Neutral citation [2009] CAT 37

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1111/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

29 December 2009

Before:

VIVIEN ROSE
(Chairman)
THE HON 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

APPEARANCES

Mr. Meredith Pickford (instructed by Osborne Clarke LLP) appeared for the Appellant.

Mr. Rob Williams (instructed by BT Legal) appeared for British Telecommunications Plc.

1. In this appeal, the Appellant ("CPW") challenges a decision adopted by the Respondent ("OFCOM") setting a price control for various services offered by Openreach which is part of British Telecommunications plc ("BT"). The services are those which Openreach's customers, such as CPW, must buy from Openreach in order to gain access to the BT local loop. The price control is based on a complex model created by OFCOM during the course of its investigation into the provision of these services. That model is in turn based on, and incorporates, a large amount of information provided to OFCOM by BT.

2. At the start of this appeal, the Tribunal established a confidentiality ring which includes the legal advisers and external economic and other expert advisers to the parties. The entire model has been disclosed to that ring. CPW now applies to the Tribunal for an order allowing disclosure of the OFCOM model to Mr Andrew Heaney. Mr Heaney is the Executive Director, Strategy and Regulation at TalkTalk Group ("TTG"). TTG is a wholly owned subsidiary of CPW and is the part of the CPW undertaking which is most closely involved with the services which are the subject of this appeal. In both of his witness statements he states that in this role he is:

> "responsible for developing TTG's strategy and approach in key areas of regulation and public policy such as local loop unbundling ("LLU"), the undertakings given by [BT], next generation access ("NGA") and illegal filesharing".

3. CPW argue that because the substance of the appeal includes alleged defects in the model, or alleged inconsistencies between the model and the statements in the OFCOM decision, it is seriously hampered in the conduct of the appeal by the fact that Mr Heaney cannot see this information. BT opposes the disclosure of this information to Mr Heaney. It argues that this information is commercially sensitive and that CPW is an actual or potential competitor to Openreach. It argues that CPW has not established that there are good reasons in this case for the Tribunal to depart from its usual practice of ensuring that confidential information is restricted to the ring of the parties' external advisers.

Is the information confidential?

4. The first matter on which the parties differ is whether the information is really confidential at all. The model comprises seven linked spreadsheets. These consist of four large spreadsheets developed by Openreach and three smaller spreadsheets developed by OFCOM. Each of the seven spreadsheets is made up of numerous individual worksheets. In relation to two of the seven (the Price Calculations and the Ancillary Pricing spreadsheets), BT has already accepted that there is no confidentiality issue and these have been disclosed beyond the confidentiality ring. In relation to the other five, CPW only accepts that one of them, the CF Final spreadsheet, contains truly confidential information.

5. As to the four spreadsheets whose confidentiality is disputed (the Final RAV, the Oak Final, the Oak Final Ancillary and the Outputs 2003 spreadsheets), CPW says that on closer analysis there is no commercial value in this information and no reason not to disclose it to Mr Heaney.

6. Information about the content of the models was provided on behalf of BT in the witness statement of Ms Anne Heal. She explains that the Oak Final and Oak Final Ancillary spreadsheets provide a detailed breakdown of the cost stacks for the range of products supplied by Openreach, including products which are the subject of the appeal and products which are outside the scope of the appeal. These spreadsheets also provide a profit and loss account based on more up to date information than is in the public domain. This is not simply historic information but a forecast of the profit and loss over the coming four years. Ms Heal describes this information as strategically important and highly confidential. As to the Final RAV model, Ms Heal says that this contains detailed information relating to copper and duct access and costs. If disclosed this would provide Mr Heaney with an insight into the costs underpinning Openreach's and BT's future plans for next generation access. As regards the Output 2003 model, a hard copy of this has been made available outside the confidential ring, redacted to exclude information about products which are outside the scope of this appeal. BT queries why Mr Heaney needs to see a soft copy of the model or why he needs to see information about other products.

