Neutral citation: [2020] CAT 25

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1342/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

2 December 2020

Before:

THE HONOURABLE MR JUSTICE ROTH

(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) SPORTRADAR AG

(2) SPORTRADAR UK LIMITED

Claimants

- and -

(1) FOOTBALL DATACO LIMITED

(2) BETGENIUS LIMITED

(3) GENIUS SPORTS GROUP LIMITED

Defendants

Heard remotely on 6 November 2020

JUDGMENT: TRANSFER APPLICATION

APPEARANCES

Ms Ronit Kreisberger QC, Mr Alistair Lindsay and Ms Ciar McAndrew (instructed by Sheridans appeared on behalf of the Claimants).

Ms Kassie Smith QC and Mr Thomas Sebastian (instructed by DLA Piper UK LLP appeared on behalf of the First Defendant).

Mr Tom de la Mare QC, Mr Tom Cleaver, and Mr Timothy Lau (instructed by Macfarlanes LLP appeared on behalf of the Second and Third Defendants).

A. INTRODUCTION

1. Since 1 October 2015, the Competition Appeal Tribunal ("the CAT") and the High Court have had a largely parallel jurisdiction in claims for infringement of EU and UK competition law. This application concerns the question of when proceedings alleging such infringements that were commenced in the CAT should be transferred to the High Court.

2. On 28 February 2020, the Claimants ("Sportradar") issued a claim in the CAT seeking an injunction and damages under s. 47A of the Competition Act 1998 ("CA 1998"). The First Defendant ("FDC") has applied for an order that the CAT transfers the proceedings to the High Court. Its application is supported by the Second and Third Defendants (together "Genius"). Sportradar strongly opposes the application.

3. The matter has been ably argued at the hearing by Ms Kassie Smith QC for FDC and Mr Tom de la Mare QC for Genius, and by Ms Ronit Kreisberger QC for Sportradar.

4. To understand how the question arises, it is necessary to explain the background to, and basis of, these proceedings.

B. FACTUAL BACKGROUND

5. Sportradar supplies sports data and sports betting services ("SDSB Services") to bookmakers in the UK and elsewhere. One category of such data is live (or "in-play") data about football matches. Such data is used by bookmakers to offer in-play betting, sometimes referred to as "live betting", which occurs while the match is actually taking place: e.g., a bet can be placed during a match on which team or which player will score the next goal, or who may be awarded the next penalty.

6. Genius competes with Sportradar in the supply of SDSB Services. Among the other significant competitors are Perform, IMG and Betconstruct.

7. FDC is owned by the Football Association Premier League Ltd ("the FAPL") and the Football League Ltd ("the EFL") in equal shares. The FAPL and the EFL, and the Scottish Professional Football League Ltd ("the SPFL") (together "the Three Leagues") are engaged in the business of organising professional football matches in various leagues and competitions in England and Scotland, respectively.

8. The FAPL is responsible for the Premier League, which currently consists of the top 20 English football clubs, each of which is a shareholder of FAPL and bound by the Premier League Rules. The EFL is responsible for the Football League, currently consisting of 72 English and Welsh football clubs, each of which is a shareholder in EFL and bound by the EFL Regulations. The SPFL is responsible for the Scottish Professional Football League, currently consisting of 42 Scottish football clubs, each of which is a shareholder of SPFL and bound by the Rules and Regulations of the SPFL. Accordingly, the Three Leagues together account for 134 UK clubs. In these proceedings, the live data pertaining to matches played in the Three Leagues has been referred to by Sportradar as "Live League Match Data" ("LLMD").

9. The Three Leagues and their constituent clubs seek to monetise the value of the live data that can be collected for football matches played in the various club grounds. To that end, the FAPL and EFL jointly, and the SPFL separately, have entered into agreements with FDC granting it the right to attend all their matches and to appoint or sub-license a third party to collect, collate and distribute data from such matches, excluding audio or audio-visual material. The Three Leagues also effectively require their member clubs to use so-called "Ground Regulations" which set out the terms on which entry to their grounds is permitted and which restrict, among other things, anyone visiting the ground from recording or transmitting live data unless they hold a licence to do so. For example, the Ground Regulations for the 2019/20 season prescribed by the FAPL include the following terms:

> "16. Mobile telephones and other mobile devices are permitted within the Ground PROVIDED THAT (i) they are used for personal and private use only (which, for the avoidance of doubt and by way of example only, shall not include the capturing, logging, recording, transmitting, playing, issuing, showing, or any other communication of any Material for any commercial purposes); and (ii) no Material that is captured, logged, recorded, transmitted,

> played, issued, shown or otherwise communicated by a mobile telephone or other mobile device may be published or otherwise made available to any third parties including, without limitation, via social networking sites.
>
> ...
>
> 19. Save as set out in paragraph 16 above, no person (other than a person who holds an appropriate licence) may capture, log, record, transmit, play, issue, show or otherwise communicate (by digital or other means) any Material in relation to the Match, any players or other persons present in the Ground and/or the Ground, nor may they bring into the Ground or use within the Ground (or provide to, facilitate or otherwise assist another person to use within the Ground) any equipment or technology which is capable of capturing, logging, recording, transmitting, playing, issuing, showing or otherwise communicating (by digital or other means) any such Material. The Club reserves the right to eject you from the Ground in circumstances where you breach this paragraph 19."

"Material" is defined in the Ground Regulations to mean "any audio, visual and/or audio-visual material and/or any information or data."

10. Further, the Three Leagues encourage and recommend to the clubs the use of terms and conditions on the tickets to matches ("Ticket Conditions") which specify that the purchaser or holder of the ticket is prohibited from recording or transmitting any "Material" (similarly defined) in relation to the match or the players save for personal or private use.

11. Over the years, FDC has entered into a number of successive agreements authorising a supplier of SDSB services to enter the grounds of the member clubs of the Three Leagues and collect live data from matches being played (excluding photographs and audio or audio-visual material) for use for betting purposes.

12. On 8 May 2019, FDC concluded an agreement with the Second Defendant ("the FDC-Genius Agreement"). It is a lengthy and detailed contract, but in effect it grants Genius the exclusive right to collect and collate LLMD directly at matches of clubs in the Three Leagues, and to supply such data to betting customers, for a period of five years, commencing with the 2019/20 football season, in return for substantial payment. Under the FDC-Genius Agreement, Genius has the exclusive right to appoint what are termed "Secondary Suppliers" and to supply them with its data feed of LLMD on non-exclusive, non-discriminatory terms for onward supply to betting customers.

13. Suppliers of SDSB Services such as Sportradar can obtain LLMD by arranging for so-called "scouts" to watch live television or online streamed coverage of matches ("off-tube data"). However, Sportradar contends that use of such off-tube data for the purpose of supply to bookmakers is not an adequate substitute for data collected directly at the grounds. In summary, it states that this is because:

(a) not all matches in the Three Leagues are televised or streamed; and/or

(b) off-tube data has a time-lag between events occurring on the pitch and pictures of those events being broadcast on television or streamed online and a delay of even a few more seconds in delivery of the data to bookmakers makes the product significantly less attractive.

C. THE PROCEEDINGS

14. Sportradar alleges that the FDC-Genius Agreement violates EU and UK competition law. It raised its allegations in pre-action correspondence with FDC and Genius. As well as disputing this contention, FDC and Genius asserted that Sportradar was in breach of their rights under English law, in that it had been arranging for scouts to attend matches of clubs in the Three Leagues from where they transmitted data on events in the match they were watching which Sportradar used to create a data feed to its bookmaker customers. In so doing, the scouts were breaching the terms of the Ground Regulations and the Ticket Conditions. FDC and Genius made clear that if Sportradar started proceedings against them, they would counterclaim accordingly.

15. Since the nature and substance of the issues raised by the claim and such counterclaims are at the heart of the dispute about transfer, it is necessary to describe them in some detail. Nonetheless, what follows is only an abbreviated summary of those issues, to the extent necessary for the purpose of addressing the present application.

16. On 28 February 2020, Sportradar issued its claim form starting these proceedings in the CAT. It contends that the FDC-Genius Agreement is in breach of Art 101 of the Treaty on the Functioning of the European Union

("TFEU") and its domestic equivalent, the Chapter I prohibition under the CA 1998, for which both FDC and Genius are liable; and further that FDC has abused a dominant position in violation of Art 102 TFEU and its domestic equivalent, the Chapter II prohibition under the CA 1998.

17. As regards Art 101(1)/Chapter I, Sportradar alleges that the FDC-Genius Agreement is a long-term exclusive rights agreement which amounts to an infringement by object and/or effect in restricting competition in the collection of LLMD for on-supply to bookmakers. Sportradar therefore alleges that the grant by FDC to Genius of a five year exclusive licence is unlawful and void.

