



Neutral citation [2021] CAT 7

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1380/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 March 2021

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 remotely on 5 March 2021

RULING

APPEARANCES

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

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 a difficult question of listing. The matter that is before us has an agreed length of three weeks (plus pre-reading). The parties have considered carefully the issues that are likely to arise in this matter and have concluded that three weeks is sufficient hearing time to dispose of this appeal and we see no reason to dissent from that view.
2. The parties also had found a three-week period in which the matter could be heard, which was commendably soon: not, perhaps, as soon as one would like, but it was the three weeks commencing 22 November 2021. Unfortunately, this was not a date that commended itself to the Tribunal. The date we proposed, as an alternative, was a three-week period commencing 1 November 2021.
3. The problem with that suggestion (the parties views were canvassed before this CMC commenced) was that Ms Demetriou QC, leading counsel instructed by the CMA, cannot make those dates. Unsurprisingly, the CMA wish to retain her services. Whilst it is not the practice of this Tribunal absolutely to list for the convenience of counsel, it is (particularly in complicated matters like this) something on which we place considerable weight.
4. In light of Ms Demetriou's difficulties, and the difficulties of Professor Ulph (the Tribunal member whose diary conflicts with the date proposed by the parties), we therefore explored the possibility of listing the matter in early 2022. Although listing at this time would involve considerable difficulty, given Mr Beard QC's commitments, he has managed to identify a three-week period in late January and early February when he would be available to deal with the matter. That period is the three weeks commencing 24 January 2022.
5. It is not an ideal date by any means, because it means that the gap between the handing down of the CMA's decision under appeal and the hearing of the appeal stretches to over 12 months. That is not, as everybody would accept, ideal.
6. The problem is that Professor Ulph's difficulties in relation to the three-week slot commencing 22 November 2021 also arise in relation to the three-week slot commencing 24 January 2022.

7. That is unusual, and it is therefore necessary to explain exactly why these difficulties arise. Professor Ulph is a distinguished economist who has a role as a Commissioner of the Scottish Fiscal Commission. The Commission produces independent forecasts that underpin the Scottish budget. When a budget is to be delivered is, not surprisingly, a matter that the Scottish Government determines. A budget is announced on 12 weeks' notice.
8. Conventionally, the UK budget is held sometime in November, with the Scottish budget falling in early/mid December. The work of the Commission would be done in the 12 week period running up to the actual delivery of the Scottish budget, and Professor Ulph's work in relation to the budget would predominantly be in the three-week period running up to the budget.
9. In anticipation of this hearing, Professor Ulph has consulted very carefully with those involved in this process, and the reason the three-week period from 1 November 2021 was put forward by the Tribunal was because he is satisfied that he can give primacy to the hearing over that three-week period. If the budget is scheduled for the second half of November, which he considers unlikely, then the position he has taken is that the Commission's work on the budget will have to be done effectively without his input or with minimal input from him.
10. The Professor is unable to give similar assurances in relation to both the three-week slot commencing 22 November 2021 and the three-week slot commencing 24 January 2022. The fact is that it is perfectly possible for the budget to be set for early December or early February. He does not know.
11. One thing is however clear: it is unlikely in the extreme that two budgets to be set, one in early December 2021 and one in early February 2022. During the course of the hearing, we therefore floated the possibility with the parties of effectively having two trial dates booked out: one three-week period commencing 22 November 2021 and another three-week period commencing 24 January 2022, on the basis that the hearing could certainly take place on one or other of those dates.

