Neutral citation [2018] CAT 7

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1279/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

9 March 2018

Before:

ANDREW LENON Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

PING EUROPE LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 2 March 2018

RULING (DISCLOSURE APPLICATION)

APPEARANCES

Mr David Scannell (instructed by K&L Gates LLP) appeared on behalf of the Appellant.

Ms Marie Demetriou QC and Mr Ben Lask (instructed by CMA Legal) appeared on behalf of the Respondent.

Ms Anneli Howard appeared on behalf of the Complainant.

Note: Excisions in this Ruling (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. On 26 January 2018, in accordance with the directions order of the Tribunal of 4 December 2017 (the "Directions Order"), the Competition and Markets Authority ("CMA") filed its Defence in this appeal brought by Ping Europe Limited ("Ping"). Six witness statements were filed by the CMA in support of its Defence, including one by the complainant in the CMA's administrative investigation (the "Complainant"). That witness statement (the "Complainant's First Witness Statement") was redacted to remove the Complainant's identity and other information in respect of which confidential treatment was requested. An unredacted version of the Complainant's First Witness Statement was subsequently disclosed into the confidentiality ring established by the order of the Tribunal of 31 January 2018, and comprising Ping's and the CMA's external legal advisers (the "Confidentiality Ring").

2. On 9 February 2018 Ping applied for an order requiring the CMA to disclose an unredacted copy of the Complainant's First Witness Statement outside the Confidentiality Ring "save for any truly commercially-sensitive material identified by the CMA" such as costs and margins data (the "Application").

B. THE APPLICATION

(1) Summary of Ping's submissions

3. Ping contended that the Application was necessary in order to protect its rights of defence. In particular, para 5 of the Application specified certain matters addressed in the Complainant's First Witness Statement to which it was said Ping's advisers were unable effectively to respond without Ping's input. These related to:

   (1) The nature and commercial strategy of the Complainant's business, including whether it is representative of the golf club retail industry as a whole (para 5(a) of the Application);

   (2) Whether the alleged proportion of the Complainant's online sales of custom fit clubs is plausible and typical of the industry as a whole (para 5(b) of the Application); and

(3) Whether the Complainant's assertion that its website offers the full range of customisable options for the custom fit clubs that it sells online is correct (para 5(c) of the Application).

4. By a letter of 14 February 2018 giving directions for the hearing of the Application, the Tribunal asked Ping to clarify the extent to which it relied on the principle of public and open justice as a free-standing basis for its Application, independent of its contentions regarding its rights of defence / right to a fair trial. Ping was asked (i) to identify the employees it contended should have access to the unredacted version of the Complainant's First Witness Statement for the purpose of responding effectively to the matters described at paragraph 5 of the Application; and (ii) whether or not it contended that its rights of defence/right to a fair trial would be infringed if such named Ping employee(s) were given access to the unredacted witness statement (and permitted to attend the *in camera* cross-examination of the Complainant) subject to the giving of a confidentiality undertaking (the "Confidentiality Ring Approach"). If Ping did not object to the Confidentiality Ring Approach, and without prejudice to its objections based on the principle of public and open justice, then it was invited to append to its submissions a suitable form of undertaking which the relevant employees would be prepared to sign.

5. On 16 February 2018 Ping wrote to the Tribunal confirming that it was happy to agree to the Confidentiality Ring Approach. Whilst it repeated certain objections relating to its rights of defence and the principle of public and open justice, it was prepared to proceed with the Application on the basis of the Confidentiality Ring Approach considering in particular that this would be a cost- and time-efficient process. However, the Complainant had raised concerns regarding the identities of the various employees proposed by Ping, and the parties had not been able to agree a way forward.

