Neutral citation [2026] CAT 62

Case No: 1771/7/7/26

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 July 2026

Before:

BEN TIDSWELL
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

MR JEREMY NEWMAN

Proposed Class Representative

- v -

(1) RIGHTMOVE PLC
(2) RIGHTMOVE GROUP LIMITED

Proposed Defendants

Heard at Salisbury Square House on 16 July 2026

RULING (DISCLOSURE)

APPEARANCES

Rob Williams KC and Ciar McAndrew (instructed by Herbert Smith Freehills Kramer LLP and Linklaters LLP) appeared on behalf of the Proposed Defendants.

Oscar Schonfeld and Greg Adey (instructed by Scott + Scott UK LLP) appeared on behalf of the Proposed Class Representative.

CONTENTS

A. INTRODUCTION

1. The Proposed Class Representative (**PCR**) seeks to bring collective proceedings against the Proposed Defendants (**Rightmove**) on an opt-out basis on behalf of a class of real estate agents estimated to number around 7,200. The CPO application is listed for hearing in November.

2. Rightmove has applied under rule 53(2)(l) of the Competition Appeal Tribunal Rules 2015 (the **Rules**) for disclosure of specific documents which Rightmove says are subject to a waiver of privilege. That application is resisted by the PCR.

3. The application arises from references in the witness evidence supporting the CPO application:

   (1) In his first witness statement, Newman 1, the PCR refers to discussions with some proposed class members (**PCMs**) and says:

   > "In the course of these interactions, it has become apparent that the vast majority of such PCMs have only been willing to provide information to me and my team on the understanding that their identity will not be revealed and the information will be treated as confidential. These PCMs have expressed a concern that they might face retaliatory conduct from Rightmove or that their commercial relationship with Rightmove would be jeopardised should their name be made public or associated with the Claim. In those circumstances, I believe it is likely that having publicly to opt-in to a claim would deter a significant proportion of PCMs from seeking to take legal action against Rightmove notwithstanding the evidence of dissatisfaction amongst the PCMs"

   (2) James Hain-Cole, a partner in the firm instructed by the PCR, has given a witness statement (**Hain-Cole 1**) which also refers to discussions with PCMs and says of those who were not willing to provide witness statements to support the application:

   > "The remaining PCMs declined, with a significant number citing a concern about the potential impact such a step might have on their ongoing business relationship with Rightmove, including the risk of adverse commercial consequences. These concerns were expressed notwithstanding an eagerness to support the Claim via the provision of anonymised factual input to the PCR and his advisers that is the subject of this statement".

4. In this ruling, I will refer to the concern identified in these extracts as one of retaliation, although it should be noted that the extracts contemplate a broad

range of commercial consequences. I should also record that Rightmove rejects any suggestion that it would engage in retaliation of any sort.

5. The PCR's claim form refers to the risk of retaliation in [45.5] and [58.5] as one of a number of factors which would justify the Tribunal certifying opt-out rather than opt-in proceedings.

6. The Draft order sought by Rightmove seeks disclosure in the following terms:

> "1(a) Any document containing or concerning communications between a PCM and the PCR […] which was in existence at the point at which the CPO Application was filed, and that is relevant to whether the PCM feared retaliation by [Rightmove] (including but not limited to any written communications with the PCM including emails, and any record of oral communications including attendance notes of meetings).
>
> 1(b) Any document containing or concerning communications between a PCM and the PCR […] which was in existence at the point at which the CPO Application was filed, and that is relevant to the number or proportion of PCMs that may fear retaliation by [Rightmove] (including but not limited to any written communications including emails, and any record of oral communications including attendance notes of meetings)."

7. Item 1(b) is said by Rightmove primarily to address the question of how many PCMs the PCR has communicated with about the collective proceedings, regardless of whether concerns about retaliation were discussed, as item 1(a) would only provide details of the number of PCMs with whom that concern was directly discussed.