7. CPW's challenge to the claim for confidentiality was set out in Mr Heaney's second witness statement. He argues that CPW is in competition with Openreach only to a very limited extent and hence is unlikely to gain any commercial advantage from access to the information. So far as information about BT's costs is concerned, Mr Heaney asserts that information about BT's costs is only useful to a competitor insofar as it enables that competitor to predict what price BT is going to charge for its services. But since those prices are set by the price control and are firmly in the public domain, there is no need to examine cost information for this purpose. Further, given profound differences between the technology used by BT and CPW and between the state of their networks (so far as ducting is concerned), any information about the prices at which BT acquires its material is of no relevance to CPW's business. So far as competitors' volume information is concerned, Mr Heaney says information about ancillary services volumes would not be commercially useful to CPW, but he also proposes that it could be aggregated to conceal the identity of the operator to or to which type of migration it relates.

8. So far as profit and loss information is concerned, Mr Heaney says the majority of this is already in the public domain and that since only about 3 per cent of the total business of TTG is related to the supply of wholesale line rental in competition with Openreach, he cannot see how sight of this information would influence CPW's strategy setting for its business.

9. Having considered all the evidence and submissions of the parties, we are in no doubt that the model used by OFCOM to establish the price control contains confidential and commercially sensitive information which must, prima facie, be protected from disclosure. Because Openreach is the owner and operator of the local loop to which competing service providers must have access, a considerable amount of detailed information about its business must be provided to the regulator and some of that information is put into the public domain in OFCOM's published decisions. Much more information about the past and future direction of its business is available to the public than is the case for most other companies. But the information which we are considering here is information which the regulator has not put into the public domain. Indeed, one of the grounds of appeal in this case challenges OFCOM's refusal to provide CPW with this costs model during the

course of the investigation. The interest in protecting this information from disclosure is not simply the commercial interest of BT. There is a wider public interest in the maintenance of the competitive process which requires that detailed information about the breakdown of a company's costs, the volumes supplied, its profit and loss forecasts and other forecasts for its business over coming years is not disclosed to its actual or potential competitors. In our judgment, it is not appropriate to consider this issue simply on the basis of a static analysis of the current competitive relationship between CPW and Openreach. This is a fast moving sector and the information in the model relates to the next four years. We note Ms Heal's comment that she expects that BT Wholesale and CPW may compete increasingly going forward and that CPW is a potential competitor of BT in relation to services which fall outside the appeal but within the scope of the OFCOM model. We are concerned that disclosure of the detailed and comprehensive information contained in this model to CPW risks distorting the competitive process and giving CPW an unfair advantage over its rivals.

10. We therefore hold that the Final RAV, the Oak Final, the Oak Final Ancillary and the Outputs 2003 spreadsheets do contain confidential information which should ordinarily be protected from disclosure to CPW.

The test for ordering disclosure

11. The next question is whether, despite the fact that the spreadsheets contain BT's confidential information, they should be disclosed to Mr Heaney. The parties disagreed as to the test to be applied. Mr Williams, on behalf of BT, pointed to the practice of the Tribunal which frequently sets up confidentiality rings limiting disclosure to external advisers. There has only been one instance in which an executive of a party to proceedings has been given access to information. In the *National Grid* appeal (Case 1099/1/2/08), two employees of National Grid were admitted to the confidentiality ring upon giving undertakings that they would not be involved in the relevant part of National Grid's business for a period after the end of the appeal: see the transcript of the case management conference in that case held on 8 October 2008, page 7. It is not suggested here that Mr Heaney is able to give any such undertaking about removing himself from TTG once he has had sight of

the confidential information. Mr Heaney has, however, offered undertakings along the lines given by the members of the confidentiality ring and would be prepared to agree to additional constraints on his access to the information.

12. Mr Williams also referred to the decision of the President of the Tribunal in *BSkyB v Competition Commission* [2008] CAT 9 at paragraph 15 where he made it clear that disclosure even to external financial experts must be justified by showing that there is good reason why they need to see the information. He argued that, considering the Tribunal's previous practice concerning the handling of confidential information, the onus is on CPW to show that there are exceptional circumstances requiring disclosure of the model to an internal executive of the company.

