The EAT gives guidance on the anonymisation of persons named in proceedings and on the redaction of documents

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Mr Frewer v Google UK Limited and Others [2022] EAT 34

HHJ James Tayler, 17th March 2022

1. The Respondent applied to anonymise the names of all its clients so that they did not appear in the hearing bundle, witness statements or Judgment (unless they were already in the public domain) and to redact information that it described as commercially sensitive and irrelevant.

2. Mr Frewer had alleged that Google was acting in an anti-competitive way by giving two main clients a disproportionate number of hits. Google wished to keep the identities out of the public spotlight. Google also wished to redact some documents.

3. The EAT reminded us of the principle of open justice and stated that it is important to name names so that matters may be reported in the press. There was, the EAT held, a strong argument that the public would have a strong and legitimate interest in knowing the identities of the clients who were alleged to have been given the alleged competitive advantage.

4. The Judgment takes us through several steps as follows.

Disclosure

5. A document is to be disclosed only if it is relevant to the issues in dispute; a document will only be "relevant" if it may well support or adversely affect a party's case (paras 18.1 and 19).

6. Even if material is relevant an order for disclosure should not be made unless the material is necessary for the fair determination of the issues. This is the test of necessity (paras 18.2 and 19).

7. If a document contains material some of which is relevant and necessary for the fair determination of the issues and some that is irrelevant, it may be appropriate to redact irrelevant sections, if there is some good reason such as commercial confidentiality or sensitivity (para 18.3).

8. If material is relevant and necessary for the fair determination of the issues, there may be restrictions on publicity including redaction where it is appropriate to make an order pursuant to Rule 50 of the ET Rules. The principle of open justice must be properly evidenced, and such an order can only be made if it is necessary (para 18.4).

Redaction

9. If a document does not support, or is not adverse, to a party's case, or is not necessary for the fair disposal of the proceedings then it need not be disclosed in the first place; that will avoid long battles about redaction - irrelevant material can be ignored (para 22). Sometimes consideration may have to be given to including only part of the document in the bundle or to redaction: particularly as the bundle may be available for inspection at the hearing, and possibly thereafter (para 23).

10. Where documents are redacted, this should be attested to by the party making the redaction. The accompanying attestation must be an explanation of the basis on which the redaction has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process. Any order for redaction on grounds of confidentiality must be made only where necessary on an application supported by evidence having full regard to the open justice principle (para 25).

The Open Justice Principle

11. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. The second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material (per Baroness Hale in *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2020] AC 629) (para 27).

Naming Names

12. It is important to name the names of those involved in legal proceedings. As Lord Rodger expressed in *re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697, "a requirement to report [proceedings] in some austere abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on". Further, "the identities of claimants may not matter particularly to the judges. But the legitimate interest of the public is wider than the interests of judges qua judges or lawyers qua lawyers. Furthermore, the fact that the parties have agreed to anonymity cannot absolve the court from balancing the interests at stake for itself. Indeed, that is when there is the greatest need for vigilance" (para 28).

13. Lord Sumption further stated in **Khuja v Times Newspapers Ltd** [2017] UKSC 49, [2019] AC 161, "the target audience of the press is likely to be different and to have a different interest in the proceedings, which will not be satisfied by an anonymised version of the judgment. In the general run of cases there is nothing to stop the press from supplying the more full-blooded account which their readers want" (para 29).

There may be circumstances in which anonymisation is appropriate, as Lord Sumption continued, “The identity of those involved may be wholly marginal to the public interest engaged. Thus Lord Reed JSC remarked of the Scottish case *Devine v Secretary of State for Scotland* (unreported) 22 January 1993, in which soldiers who had been deployed to end a prison siege were allowed to give evidence from behind a screen, that “their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their Disclosure”” (para 31).

Rule 50

14. This rule permits orders such that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymization or otherwise, whether in the course of any hearing or its listing or in any documents entered on the Register or otherwise forming part of the public record.

15. Orders may therefore be made to protect commercially confidential information. Orders may be made in respect of the protection of trade secrets and commercial confidentiality, being matters that could support a restriction to the open justice principle. However, such an order can only be made subject to the high threshold required for any order that derogates from the open justice principle. Information that is truly subject to obligations of commercial confidentiality, as opposed merely to being commercially sensitive, can be protected (para 34).

16. Simpler J (President) in *Fallows v News Group Newspapers* [2016] ICR 801 stated that the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice (para 36).

In Summary

17. The public interest principle usually requires the naming of those significantly involved in court proceedings.

18. There is a public interest in hearings being conducted so that the press can report names of those involved, even if the court could have done its job without the names being named. For example, in this particular case there was a strong argument that the public would have a genuine and legitimate interest in knowing the identity of the key clients of Google who were said to be given the competitive advantage.

19. Consideration of anonymisation requires a focused and detailed consideration of the competing rights, including the claimant's Article 6 right to a fair and public hearing, the Article 10 right to freedom of expression on the one hand, and any issues of commercial confidentiality on the other.

20. It is important that a distinction is drawn between information that is said to be "commercially sensitive" and that said to be "confidential". Material clearly can be commercially sensitive without being confidential, in the sense that the information has been imparted in circumstances that result in a legal right to confidentiality.

21. When dealing with redaction, the following stepwise approach should be adopted (para 47):

    (i) Is any material relevant in the sense of being likely to support or be adverse to a party's case?

    (ii) Is the material necessary for the fair disposal of the proceedings?

    (iii) If material does not pass both of those criteria it should not be before the tribunal.

    (iv) Only if there is material that is likely to support or to be adverse to a party's case and is necessary for the fair disposal of the proceedings should consideration be given as to whether some order pursuant to rule 50 should be made Such an order should only be made if the party persuades the tribunal on proper evidence that such an order is necessary, having given full regard to the open justice principle, including the importance of names being named particularly those of persons who played a significant role in the subject matter of the proceedings, so that the press can report exercising its editorial judgement.

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