



Neutral citation [2020] CAT 22

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 October 2020

Before:

THE HONOURABLE MR JUSTICE ZACAROLI
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) CHURCHILL GOWNS LIMITED**
(2) STUDENT GOWNS LIMITED

Claimants

- v -

- (1) EDE & RAVENSCROFT LIMITED**
(2) RADCLIFFE & TAYLOR LIMITED
(3) WM. NORTHAM & COMPANY LIMITED
(4) IRISH LEGAL AND ACADEMIC LIMITED

Defendants

Heard remotely on 27 October 2020

RULING (SPLIT TRIAL AND EARLY DISCLOSURE)

APPEARANCES

Christopher Brown and Paul Skinner (instructed by TupperS Law Limited) appeared on behalf of the Claimants.

Michael Armitage (instructed by Fladgate LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. On 22 May 2020 the Claimants filed a claim under section 47A of the Competition Act 1998 (“the Act”) alleging that the Defendants have infringed the prohibition contained in section 18 of the Act (“the Chapter II prohibition”) and the prohibition contained in section 2(1) of the Act (“the Chapter I prohibition”).
2. The Defendants filed their Defence on 21 August 2020 and the Claimants filed their Reply on 25 September 2020.
3. On 20 October 2020, the Claimants made an application pursuant to Rule 53(1) of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (“the Tribunal Rules”) requesting, amongst other things, (a) the bifurcation of trial of issues of liability and quantum, and (b) early disclosure of documents containing or evidencing what the Defendants refer to in their Defence as “official supplier arrangements” (“OSAs”), with general disclosure to be provided after a scoping exercise to be conducted by the parties.
4. A first case management conference (“CMC”) in these proceedings was held remotely on 27 October 2020 at which I heard submissions from counsel for the parties on the Claimants’ applications for a split trial and early disclosure. This is my ruling given at the CMC. Nothing in this ruling prejudices the issues that fall for determination in this case.

B. THE APPLICATION FOR A SPLIT TRIAL

5. The jurisdiction to order a split of the trial arises, in particular, under Rule 53(2)(o) of the Tribunal Rules, where the hearing of any issues as preliminary issues can be ordered prior to the main substantive hearing.
6. The overall test to be applied is to ensure that proceedings are dealt with justly and at proportionate cost. The parties are in agreement that this test involves a pragmatic balancing exercise, taking into account numerous factors, including those helpfully summarised by Hildyard J in *Electrical Waste Recycling Group*

Limited v Philips Electronics UK Limited and Others [2012] EWHC 38 (Ch) at [5] and [6]:

“5. Where the issue of case management that arises is whether to split trials the approach called for is an essentially pragmatic one, and there are various (some competing) considerations. These considerations seem to me to include whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary; what are likely to be the advantages and disadvantages in terms of trial preparation and management; whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials; whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case; whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages); whether there are difficulties of defining an appropriate split or whether a clean split is possible; what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process; generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.

6. Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and a pragmatic approach, may include whether a split would assist or discourage mediation and/or settlement; and whether an order for a split late in the day after the expenditure of time and costs might actually increase costs.”

7. These principles were recently applied in the case of *Daimler AG v Walleniusrederierna Aktiebolag and Others* [2020] EWHC 525 (Comm) (“*Daimler*”) by Bryan J, particularly at [26] and following.
8. Each party sought either to rely on or distinguish the *Daimler* case. There is, however, limited utility in comparing the application of the overall test and the particular factors in other cases. Every case is highly fact sensitive. It is important to recognise that the list produced by Hildyard J is a non-exhaustive list of relevant, in many respects overlapping, factors.
9. The Claimants’ application is that the first trial would be limited to issues of infringement, meaning that all issues of causation and quantification of loss would be deferred to a second trial. An intermediate possibility, which neither side put as their preferred option but both advocated as a fallback, was that infringement and causation could be determined at the first trial so that all that was split off would be the quantification of loss.

