Neutral citation [2017] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1262/5/7/16 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

10 February 2017

THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chairman)
PETER FREEMAN CBE QC (Hon)
BRIAN LANDERS

Sitting as a Tribunal in England and Wales

BETWEEN:

AGENTS' MUTUAL LIMITED

Claimant

- v -

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)

Defendant

RULING (ADMISSIBILITY)

APPEARANCES

Mr Alan Maclean QC and Mr Josh Holmes (instructed by Eversheds Sutherland (International) LLP) appeared for the Claimant.

Mr Paul Harris QC and Mr Philip Woolfe (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared for the Defendant.

1. The sixth witness statement of Mr. Boris Bronfentrinker, a solicitor and partner in the firm of Quinn Emanuel Urquhart & Sullivan UK LLP ("QE"), the solicitors for the Defendant ("Gascoigne Halman") in these proceedings, exhibits and provides an explanation of four transcripts of three audio files, which are recordings of meetings that took place in Northern Ireland in 2016 relating to the Claimant's ("Agents' Mutual") property portal, known as "OnTheMarket". A further explanation of these documents is provided in QE's second letter of 9 February 2017.

2. The audio files themselves had been provided, by way of disclosure and inspection, to Agents' Mutual's solicitors on Sunday 5 February 2017. One of the transcripts exhibited to Mr. Bronfentrinker's statement – a so-called "convenience" transcript produced by someone we shall refer to as "X", and provided to QE by X – was provided to Agents' Mutual's solicitors on Monday 6 February 2017. The other three transcripts – one of which transcribes the same audio file as the convenience transcript – were produced by QE and the first time Agents' Mutual's solicitors saw these was when Mr. Bronfentrinker's statement was served on Tuesday 7 February 2017.

3. Tuesday 7 February 2017 was, we should say, Day 3 of the trial of these proceedings. The statement of Mr. Bronfentrinker was produced at a time when a Mr. Jonathan Notley of Zoopla Property Group Plc was being cross-examined by Mr. Alan Maclean QC, leading counsel for Agents' Mutual. Mr. Notley's involvement in the production to QE of the audio files (and convenience transcript) was not mentioned in Mr. Bronfentrinker's statement but was disclosed in QE's second letter of 9 February 2017.

4. Whilst we accept that there is nothing to be read into the drafting or timing of Mr. Bronfentrinker's statement or the letter of 9 February 2017, the upshot was that Mr. Maclean lost the opportunity of asking Mr. Notley about his involvement in the production to QE of the audio files (and convenience transcript).

5. The audio files and the transcripts are all "documents" which QE contend are disclosable documents for the purposes of these proceedings and which have, therefore, been produced by QE as part of their client's on-going disclosure obligations. We agree with the submissions of Mr. Philip Woolfe (who addressed the Tribunal on the matters

the subject of this Ruling on behalf of Gascoigne Halman) that the audio files and the transcripts are and were sufficiently relevant to these proceedings to be disclosable.

6. The issue that now arises is the status of these documents, now that they have been disclosed. Yesterday morning, Mr. Woolfe applied to have them admitted into evidence pursuant to Rule 55(1)(b) of the Competition Appeal Tribunal Rules 2015, S.I. 2015 No. 1648 ("the Rules"). Mr Maclean opposed that application.

7. We agree with the parties' implied acceptance that the Rules apply in this case. The reason that this is not as clear-cut as it might be is because these proceedings originated in the Chancery Division of the High Court and only some of the issues (the "Competition Issues") were transferred from the Chancery Division to the Tribunal. The other, non-Competition, Issues remain in the Chancery Division. Nevertheless, the audio files and the transcripts clearly relate (and, in our view, only relate) to the question of whether there were one or more "horizontal" anti-competitive agreements as between Agents' Mutual and various estate agents in the United Kingdom market, an issue pleaded in paragraphs 38*ff* of Gascoigne Halman's Defence (as amended). In these circumstances, it is plainly right that the Rules and the Tribunal's approach to evidence apply in this case.

