



[2016] CAT 1

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1246/8/3/16

B E T W E E N:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

SKY UK LIMITED

Intervener

ORDER
(CONFIDENTIALITY RING)

UPON reading the correspondence from the parties to this appeal and from the Football Association Premier League relating to the establishment of a confidentiality ring and the disclosure into that ring of a non-confidential version of Ofcom’s statement dated 19 November 2015 and entitled “*Review of the pay TV wholesale must-offer obligation*” (the “2015 Statement”)

AND UPON hearing the parties at a case management conference (“CMC”) on 18 February 2016 at which Sky UK Limited (“Sky”) was given permission to intervene

IT IS ORDERED THAT:

1. This Order becomes effective in respect of each of the persons named in Part A of the Schedule to this Order only upon receipt by the Tribunal of a signed undertaking in the terms of either Part B(i) or B(ii) of the Schedule to this Order.
2. For the purposes of this Order:
 - a. “**Confidential Information**” is defined as information justifying confidential treatment by the Tribunal in accordance with rule 101 of the Competition Appeal Tribunal Rules 2015 which is contained in (i) the full un-redacted versions of the parties’ pleadings and other documents served on the Tribunal which has not, prior to the making of this Order, been disclosed to all other parties in the non-confidential versions of pleadings and other documents thus far served, and/or (ii) any documents served or disclosed hereafter.
 - b. “**Relevant Advisers**” are those persons:
 - i. listed in Part A(i) of the Schedule to this Order who have given a signed undertaking to the Tribunal in the terms of Part B(i) of the Schedule to this Order;
 - ii. listed in Part A(ii) of the Schedule to this Order who have given a signed undertaking to the Tribunal in the terms of Part B(ii) of the Schedule to this Order; or
 - iii. authorised by the Tribunal upon further application.
3. By 5pm on 25 February 2016, Ofcom serve on the parties a partially un-redacted version of the 2015 Statement on the basis that:
 - a. the following information in the 2015 Statement shall remain redacted:
 - i. the information confidential to the Football Association Premier League and/or to Sky contained in paragraph 5.41 and sub-paragraphs (i), (ii) and (iii), including footnotes 184-185;
 - ii. the information confidential to Sky contained in paragraph 5.42 and footnote 186;
 - iii. the information confidential to ITV in footnote 372;
 - iv. the information confidential to the third party that has requested not to be named in these proceedings contained in paragraphs 2.8, 2.10, 4.16, 5.11, 5.58, 5.72, 6.9, 6.13, 6.70, 6.71, A1.8, A1.16, A1.26, A1.32,

A2.36, A2.2, A2.38 (first and second bullets), A2.39, A2.40, A2.44 (fourth bullet), A2.47 and A2.66; footnotes 130, 153, 201, 214, 222, 231, 300, 334, 342, 354, 375, 414, 415, 417, 419 and 444;

- v. the amounts spent on sports rights by each individual broadcaster in Figure 3.4;
 - vi. the percentages corresponding to the total expenditure on individual sports rights other than football in Figure 3.5;
 - vii. information confidential to ESPN and Setanta in paragraphs A2.14(a) and A2.58 and Table 5.1;
 - viii. the information confidential to TalkTalk Telecom Group in paragraphs 6.61, 6.30 (first bullet), 6.32 (first sentence and second bullet); 6.53, 6.55, 6.56, 6.58, 6.61 and A3.3; footnotes 254, 292 and 293; and tables 6.1, 3.3, 3.8 and 3.9; and
 - ix. the information confidential to Virgin Media contained in paragraphs 1.24 (second bullet); 5.22 (third bullet); 6.32 (first sentence and third bullet); 6.48, 6.53, 6.55, 6.56, 6.57, 6.58, 6.61, 6.63, 6.68, A1.27, A2.3, A 2.24, A2.37 (third bullet) A2.44 (third bullet), A3.3, A3.7, A3.9, A3.10, A3.11, footnotes 6, 174, 276, 292, 293, 315, 452 and Tables 3.3, 3.8, 3.9 and 6.1;
 - x. the third party confidential information included in paragraphs 1.24, 3.35, 6.21, 6.30 and footnote 99
- b. any Confidential Information contained within that document shall be disclosed only to the Relevant Advisers listed in Part A of the Schedule to this Order and who have signed an undertaking to the Tribunal and to the parties in the terms of Part B(i) or B(ii) (as the case may be) of the Schedule to this Order.
4. By 5pm on 25 February 2015 Ofcom serve on the parties (in the case of BT, serve by way of service on a Relevant Adviser nominated by BT who is listed in Part A(i) of the Schedule to this Order and who has signed an undertaking to the Tribunal and to the parties in the terms of Part B(i) of the Schedule to this Order) a further partially un-redacted version of the 2015 Statement, on the basis that:
- a. the information referred to in paragraphs 3.a.viii to 3.a.x is un-redacted;
 - b. the information referred to in paragraphs 3.a.i to 3.a.vii remain redacted; and
 - c. any Confidential Information contained within that document shall be disclosed only to the Relevant Advisers listed in Part A(i) of the Schedule to this Order and