10. The real dispute between the parties in this case boils down essentially to two main points among those factors that I have already mentioned identified by Hildyard J. The first point is whether it is possible to define a split with clarity so as to avoid duplication and attendant difficulties. The second is whether bifurcation is desirable because of the number of potential permutations of findings at stage 1, each of which would lead to a different enquiry at stage 2 such that, if you had a split trial, the necessary framework would be identified before embarking on stage 2.
11. As to the first point, it is common ground that there are a number of issues that go both to infringement and causation. It is common ground, therefore, that there are a number of witnesses whose evidence will be relevant both to infringement and causation. Particular examples relate to the counterfactual that needs to be established in order to prove infringement. Much of that will be equally relevant to issues of causation.
12. The Defendants point also to the overlap on expert economic evidence relevant to infringement, for example to the allegation that exclusivity agreements enable higher prices to be charged. That would clearly be relevant to both causation (and potentially quantum) as well as infringement.
13. The Claimants contend, nevertheless, that this duplication points in favour of a split trial. In brief, it is submitted that, since the witnesses' evidence would essentially be the same, whether it goes to infringement or causation, the whole of their evidence would be given at the first trial and there would be no need for them to return for a second trial. The evidence at the first trial would effectively stand as the basis on which determinations would be made at the second trial as to causation and quantum.
14. In my judgment, however, in agreement with the Defendants, the extent of duplication in this case points against splitting the trial, certainly as between infringement and causation. First, there is a risk that the preparation of the evidence, the cross examination in relation to it and the Tribunal's consideration of it at the first trial, if only infringement was in play, may not be as extensive, and the Tribunal's findings may not be as extensive, as they would be if it was

being considered in the context of all issues to which it related. There is scope, it seems to me, for matters falling between two stools.

15. Second, as the Defendants pointed out, if the evidence is all going to be given in the first trial, including the expert evidence relating to infringement and causation, leaving aside for a moment the forensic financial evidence, then what would be the real saving in terms of time and cost in deferring determination of causation until later?
16. The Claimants accept that some witnesses, for example Mr Cormack and a witness from the finance department of the Defendants, would be required to give separate independent evidence at both trials: i.e. distinct evidence going to causation, as well as evidence that goes both to causation and infringement. That seems to me to be a relatively minor factor in the scheme of things here.
17. I consider that the risk of duplication is powerful reason against the splitting of the trial. It operates, however, particularly against a split as between infringement and causation; it is far less powerful in the context of a split of just the quantification of loss issues.
18. The Defendants make a subsidiary point that, for a claim such as this, namely breach of statutory duty, damage is an essential element of liability. They referred me to *Arriva The Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch) per Rose J at [51]. While in many cases it is accepted that once infringement is established there will have been some loss, that was so in that case where it was contended that, even if there was some infringement, that had not caused any loss.
19. The Defendants say that is also true in this case, because basic causation would not be established by a finding on infringement. In particular the Defendants say that the Claimants will not be able to demonstrate that they would have established a profitable business in the market absent the infringements.
20. The Claimants accept they have to show some loss, but this is a relatively low hurdle and there would be a ready inference that there was some loss if they

establish infringement. In any event, it would not be problematic if the Tribunal needed to wait until a second trial before it could make a conclusion on liability, including there being some loss.

21. I think that this point of the Defendants has considerably less force, but it does not detract from the importance of avoiding duplication.
22. Turning to the second main issue, the most telling point in favour of a split is if there are multiple different causation routes and/or heads of damage which would only be relevant on one of the many permutations on the outcome on liability. The Claimants say the permutations would include things such as the definition of the market: is it university specific, national or even worldwide? The Claimants may succeed on certain aspects but not others. For example, some agreements may be found to have a restrictive effect in a particular university market but not others. This would clearly have an effect on quantification issues.
23. The Defendants submit that the allegation made is that all agreements confer exclusivity or quasi exclusivity. At this stage, however, it is impossible to say whether that would be the finding made at trial. I have to contemplate the possibility that some of the agreements do create infringements and others do not.
24. Equally, the conclusions on the counterfactual sub-issues will have a direct bearing on quantum. For example, on the Chapter I issues, assessing a restrictive effect on competition requires a comparison on the state of competition, both with and without the relevant conditions. The Defendants accept that precise findings on the counterfactual are clearly relevant to detailed quantification. I agree. Until you know the correct counterfactual, i.e. what, if any, agreements would have been reached with the Defendants and the universities without committing infringements, you do not know how to calculate the precise loss suffered. But the strength of this point goes primarily, if not completely, to hiving off only the quantification of damages.