B. THE ARGUMENTS OF THE PARTIES

(1) Rightmove's submissions

8. Rightmove says that the PCR has expressly referred to communications with PCMs in the witness evidence supporting the CPO application. While Rightmove accepts that these may be subject to litigation privilege, it says that the references are positively relied on by the PCR to advance his case that certification should be on an opt-out basis. Given the generalised and uncertain nature of the references (Rightmove highlights the shifting description of the size of the group of PCMs involved), Rightmove says it would be unfair for the

Tribunal to certify opt-out collective proceedings on the basis of a partial picture of PCM views which cannot be tested.

9. On that basis, Rightmove argues that the PCR has waived privilege in the communications with the PCMs and the documents recording those should be disclosed.

(2) The PCR's submissions

10. The PCR says that he was not in his witness statement asserting the concerns of any particular number or proportion of PCMs, but merely recording the fact that some had expressed concern about retaliation. Rightmove has brought the application under Rule 53(2)(l), which means that the Tribunal's usual approach to matters such as relevance, necessity, proportionality and impact on third parties must all be taken into account. In that light, disclosure is not necessary, proportionate or fair, and risks leading to a potential chilling of the willingness of PCMs to engage with the collective proceedings, as well as cutting across the confidentiality of the process of engagement with PCMs.

11. Further, there has been no waiver of privilege as no specific documents were referred to in the witness statements and claim form, there is no proper inference as to documents arising from what has been said, and the disclosure request goes beyond what could be said to be relied on by the PCR.

C. THE LEGAL FRAMEWORK

12. The Tribunal's jurisdiction under Rule 53(2)(l) is broad, allowing for the disclosure and the production by a party or third party of documents or classes of documents. This is subject to the overall just and proportionate requirement set out in Rule 4.

13. It should be noted that Rightmove's case is not based on Rule 61, under which a party may request disclosure of documents mentioned in statements of case or witness statements. Instead, Rightmove relies on general principles of waiver of privilege in the communications with the PCMs, in combination with the

inference that there must be documents in existence which record those communications.

14. The test which should be applied when determining whether or not there has been a waiver of privilege is explained by Waksman J in *PCP Capital Partners v Barclays* [2020] EWHC 1393 (Comm) ('*PCP Capital'*) as a fact sensitive exercise which should be viewed through the prism of:

(1) Whether there is any reliance on the privileged material adverted to.

(2) What the purpose of that reliance is.

(3) The particular context of the case in question.

15. It is a two-stage test:

(1) First, has there been a waiver of privilege? This involves consideration of whether the PCR has: (a) referred to privileged communications; and (b) positively relied on that reference *"in some way to support or advance his case on an issue that the court has to decide"*.

(2) Second, if there has been a waiver, is it appropriate to order production of privileged documents other than those to which reference has been made which was the foundation for the waiver? Analysis of this issue is driven by considerations of fairness, because *"if the party waiving is, by the waiver, thereby creating a partial picture only of the relevant [privileged materials], it is unfair to the other party to allow him to 'cherry pick' in this way"*.

16. The parties agreed that the approach set out in *PCP Capital* was the correct way to look at the issue of waiver in this case, and I respectfully adopt Waksman J's framework as the correct way to approach the question in this case. It was common ground that the same analytical framework applied to litigation privilege (which applied here) as applied to legal advice privilege (which was the type of privilege discussed in *PCP Capital*).

17. The parties referred to other cases in argument:

(1) *Kyla Shipping Co Ltd v Freight Trading Ltd* [2022] EWHC 376 (Comm), which contains a passage at [46] about the role that fairness plays in the exercise of assessing whether or not there has been a waiver. This makes it plain that fairness is not to be equated with discretion but is a fact specific judgment which guides both limbs of the two-stage test.

(2) *MAC Hotels Ltd v Rider Levett Bucknall* [2010] EWHC 767 (TCC) ('*MAC Hotels*'), which is quoted in *Kyla* and highlights the invidious choices a party may need to make when putting forward evidence to prove a case where a waiver of privilege might arise.

