Neutral citation [2021] CAT 33

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1380/1/12/21

4 November 2021

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chairman)
BRIDGET LUCAS QC
PROFESSOR DAVID ULPH CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BGL (HOLDINGS) LIMITED
(2) BGL GROUP LIMITED
(3) BISL LIMITED
(4) COMPARE THE MARKET LIMITED

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 4 November 2021

RULING (CONFIDENTIALITY)

APPEARANCES

Mr Daniel Beard QC and Ms Alison Berridge (instructed by Linklaters LLP and TLT LLP) appeared on behalf of the Appellants.

Ms. Marie Demetriou QC and Mr Ben Lask and Mr Michael Armitage (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

1. We have before us an application that part of these proceedings, which are for the usual (and obvious) reasons being heard in public, which is the default, go into private session.

2. The application is made by Mr Beard, QC, leading counsel for the Appellants, who will be cross-examining a witness called by the Respondent to this appeal, the Competition and Markets Authority ("CMA"). The reason why Ms Glasgow, the witness, needs to be cross-examined in private session is because of the confidentiality regime that has been put in place to protect confidential material in the documents that form part of the Tribunal's record in this case.

3. The difficulty that has been articulated is this. In the course of opening submissions, counsel for both sides have very skillfully, and on the whole successfully, navigated the confidential material by using code references as a proxy for confidential terms, or by directing the Tribunal to read to itself confidential passages. It is entirely unfair to expect a witness, who is seeking to give evidence in what can only be described as a stressful environment, to have in mind this confidentiality regime.

4. That unfairness – or potential unfairness – to a witness must be avoided. Ms Glasgow needs to be in the best position to give her evidence, and that includes removing from her mind the concern that she might misspeak and inadvertently refer to confidential material.

5. This is both the starting point and the end point for this application. The question before us is how best this can be achieved in the context of the facts of the present case. The objective, as we have noted, is clear: Ms Glasgow must be unconstrained by worries of confidentiality. The resolution of that objective is less clear. Either the confidentiality regime needs to be removed or we need to go into private session.

6. Our strong preference would be to not go into private session but to lift the confidentiality regime. The reason for that statement has become very clear over the last few days. What has become clear is that the CMA, entirely understandably, has sought, during the course of its investigations which culminated in the Decision under appeal, to assuage the concerns of the third parties that it has been interviewing and

speaking to, by indicating that significant protection would be given by it to all kinds of material in the documents, just to encourage persons to speak in an uninhibited way with the CMA. One can understand exactly why that course was taken. The fact is that, although the CMA has significant enforcement and compulsion powers in regard to the obtaining of evidence, entirely wisely, it prefers to rely upon the voluntary good offices of those that it speaks to.

7. We can quite appreciate why, in the course of its investigations, the CMA would say to a third party it was interviewing: "Do not worry, your names will not be used in public, do not worry about the information you provide, we will ensure that it is kept under wraps." The result, of course, is that a confidentiality regime is created, during the course of the investigation, that is exceedingly broad-brush. It is human nature, when a third party is offered a wide confidentiality protection, that they tend to accept what is on offer, and then seek to maintain it.

8. The problem is that when one comes to trial – here, an appeal of the Decision supported (in part) by this confidential information – a wide confidentiality regime is entirely at odds with, by which we mean prejudicial to and inconsistent with, the principle of open justice. For the future, a significant reassessment of the confidentiality regime needs to be undertaken by the CMA at the moment that an appeal against any decision that it makes is launched. At that point, the parties (that is, the party or parties appealing the decision and the CMA) must ensure that the confidentiality regime that applies is appropriately calibrated by reference to what is going to take place, if the appeal is heard, in court. That will involve, we are satisfied, a substantial narrowing of what can be subjected to a strict regime of confidentiality.

9. In short, the confidentiality regime will have to be dramatically curtailed and confined to that which is materially damaging to third parties. The confidentiality regime cannot and must not be informed by nothing more than a subjective desire to keep names and figures and other material out of the public domain, unless that desire is supported by a clearly and specifically articulated reason why the release of this material will cause harm. Unless that reason can be articulated clearly and specifically, and need for confidentiality maintained, if necessary supported by evidence, and the harm identfied is a material one, then the material cannot and should not continue to be confidential in

the proceedings. Rather, the material should be available for the responsible legal teams that appear before the Tribunal to use as they consider fit in order to advance the case of the party that team is representing. That fact, we consider, should provide considerable comfort to any third party concerned about confidential information. The legal teams who generally appear in this Tribunal are well-versed in the fact that more often than not the material they handle is highly confidential, and that such confidentiality should be respected unless overridden by the clearly prior need to put their case – which case, as we have said, should be heard in public.

10. That is for the future, and we say it to ensure that we do not get a situation like this again.

11. For the purposes of the application before us today, we cannot, without a substantial adjournment – and we are not going to adjourn – seek to draw a difference between "confidential" material that is not really confidential and confidential material that is. It would be unfair to Mr Beard to require him, on the hoof, during the course of his cross-examination, to make that assessment.

12. So, and with considerable reluctance, when Mr Beard indicates, we will go into private session, and Ms Glasgow will then give her evidence in private.

13. We will, thereafter, review the transcript of the evidence that Ms Glasgow gives, and we will publish it on the tribunal's website with redactions, if appropriate. Those redactions, we stress, will be on the basis of the confidentiality regime that we would have liked to have had in place, rather than the confidentiality regime that is in place at the moment. That is something which we can deal with after the event, and I am sure that both legal teams will assist in ensuring that the widest proper dissemination of material occurs.

The Hon Mr Justice Marcus Smith Bridget Lucas QC Professor David Ulph CBE

Chairman

Charles Dhanowa OBE, QC (*Hon*) Date: 4 November 2021
Registrar