25. Balancing these two main considerations against each other, therefore, I am of the clear view that the appropriate course is that infringement and causation should be dealt with together at one trial but that the quantification of damages should be hived off to a subsequent trial as necessary. I have taken into account all of the other factors identified in Hildyard J's judgment, but do not think that they detract from the conclusion based on the two principal factors at play in this case.
26. I note, however, two additional points. The first factor is whether the prospective advantage of saving of the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary. The Claimants suggest that the costs overall would be less if the trial was split, even if there is a second trial. It is always difficult to evaluate this in the abstract, particularly without any quantification of the alleged saving and without any identification as to what the length of the second trial would be, but I think it is inherently more likely that there would be an increase in overall costs if there were a split trial.
27. Nevertheless, I accept that where there are multiple potential conclusions on infringement, or infringement and causation together, which would require multiple avenues of quantum to be gone down, that clearly favours splitting off quantification and would lead to a saving in cost. In particular, the forensic accountancy evidence would be far more limited if the parameters were known at the outset rather than the experts having to deal with all possibilities.
28. Picking up the seventh factor identified in Hildyard J's judgment (the weight to be given to the risk of duplication, delay and the disadvantage of a bifurcated appellate process), there is clearly a concern in every case at a bifurcated appeal process. The Claimants point out that the Tribunal retains a discretion as to what to do about quantum, even if there is an appeal after the first trial. But the point cuts both ways, particularly because an appeal on a composite trial runs the risk of the matter having to be remitted to reinvestigate quantum, depending on the appeal court's determination as to liability.

29. For all of those reasons, therefore, I remain of the view that the appropriate conclusion is to split only quantification of damages off from the rest of the issues.
30. Finally, there was a mention floated for the first time today by the Claimants that the issues dealing with joint and several liability might be more suitably dealt with at the second trial. Given my conclusion on the principal point, I don't accept that that would be right. Those matters will be determined at the first trial, along with infringement and causation.

C. THE APPLICATION FOR EARLY DISCLOSURE

31. I consider that there has been a reason put forward for this early disclosure. The principal reason is that it will assist with the disclosure process that is about to be embarked upon if the suite of existing agreements is at least as full as possible. I also take on board the Claimants' point that they are currently in the dark as to the precise agreements that have been reached and, once they have seen them, it may well reshape the case by prompting further amendments to the pleadings.
32. I am secondly, however, sympathetic to the difficulties the Defendants identify in the evidence of Ms Taylor, to the extent that locating the relevant documents would require the sort of internal investigation and searches that would also be necessary in the disclosure exercise which they are going to have to undertake in any event. To the extent that is the case, it is a powerful reason for not requiring it to be done twice.
33. On the other hand, I am not persuaded, on the basis of that evidence, that a more limited range of documents, being those that currently exist and those that contain terms (as opposed to merely evidencing discussions where terms were agreed orally) would create such difficulties. It does seem to me that the Defendants ought to be able to lay their hands on the agreements they currently have with institutions, because they could be required to do so in all sorts of circumstances which have nothing to do with this litigation.

34. Accordingly, balancing the desire not to impose an onerous disclosure exercise at this stage with my instinct that the documents that I have mentioned should be readily available, I will make an order in terms that require the Defendants to give initial disclosure of all documents containing the terms of the OSAs to which they are currently a party. I will not, therefore, require the Defendants to undertake the historic search that has been asked for.

The Hon Mr Justice Zacaroli
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 27 October 2020