6. Ping identified Mr John Clark (Managing Director of Ping) and Mr Steve Carter (European Sales Director of Ping) as the employees who were the most appropriate individuals at Ping to provide input on the Complainant's First Witness Statement, with the necessary overarching knowledge of Ping's account holders, golf retailers and the golf club industry more generally. According to Ping, without such input, it would not be possible for Ping's legal advisers to respond meaningfully to and

comment on the Complainant's evidence, which covered commercial, industry-specific as well as technical statements and assertions. Ping submitted that Mr Clark was particularly crucial to this process given that he was Ping's primary witness of fact in these proceedings: without his full involvement, Ping would not be able to defend itself properly.

7. In reply to the responses to the Application (see below) on 27 February 2018, Ping further argued that as the Complainant was now a voluntary witness of fact, there was no potential harm to the wider CMA regime or to the likelihood of complainants coming forward to the CMA with information which may trigger an investigation.

8. In addition, both the CMA and the Complainant had failed to explain why the Complainant was objectively justified in fearing commercial reprisals from Ping. Moreover, Ping re-iterated that Mr Clark was the key individual with the overarching knowledge and expertise to respond to the Complainant's evidence and he would benefit from input from Mr Carter or, failing that, Mr Pete Brown (Ping's UK Sales Director). However neither Mr Carter nor Mr Brown was a substitute for Mr Clark. Disclosure of the Complainant's First Witness Statement to Mr Clark was the absolute minimum disclosure necessary to protect Ping's rights of defence.

9. In its written submissions, Ping relied on the Tribunal's Ruling in *2 Travel Group PLC v Cardiff City Transport Services* [2012] CAT 7 ("*2 Travel*"), a case concerning an application before the Tribunal to anonymise a witness statement, albeit in a private action, such that only external lawyers would be aware of the witness's identity. This application for anonymity was refused. The Tribunal held as follows:

> "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.
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> …
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> 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:
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> > "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…

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…"

10. At the hearing, Ping maintained its primary position that there should be full disclosure outside the Confidentiality Ring of the Complainant's identity. It cited a number of authorities addressing the principle of open justice. It relied in particular on the decision of the Supreme Court in *A v British Broadcasting Corporation* [2014] UKSC 25 in which the issue was whether an order could be made preventing the press from disclosing the identity of an immigrant who was about to be deported. The immigrant had been convicted of a serious sexual offence in this jurisdiction and contended that he would be at risk of death or ill-treatment in his native country at the hands of people outraged by his crimes should they become known there. Lord Reed, giving the unanimous judgment of the Supreme Court, referred to the general principle of open justice in the following terms:

> "23. It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the courts to act as guardians of the rule of law. *Sed quis custodiet ipsos custodes*? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny."

11. Lord Reed then traced the history of the common law exceptions to the principle from its origins in early constitutional legislation, continuing as follows:

> "31. More recently still, the importance of the common law principle of open justice was emphasised by nine Justices of this court in the case of *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38; [2013] 3 WLR 179. Lord Neuberger, giving the judgment of the majority, described the principle as fundamental to the dispensation of justice in a modern, democratic society (para 2). He added that it had long been accepted that, in rare cases, a court had an inherent power to receive evidence and argument in a hearing from which the public and the press were excluded, but said that such a course might only be taken (i) if it was strictly necessary to have a private hearing in order to achieve justice between the parties, and (ii) if the degree of privacy was kept to an absolute minimum. He gave, as examples of such cases, litigation where children were involved, where threatened breaches of privacy were being alleged, and where commercially valuable secret information was in issue."

12. Lord Reed concluded his review of the authorities as follows:

> "41. …Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson observed in *Kennedy v Information Comr* [2015] AC 455, 525, para 113, [2014] UKSC 20, para 113, the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."

