



Neutral citation [2008] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1095/4/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

30 April 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Applicant

- and -

(1) THE COMPETITION COMMISSION
(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND
REGULATORY REFORM

Respondents

- and -

VIRGIN MEDIA, INC.

Intervener

Mr. James Flynn QC (instructed by Allen & Overy) appeared for the Applicant.

Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared for the Competition Commission.

Mr. Simon Priddis of Freshfields Bruckhaus Deringer appeared *de bene esse* for ITV plc.

Heard at Victoria House on 30 April 2008

RULING: APPLICATION TO EXTEND THE CONFIDENTIALITY RING

Note: Excisions in this judgment marked “[...][C]” relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002

THE PRESIDENT:

1. The background to this judgment is contained in my earlier judgment in this matter dated 23 April 2008, ([2008] CAT 7) with which the present judgment should be read.
2. By letters from its solicitors dated 23 and 25 April 2008 British Sky Broadcasting Group plc (“Sky”) seeks an extension to the confidentiality ring established by the Tribunal’s Order of 31 March 2008 in respect of two particular documents. These documents form part of the ITV plc (“ITV”) material which were disclosed to the parties’ external legal advisers within the terms of that confidentiality ring, pursuant to the Order which I made on 17 April 2008.
3. Sky seeks to have the names of two named external expert financial advisers added to the confidentiality ring, so as to be able to disclose the two documents in question to those advisers. The stated purpose of such disclosure is summarised by the letter of 23 April 2008 as follows “to seek the input of independent financial advisers in order to analyse the implications of ” the material and analysis contained in the two documents.
4. One of the documents is a memorandum from ITV’s own external financial advisers dated 24 August 2007 commenting on a memorandum by Sky’s financial advisers dated 15 August 2007 which contains views on ITV’s ability to finance acquisitions through debt and equity issuance between that time and the end of 2009. [...] [C]. It argues that since in August 2007 ITV sought its financial advisers’ comments on Sky’s advisers’ memorandum (which it says was done without the authority of the latter who had placed a limitation on the further circulation of the memorandum, which ITV did not respect) it is only right that Sky should in turn be able to show those comments to its financial advisers and seek their expert view on them.
5. The second of the two documents is ITV’s Supplemental Response to the Competition Commission relating to special resolutions of ITV’s shareholders. In the letter of 23 April 2008 Sky states that this document needs to be disclosed to the named financial experts so that they can be “aware of the factual basis upon which it appears that [ITV’s financial advisers] were instructed”.

6. The Competition Commission (“the Commission”), the Secretary of State for Business, Enterprise and Regulatory Reform, and Virgin Media, Inc. (“Virgin”) have all expressed concern that the application provides further evidence that Sky is seeking a review of the Commission’s Report and the Secretary of State’s decision on the merits rather than by reference to judicial review principles as required by section 120 of the Enterprise Act 2002. Nevertheless none of those parties contests the application and Virgin consents to it. The Commission and the Secretary of State suggested in correspondence that the matter could be resolved by the Tribunal on the correspondence without a hearing.
7. ITV, on the other hand, set out their objections to the further disclosure of these documents in a letter from their solicitors to the Tribunal dated 24 April 2008. Those objections are two-fold. First, the information is said by ITV to be of the highest possible level of sensitivity such that its disclosure to the financial community would be liable to cause significant harm to ITV’s legitimate business interests within the terms of paragraph 1(2)(b) of Schedule 4 to the Enterprise Act 2002, [...] [C]. Secondly, in ITV’s view, without casting any aspersions on the named financial advisers, there is no professional obligation on them which is equivalent to the obligations to which the parties’ external legal advisers are subject.
8. Sky responded to these points in its solicitors’ letter dated 25 April 2008, contesting the sensitivity and secrecy of the two documents, and taking issue with ITV’s concern as to the absence of professional obligations. However neither in this letter nor the earlier one does Sky explain why disclosure of the documents in question to Sky’s external financial advisers is required in order that Sky may properly put its case and that the Tribunal may justly hear the review application. In these circumstances a hearing was listed for today, in particular to enable Sky to expand on the need for the further disclosure sought.
9. At the hearing before me today, Mr. Flynn QC, appearing for Sky, reiterated that the application was a focused and limited one seeking disclosure only to the two named advisers. He expanded somewhat on the reasons why Sky wished to show the documents to those advisers. It was not that the lawyers did not understand the sense of what was being said in the documents, or that it was expressed in jargon that was obscure. He said that the lawyers advising Sky were competition lawyers, not experts

in capital market practice, and that Sky wishes to have the assistance of the named financial advisers as to the weight to be given to the evidence upon which the Commission relied.

