Neutral citation [2019] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1280/3/3/17

Victoria House
Bloomsbury Place
London WC1A 2EB

15 April 2019

Before:

THE HONOURABLE MR JUSTICE MANN
(Chairman)
DR CLIVE ELPHICK
ANNA WALKER CB

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

Heard at Victoria House on 15 April 2019

RULING (PERMISSION TO APPEAL AND COSTS)

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 (instructed by Jones Day) appeared on behalf of the Intervener.

1. We have considered carefully the application for permission to appeal and the various grounds which Viasat would seek to advance, were they given permission. We do not consider that any of them have a real prospect of success, particularly the one relating to dictionary definitions. In those circumstances, we refuse permission.

2. We have considered with particular care the impact of the Belgian reference to the European Court, but we do not in the circumstances consider that the existence of that reference is a reason for giving permission to appeal in relation to grounds which we do not consider, on the normal test, to have a real prospect of success. We therefore refuse permission.

3. Having dealt with permission to appeal in this matter, it now falls upon us to deliver a decision on costs. What follows is the decision and the reasons of the entire Tribunal on the question of costs.

4. There is no dispute as to the costs of Ofcom. It is accepted that Viasat will pay Ofcom's costs. The dispute is as to Inmarsat's costs. Inmarsat seeks its costs and Viasat disputes that it should pay any costs, and adopts a secondary position that if it should pay the costs it should only pay a proportion of them.

5. The starting point for the resolution of this dispute is the general practice of this Tribunal which is that interveners do not get their costs. If one followed that position in this case, Inmarsat would not get any of its costs. However, Inmarsat takes the view that it should have its costs because it is in the same position as, for example, the successful intervener in one of the cases to which we were taken, which was the case of *Aberdeen Journals Limited v The Office of Fair Trading (supported by Aberdeen Independent Limited)*, a decision given in this Tribunal on 18 September 2003, with the neutral citation number [2003] CAT 21.

6. We were taken to several other authorities, each of which was said to support the case of one party or the other, but I do not propose to refer to them in any detail, or indeed at all, other than the *Aberdeen* case.

7. We are satisfied that, first of all, the starting position was indeed made out - that is to say an intervener does not normally have its costs. However, we are also satisfied that this is a case in which the intervener should not only have its costs, it should have all its costs and not a proportion of its costs. That is principally for the following very brief reasons.

8. The first and main reason is that, unlike any of the cases to which we were taken, except perhaps the *Aberdeen* case, Inmarsat was a real target of the application of Viasat. It is not an entity which has some shared interest along with others in the business community in relation to the dispute; it was very much the target of what Viasat was seeking to do. If Viasat had been successful it would have brought to a grinding halt Inmarsat's activities in relation to its EAN system in this country, and conceivably more widely bearing in mind the extent to which EAN is supposed to be a Europe-wide system. It was a target not only for that reason, but also because it was the EAN which was targeted itself in Viasat's complaint about Ofcom's approval or authorisation of the system. That is the main reason, in our view, why Inmarsat should have its costs, and indeed all its costs, because it has been successful in seeing off what is effectively a challenge to its business model.

9. Furthermore, contrary to the submissions of Mr Bowsher, it did indeed contribute useful evidence. It did not add any matters to the proceedings by way of duplication, and we had detected a sensible approach in division of effort and submissions as between Ofcom and Inmarsat. So far as Mr Bowsher sought to rely upon what he said was a culpable failure of Inmarsat to supply relevant information, that was, to a very significant extent at least, dealt with in a previous application in these proceedings in which there was a ruling as to matters such as redaction. If Viasat had other complaints, it should have made other applications. Otherwise the matter was fought on the material which the parties chose to place before the Tribunal, and the fact that Inmarsat did not, as it did not, produce full details of its system or other evidence that Viasat would have liked to have seen is not in our view a reason for discounting in any way the costs to which we think Inmarsat would otherwise be entitled - that is to say 100 per cent of its costs, as being principally a target.

10. In other words, contrary to the submissions of Mr Bowsher, Inmarsat had a real and compelling business interest in participating in these proceedings as an intervener, and it was indeed a target.

11. In those circumstances, and for those reasons, therefore, we consider that Inmarsat should have its costs, and should have 100 per cent of its costs. Those costs will be assessed in the normal way.

12. We now have to do the exercise of assessing the payment on account. Mr Bowsher does not dispute this Tribunal has jurisdiction to order a payment on account, which means that we do not have to entertain any debate or make a decision about that.

13. Mr Bowsher urges upon us that the amount that we should order should be a safe amount, which is no more than, or perhaps less than, the amount which we assess is likely to be forthcoming on a taxation or a detailed assessment. While, of course, we have to have an eye on what the detailed assessment may be, the irreducible minimum test has, I think, at least in the High Court, been departed from.

14. Taking into account the observations made by Mr Bowsher, which we do, and looking at the size of this bill and forming our own view as to the sort of sums which may be awarded on a detailed assessment, we agree with Mr Bowsher that the right sum to award is less than 50 per cent of bill, but we may not go quite so far as Mr Bowsher would have wished us to go in going below that 50 per cent. We think the correct sum to be ordered as a payment on account is £400,000.

The Hon. Mr Justice Mann
Chairman

Dr Clive Elphick

Anna Walker CB

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

Date: 15 April 2019