Neutral Citation Number: 2015 EWHC 3472 (Ch)

Case No: HC-2012-000063

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 November 2015

Before:

THE HONOURABLE MR JUSTICE BARLING

Between:

SAINSBURY'S SUPERMARKETS LIMITED

Claimant

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Defendants

Judgment

(Reasons for Order pursuant to section 16 Enterprise Act 2002)

MR JUSTICE BARLING:

Introduction

1. In the course of case management conferences in these proceedings I have raised with the parties the question whether, in view of the enactment of the Consumer Rights Act 2015 ("the 2015 Act") and consequent expansion of the jurisdiction of the Competition Appeal Tribunal ("CAT"), this would be an appropriate case to transfer to the CAT pursuant to the powers invested in the court by virtue of section 16 of the Enterprise Act 2002 (the "2002 Act"), and the regulations and rules of court now made thereunder.

2. On 12 November 2015 I wrote to the parties seeking their views on such a transfer. Both parties have now replied through their respective solicitors. Below I refer to the positions taken by the parties.

3. Having considered all the circumstances of the case, including the parties' comments, I have decided that a transfer to the CAT is appropriate in respect of these proceedings.

4. As this will be the first such transfer, I will set out briefly the legislative history and the background to the court's powers in this regard, before indicating why I consider that a transfer is appropriate in the present case.

History of section 16

5. Prior to the coming into force of the 2015 Act on 1 October 2015, the jurisdiction of the CAT in relation to private damages actions for infringement of competition law was limited to so-called "follow on" claims, almost all of which were brought under section 47A of the Competition Act 1998 (the "1998 Act") (as inserted by subsection 18(1) of the 2002 Act) ("Old Section 47A"). These are claims which follow on from a pre-existing decision by one of the UK competition authorities or by the European Commission (or by a relevant court or tribunal on appeal from one of those bodies) that there has been an infringement of UK or EU competition law (specifically, the Chapter I and Chapter II prohibitions in the 1998 Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union). Curiously, the UK's specialist competition tribunal, the CAT, was not empowered to make such a finding of infringement in the context of a private damages action, although it could do so in the context of an appeal from the decision of one of the UK competition authorities. This was clearly anomalous, as Lloyd LJ pointed out in *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2 at [143].

6. The CAT's limited jurisdiction under Old Section 47A meant that stand-alone claims for damages, that is, claims in which the court itself is asked to make a finding of infringement, were, in England and Wales, the sole preserve of the High Court.

7. Subsection 16(1) of the 2002 Act offered a means of partially rectifying the anomaly by giving the Lord Chancellor power to adopt secondary legislation enabling the High Court to "transfer to the [CAT] for its determination so much of any proceedings before the court as relates to an infringement issue". However, no such secondary legislation was brought forward during the period that Old Section 47A was in force. Although the High

Court did have the power, pursuant to subsection 16(4) of the 2002 Act, to transfer to the CAT "in accordance with rules of court, so much of any proceedings before it as relates to a claim to which section 47A of the 1998 Act applies", in light of the limited scope of Old Section 47A, this power could only have been used in the context of a follow-on claim.

Recent legislative developments

8. With effect from 1 October 2015, landmark reforms to the procedures for private enforcement of competition law in the UK have been introduced by the 2015 Act, and have significantly expanded the jurisdiction of the CAT in this field. Notably (for present purposes), Old Section 47A has been substituted by sub-paragraph 4(1) of Part 1 of Schedule 8 to the 2015 Act ("New Section 47A"). New Section 47A confers on the CAT jurisdiction to hear *inter alia* stand-alone claims for damages and, pursuant to sub-paragraph 4(2), applies to claims arising before 1 October 2015 as it applies to claims arising after that date.