13. Ping referred in addition to the principle of natural justice, as explained by Lord Neuberger in *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38, [2013] 3 WLR 179 (at paragraph 3), in which the main issue was the legitimacy of a closed material procedure on an appeal. Lord Neuberger held that the most important aspect of this principle is that every party has a right to know the full case against him and the right to test and challenge that case fully, a right which cannot be abrogated at common law. The open justice and natural justice principles are also protected by Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(2) Summary of the CMA's submissions

14. The CMA submitted, in summary, in its written response to the Application on 22 February 2018 and at the hearing, that:

(1) There was a strong public interest in protecting the identity of complainants so far as possible. This was necessary both to protect individual complainants from commercial harm and to avoid deterring other potential complainants from cooperating with the CMA in the future. As explained in the witness statement of Ms Ann Pope (Senior Director for Antitrust Enforcement in the Competition, Consumer and Markets Group of the CMA), complainants are an important source of information about potentially anti-competitive behaviour. If prospective complainants could not be confident that their identity will be protected so far as possible, including in any subsequent appeal proceedings, this could "chill" the flow of information to the CMA, which in turn could compromise the CMA's ability to enforce competition law.

(2) The Tribunal needed to balance, on the one hand, the public interest in protecting a complainant's identity against, on the other hand, Ping's rights of defence. However, it was now common ground that Ping's rights did not require that the Complainant's identity, and an unredacted copy of its statement, be disclosed outside the Confidentiality Ring.

(3) It was not ordinarily appropriate or necessary for a complainant's identity to be disclosed to a commercial partner. In this case, the Complainant was one of Ping's account holders, and was in a comparatively vulnerable position as against Ping since: (i) it was important for the Complainant to stock Ping golf clubs; yet (ii) the Complainant was a relatively small undertaking. The CMA considered that the Complainant's concerns about possible commercial reprisals by Ping were properly founded.

(4) The Tribunal takes an extremely cautious approach to the dissemination of confidential information in appeal proceedings (see *Carphone Warehouse v Ofcom* [2009] CAT 37). If Ping employees became aware of the Complainant's identity, they could not realistically be expected to excise that knowledge from their minds in future interactions with the Complainant. In

BSkyB v Competition Commission [2008] CAT 9 the Tribunal had pointed to the impossibility of "unlearning" information once it has been seen and the risk that the information will be used in commercial dealings going forward, whether consciously or unconsciously.

(5) The argument in this case was about the confidential treatment of a very small proportion of the Complainant's First Witness Statement. All Ping employees were in a position to see the redacted version of the statement, and all that was being withheld from them was matters going directly to the identity of the Complainant. There was no reason why the limited redactions would prejudice the ability of Ping's legal team to obtain the factual instructions from their client that were referred to at para 5 of the Application.

(6) The CMA was in the position of seeking rebuttal evidence from the Complainant to answer the new evidence produced by Ping at the appeal stage. It would be unfortunate if a party such as Ping could produce new evidence on appeal and at the same time resist any effort the CMA made to rely on a complainant's rebuttal evidence while maintaining their request for anonymity.

(7) The Complainant's strong preference was that its identity and role as complainant should remain strictly confidential. However, if the Tribunal disagreed, the Complainant was prepared to accept the Confidentiality Ring Approach, provided the Ping employee in question had not previously been involved in direct commercial dealings with the Complainant and was not likely to be in the future, and provided suitable undertakings were given. The CMA was also prepared to agree to the Confidentiality Ring Approach on that basis.

(8) The CMA did not, however, agree that the Complainant's identity should be disclosed to Mr Clark and/or Mr Carter. Given their positions within Ping, the Complainant had a genuine concern that disclosure could result in harm to its legitimate business interests. Disclosure in those circumstances would be contrary to the public interest. Ping had failed to explain how the specific information in the narrow compass of para 5 of the Application required the

input of Mr Clark, or indeed anyone from Ping; and further why that information could not be obtained from Mr Brown. Mr Brown was extremely experienced, was interviewed by the CMA during its investigation and there was no evidence to suggest he would have any difficulty in dealing with the relatively narrow compass of matters raised by para 5 of the Application. Ping's interests could obviously be protected by Mr Brown and that would be the proper balance between Ping's interests and the public interest and the commercial interests of the Complainant.