(3) *Scipharm Sarl v Moorfields Eye Hospital NHS Foundation Trust* [2021] EWHC 2079 (Comm), which Rightmove relies on for the proposition that the Tribunal can infer the existence of documents.

(4) *Digicel (St. Lucia) Ltd v Cable & Wireless Plc* [2009] EWHC 1437 (Ch) which observes at [31] that the test for waiver of privilege is objective, not subjective.

D. ANALYSIS

(1) Has there been a waiver of privilege?

18. Many of the cases on waiver seem to start with the mention of a privileged document (under, for example, CPR 31.14) as the basis for disclosure. That is not the approach taken by Rightmove here, in that it relies directly on Rule 53(2)(l) as the basis for disclosure. Mr Williams KC submitted that it was not necessary to approach an application for waiver through the mechanism of CPR 31.14 (or Rule 61 in the Tribunal). He noted that the approach taken in *PCP Capital* did not apparently involve an application under CPR 31.14, which was logical as the waiver was said there to have been effected in ways other than just a mention in witness statements or statements of case (for example, by references to legal advice in opening submissions).

19. While the PCR's written response to the application and his skeleton argument both suggested that the PCR was taking a point about whether a mention of documents was a precondition to waiver of privilege, this was not pursued by Mr Schonfeld with any enthusiasm at the hearing. I think that was the correct course, as it seems to me that there is no reason in principle why Rightmove's approach is wrong. It seems possible that litigation privilege in communications between a claimant and a third party can be waived by a suitable reference to those communications, regardless of how they are recorded.

20. The question then becomes what the nature of the waiver is, by reference to any documents that might record the communications, and the mechanism for seeking disclosure of those. The nature of the communications and the documents which may record them is of course also a relevant factor to consider in the waiver analysis, as part of the case-specific exercise emphasised in *PCP Capital*.

21. Turning to the first of the elements of the "prism" identified in *PCP Capital*, there is no question that the PCR is putting forward evidence about the existence and prevalence of concerns by PCMs about retaliation if they were forced to participate in opt-in proceedings. That evidence is expressly founded in conversations with PCMs. There is therefore obvious reliance on the communications with the PCMs which would ordinarily be covered by litigation privilege.

22. As for the purpose of the reliance, the question of whether the collective proceedings should be certified on an opt-in or opt-out basis is clearly going to be an important battleground at the certification hearing. The evidence in Newman 1 and Hain Cole 1 is plainly put forward in order to support and substantiate the argument that a material number of PCMs will be reluctant to participate in opt-in proceedings, because of concerns about retaliation.

23. Mr Schonfeld sought to suggest that the extracts from the witness statements of Mr Newman and Mr Hain-Cole should be read in a narrow way, such that they simply recorded the fact of the responses of a number of PCMs, and were not intended to address questions such as the overall prevalence of PCMs with

concerns about retaliation or the characteristics (including their identity, which is relevant to an issue discussed further below) of the PCMs who did respond. It was said that the intended meaning of the passages quoted above had been made clear in recent correspondence between solicitors.

24. I do not accept that submission. While the relevant passages are in many ways opaque, it is clear to me that they do, on their face, intend to address the question of prevalence of concerns about retaliation in respect of the sample communicated with and the wider population. The references to the "*vast majority"* of PCMs in the contacted sample and the "*significant proportion"* of overall PCMs believed to have that concern *"in those circumstances*" (which can only be a reference back to the sample) make that obvious.

25. Looking at the context of the case, it seems to me that the size of the claim against Rightmove (in the region of £1.5 billion) and the nature of the proceedings (including the significance of any decision of the Tribunal as to whether Rightmove might face opt-in or opt-out proceedings), are important factors which suggest that it is important as a matter of basic fairness for Rightmove to be able to test the credibility of the evidence in Newman 1 and Hain-Cole 1, so that Rightmove, and the Tribunal, have a picture of the nature and extent of any concerns about retaliation, if and when the PCR advances that point at the certification hearing.