9. For the purposes of subsection 16(4) of the 2002 Act, "a claim to which section 47A of the 1998 Act applies" now includes (by virtue of subsections 47A(2) and (3) of the 1998 Act, as amended by the 2015 Act) a claim of the type which is the subject of the present proceedings, namely a claim for damages or any other claim for a sum of money brought in respect of an infringement decision or an alleged infringement of the Chapter I prohibition in the 1998 Act or the prohibition in Article 101(1) of the Treaty on the Functioning of the European Union.

10. Further, in parallel, and also with effect from 1 October 2015, the Section 16 Enterprise Act 2002 Regulations 2015 ("the 2015 Regulations") came into force. These were made pursuant to subsection 16(1) of the 2002 Act and enable the High Court to transfer to the CAT "for its determination so much of" any proceedings before the court as relates to an infringement issue falling to be determined in those proceedings. "Infringement issue" is defined in subsection 16(6) of the 2002 Act (so far as relevant) as "any question relating to whether or not an infringement of (a) the Chapter I prohibition….or (b) Article 101….of the Treaty has been or is being committed".

11. Therefore, the combined effect of these legislative developments is to invigorate the existing transfer provisions set out in section 16 of the 2002 Act.

Relevant changes to rules of court

12. Rules of court have been revised to take account of the legislative developments. Paragraphs 8.3-8.6 of Practice Direction 30 (as in force from 1 October 2015) make provision for transfer under subsection 16(4) of the 2002 Act. Paragraph 8.3 provides that the High Court may order a transfer under that subsection on its own initiative or on application by the claimant or defendant. When deciding whether to make an order the court must consider all the circumstances of the case including the wishes of the parties. Similar provision is made by paragraphs 8.10-8.13 of the Practice Direction for transfers under subsection 16(1) and the 2015 Regulations. The procedural rules of the CAT have also been updated. The Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "CAT Rules") came into force on 1 October 2015. Rule 72 sets out certain practical requirements following any transfer of proceedings to the CAT.

Specialist nature of the CAT

13. There is no doubt but that the High Court has at its disposal, through its judiciary, considerable skill and experience in dealing with complex litigation, including in the competition field. There are judges who have specific expertise in this area. It is therefore material to reflect on why legislative provision has been made for transfers between the High Court and the CAT.

14. In recent years there has of course been a deliberate movement of some cases from courts with a more general jurisdiction to courts and tribunals whose judges are specialists in a particular field of law. For example, the transfer of some immigration appeals from the Administrative Court to specialist immigration tribunals, and the movement of certain tax appeals from the High Court to the chamber of the Upper Tribunal specialising in tax cases.

15. The 1998 Act recognised that competition law was an area which justified a specialist court to deal, not just with appeals in cases concerning public enforcement of the competition rules, but also with some private law claims for damages. One obvious feature of competition litigation is the almost ubiquitous presence of expert economic evidence, often of a complex and technical nature. Another common feature, related to the last one, is evidence as to the characteristics and dynamics of specific industries and markets. Mindful of these features, Parliament provided for the specialist competition tribunal to have a multi-disciplinary constitution. In this way panels have the potential to include not just lawyers but also, for example, distinguished economists, accountants or industry experts, selected for each case from the members appointed to the CAT by reason of their knowledge and experience in these areas. Expertise of this kind is of considerable assistance in understanding and resolving the difficult issues which are a common feature of competition litigation. This has long been recognised in the UK, the former Restrictive Practices Court having had a similar constitution. Although it is not impossible for a judge sitting on a case in the High Court to enlist the assistance of a court expert, this is relatively uncommon, and there are resource and other obstacles to the adoption of that course on more than very exceptional occasions.

16. Furthermore, CAT panels benefit from outstanding logistical and legal support provided by the CAT staff and legal assistants (“referendaires”). This is of particular value in lengthy and complex actions.

Relationship with the High Court

17. In one important respect the CAT has the best of both worlds, in that it is also able to tap into the expertise of the High Court in this field. For many years High Court judges of the Chancery Division have been appointed as CAT Chairmen, and have regularly sat in the CAT. In this way the CAT is in a position to draw on the assistance of experienced judges who have heard competition law cases in both the High Court and the CAT. Indeed, the CAT’s ability to have recourse to senior judges with appropriate expertise has now been augmented by section 82 of the 2015 Act. Section 82 amended the 2002 Act to facilitate the appointment to the CAT of suitably qualified judges sitting in any Division of the High Court (and its equivalents in Scotland and Northern Ireland).