12. It is a very unusual suggestion and it means that the diaries of the Tribunal and the legal teams of both parties would be left in a state of limbo for a considerable period, since one would only know that the budget was not going to take place in early December 2021 some time in the course of September 2021. We have considered most carefully whether this unusual arrangement is one that we should adopt in order to accommodate the convenience of both legal teams.
13. Mr Lask, who appears today for the CMA, has with a degree of enthusiasm endorsed the proposal that we floated because it is a way of ensuring that the CMA's choice of leading counsel will be engaged, because she can make both of these dates.
14. Mr Beard, who can also obviously make both of these dates, has articulated the very considerable problems that barristers, including but not exclusively himself, have in blocking out what is effectively a five or six-month period because of the need to have in the diary both three-week hearing dates and, of course, the preparation time for those three-week hearings. What he says, and I accept, is that effectively he (and I refer to him as a proxy for many of the other lawyers involved in this case) would have to put a line through his diary for both September, October, November, December 2021 and January and February 2022. I accept that. Although Mr Lask sought to portray Mr Beard's position as unique to him, we do not accept that. Mr Beard was, quite properly, raising a general difficulty, and the fact that the following discussion of the difficulties that arise out of our proposal refer to Mr Beard is simply because it was he who articulated these difficulties and, quite rightly, drew them to our attention.
15. It seems to me that the course we have suggested places other clients who have instructed Mr Beard in an unacceptably uncertain position. Of course, Mr Beard has other matters, which he is instructed on, where those matters are being listed for hearing. It seems to us to be entirely unacceptable to oblige third parties, who wish to instruct the services of Mr Beard, to be told that they cannot have him, not because of a fixed commitment but because of a potentially fixed commitment.
16. Equally, Mr Beard has made clear that so far as hearings in the EU Courts are concerned, this sort of listing difficulty would not be particularly persuasive: it is one thing to say that one has a definite commitment in another court, it is another thing

altogether to say that one has a contingent commitment (or contingent commitments) in another court.

17. So it seems to us that that is a weighty objection to the question of two fixtures approach, with each being contingent on the other not taking place.
18. We consider, imaginative though the suggestion of a contingent set of trial dates is, it is a course we are not going to order. We think that it is an unacceptable waste of resources, particularly of court time. The one thing I have not mentioned, thinking simply of my responsibilities as a High Court Judge, is that I have no doubt that Chancery Listing would take a dim view of my booking out a shadow trial for three weeks, particularly when I know that I have a Financial List matter that is likely to be fixed in the early months of 2022.
19. For all these reasons, we are not going to take the imaginative course that was proposed, not, I stress by the parties, but by the Tribunal itself.
20. That means we need to consider which of the two possible dates we must go for. It seems to us obvious that neither of the November 2021 or January 2022 dates proposed by the parties can work unless one has both sets of dates in the diary. And so we are driven, I am sorry to say, to the dates that we initially proposed, which is to fix this matter for the weeks commencing 1, 8 and 15 November 2021. I say that with great regret, because I know that Ms Demetriou is an important, and indeed a leading, member of the CMA's team. But, with the best will in the world, we cannot, I am afraid, see any other course to having this matter efficiently heard than to fix it for those three weeks in November 2021.
21. I should add, although I hope it is obvious from our approach generally, that we have considered very carefully whether the CMA would be unfairly prejudiced by this course. We conclude that whilst it is obviously unfortunate that the CMA is being deprived of its counsel of choice who, we have been told, has advised during the course of the administrative stages of the decision of the CMA under appeal, we do not consider that there is any unfairness to the CMA in this regard. We are, as we have provisionally indicated, minded to give a considerable degree of time for the

preparation of a defence, and I make clear that the CMA wants the 28 April 2021 and it will get that date, not least because of the difficulties we are imposing because of the hearing date we are ordering.

22. Equally, if there are any other matters that we can do to assist the CMA, in terms of a transition to a new leading counsel, we will consider those. But we consider that, speaking in early March 2021, that the idea that the CMA cannot be properly ready with new leading counsel for an appeal commencing on 1 November 2021 is, frankly, fanciful. We therefore will order that the appeal take place in the three weeks commencing 1 November 2021.

The Hon Mr Justice Marcus Smith
Chairman

Bridget Lucas QC

Professor David Ulph CBE

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 5 March 2021