10. As to the confidentiality of the material, Mr. Flynn accepted that some of it was confidential, although by no means all of it. He also accepted that, as it stood, Sky's application was based on an 'all-or-nothing' approach, i.e. it had not been thought appropriate to seek to focus on specific parts of the documents, in view of the time that that might take.
11. Mr. Priddis, whom I heard *de bene esse* on behalf of ITV, took me to some of the passages in the two documents to demonstrate why they were confidential and highly sensitive. [...] [C].
12. Both Mr. Beard, who appeared for the Commission, and Mr. Priddis emphasised that to disclose this kind of material beyond the existing confidentiality ring required a good reason and, in their view, the reasons given by Sky were somewhat obscure, and Sky had not shown a good reason.
13. In response to the points made by Mr. Beard and Mr. Priddis, Mr. Flynn reiterated that large parts of the documents were not in fact confidential. Rather than taking a line-by-line approach pointing out which parts were and which were not confidential, Sky had taken a more proportionate approach by selecting these particular documents and seeking to show them only to the named financial advisers, whose probity was not in doubt. He submitted that the material was such that absent the terms of the confidentiality ring, the lawyers would have wished to take instructions on it from their client as to its import.
14. I do not accept that the documents in question are less sensitive or less secret than ITV contends. They seem to me, as ITV says, to contain material at the highest level of sensitivity, containing as they do reference to information of a financial nature [...] [C], including ITV's own views of such matters. It is neither practicable nor sensible to embark upon a detailed consideration of how much of this information is within the public domain. Much of it would seem not to be and, indeed, Mr. Flynn very properly accepted that some of it was not. Nor do I consider that ITV's concerns about

disclosure of this kind of material to external financial experts are without foundation. No one suggests that the experts in question are not persons of the utmost integrity and highest professional standards. That is not the point. ITV's concern relates to the sense of the information getting into the financial markets. I do see a problem in that regard. Once financial experts have seen information relating to the financial circumstances and commercial plans of a company it will be extremely difficult, if not impossible, for them to "unlearn" it. They may be asked to give all kinds of advice in all kinds of circumstances to all kinds of people thereafter, when either consciously or unconsciously they will take account of what they have learned. Indeed, it is conceivable that they would be failing in their obligation to those they advise later if they did not take it into account where it was relevant. In that regard it seems to me that they are in a very different position from the external legal advisers who are inside the confidentiality ring.

15. However, the main problem with Sky's application for further disclosure is that, despite Mr. Flynn's valiant efforts to find some, there appears to be no good reason for it given the nature of review under section 120 of the Enterprise Act 2002, and the grounds of review relied upon by Sky. The ITV evidence upon which the Commission relied was ordered to be disclosed to the parties' external legal advisers within the terms of the agreed confidentiality ring because one of Sky's grounds of review is that, on the basis of the evidence before it, the Commission was not entitled to reach certain of the conclusions contained in its Report. The ITV evidence had clearly been relied upon by the Commission in arriving at those findings. Accordingly it was, in my view, right that that material should be disclosed to the external lawyers acting for Sky (and the intervener, Virgin) in order that they could make such points as were appropriate in relation to what, for brevity's sake, I might call the perversity or irrationality ground of challenge advanced by Sky. But I do not consider that for this purpose there is any need for the two documents in question to be disclosed to, and commented upon by, external financial advisers instructed by Sky. It is the Commission's conclusions which are said to be unsupported by the evidence of ITV which was before the Commission. Those acting for Sky now have access to that evidence. Either the ground of challenge is a good one, or it is not. That is really a matter for legal argument in the light of the contents of the ITV material. It is not appropriate for material of this nature to achieve wider circulation than is necessary for a fair trial of this application.

16. Accordingly, I do not consider that Sky has established that further disclosure of these documents is necessary or proportionate in order to secure the just, expeditious and economical conduct of the proceedings. The application is therefore refused.
17. Whilst the application was put to me on the basis of an ‘all-or-nothing’ approach, it is, of course, open to the parties and ITV to attempt to reach an arrangement by redacting the relevant documents in order to meet ITV’s concerns, whilst enabling Sky to take instructions from the named financial advisers.

The Honourable Mr Justice Barling
President of the Competition Appeal Tribunal

30 April 2008