18. This overlap of judiciary can also be of significance in enabling continuity to be maintained in cases where there is a transfer of proceedings which have reached an advanced stage in the journey to trial.

The present case

19. I am the judge nominated by the Chancellor of the High Court to case-manage and ultimately to hear the present proceedings, which are due to be heard over a period of 9 weeks (including reading time) beginning on 11 January 2016. As that time estimate indicates, the proceedings are undoubtedly lengthy. They are also complex. The latest agreed list of issues runs to some 16 pages and records more than twenty separate issues. These include questions in respect of which there is likely to be a considerable input of economic evidence and argument, for example, issues as to the definition of relevant markets, as to the appropriate "counterfactual" when assessing the effect on competition of the alleged unlawful restrictions, as to whether the alleged restrictions contributed to *inter alia* the promotion of economic progress, and many other related questions, including cost-related matters. I have been informed by the parties that there will be in the region of 1,000 pages of expert evidence, with oral evidence of experts also to be given at trial. In the light of this, the present proceedings appear suitable to be heard in the CAT.

20. Given the advanced stage the proceedings have reached, it would be unlikely to be considered appropriate to transfer them if the trial window, which has been in place for some months, would thereby be put at risk. Enquiries of the CAT Registry indicate that a transfer of the proceedings to the CAT can be accommodated without any impact on the existing timetable.

21. Further, the period during which I have been involved in the case-management of the proceedings as the assigned judge is such that my availability to sit on this matter as Chairman of a CAT panel would be a significant factor in deciding whether or not to transfer the case. As things stand I am available, as the understanding has been that I would, if practicable, be the trial judge. To that extent a transfer would not result in loss of such familiarity as I have gained of the issues in the proceedings.

The wishes of the parties

22. Having myself raised with the parties the question of a transfer, by my letter of 12 November 2015 I invited their views on that course.

23. By letter of 12 November 2015 the solicitors for the defendants confirmed their agreement to a transfer. By their letter of 17 November 2015 the solicitors for the claimant confirmed that they were not in principle opposed to a transfer. However, they raised two points relating to limitation and costs.

Limitation point

24. The query under this head concerns the transitional provisions in Rule 119 of the CAT Rules. Although the claimant's solicitors consider that Rule 119 does not apply to claims transferred to the CAT, with which Rule 72 is concerned, they have asked for clarification from the court in this regard. Their concern appears to be that if Rule 119 were to be interpreted as applying to the proposed transfer, it could be suggested that the CAT would only have jurisdiction in respect of that portion of the present claim for which the cause of

action arose less than two years prior to the commencement of the claim (by virtue of the different time limits for making a CAT claim under Rule 31(1) to (3) of the Competition Appeal Tribunal Rules 2003 (S.I. 2003 No. 1372) ("the 2003 Rules")).

25. Rule 119 of the CAT Rules states as follows:

> "119.—(1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") as if they had not been revoked.
>
> (2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—
>
> (a) proceedings under section 47A of the 1998 Act, or
>
> (b) collective proceedings.
>
> (3) A claim falls within this paragraph if—
>
> (a) it is a claim to which section 47A of the 1998 Act applies; and .
>
> (b) the claim arose before 1st October 2015.
>
> (4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015(1) continue to apply to the extent necessary for the purposes of paragraph (2)."

26. Rule 31 of the 2003 Rules provides:

> "COMMENCEMENT OF PROCEEDINGS
>
> Time limit for making a claim for damages
>
> 31.—(1) A claim for damages must be made within a period of two years beginning with the relevant date.
>
> (2) The relevant date for the purposes of paragraph (1) is the later of the following—
>
> (a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;
>
> (b) the date on which the cause of action accrued.
>
> (3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.
>
> (4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A."