13. CPW relied on an analogy with the practice of the Patents Court in relation to disclosure of information between parties to patent infringement cases. Mr Pickford, on behalf of CPW, took us to the decision of Laddie J in *Dyson Limited v Hoover Limited (No 3)* [2002] EWHC 500 ("*Dyson*"). That case concerned a claim for damages amounting to £27 million for patent infringement in which Dyson applied for an order withholding access to certain extremely commercial sensitive documents from certain named members of the defendant's managerial and financial personnel. Hoover argued that its lawyers could not take instructions on crucial issues from their clients both as to the evidence which needed to be adduced in the case and also in relation to the future conduct of the proceedings. The documents included a number which had been appended to a witness statement lodged by Dyson but which the Hoover personnel could not see. The judge held that the onus was on the party trying to restrict disclosure to show why, in all the circumstances, the documents should not be shown to the litigant on the other side. As the learned judge put it "… it is essential that the court puts in place procedures which allow the parties to litigate on an equal footing and with full knowledge of the materials before the court" (paragraph 33).

14. In our judgment, the analogy between the current appeal and the proceedings in the *Dyson* case cannot be pushed too far. *Dyson* concerned *inter partes* litigation where the party seeking disclosure had to defend itself against a claim for a very substantial amount of money. Disclosure and inspection of documents is the

standard procedure in such litigation. The difference is illustrated by the fact that Hoover argued that one of the reasons they needed to see the information was in order to decide whether to make an offer of settlement to Dyson and, if so, of how much. Here the appeal is not a commercial dispute between BT and CPW – there is no question of the parties settling the dispute between themselves. It is a challenge by CPW to a decision adopted by OFCOM in the exercise of their functions under the Communications Act 2003. In arriving at their regulatory decisions, OFCOM have gathered and had regard to large amounts of information from third parties through the exercise of their statutory powers. The issue here is not a matter of ensuring that parties to commercial litigation have "equality of arms" so that they are placed on an equal footing before the court. The question is rather how much confidential information provided to OFCOM by a third party for the purpose of OFCOM's regulatory function should be disclosed to the appellant in the course of this challenge. This is not in any way to belittle the importance of the appeal to CPW or the necessity of CPW being placed in a position where it is able properly to identify and explain defects it alleges in the OFCOM decision, particularly given that this is an "on the merits" appeal rather than a judicial review. But BT is not in the same position as Dyson which was pursuing a multi-million pound claim against Hoover and yet seeking to withhold key information about the basis of that claim. It was not inevitable that BT would be a party to these proceedings at all since it might have decided not to intervene.

15. There is a further important distinction between the current appeal and the procedure in the *Dyson* case. This appeal is brought under section 192 of the Communications Act 2003 and, since the grounds of appeal include price control matters, the procedure set out in sections 193 to 195 of that Act is engaged. The challenges arising from the content of the model are therefore included in the price control matters which have been referred by the Tribunal to the Competition Commission ("the Commission") for their determination: see the Tribunal's Order of 27 November 2009. The members of the Commission and their staff have six months during which they will investigate those matters and determine whether any of CPW's complaints are well founded. This rather unusual appeal mechanism whereby the issues in the appeal are split between the Tribunal and the Commission reflects the particular expertise that the Commission has in getting to grips with the

detail of complex cost models of the kind in dispute here. The procedures adopted by the Commission are very different from the procedures before a court or this Tribunal, in particular the Commission is much more proactive in identifying the issues it considers most relevant and seeking information it needs from the parties.

16. We do not therefore consider that BT needs to establish that exceptional circumstances exist in order to prevent this information being disclosed to Mr Heaney. We consider, in keeping with the comments of the President in the *BSkyB* case, that CPW must show good reason why Mr Heaney needs to see this material. Ultimately, it is for the Tribunal to balance CPW's need to be able properly to conduct its appeal against the need to protect confidential information in the particular context of these proceedings.

Does Mr Heaney need to see the model spreadsheets?

17. In our judgment CPW has not put forward any convincing reasons why it cannot properly conduct its case without Mr Heaney seeing this information. CPW made some specific submissions illustrating why it was hampered in relation to particular points and a more general submission that Mr Heaney was uniquely placed to understand the information in the models and hence identify defects or inconsistencies on behalf of CPW.