who have signed an undertaking to the Tribunal and to the parties in the terms of Part B(i) of the Schedule to this Order.

5. Subject to any further ruling of the Tribunal or agreement amongst the parties concerning Confidential Information within any document provided pursuant to a disclosure request, each of the parties shall hereafter disclose to the other parties un-redacted versions of their pleadings and other documents served in these proceedings on the condition that, save in respect of Ofcom employees, such un-redacted versions and any Confidential Information contained within those pleadings and documents shall be disclosed only to the Relevant Advisers listed in Part A of the Schedule to this Order and who have signed an undertaking to the Tribunal and to the parties in the terms of Part B(i) or B(ii) (as the case may be) of the Schedule to this Order.
6. All such un-redacted versions of pleadings and other documents served in these proceedings must be marked so as to indicate the parts in relation to which confidential treatment is claimed, in the manner referred to in paragraph 7.46 of the Tribunal's Guide to Proceedings 2015.
7. In the case of pleadings and other documents served thus far in the proceedings, the Appellant shall comply with paragraph 5 of this Order by 5pm on 25 February 2016.
8. If any party wishes to add any additional person as a Relevant Adviser for the purposes of paragraph 2(b) of this Order, they shall apply to the Tribunal indicating whether each of the other parties consents or does not consent to the addition of that person.
9. There be liberty to apply.

REASONS

1. BT and Sky have been unable to reach agreement on certain aspects of the confidentiality arrangements in these proceedings. The points in dispute were: (i) whether or not the confidential information pertaining to Sky in paragraph 5.42 and footnote 186 should be redacted from the confidential version of the 2015 Statement that Ofcom will disclose pursuant to this Order; and (ii) the scope of the restrictions set out in paragraph 11 of Part B(ii) of the Schedule to this Order pertaining to the activities of BT's in-house solicitors who are admitted to the confidentiality ring.

Redaction of confidential information pertaining to Sky in paragraph 5.42 and footnote 186

2. The Tribunal has decided that it is appropriate to redact this confidential information from the version of the 2015 Statement that Ofcom will disclose pursuant to this Order. As indicated at the CMC, at this point the priority is to establish a

confidentiality ring so that information can be disclosed into the ring and the case can proceed. Caution should prevail in the situation where the party claiming confidentiality has indicated that the information is highly commercially sensitive and disclosure is to a close competitor, as is the case here. Moreover, as noted at the CMC, a staged approach to disclosure is in any event appropriate in this case, and BT is not precluded from making a further reasoned application for disclosure in due course. If there is such a further application, the Tribunal will be in a position to take an informed decision, which moreover takes into account the views of other parties such as the Football Association Premier League (whose solicitors wrote to the Tribunal highlighting the concern that this information might be confidential to the Premier League, as well as to Sky). In the meantime, this should not hold up the establishment of the confidentiality ring and the disclosure of a confidential version of the 2015 Statement.

Restriction applicable to BT's in-house solicitors admitted to the confidentiality ring

3. At the CMC I indicated that the restrictions pertaining to the activities of BT's in-house solicitors set out in the Tribunal Order dated 29 June 2010 in Cases 1156-1159/8/3/10 (the Pay TV Litigation) should form the starting point for the agreement of appropriate restrictions in these proceedings.
4. In 2010, BT's in-house solicitors admitted to the confidentiality ring undertook not to have any involvement in the consideration or formulation of commercial strategy or policy *in relation to BT Vision*.¹ This restriction applied for the duration of the proceedings and a further period of three years² from their final conclusion. In these proceedings, BT contends that a narrower restriction is appropriate, namely a prohibition on the involvement of in-house solicitors in the consideration or formulation of commercial strategy or policy only *in relation to the acquisition and exploitation of sports rights, or any other matters in relation to which the confidential information is relevant*.
5. At the CMC BT explained that it has limited resources in terms of lawyers that are available to deal with the many matters that it has to deal with and that the wider restriction raised real practical problems. BT also pointed out that BT's in-house solicitors are professionally regulated in the same way as external lawyers, who may also have long-standing and close relationships with particular clients; therefore the narrower restriction would be sufficient to deal with Sky's concerns.
6. Sky illustrated their concerns by way of the following example. The confidential version of the 2015 Statement covers matters such as Sky's wholesale pricing of its channels to BT's competitors. BT's formulation of the restriction would allow its in-

¹ 'BT Vision' is now known as 'BT TV'.

