



## Judgment in *Bugsby Property LLC v LGIM Commercial Lending Limited* [2021] EWHC 1054 (Comm) (Henshaw J).

The Commercial Court orders third party disclosure to be made subject to a confidentiality club excluding a party's lay representative:

***Bugsby Property LLC v LGIM Commercial Lending Limited*** [2021] EWHC 1054 (Comm) (Henshaw J).

This dispute relates to the sale of Olympia, the exhibition and events space in West London, which was put up for sale by its former owner, Capital and Counties, in 2015. Bugsby alleges that in arranging finance for the successful bidder, Yoo Consortium, LGIM breached an earlier exclusivity agreement between it and Bugsby, and that Bugsby had a chance of winning the bid without LGIM's breach. LGIM admits breaching the agreement, but argues that Bugsby has suffered no loss because Yoo Consortium would still have won the bid for Olympia even without its support. The trial is listed for October 2021.

Both parties sought third party disclosure from the members of the Yoo Consortium and Capco, each claiming that the documents would support their case and undermine that of the other party. Henshaw J issued rulings in relation to certain categories of documents which were not agreed,

including notably documents evidencing the business plans of the Yoo Consortium for Olympia since the acquisition.

The point of greatest interest is the judge's acceptance of the third parties' objections to Bugsby's lay representative, whom they regarded as a competitor, being given access to the disclosed documents at the disclosure stage. The judge accepted that the documents were highly commercially sensitive, and that there was a risk that disclosure might confer a competitive advantage on Bugsby, even inadvertently. He also noted that it is a common feature of litigation that much of the disclosed documentation is not deployed at trial. He therefore ordered a tiered confidentiality ring under which disclosed documents would be initially reviewed only by lawyers and experts, but which established a mechanism for the parties to apply for particular documents to be made more widely available, allowing decisions to be taken on a case by case basis.

The judge applied the balancing approach adopted in IP cases such

as *IPCOM v HTC* [2013] EWHC 52 (Pat), recognising the justification for ordering disclosure of necessary and proportionate documents held by third parties, but at the same time protecting the confidentiality of the third parties except where justice requires otherwise. He stressed that the case was still at an interim stage. Different considerations arise at trial, where a party is entitled as a matter of due and fair process to see the evidence which is being relied upon against it: see *AI Rawi v Security Service* [2012] 1 AC 531. A tiered confidentiality ring such as that ordered in this case permits the orderly identification of documents for use at trial which are truly critical without requiring an outsider to the dispute to give up large quantities of commercially confidential information to a competitor which may never be relied upon.

Zoe O'Sullivan QC acted for Deutsche Finance International LLP, one of the third parties.

Zoe O'Sullivan QC