(3) Summary of the Complainant's submissions

15. The Complainant submitted in its written response to the Application on 22 February 2018 (supported by a further confidential witness statement by the Complainant) and at the hearing, in summary, that:

(1) The Complainant adopted the CMA's submissions. Its primary case was that its anonymity should be protected by law because of: (i) the public interest in ensuring that complainants are not dissuaded from providing the CMA with information regarding possible competition law infringements; and (ii) the Complainant's interest in avoiding the significant risk of commercial reprisals in this case.

(2) There was no basis for disclosure of the Complainant's First Witness Statement and its identity outside of the ring as sought by Ping in the Application. That result, which would render its sensitive information public and expose it to considerable commercial risk, would not balance the competing interests properly or at all. Faced with that prospect, the Complainant would have to consider withdrawing the evidence that it had provided to the CMA.

(3) The Complainant's alternative case was that should the Tribunal determine that the Confidentiality Ring Approach struck the correct balance between the various competing public interests, the Complainant would reluctantly accept that the Confidentiality Ring be extended to <u>one</u> Ping employee. The Complainant expressed concerns about its identity being disclosed to Mr Clark or Mr Carter. In essence, the Complainant feared that, if its identity were to be

revealed to those individuals, there would be a real risk of commercial reprisals, which could take a variety of forms.

(4) In Tribunal proceedings, the standard position was for a confidentiality ring to be restricted normally to external legal representatives and other external advisors. Exceptionally it might be widened to cover in-house lawyers but only where that was "necessary" and even then they might be required to give more onerous undertakings. It was extremely rare for internal employees that were non-lawyers to be admitted to a confidentiality ring and only then under the strict understanding of, and adherence to, their confidentiality obligations.

(5) The Complainant would be prepared to accept Mr Brown as a member of the Confidentiality Ring, provided Mr Brown gave specific undertakings governing his access to and subsequent use of the information in the Complainant's First Witness Statement. In common with the CMA, the Complainant argued that Mr Brown ought to be able to provide adequate input to address the matters set out in para 5 of the Application.

C. THE TRIBUNAL'S POWERS

16. Although the Tribunal's rules do not expressly permit the CMA to file evidence from an anonymous witness, it was not seriously disputed that the Tribunal has the power to treat a witness as anonymous for the purposes of proceedings before it. The Tribunal may direct that a hearing at which the witness is to give evidence be held in private and/or that a document in which the witness is named be accorded confidential treatment. Rules 99 and 101 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Tribunal Rules") provide:

> "**Hearing to be in public**
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> **99.**—(1) Every hearing is to be in public except that a hearing or part of a hearing may be in private if the Tribunal is satisfied that it will be considering information which is, in the opinion of the Tribunal, information of the kind referred to in paragraph 1(2) of Schedule 4 to the 2002 Act.
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> (2) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is entitled to attend the hearing or part of it."
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> **"Requests for confidential treatment**

> **101.**—(1) A request for the confidential treatment of any document or part of a document provided in the course of proceedings before the Tribunal shall—
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> (a) be made in writing indicating the relevant words, figures or passages for which confidentiality is claimed; and
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> (b) be supported in each case by specific reasons,
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> and, if so directed by the Registrar, the person making the request shall supply a non-confidential version of the relevant document.
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> (2) In the event of a dispute as to whether confidential treatment should be accorded, the Tribunal shall decide the matter after hearing the parties and having regard to the need to exclude information of the kind referred to in paragraph 1(2) of Schedule 4 to the 2002 Act.
>
> (3) The Tribunal may direct that documents, or parts of a document, containing confidential information are disclosed within a confidentiality ring."

17. The Tribunal's powers reflect the general power of the courts to maintain the anonymity of a party or witness: see part 39.2(4) of the Civil Procedure Rules. When considering whether to exercise the Tribunal's powers under the Tribunal Rules, regard is to be had to the need to exclude information of the kind referred to in paragraph 1(2) of Schedule 4 to the Enterprise Act 2002 (which mirrors the considerations that apply to the CMA under Part 9). Such information includes: (a) information the disclosure of which would in its opinion be contrary to the public interest; (b) commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates; and (c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests.

