

Neutral citation [2014] CAT 18

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1152/8/3/10 (IR)

Victoria House
Bloomsbury Place
London WC1A 2EB

12 November 2014

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N :

BRITISH SKY BROADCASTING LIMITED

Applicant / Respondent in the Interim Application

-v-

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC

Intervener / Applicant in the Interim Application

VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
TOP-UP TV EUROPE LIMITED

Interveners

EE LIMITED

Intervener in the Interim Application

RULING (COSTS)

APPEARANCES

Mr. Meredith Pickford (instructed by Herbert Smith Freehills LLP) appeared for British Sky Broadcasting Limited.

Miss Sarah Ford and Mr. Gerry Facenna (instructed by BT Legal) appeared for British Telecommunications PLC.

Mr. Simon Leathley (of the Office of Communications) appeared for the Respondent.

THE PRESIDENT:

1. There has been a short hearing this morning to finalise the terms of the order to be made by the Tribunal following the judgment in this application that was handed down on 5th November ([2014] CAT 17) (the “Judgment”). I appreciate the efforts made by the parties that resulted, I think just this morning, in agreement being reached between British Telecommunications Plc (“BT”) and British Sky Broadcasting Limited (“Sky”) as to material terms of the order. That has meant that this hearing has been much shorter than it would otherwise have been, although it does appear that it was necessary to arrange such a hearing in order to achieve rapid agreement.
2. The only remaining issue is the application by the Office of Communications (“Ofcom”) for the costs of its attendance at the hearing. Those costs are set out in a statement of costs served by its general counsel, and amount to some £8,000 plus VAT. They are therefore a metaphorical drop in the ocean of what I imagine are the total costs of the underlying application to vary the Interim Relief Order.
3. Ofcom attended the hearing not to take any position either for or against the application, but in order to assist the Tribunal. That assistance was indeed helpful since Ofcom was able, through counsel, to explain the position under two current investigations or proceedings which it is undertaking relating, first, to a review of the WMO remedy and, second, to the complaint submitted by BT under the Competition Act 1998 (see paragraphs [36] to [42] of the Judgment).
4. I therefore think it was entirely appropriate for Ofcom to be represented at the hearing. That being the case, I do not think it is right that the regulator should have to bear its own costs. Mr. Pickford, appearing for Sky, suggested that the starting point for Ofcom’s costs should be analogous to a respondent who appears on a permission application in the Court of Appeal, where such attendance is not required. I do not accept that analogy. Ofcom is appearing as the regulator pursuant to its public role and is there to assist the Tribunal on an application which, as the judgment makes clear, had to be determined in the public interest and not simply as a dispute between the two private parties.

5. The question, therefore, arises: who should bear Ofcom's costs? If this application had been agreed, no hearing would have been required. It was not agreed. There was, therefore, a hearing. Sky has lost, and it follows, in my judgment, that it is for Sky, rather than the successful party, to bear the costs of Ofcom's attendance.
6. Those costs, as I have indicated, are modest, and Mr. Pickford very properly does not take any issue with the amount. I shall, therefore, order that Ofcom's costs are paid by Sky, and I summarily assess those costs in the amount asked for, namely £8,112.51 plus VAT if Ofcom is unable otherwise to recover the VAT by way of deduction.

The Honourable Mr Justice Roth
President

Charles Dhanowa
Registrar

Date: 12 November 2014