8. As has been made clear on a number of occasions (see e.g. *Argos and Littlewoods v. OFT* [2003] CAT 16 at [105]; *Claymore v. OFT* [2003] CAT 18; *Aberdeen Journals v. OFT* [2003] CAT 11 at [126] to [134]), strict rules of evidence do not apply before the Tribunal. The Tribunal will be guided by circumstances of overall fairness, rather than technical rules of evidence.

9. The consequence is that – certainly as far as disclosed documents are concerned, which is what the audio files and the transcripts are – there is very rarely argument before the Tribunal as to whether a document is admissible as evidence: the argument, by reason of the Tribunal's general approach, focusses instead on the weight to be attached to the document.

10. In this case, however, Gascoigne Halman applies to have the audio files and transcripts admitted to these proceedings, pursuant to Rule 55(1)(b) of the Rules. Agents' Mutual, relying on the same Rule, applies to have this material excluded. Given the Tribunal's ordinary practice – described in paragraph 9 above – we should place on record the fact

that, given the late production of these documents, and their remarkably unsatisfactory nature, it was entirely right for Gascoigne Halman to make the application and Agents' Mutual was totally justified in resisting it. We should also stress that when we refer to "late production" of the documents and their "remarkably unsatisfactory nature", no criticism is intended of QE. Indeed, we did not understand Mr. Woolfe to dispute either of these descriptions.

11. The governing principles we must apply in determining whether the audio files and transcripts should be admitted to the proceedings are set out in Rule 4 of the Rules. Rule 4 draws heavily on the "overriding objective" of the Civil Procedure Rules, and obliges the Tribunal to ensure that each case is dealt with justly and at proportionate cost. More specifically, the factors that we have taken into account in determining the application are the following:

    (1) As we noted in paragraph 5 above, we consider the audio files and transcripts to be sufficiently relevant to these proceedings to be disclosable. That is, however, a relatively low standard. We find it quite difficult to judge how important these documents could be (laying to one side the concerns about them that we express below). That, however, is unsurprising: in many competition cases, documents regarding anti-competitive practices are often fragmentary and what they teach can be difficult to nail down. It is, no doubt, for this reason that Tribunal's approach to admissibility is what it is: generally speaking, documents should be (and are) admitted. Any concerns relating to them affect weight, not admissibility.

    (2) That said, the list of factors pointing against admission is a long one in this case:

        (i) The audio files are the result of covert recording of conversations whose protagonists (apart from the persons making the recording) did not know they were being recorded. It is quite possible that these recordings were in fact obtained in breach of the local law (which is Northern Irish law), but neither Mr. Woolfe nor Mr. Maclean felt able to address us further on this point. In the first place, there was insufficient time to obtain advice on the applicable law. In the second place, the factual uncertainty surrounding the recordings is such that even if the law were clear, a conclusion on illegality might be difficult. We consider – following the approach

described in *Jones v. University of Warwick* [2003] EWCA Civ 151 at (especially) [28] – that this potential illegality is a material factor to take into account, but not an overwhelming one.

(ii) We do not know precisely how the audio files were originally obtained. We know that there were two persons involved in the recording – "Y" and "Z" for present purposes. We also know that "Y" and "Z" are prepared to have their identities disclosed into a confidentiality ring (although that has not yet occurred). But we do not know anything about the integrity of the audio files – whether the recording is complete or selective; whether "tracks" have been spliced or not. We should point out that whilst we know nothing about the recording process, the convenience transcript does give some indications of concern: the timings of the recordings do not always appear in chronological order (see, for example, p.10 of exhibit "BB9" to Mr. Bronfentrinker's statement, where the "track" timed 30:37 appears before the "track" timed 30:11; see, again, p.13 of BB9, where the "track" 49:22 appears before "tracks" 40:25 and 40:35). Equally, it appeared to us – on a very impressionistic basis – that the gaps between the recorded times were longer than the transcribed words would have taken to speak. We are conscious that it is impossible to reach concluded views on either of these points, and we do not do so. But they are concerns that we cannot dismiss.