26. It is also the case that the evidence in question is given at a very high level and lacking in detail. I recognise (as described in *MAC Hotels*) the invidious position in which the PCR finds himself, seeking to advance evidence of concerns about retaliation while at the same time protecting confidentiality. However, the PCR has chosen to approach the matter in this particular way, with the consequence that he has referred, in a very opaque and partial way, to evidence which would otherwise be privileged and which is designed to support or advance his case on a point which the Tribunal will need to decide.

27. Mr Schonfeld again sought to minimise the significance of the evidence, suggesting that it is of limited importance in the context of the CPO hearing and referring to other cases in which the Tribunal has considered the opt-in/opt-out

question. For example, in *Ennis v Apple (Decertification Application)* [2026] CAT 55, the question of retaliation was raised in evidence from the class representative, which apparently encompassed conversations with proposed class members and material in the public domain. The Tribunal at [83] took account of at least the public domain evidence.

28. I do not see how this assists the PCR here. The waiver analysis must be case specific. The PCR has chosen to advance a point in these proceedings, which is to put the question of retaliation directly in issue in relation to the Tribunal's consideration of the suitability of opt-out proceedings. That pleading is supported by witness statements which reference discussions with PCMs on that subject. There is no other evidence put forward to support the pleading. The fact that the Tribunal in *Ennis* was able to reach a view based on evidence in the public domain does not assist in determining whether a waiver of privilege has taken place on the facts of this case.

29. The PCR cannot have it both ways – if he has set out evidence which supports a pleaded point which requires determination at the CPO hearing (that is, whether opt-out proceedings are more suitable because there is a risk of retaliation against PCMs who might opt in), Rightmove must be entitled to respond properly to that point. That strongly points to the need for disclosure of the underlying material recording the communications which have been relied on, and the consequence that privilege has been waived in those communications and the underlying documents.

30. Otherwise, what is likely to be an important question about the suitability of opt-out or opt-in proceedings will have to be determined on the basis of the summary of the communications advanced by the PCR, which is at best vague and cannot be said in its current form to be anything like a definitive description of the underlying position.

31. Finally on the question of context, Rightmove acknowledges that it is not able to point to particular documents which record the communications in question. However, Rightmove says that there is no real question about whether documents exist (given that the PCR has not made that point) and that it is an

easy inference that any verbal communications will be recorded in a file note or other document.

32. Item 1(a) in the draft order is limited in its scope, as it is only intended to capture communications where there was some discussion about concerns of retaliation (there was a discussion at the hearing as to whether the drafting of this was sufficiently clear). That seems to me to be a suitably limited set of documents which are likely to exist and which are directly related to the issue which the PCR's evidence and pleadings address in relation to the desirability of opt-in proceedings. They can reasonably be treated as a set of communications in which privilege has been waived as a consequence of the reliance of the PCR on the relevant witness evidence for the purpose identified above.

33. Mr Schonfeld did not appear to contest this conclusion, save for one respect, which was that he sought to argue that the identity of the PCMs who discussed retaliation concerns could be severed from what they were recorded as saying, so that the disclosure would effectively be anonymised.

34. I do not accept that submission. The identity of the PCM is a material part of the picture. Mr Williams KC advanced several reasons as to why it would be important to know the identity of the PCM raising the concern. Some of these were more compelling than others, but the short point is that providing disclosure of the relevant communications without the identity of the PCMs materially reduces the context available, to the extent that the disclosure really adds nothing to the picture beyond the question of the prevalence of the concern.

35. Putting the matter another way, I see no principled reason why the PCR should be able to contain the waiver of privilege to exclude the identity of the PCMs in the sample which he is effectively putting forward to suggest a widespread concern among PCMs. A simple example demonstrates this: if a large PCM were to express concern about retaliation, that might be subject to some scepticism, given the relative economic positions of the PCM and Rightmove.

