



Neutral citation [2022] CAT 11

Case No: 1380/1/12/21

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 February 2022

Before:

SIR MARCUS SMITH
(President)
BRIDGET LUCAS, QC
PROFESSOR DAVID ULPH

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

- and -

THE COMPETITION AND MARKETS AUTHORITY

Respondent

Ruling after receiving written submissions from interested third parties

**RULING (EXCISIONS FOR CONFIDENTIALITY IN A FUTURE
JUDGMENT)**

1. During the course of the hearing of this appeal, we dealt with an application for the proceedings to go into private session. That ruling (the “Ruling”) is reported under Neutral Citation Number [2021] CAT 33.
2. In the Ruling, we gave our reasons for going into private session. The reasons, in essence, were that although we very much wanted to avoid hearing even part of the case in private, we were effectively compelled to take that course because of the over-inclusive confidentiality regime that had been operated by the Competition and Markets Authority (the “CMA”). We wish to stress – as we did in the Ruling – that this is in no way intended to be a criticism of the CMA. The CMA was simply reflecting the desire for confidentiality articulated by third parties involved in the CMA’s investigation, which investigation resulted in the decision under appeal in these proceedings.
3. We do not consider that the CMA can be criticised in seeking to preserve information that third parties, who have assisted the CMA in its investigations, insist is confidential. However, we are conscious that because of the wide regime of confidentiality operated to date by the CMA, there is no clear distinction between information which, if published, might do material harm to a third party, and material which a third party merely wishes to keep confidential for other reasons.
4. For the reasons given at [8] of the Ruling, we consider that material that may appropriately be protected during the “administrative” phase of an investigation by the CMA, does not and cannot automatically benefit from such continued protection when the decision – the outcome of the investigation – is appealed to this Tribunal. As all of the courts in this jurisdiction do, this Tribunal places a very high premium on the principle of open and public justice. Hearings are – and should be – conducted in public, so that interested persons can see and understand the material on which our decisions are based. That way confidence in our system of justice is maintained and enhanced. Justice must not only be done: it must be seen to be done.
5. In these circumstances, and as was stated in the Ruling, we consider that information can be referred to openly, and during the course of in public proceedings, without undue restriction unless a need for confidentiality has been articulated, if necessary supported by evidence, demonstrating why reference to such material will result in material harm to a person either before the Tribunal or to some third party. Paragraph (1)(2) of Schedule 4 of the Enterprise Act 2002 refers to the need for a judgment to exclude so

far as practicable reference to certain sensitive material, and we use the test “resulting in material harm” to refer to this paragraph.

6. Naturally, the Tribunal expects those advocates appearing before it to be sensitive to the confidential information they are handling, and not to refer to it gratuitously. But, absent a real risk of material harm, the interests of open justice will almost always trump even legitimate interests of confidentiality.
7. Where there is evidence demonstrating a real risk of material harm, it should not be thought that this Tribunal will automatically permit confidentiality to trump the principle of open justice. Where it is shown that publication entails a risk of material harm, the Tribunal will engage in a balancing exercise that will appropriately take account of what are, in effect, competing interests and values. The principle of open justice is a significant factor that the Tribunal will have regard to, and attach weight to when conducting that exercise.
8. Generally speaking, this balancing exercise (if it arises) should take place, and be resolved, well before any hearing at which the confidential material at issue is going to be deployed.
9. Following our Ruling, the question arose as to how our future judgment, disposing of the appeal, should treat information asserted to be confidential. At our invitation, the CMA notified the third parties asserting confidentiality in the material adduced by the CMA, and we have received written submissions from many of these third parties in support of the maintenance of a wide regime of confidentiality. These submissions – which we will do no more than summarise – ranged from asserting that very specific facts and figures should not be referenced in the future judgment because they were sensitive and commercially confidential, to largely unsubstantiated assertions that the very name of a particular party and that party’s involvement in the market should remain under wraps when the future judgment came to be handed down.
10. We are conscious that a wide regime of confidentiality has been operated to date, and that as a result there has been no clear distinction between information which might do material harm to a third party if published, and information which a third party would simply prefer not to be published. Accordingly, when we circulate our future judgment disposing of the appeal, we will do so in draft form to the parties to these proceedings.

We will invite the CMA to draw to our attention any parts of the judgment which, in the opinion of the CMA, might cause material harm if published in an unredacted form. We will consider most carefully any aspects of the draft judgment that the CMA considers might cause material harm if published. We do not propose to hear from any third parties, and it will be for the CMA to consider the extent to which it should engage with the views of such third parties when forming its view.

11. We should, however, make clear that we do not consider that the mere reference to the name or identity of a participant in the market or markets here under consideration can constitute information which, if published, might cause material harm. We appreciate, of course, that it would be inappropriate to be too prescriptive as to what can and cannot constitute material harm, and that this is a matter that must be considered in the individual case. However, having considered the matter very carefully, we consider that the publication of a named person's participation in the home insurance market(s) described in the CMA's decision under appeal does not give rise to any risk of material harm to that person or any other person. We are confirmed in this view by the fact that those parties who asserted "broad-brush" protection of their names and identities did so without adducing any evidence in support of such a course. Whilst, of course, we will hear from the CMA about any and all aspects concerning redactions to or re-wordings of the draft judgment, we consider that a bare assertion of confidentiality in relation to name/identity is not enough to protect information from public disclosure.
12. We have no doubt that the CMA will bear this in mind when considering both the need for redaction, and the need to consult third parties in relation to redactions.
13. We conclude by making clear one further point: the CMA is a public body, conducting a difficult and important role for the public benefit. We doubt whether this ruling will result in any "chilling effect" on disclosure of information by third parties to the CMA in any future investigation. In any event, even if there were such a "chilling effect", the CMA has powers to compel the production of information, which it will no doubt use. We would only say that if the CMA needed the assistance of this Tribunal in obtaining information relevant to its public duties, the Tribunal would be willing to hear any application that the CMA might make in this regard.

Sir Marcus Smith
President

Bridget Lucas, QC

Professor David Ulph CBE

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 21 February 2022