(iii) That is particularly so, given the fact that the audio files were made for what we will broadly term "corporate espionage" purposes. For the sake of preserving a doubtful confidence, we will - at least for the present – be no more specific than that. Suffice it to say that we are entirely unwilling to give Y and Z the benefit of very much doubt when considering the integrity of the audio files.

(iv) Y certainly and Z probably took an active part in the conversations they recorded. This is particularly noticeable in the transcript of the February 2016 meeting, where "F1" – Y, as we call him/her – spoke a great deal, and seems to have been steering the conversation and seeking to elicit information: see, for example, pp.37 and 41-43 of BB9.

(v) The tape recordings were then passed to X, who made the convenience transcript. QE, as we have said, made the other transcripts, including a fresh transcript of the convenience transcript. However, it would be altogether wrong to regard the transcripts as simply setting down word-for-word what was spoken. We have not heard the audio files, but the following points were common ground between the parties:

(a) In some – although not all – cases, X provided names for the speakers in the convenience transcript, when this was not evident from the recorded conversation. Those provided names were adopted when the QE transcript of the same audio file was made. These are "facts" which do not emerge from the audio file, and there is simply no basis for accepting the accuracy of this information.

(b) Unsurprisingly, the audio files are of relatively poor quality. As Mr. Bronfentrinker stated (paragraph 15 of his statement) "[t]he transcripts of the audio files received from the external transcribers required further review and amendments to fill in gaps in the transcript to the extent possible (my team was able to fill in certain gaps because of our familiarity [with] the issues being discussed)".

Obviously, these are further reasons for treating the transcripts with especial caution.

(vi) Finally, there is the question of the late adduction of this evidence, if it is to be admitted. As to this:

(a) Mr. Maclean accepted that the transcripts could be put in cross-examination to Mr. Springett, Agents' Mutual's chief executive and (although Agents' Mutual called other witnesses of fact) the only witness from Agents' Mutual itself. Mr. Springett was not present at any of these meetings and – although we do not particularly want to anticipate – we strongly suspect that, for entirely understandable reasons, he will be unable to assist the Tribunal on these particular meetings. Had it been clear that Mr. Springett could help, then we

would likely have refused Gascoigne Halman's application to admit the audio files and the transcripts, and left Gascoigne Halman to whatever answers Mr. Springett chose to give in cross-examination.

(b) But since those answers are likely to be (for reasons we would entirely understand) uninformative, that is a matter that inclines us to admit the audio files and transcripts, for whatever they are worth.

(c) However, we are conscious that that course would leave Agents' Mutual with no ability properly to investigate the provenance or content of the audio files and transcripts, and no real ability to counter them (if so advised) with further evidence. This application has been made in the middle of the trial, when the factual evidence has to a substantial extent already been heard. To require Agents' Mutual to do anything in response to this late evidence would, in our minds, be entirely unreasonable. On a number of occasions, when seeking to counter our concerns regarding the provenance and content of the audio files and transcripts, Mr. Woolfe sought to assuage those concerns by suggesting that they (the concerns) could be resolved by asking the Agents' Mutual representative, present at some but not all of the recorded meetings, about them. We wish to make explicitly clear that if this evidence is admitted (and it is a big if), then it is on the basis that Gascoigne Halman have to live with the deficiencies in the evidence that we have described and cannot, at a later stage in the proceedings, seek to bolster this material by suggesting that if it were false, Agents' Mutual could have produced evidence to say so. We will not entertain any submission that silence on the part of Agents' Mutual in response to this material indicates any form of acceptance or evidence that the recordings are accurate or unimpeachable.

(d) This course is the only way – apart from excluding the evidence altogether, which is the other option – of avoiding material prejudice to Agents' Mutual.

12. Taking all of these factors into account, we unanimously rule that – by an extremely narrow margin, and expressly on the basis set out in paragraph 11(2)(vi)(c) above – the audio files and the transcripts should be admitted into the proceedings pursuant to Rule 55(1)(b) of the Rules.

Mr Justice Marcus Smith Peter Freeman CBE, QC (Hon) Brian Landers

Chairman

Charles Dhanowa OBE, QC (Hon) Date: 10 February 2017

Registrar