



Neutral citation [2009] CAT 25

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1111/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

25 September 2009

Before:

VIVIEN ROSE
(Chairman)
THE HONOURABLE ANTONY LEWIS
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC

Appellant

- supported by -

BRITISH SKY BROADCASTING LIMITED

Intervener

-v-

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

RULING ON THE FUTURE COURSE OF PROCEEDINGS

APPEARANCES

Mr. Jon Turner Q.C. and Mr. Meredith Pickford (instructed by Osborne Clarke) appeared for the Appellant.

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward and Mr. Rob Williams (instructed by BT Legal) appeared on behalf of British Telecommunications Plc.

Mr. Stephen Wisking and Mr. John McInnes of Herbert Smith LLP appeared on behalf of British Sky Broadcasting Limited.

THE CHAIRMAN:

1. As it turned out this morning the main issue that we have to decide is the sequence in which further pleadings in this appeal are going to be lodged.
2. The parties differed in their suggestions for the correct order and timing of the pleadings. Carphone Warehouse and Sky suggested that the defence should be served and then the statements of intervention should be served together thereafter. OFCOM argued strenuously that Sky's statement of intervention should be served first so that the respondent could include in their defence all the issues which would be raised both in Sky's statement of intervention and in the notice of appeal. The defence would then be followed by BT's statement of intervention. BT took a slightly different view and suggested that the first step should be for Carphone Warehouse to clarify whether they wanted to make any amendments to their notice of appeal arising from the disclosure of the confidential information which is the subject of the confidentiality ring order which I will refer to later. They said that proposed amendments to the notice of appeal should come first, then Sky should serve their statement of intervention, then there should be the defence and then BT's statement of intervention.
3. Practical considerations were also discussed. OFCOM were very clear that they could not serve their defence before 23 October 2009 for the various reasons outlined in their skeleton submissions, though they had not given different dates depending on whether they have or have not seen Sky's statement of intervention before they serve their defence.
4. The first point is that we do not accept the suggestion by BT that we should set a deadline for Carphone Warehouse to examine the confidential information. They argued, as I have said, that Carphone Warehouse should bring forward any proposed amendments by a particular deadline. In our judgment it is unrealistic to expect that to work within a reasonable time scale, and it is not at all clear at the moment that there will in fact be any amendments that Carphone Warehouse wishes to make.

5. OFCOM, as I have said, did not argue for that step to be the first step although they did stress that it is very important that any amendments which do arise from the confidential information should be brought to the Tribunal as soon as possible, and Mr. Turner Q.C., appearing for Carphone Warehouse, of course accepted the need for promptness. Clearly promptness is a factor which will be relevant both to the other parties in deciding whether to oppose any amendments suggested, and to the Tribunal in deciding whether to grant permission for amendment in respect of any proposed amendments which are opposed. BT also argued in the alternative that they should have three weeks from the date of the defence in which to file their statements of intervention. Sky, as far as dates are concerned, said that they could not serve their statement of intervention before 23 October whether or not it is to be served before the service of the defence.

6. Our concern in this matter is that we should progress to the reference of the questions to the Competition Commission relating to the price control matters as soon as possible and that means in our judgment that the defence should come sooner rather than later. We are also concerned that if the statements of intervention cause issues to be debated as to what is their permissible scope this would lead either to further delay to the defence, or to a fragmentation of the pleadings which the sequence proposed by OFCOM is supposed to prevent.

7. Although OFCOM argued that it would be best for them to see the Sky statement of intervention so that they could deal with it in their defence, according to the Tribunal Rules the defence is intended to be an answer to the notice of appeal not to the statements of intervention. Rule 16 of The Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) instead envisages that the Tribunal can direct if appropriate the submission by the principal parties of a response to the statement of intervention. Given that there are so many unknown factors at play here, for example, whether there will need to be amendments to the notice of appeal, whether the statements of intervention will raise anything to which the appellant or OFCOM need to respond, in our judgment the best way forward is to direct that the sequence and the timing is as follows. The defence should be served by 23 October 2009, and BT and Sky shall lodge their statements of intervention in accordance with the provisions of Rule 16 by 6 November 2009. The Tribunal will then take stock as to whether a reply or response

to either statement of intervention is needed, and if and when any applications to amend a pleading are made we will deal with those and with any consequential directions as and when they arise.

8. On the question of disclosure, there appeared at the start of the CMC this morning to be an application before us by Carphone Warehouse for disclosure of the internal documents from OFCOM, on the basis that these might clarify what are alleged to be opaque parts of the decision. However, further on in the proceedings Carphone Warehouse said that they were not pursuing that today but would revisit the matter with proper notice once they have seen the defence and accompanying documents served by OFCOM. However, as we intimated during the course of argument, at the moment we see little value in the context of a merits appeal of a fully reasoned decision in seeing the internal deliberations of the decision maker. Either the reasoning is set out in the decision or, if it is not, and it can be clarified in the pleadings or submissions, then that can happen if the Competition Commission indicates that it does not understand what OFCOM has done or why. We do not at the moment see how a trawl through what is likely to be a very substantial volume of documents is likely to help the Competition Commission or us.
9. As to the question of the draft reference to the Competition Commission we would urge the parties to make progress with the draft questions and we will write to the parties with our comments. In our view the sooner we identify any issues that might need to be resolved by the Tribunal the better. It is now agreed on all sides that the actual reference should not be made at least until after the statements of intervention are served.
10. On the confidentiality ring order, we have undertakings in from OFCOM's external expert, the list of people acting for Carphone Warehouse, Sky's legal adviser, and BT's in-house legal team and their counsel, but not BT's experts. We will make the order today and order disclosure of the documents mentioned by 5pm on Tuesday 29 September 2009. If BT provides undertakings on Monday or Tuesday for their external experts we will make an order incorporating those people into the ring so they will catch up with the other parties. As we read the order we do not need to make an

order that the models are disclosed, they simply become “documents served hereafter” and therefore covered by the terms of the confidentiality ring.

11. We discussed the date for a possible two day hearing for the non-price control matters before the Tribunal, the Tribunal panel have compared their diaries and would suggest 1 and 2 December if that is convenient for the parties. We should also mention that we have pencilled in 20 November for a further case management conference if that is needed.