² In these proceedings, the three year period has been reduced to two years.

house solicitors to advise the business on commercial strategy and policy provided the solicitor had formed the view that the confidential information they had obtained was not relevant to that activity.

7. The Tribunal accepts, of course, that in-house solicitors are professionally regulated in the same way as external solicitors. However, in our view, BT's formulation of the restriction potentially puts the in-house solicitors admitted to the ring in the difficult position of having to determine the relevance of the confidential information they have obtained in the context of these proceedings to the areas in which they are asked to advise. This may be problematic because the relevance of their knowledge may not be apparent at the point in time at which their advice is requested, and it is likely to be difficult for them to withdraw their involvement at a later stage. It is preferable that this situation is avoided. The Tribunal is also not persuaded that BT's legal resources are such that the approach creates real practical difficulties; no concrete examples of such difficulties were provided. If these do arise, there is liberty to apply.

Peter Freeman CBE QC (Hon)
Chairman of the Competition Appeal Tribunal

Made: 24 February 2016
Drawn: 24 February 2016

SCHEDULE

PART A

This part contains the names, for each party, of Relevant Advisers:

PART A(i)

British Telecommunications Plc

External Counsel

Jon Turner QC (of Monckton Chambers)

Gerry Facenna QC (of Monckton Chambers)

Sarah Ford (of Brick Court Chambers)

Nikolaus Grubeck (of Monckton Chambers)

External Experts

Greg Harman (FTI Consulting)

Dr Jorge Padilla (Compass Lexecon)

Neil Dryden (Compass Lexecon)

Laura Phaff (Compass Lexecon)

Lau Nilausen (FTI Consulting)

Kadambari Prasad (Compass Lexecon)

Alejandro Requejo (Compass Lexecon)

Scott Morison (FTI Consulting)

Mark Bosley (FTI Consulting)

Patricia Lorenzo (Compass Lexecon)

Office of Communications

External Counsel

Josh Holmes (of Monckton Chambers)

Jessica Boyd (of Blackstone Chambers)

Sky UK Limited

External Counsel

James Flynn QC (of Brick Court Chambers)

Meredith Pickford QC (of Monckton Chambers)

External Solicitors

Stephen Wisking

Andrew North

Joe Williams

Juliana Penz (all of Herbert Smith Freehills LLP)

External Experts

Dr Cristina Caffarra

Dr Valter Sorana

Dr Pierre Régibeau

Dr Helen Weeds (all of Charles River Associates)

Liam Colley (of AlixPartners)

Prof John Van Reenen (of the London School of Economics)

PART A(ii)

British Telecommunications Plc

In-house Solicitors

Beatrice Roxburgh

Louise Rason

PART B(i)

In respect of any Confidential Information disclosed to them pursuant to this Order, each Relevant Adviser undertakes that they will comply with the following requirements in the following terms:

I, [NAME] of [FIRM, COMPANY OR ESTABLISHMENT] being [LEGAL OR OTHER QUALIFICATION] and regulated so far as my professional conduct is concerned by [REGULATORY BODY, IF ANY] undertake to the Tribunal and each of the parties as follows:

1. I have read a copy of the Tribunal's Order of [date] ("the Tribunal's Order") and understand the implications of that Order and the giving of this undertaking.
2. Save in respect of provision to the Tribunal, I will not disclose the Confidential Information (as defined in the Tribunal's Order) to any person who is not an Office of Communications ("OFCOM") employee or a Relevant Adviser (as defined in the Tribunal's Order) without the express consent of the party originally disclosing the information or the permission of the Tribunal.
3. I will use the Confidential Information only for the purpose of these proceedings and for the purpose of no other current or future proceedings, dispute, complaint, or other use whatsoever without the express consent of the party originally disclosing the information or the permission of the Tribunal.
4. The pleadings and documents containing the Confidential Information will remain in my custody or the custody of another Relevant Adviser or OFCOM at all times and be held in a manner appropriate to the circumstances so as to prevent unauthorised access.
5. The production by me of further copies of the documents containing the Confidential Information shall be limited to those strictly required for the use of the Relevant Advisers for the purpose of these proceedings and shall be held in accordance with paragraph 4 of this undertaking.
6. Any and all copies and the pleadings and documents in paper form containing the Confidential Information will be returned to the party originally disclosing the pleading or documents or destroyed by the receiving party at the conclusion of the present proceedings; any copies of the pleadings and the documents containing the Confidential Information in electronic form will where possible be returned or where that is not

possible will be rendered inaccessible from any computer systems, disk or device so that the Confidential Information is not readily available to any person.