27. Whatever the precise ambit of Rule 119, in my view it could have no application to proceedings such as the present if they were transferred in whole or in part to the CAT

pursuant to section 16 of the 2002 Act. The present proceedings have been commenced in the High Court. Therefore what would be transferred to the CAT in such a case would be all or part of an *existing* claim, whereas it is in my view clear that Rule 119 is only dealing with claims originating in the CAT.

28. Rule 119(1) makes reference to proceedings "commenced before the Tribunal before 1st October 2015". That part of the rule is obviously not relevant to the present proceedings.

29. Similarly with Rule 119(2). It has the effect of applying Rule 31(1) to (3) of the 2003 Rules "for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in […] proceedings under section 47A of the 1998 Act …". That has no application here for at least the following reasons. First, the present claim is not a claim "made on or after" that date. Second, it is in my view not a claim "*made …..in …. proceedings under section 47A of the 1998 Act*" within Rule 119(2). New Section 47A concerns "the right to make a claim in proceedings under this section" (see subsection 47A(5)). That is not an apt description of the present claim, which was made, not in proceedings under that section, but in the High Court under the latter's own jurisdiction, which is not dependent on New (or Old) Section 47A. Third, it is clear from the wording of Rule 31 of the 2003 Rules that that rule too applies only to claims originating in the CAT. Thus: "*The Tribunal may give its permission for a claim to be made* before the end of the period referred to in paragraph (2)(a)…." (Rule 31(3)), and "*No claim for damages may be made if, were the claim to be made in proceedings brought before a court*, the claimant would be prevented from bringing the proceedings…." (Rule 31(4)). (My italics)

30. Therefore, regardless of whether Rule 119 (and Rule 31 of the 2003 Rules) applies only to follow-on (and not to stand-alone) claims, which the claimant's solicitors say is the subject of current debate, it would have no application to the present proceedings if they were transferred in whole or in part to the CAT under section 16. I can see no grounds on which it could reasonably be argued that a different limitation period would apply by reason of a transfer in circumstances such as the present.

Additional cost point

31. The solicitors for the claimant have also drawn my attention to an additional cost arising from the copying and checking of four additional trial bundles for the CAT, which they estimate may cost (so far as copying alone is concerned) about £6,400 per bundle. The solicitors point out that these costs will, initially at least, fall on their client as claimant, and invite me to consider making an order splitting these costs between the parties.

32. It is true that because a CAT panel consists of three members rather than a judge sitting alone, additional sets of bundles will be required on a transfer, and this will require additional costs to be incurred. Whilst not in any way underestimating the burden of such costs, it must be acknowledged that in the context of litigation on this scale, with a claim running to more than £100 million and a trial extending to nine weeks, the additional burden of providing extra trial bundles is not the heaviest factor to be weighed in the balance against a transfer to the CAT. Nor do I consider that it would be appropriate to treat such costs any differently so far as initial burden is concerned.

Transfer Order

33. In light of the above, and having considered all the circumstances of the case including the wishes of the parties, I am of the view that a transfer to the CAT pursuant to section 16 of the 2002 Act and the 2015 Regulations is appropriate in the present case. In reaching this conclusion I have also had regard to the need to give effect to the overriding objective set out in CPR Rule 1.1(1) of dealing with the case justly and at proportionate cost. I have considered the factors set out in Rule 1.1(2), not least those in paragraphs (c) to (d).

34. For the avoidance of doubt I also record that my intention is that neither the order which I propose to make to give effect to the transfer, nor the transfer itself, should in any way alter, limit or exclude in any respect any element of the claimant's claim as constituted in this court prior to the transfer taking effect. I will make this clear in the order itself.

35. Therefore, I propose to make an order in the form of the attached draft, subject to any observations on the draft received from the parties by 4pm on Tuesday 1 December 2015. In accordance with paragraph 3 of Practice Direction 30, the order will take effect from the date it is made.