18. In its letter of 17 November 2009 in which it makes its application for disclosure, CPW sets out three particular examples where, it says, it would have been extremely helpful for Mr Heaney to have direct access to the model. In Mr Heaney's second witness statement he sets out a further example. We have considered the examples put forward and the points made in response by BT. It is clear that Mr Heaney has been the person within CPW who has provided much of the critique of the reasoning set out in the published decision and that this formed the basis of the grounds originally pleaded in the Notice of Appeal. When the model was disclosed to CPW's experts, those experts identified a number of additional points, in particular highlighting apparent inconsistencies between the reasoning set out in the decision and the way the model was in fact constructed.

This led to additional points being included by way of amendment in the Notice of Appeal – the new paragraphs 83.6 to 83.9.

19. In our judgment this illustrates that the confidentiality ring has worked entirely as it is intended to do. Mr Heaney is able to identify on behalf of CPW the grounds of challenge available to it on the basis of the published information and further information which has been disclosed in these proceedings outside the ring. CPW's experts are able to identify further grounds of challenge in the confidential information available to them. We recognise that the process whereby these experts and Mr Heaney have to liaise in order to formulate CPW's case in relation to the points where only the experts can see the full picture is more laborious and time consuming than it would be if Mr Heaney had access to the models. Having explained matters, CPW has to rely on the value judgments of these experts as to whether a potential point they have identified is material to CPW's case and worth pursuing. It may be that CPW has a residual concern that if Mr Heaney could see the information then he might take a different view from the experts. But in this CPW is really in no different position from many parties who appear before the Tribunal and who accept the burdens and benefits of a confidentiality ring which restricts them from access to the other parties' information but also protects their own information from access by those other parties.

20. CPW also refer more generally to the possibility that if he had sight of the information, Mr Heaney might be able to see points that escape its expert advisers. Dr Houpis is the external expert who has provided a witness statement explaining the points incorporated in the amendments to the Notice of Appeal. He describes his qualifications as follows:

> "I have more than 15 years experience advising regulatory authorities and operators on issues including fixed and mobile interconnection, regulation and costing of Next Generation Networks, broadband internet margins, retail and wholesale price control design and implementation, the application of the EU telecommunications regulatory framework, liberalisation strategies and market analysis."

21. CPW is also advised by Mr Hugh Kelly, a forensic accountant, who says in his witness statement that he has worked in the telecoms sector for over ten years and specialises in providing advice on regulatory accounting in telecoms and other

regulated sectors. Mr Kelly formerly worked as a Principal Financial Analyst at OFCOM. We do not think that the likelihood that points in the model will slip past Dr Houpis or Mr Kelly is sufficiently strong to override the importance of protecting the information contained in the model.

22. As we have explained, the points in contention here are matters that the Commission will investigate following the reference to them of the price control matters in this appeal. The members of the Commission and their expert staff will have access to all the information provided to the ring and will be able to discuss it with the parties' experts. Should it become apparent that a particular point cannot be fully explored without a particular item of information being disclosed to an internal person, there is scope for a much more focussed application for disclosure to be brought before the Tribunal at that stage. At present, we consider that the advantages to CPW of Mr Heaney having access to the whole model are speculative.

23. CPW made submissions concerning the changes that could be made to the information to overcome any concerns that BT had. The information in the CF Final spreadsheet, which CPW accepts for the purpose of this application is confidential, could be randomised by replacing the true figures with ones to which a random factor, within a specified range, was applied. This would remove any commercial value and yet still enable Mr Heaney to understand the structure and mechanics of the model. Certain information in the other spreadsheets could be aggregated without diminishing its value to Mr Heaney. CPW described these proposals as pragmatic and straightforward. But we consider that they generate a considerable amount of work for BT and it is entirely reasonable that BT would not be prepared to leave this task to CPW's experts to perform. There is also a risk that such an exercise would generate more disputes between these parties. We do not consider that CPW has established that such an exercise is justified.

The Tribunal therefore unanimously dismisses CPW's application for disclosure.

Vivien Rose Antony Lewis Arthur Pryor

Charles Dhanowa
Registrar Date: 29 December 2009