as a pre-condition of their membership of the confidentiality ring. It seems to me that this is, *par excellence*, a discretionary matter of case management, and therefore I am going to refuse permission to appeal, both on the ground that it has no realistic prospect of success, and that I do not regard it as having any major point of principle at its heart which would justify an appeal in any event. Of course, the application can be renewed to the Court of Appeal within the appropriate time in accordance with the Civil Procedure Rules.

(For discussion after Ruling see Transcript of 25 June 2010)