D. DECISION

18. Consistently with the authorities referred to above, I propose to consider the following issues:

(1) Whether the CMA and the Complainant have established that the need to keep confidential the identity of the Complainant would justify the Tribunal in taking measures involving a departure from open justice.

(2) If so, whether those measures would be compatible with Ping's right to a fair trial.

19. Taking first, the Complainant's evidence as to risk of harm, this consisted of evidence of […][✂] main decision makers within Ping, namely Mr Carter, Ping's European Sales Director, and Mr Clark, Ping's Managing Director, and the potential for retaliatory measures, such as closure of the Complainant's account with Ping ([…][✂]), the removal of discounts, the imposition of disadvantageous terms and the requirement to maintain minimum quantity of stock increasing storage costs. The Complainant also expressed concern that disclosure of its identity would lead to other sports equipment manufacturers regarding the Complainant as a trouble maker and taking similar retaliatory measures. In response, Mr Scannell pointed out that Ping's lawyers had not been able to take full instructions on these allegations as the evidence in question was subject to the Confidentiality Ring. He characterised the evidence of […][✂] as scant and suggested that the fear of future retaliatory measures was misplaced given that other retailers had been willing to give evidence in support of Ping and given the availability of remedies for breach of competition law, were Ping to operate its distribution system in a discriminatory way.

20. Notwithstanding these criticisms of the Complainant's evidence, I am not prepared to dismiss as wholly unfounded the Complainant's fears as to damage to its legitimate commercial interests in the event that its identity were disclosed to Ping. I accept the Complainant's evidence that the golf industry is relatively close knit, that there is scope for Ping and other manufacturers to take retaliatory action towards a small retailer such as the Complainant were they to discover the Complainant's identity, that the Complainant is in a more vulnerable position than a large retailer such as American Golf which has provided witness statements in support of the CMA's case without claiming anonymity, that Mr Clark and Mr Carter have the potential to be directly involved in decisions affecting the Complainant's account, that they could not be expected to erase from their minds the identity of the Complainant were it disclosed to them, and that competition law would not necessarily provide effective protection to the Complainant in the event of discriminatory treatment, given the difficulty in proving an infringement and the costs involved.

21. Turning to the CMA's submission that disclosure of the Complainant's identity would lead to a "chilling effect" on future complainants, there is an important distinction between the *administrative* or investigative phase of a CMA investigation and the *judicial* or appeal phase before the Tribunal. The CMA granted the Complainant anonymity at the administrative phase. The Complainant then chose voluntarily to provide a witness statement in support of the CMA's Defence at the judicial phase. The CMA is not in a position to guarantee anonymity at the judicial phase as this is subject to the disclosure powers of the Tribunal. The Complainant thereby exposed itself to the possibility that the Tribunal might require its identity to be disclosed. Had the Complainant not provided a witness statement at the judicial phase, its identity would have remained anonymous.

22. It follows that, if the Tribunal now orders the Complainant's identity to be disclosed to Ping, that would not affect the right of future complainants to anonymity at the administrative stage. I accept, however, that this distinction might be lost on future potential complainants and that an order for the disclosure of the Complainant's identity, in the face of efforts by the Complainant and the CMA to keep it secret, might discourage future complainants from coming forward. I therefore consider that, on the facts of this case, the public interest in not deterring future complainants requires the identity of the Complainant to have some protection from disclosure.

23. For these reasons, I consider that the Complainant and the CMA have established that the identity of the Complainant and the redacted parts of the Complainant's First Witness Statement should not be disclosed on an unrestricted basis and that some departure from open justice is therefore called for. This case is accordingly distinguishable from the *2 Travel* case in which the witness's evidence of potential prejudice from disclosure was too vague to be given any weight.