36. Taking all these matters into consideration, I consider that there has been a waiver of privilege, where the PCR has referred to privileged communications

in which the question of concern about retaliation was discussed, and has positively relied on those to support his arguments on opt-in/ opt-out, which is likely to be an important point for the Tribunal to decide at the certification hearing. The documents sought by Rightmove under item 1(a) of the draft order fall within this category.

37. There was some discussion at the hearing about whether the documents requested under item 1(a) corresponded to documents subject to a direct waiver in *PCP Capital* and other cases, or would be consequential disclosure arising under the second question identified in *PCP Capital*. It does not seem necessary to make any strict delineation between the two concepts in this case, as I am firmly of the view that fairness requires the disclosure of the documents recording discussions with PCMs about retaliation concerns, given that goes to the heart of the point which the PCR is apparently advancing.

38. Rightmove also seeks disclosure of the documents referred to in item 1(b) of the draft order. That is a request for consequential disclosure in accordance with the second question identified in *PCP Capital*. It potentially covers a very broad range of documents and it is sufficient for present purposes to say that I am not convinced that the request, as worded, strikes the right balance between fairness to Rightmove and the disclosure necessary to address that. However, it does seem important that the question of prevalence of retaliation concerns is addressed in some way.

39. As I understand the position, the PCR is willing to provide information about the overall number of PCMs with whom the PCR has communicated which, along with disclosure under item 1(a), would allow Rightmove to understand the size of the sample involved in discussions about retaliation concerns. In that light, I will not consider Rightmove's request under item 1(b) further at this stage. If, however, there is any disagreement between the parties about the adequacy of any information provided in relation to prevalence, Rightmove is at liberty to renew the consequential waiver request in a suitably modified form.

(2) The PCR's submissions about discretion

40. The PCR placed considerable emphasis in its submissions on the discretion which the Tribunal has when considering disclosure requests under Rule 53(2)(l). This included references to the well-known principles set out in *Ryder Ltd v MAN SE* [2020] CAT 3, [2020] Bus LR 1176, which record the Tribunal's usual approach to matters such as relevance and necessity.

41. While I accept that the Tribunal should have reference to those matters when exercising its discretion under Rule 53(2)(l), it seems to me that questions of relevance, necessity and (at least to some extent) proportionality have more or less been determined by the exercise of determining whether a waiver of privilege has taken place. As already discussed, the basic principle of fairness underpins the waiver analysis. It seems to me that, having decided a waiver of privilege has taken place in order to satisfy that principle, no real question of relevance or necessity can arise.

42. As for proportionality, the analysis under Rule 53(2)(l) will be broadly the same as the question of what consequential waiver will be appropriate. As it happens, I have declined at this stage to make an order under item 1(b) of the draft order, so the proportionality really only arises in relation to a contained set of documents which can be easily produced. The PCR's submissions on proportionality are therefore really limited to the question of disclosure of the identity of the PCMs involved.

43. In that regard, Rightmove has agreed that any documents disclosed should be placed in a confidentiality ring which includes lawyers only. The PCR's objections to this are as follows:

    (1) The identity of the PCMs cannot be assured by the confidentiality ring, given the risk of inadvertent disclosure of their names, and especially given the apparent intent of Rightmove to conduct some analysis of its commercial relationship with the PCMs.

(2) It remains open to Rightmove at any time to seek redesignation of documents so they are no longer protected by the confidentiality ring.

(3) There is no proper basis for Rightmove to require the identity of the PCMs, as the position of specific PCMs is not a relevant issue for the certification hearing.

(4) If PCM identities are somehow disclosed outside the confidentiality ring, the consequences could be severe, including the very retaliation which the PCMs fear.

(5) In any event, there will be a chilling effect if PCMs learn that their identities have been made available, which will dissuade them and others from further engagement with any proceedings.

