



Neutral citation [2012] CAT 7

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1178/5/7/11

Victoria House
Bloomsbury Place
London WC1A 2EB

16 March 2012

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)
PETER FREEMAN QC
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

2 TRAVEL GROUP PLC (IN LIQUIDATION)

Claimant

- and -

CARDIFF CITY TRANSPORT SERVICES LIMITED

Defendant

RULING (EVIDENCE)

APPEARANCES

Mr. Michael Bowsher QC and Ms. Anneliese Blackwood (instructed by Addleshaw Goddard LLP) appeared for the Claimant.

Mr. James Flynn QC and Mr. Colin West (instructed by Burges Salmon LLP) appeared for the Defendant.

1. An application is made by the claimant to call a witness, an individual, to give evidence. The claimant wishes to anonymise that witness evidence. The effect would be that the witness' identity would be known to counsel and certain of the solicitors, but would not be known to the defendants themselves, that is to say the lay clients for whom Mr Flynn, Mr West and their instructing solicitors appear. The individual has made a witness statement, which this Tribunal has seen but the defendants have not seen. That introduced an element of artificiality into the argument. We are grateful to counsel on both sides for facilitating that argument to the best extent possible.
2. We start with what we trust is the incontrovertible proposition that the Tribunal, like all courts, is generally a public and open court. Such a court, of course, is subject to certain exceptions, which have been established on a piecemeal basis, much of the jurisprudence being in the work of the Special Immigration Appeals Commission. However, limits on openness have been applied in other courts.
3. We should start with rule 50 of the Competition Appeal Tribunal Rules 2003 (SI No. 1372 of 2003). Rule 50 provides that the hearing of any appeal, review or claim for damages shall be in public, except as to any part where the Tribunal is satisfied that it will be considering information, which is, in its opinion, information of the kind referred to in paragraph 1(2) of schedule 4 to the Enterprise Act 2002.
4. Schedule 4, part 1, paragraph 1, refers to decisions of the Tribunal. That part of the schedule relates to the form of the document through which the Tribunal provides its decisions. But it is instructive and relevant. It provides, at subparagraph 2:

“In preparing that document [the decision] the Tribunal shall have regard to the need for excluding, so far as possible, as practicable –

...

(c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests.”

5. Our view is that that procedural provision relating to the form of our decisions is a reflection of the general rule set out in the Civil Procedure Rules (“CPR”) part 39.2, paragraph 4, which reads as follows:

“The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.”

6. Those provisions are to be considered as part of the balancing exercise which the court has to carry out. What is the nature of that balancing exercise? It is to enable the Tribunal to achieve the overriding objective, which is set out in the Tribunal’s rules and, of course, in CPR part 1.
7. The application for anonymity is therefore an application for an exception from the ordinary rule of public and open justice to which I referred earlier. This Tribunal is very accustomed to applications for evidence to be subject to a ring of confidentiality. Generally speaking, this applies to “economic confidentiality”, for example, concealing costs or profits from another party who is or may be a competitor. Other courts are more familiar with, perhaps, more conventional reasons for anonymity. Criminal courts and sometimes civil courts are subject to applications for the protection of the physical safety or well-being, indeed occasionally the life, of an individual, irrespective of any economic interests.
8. We consider this application in the context of the overriding objective and bearing in mind that it differs from the usual reasons for an application for anonymity in this Tribunal, as I have described. That it is different does not mean, if you will forgive the double negative, that it is not right; it could be in certain circumstances.
9. We have considered the individual's statement in detail. Dealing with paragraph 5 onwards, but leaving out paragraphs 10 and 11, we accept that the individual has subjective concerns as described. However, in our judgment, those concerns are not objectively sufficient to justify treating the individual’s potential evidence in a way different from the ordinary treatment of evidence,

especially when one weighs the subjective concerns against the objective considerations of open justice.

10. So far as paragraphs 10 and 11 are concerned, we consider that what the individual says there is entirely subjective and far too vague to take the application any further.
11. Furthermore, in order to achieve the overriding objective of a fair disposal of the case in justice to both sides, we have had to consider whether the evidence could be tested if the individual was called in circumstances of anonymity as requested. What would be the situation in the event of the defendant being deprived of the full opportunity to cross-examine? In this case the result would be that certain documents could not be used because the defendant might not know that they were available or relevant. In addition, and this is important on the facts of this case, there might be conflicting factual accounts of events relating to the individual and the individual's relevant experience and activities, which could not be challenged because the defendant would not be able to obtain the material with which to make the challenge.
12. It is therefore our conclusion that even were we to be minded to grant anonymity on objective grounds relating to the individual, the defendant would be deprived of the opportunity of a fair trial. We therefore reject the application. Of course, it is a matter for the claimant, whether the claimant wishes to call the witness. In certain circumstances the claimant would be able to obtain a witness summons to compel the attendance of the witness.
13. We will consider the costs of this application separately in due course and we will reserve costs until we give our final judgment in this matter.

Lord Carlile of Berriew QC

Peter Freeman QC

Marcus Smith QC

Charles Dhanowa
Registrar

Date: 16 March 2012