24. In my judgment, a fair balance would be struck between the principle of open justice and the need to maintain the confidentiality of the Complainant's identity by directing that disclosure of its identity and of the unredacted version of the Complainant's First Witness Statement be made to Mr Brown, who will be admitted to the Confidentiality Ring, subject to the giving of suitable undertakings to protect the Complainant's anonymity, but not to Mr Carter or Mr Clark. The departure from the open justice principle entailed by the anonymising of the Complainant's identity and the limited

redactions of the Complainant's First Witness Statement outside the Confidentiality Ring are relatively modest. In this respect, the facts of this case are very different from cases such as *A v British Broadcasting Corporation* and *Bank Mellat.* The open justice principle will not be affected more than is necessary to protect the Complainant from the risk of harm to its legitimate business interests and the public interest in protecting the anonymity of complainants to the CMA. At the same time, the concerns of the Complainant and the CMA as to confidentiality will be adequately met by the restricted extent of the disclosure which I am directing. The cross-examination of the Complainant will take place in camera, possibly by video link, with access limited to the individuals within the Confidentiality Ring, including Mr Brown.

25. Turning to the second of the two issues identified at paragraph 18 above, I am satisfied that this direction will not infringe Ping's right to a fair trial. Indeed, it is far from obvious why maintaining the anonymity of the Complainant's identity with no provision for disclosure to any Ping executives would have any material effect on Ping's ability to defend itself. There is force in the CMA's submission that the issues on which Ping's advisers say they need to take instructions from Ping itself in order to respond, set out at paragraph 3 above, could be adequately addressed without knowing the identity of the Complainant and without access to the redacted parts of the witness statement.

26. Although Ping argued that Mr Brown was not a suitable alternative to Mr Clark, it transpired in the course of the hearing that Mr Brown has been employed by Ping for as long as twenty years. He was involved in the CMA's investigation and was interviewed by the CMA. According to the transcript of his interview by the CMA he has frequent interactions with Ping account holders and Ping's sales representatives report directly to him. I am satisfied that, based on his experience, Mr Brown will be able to provide the necessary input to enable Ping's legal advisers to respond to the Complainant's First Witness Statement.

27. I would emphasise that the admission of a party's employee to the confidentiality ring is exceptional. The general rule set out in para 7.38 of the Tribunal Guide to Proceedings 2015 will continue to apply:

> "7.38 Individuals admitted to the ring will normally be the parties' named legal representatives and possibly other external advisers or experts such as accountants and economists: see *Claymore Dairies v OFT* [2003] CAT 12 and the Order of the Tribunal of 9 June 2003 in those proceedings; *Genzyme v OFT* – see the transcript of 27 May 2004; Order of the Tribunal of 31 March 2008 in *British Sky Broadcasting v CC & the Secretary of State*; *National Grid v GEMA* – see the transcript of 23 May 2008. It may sometimes be necessary to add employees of the parties, such as in-house counsel, to the confidentiality ring subject to them giving suitable undertakings; these may be more onerous than those given by individuals external to the parties (see the Order of 8 October 2008 in *National Grid v GEMA*; cf. the Ruling in *Carphone Warehouse v OFCOM (Local Loop Unbundling)* [2009] CAT 37)."

28. I invite the parties to agree on suitable undertakings before Mr Brown is admitted to the Confidentiality Ring and to submit agreed wording by 12 March 2018. Alternatively, following this ruling the CMA may decide not to rely on the Complainant's evidence in which case the issue of disclosure of the Complainant's identity to Ping will fall away.

29. Finally, Ping has applied for an extension of time to file its Reply to the CMA's Defence from 9 March to 29 March 2018 on the basis that it needs more time. This is opposed by the CMA on the basis that no sufficient grounds have been advanced for an extension which will prejudice the CMA in the preparation of its skeleton argument for the main hearing. I direct that the Reply be filed by 20 March 2018. This gives the CMA five weeks to prepare its skeleton argument which is adequate time, even in light of the intervening Easter period. The other procedural deadlines under the Directions Order are unchanged.

30. I invite the parties to make submissions on the costs of this application by 16 March 2018.

Andrew Lenon Q.C.
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 9 March 2018
Registrar