44. The PCR feels sufficiently strongly about this that Mr Schonfeld indicated that the PCR would withdraw the relevant evidence in Newman 1 and Hain-Cole 1 rather than disclose the identities of PCMs into a confidentiality ring. It is accepted by Rightmove that this is a course of action open to the PCR, should he so wish.

45. In addition to these points, the PCR also submits that it would be contrary to the Tribunal's governing principles to require any disclosure, given he had no alternative way to approach the question of retaliation concerns, and that policy considerations relating to the effectiveness of collective proceedings point to refusing to allow the application. Further, the PCR asserts that Rightmove might gain a tactical advantage from disclosure, given the potential for PCMs to cease to assist the PCR.

46. The Tribunal regularly employs confidentiality rings to ensure the protection of highly sensitive material. Practitioners are well aware of the importance of their obligations, which are set out clearly in the orders constituting the rings. The Tribunal relies on the professional integrity of the lawyers who are in the rings and those who administer and have responsibility for the operation of the rings.

Changes to the confidentiality ring, and any disputes about that, are subject to the oversight of the Tribunal.

47. In my view, there is no basis on which the PCR can reasonably suggest that a properly constituted confidentiality ring will not adequately protect the identity of the PCMs. Such mechanisms have been used successfully over many years to protect material which is at least as sensitive as the identity of the PCMs, if not considerably more so. Confidentiality rings remain under the Tribunal's control and oversight and there would be a significant sanction for any knowing breach of the terms of the order constituting the confidentiality ring. In practice, the Tribunal's experience is that practitioners are very careful with information subject to a confidentiality ring, and that confidentiality rings provide more than reasonable assurance about the protection of sensitive information.

48. It may well be the case that some PCMs take a different view and that inclusion of their identities in a confidentiality ring provides a chilling effect. That however would be a consequence of the way in which the PCR has approached this matter, by including in his witness evidence references to confidential material and putting that material at risk of an application for disclosure. While it is correct (as observed in *MAC Hotels*) that the PCR has difficult decisions to make as to how to pursue the concern about retaliation, in this case he has made a particular choice and must accept the consequences which flow from that.

49. For the same reason, it seems to me that nothing in the governing principles in Rule 4 or any broader policy consideration should override the entitlement of Rightmove to obtain disclosure of the documents in which privilege has been waived. Nor can any concern about tactical impact, which again only arises as a consequence of the choices the PCR has made.

50. I should add that nothing in this Ruling should be taken to encourage applications for disclosure before certification hearings. As the Tribunal's Guide to Proceedings records at [6.28]:

> "The Tribunal does not encourage requests for disclosure as part of the application for a CPO. However, where it appears that specific and limited disclosure or the supply of information (cf Rule 53(2)(d)) is necessary in order

> to determine whether the claims are suitable to be brought in collective proceedings (see Rule 79(1)), the Tribunal may direct that such disclosure or information be supplied prior to the approval hearing."

51. This outcome should be viewed as exceptional, arising from the particular way in which the PCR has approached an aspect of his case.

52. Finally, as already noted, nothing in previous decisions of the Tribunal about the merits of opt-in/opt-out proceedings provides assistance in this case. It seems that the particular issues discussed above have not arisen in the same way in other cases and, in any event, every case is different and requires individual consideration, both as to the question of waiver and as to the exercise of any discretion.

E. DISPOSITION

53. I will grant Rightmove's application in respect of item 1(a) of the order, subject to the proviso that all material disclosed should be subject to the lawyers only confidentiality ring.

54. This order need not be complied with if the PCR removes from Newman 1 and Hain-Cole 1 the references to the communications with PCMs which give rise to the waiver of privilege.

55. Rightmove is at liberty to reapply in relation to item 1(b) of the order if information about prevalence is not made available in another satisfactory way.

56. The parties are to liaise to produce a revised draft order.

Ben Tidswell

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

Date: 27 July 2026