7. Save that none of the requirements listed at paragraphs 2 to 5 above shall prevent Relevant Advisers from disclosing to a person advised by them Confidential Information which such person has already legitimately seen.

Signed:

.....

Name

.....

Date

PART B(ii)

In respect of any Confidential Information disclosed to them pursuant to this Order, each Relevant Adviser undertakes that they will comply with the following requirements in the following terms:

I, [NAME] of [FIRM, COMPANY OR ESTABLISHMENT] being [LEGAL OR OTHER QUALIFICATION] and regulated so far as my professional conduct is concerned by [REGULATORY BODY, IF ANY] undertake to the Tribunal and each of the parties as follows:

1. I have read a copy of the Tribunal's Order of [date] ("the Tribunal's Order") and understand the implications of that Order and the giving of this undertaking.
2. Save in respect of provision to the Tribunal, I will not disclose the Confidential Information (as defined in the Tribunal's Order) to any person who is not an Office of Communications ("OFCOM") employee or a Relevant Adviser (as defined in the Tribunal's Order) without the express consent of the party originally disclosing the information or the permission of the Tribunal.
3. I will use the Confidential Information only for the purpose of these proceedings and for the purpose of no other current or future proceedings, dispute, complaint, or other use whatsoever without the express consent of the party originally disclosing the information or the permission of the Tribunal.
4. The pleadings and documents containing the Confidential Information will remain in my custody or the custody of another Relevant Adviser or OFCOM at all times and be held in a manner appropriate to the circumstances so as to prevent unauthorised access.
5. The production by me of further copies of the documents containing the Confidential Information shall be limited to those strictly required for the use of the Relevant Advisers for the purpose of these proceedings and shall be held in accordance with paragraph 4 of this undertaking.
6. Any and all copies and the pleadings and documents in paper form containing the Confidential Information will be returned to the party originally disclosing the pleading or documents or destroyed by the receiving party at the conclusion of the present proceedings; any copies of the pleadings and the documents containing the Confidential Information in electronic form will where possible be returned or where that is not

possible will be rendered inaccessible from any computer systems, disk or device so that the Confidential Information is not readily available to any person.

7. Save that none of the requirements listed at paragraphs 2 to 5 above shall prevent Relevant Advisers from disclosing to a person advised by them Confidential Information which such person has already legitimately seen.
8. Hard copies of any documents containing Confidential Information shall be held in a filing system that is locked and unable to be accessed by anyone other than me or a Relevant Adviser at any time so as to prevent unauthorised access; and
9. Electronic copies of any documents containing Confidential Information shall be stored and transmitted in such a way as to be inaccessible by electronic means by anyone within BT other than a Relevant Adviser;
10. My activities in relation to BT TV and any other television service that is or may be offered by BT whether on its own or in conjunction with any other party (“BT Television”), will for the duration of these proceedings and a period of two years from their final conclusion by a judgment from any final competent court of appeal (“the Relevant Period”) be limited to the conduct of these and any directly related proceedings, and to the provision of legal advice on competition and regulatory matters unconnected to the subject matter of these proceedings, but not including any future actual or contemplated investigation by Ofcom, or any other regulatory authority or any actual or contemplated litigation by any party relating to the sale of the audiovisual rights to any sporting event(s) or competition(s), save with the written consent of the party whose information is relevant to the new matter, which consent shall not be unreasonably withheld. In the event of a dispute concerning this paragraph the parties will have liberty to apply for a direction from the Tribunal.
11. During the Relevant Period, I will have no involvement (whether by the giving of legal advice or otherwise) in the consideration or formulation of commercial strategy or policy in relation to BT Television. In addition, for the Relevant Period and for two years thereafter, I will not advise BT in relation to any actual or potential sale, acquisition or use of sports audiovisual rights by BT Television, including specifically the following in relation to sports rights:
 - a. Any future Invitations to Tender issued by sports rights holders in relation to any sports audiovisual rights; and

- b. Any bid submitted or considered by BT Television in relation to the sale of any sports audiovisual rights.

Signed:

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Name

.....

Date