18. As regards the Ground Regulations and Ticket Conditions, the claim asserts (at para 64(d)):

> "The Three Leagues each require their member clubs to impose conditions of entry into their stadia (ground regulations and/or ticketing conditions) that purport to prevent ticket holders from logging data for commercial purposes. Pending disclosure, the Claimants infer that The Three Leagues have imposed such conditions in agreement or concerted practice with FDC ("the No Commercial Logging Agreement or Concerted Practice")."

19. Sportradar then contends (at para 82):

> "For the avoidance of doubt, to the extent that FDC and/or Genius rely on terms and conditions of entry to football stadia operated by members of the Three Leagues (ground regulations and/or ticketing conditions) and/or property rights to the stadia in purported justification for the grant to Genius of an exclusive licence to collect, store, license and supply LLMD to the betting market for five years, Sportradar will say:
>
> (a) Reliance on any restrictions contained in such terms and conditions of entry in order to give effect to the said unlawful agreement or concerted practice or decision is, in turn, unlawful;
>
> (b) The grant by FDC to Genius of a five year exclusive licence to collect, store, license and supply LLMD to the betting market taken together with the No Commercial Logging Agreement or Concerted Practice and/or the ground regulations and/or ticketing conditions giving effect to the No Commercial Logging Agreement or Concerted Practice have the object and/or appreciable effect of restricting competition in breach of Article 101/Chapter I by ensuring that Genius is in practice shielded from competition in its supply of LLMD; and/or
>
> (c) The holders of any such property rights are required to grant access to Rival Data Scouts where barring their entry infringes Article 101 and/or Chapter I."

20. As regards Art 102/Chapter II, Sportradar alleges that FDC is dominant in the market for the supply of LLMD, which geographically comprises at least the UK and potentially other countries. It contends that the entry by FDC into the FDC-Genius Agreement constitutes an abuse of that dominant position since it differs from normal competition or competition on the merits and hinders the maintenance or growth of competition in SDSB Services, including the provision of LLMD.

21. By way of relief, Sportradar seeks damages and an injunction, including an injunction to prevent FDC from applying and/or procuring the application of the No Commercial Logging Agreement or Concerted Practice and associated provisions of the Ground Regulations and/or Ticket Conditions to scouts representing suppliers of SDSB Services other than Genius.

22. The time for FDC and Genius to serve their defences was extended several times with consent from Sportradar because of the effect of the Covid-19 pandemic. No point arises from that delay. On 29 June 2020, both FDC and Genius served full defences to the claim. Their pleadings comprise what are called "draft" counterclaims, because they recognise, as is indeed common ground, that the counterclaims raise issues and seek relief that is outside the jurisdiction of the CAT. The draft counterclaims therefore constitute the part of the pleading that they would serve if, as they seek, this action were transferred to the High Court.

23. In defence to Sportradar's competition claims, the Defendants deny that FDC-Genius Agreement infringes Art 101(1)/Chapter I, on the basis that it does not have any anti-competitive object or effect, or in any event does not restrict competition to any appreciable extent. They assert that the restriction on Sportradar logging live data at the grounds for commercial purposes arises under the Ground Regulations and Ticket Conditions, independently of the FDC-Genius Agreement. FDC asserts that the FDC-Genius Agreement concerns the creation and use of a database right; and the Defendants contend that the LLMD (excluding off-tube data) was a trade secret under the Trade Secrets (Enforcement etc) Regulations 2018 ("the TSER") and/or constitutes confidential information. They assert that Sportradar is barred from collecting and disseminating LLMD at the grounds by reason of intellectual property rights, including rights over confidential information held by FDC. FDC further

contends in the alternative that if there is an appreciable restriction of competition, the FDC-Genius Agreement benefits from exemption under Art 101(3) and s. 9 CA 1998. FDC and Genius both dispute that the supply of LLMD (at least if that excludes off-tube data), is a relevant market, and FDC denies that it is dominant in any relevant market. Further, it denies that entry into the FDC-Genius Agreement constitutes an abuse; alternatively, if it would otherwise be an abuse, FDC contends that its conduct is objectively justified.

24. The draft counterclaims are raised not only against Sportradar but also against six individuals who are among the scouts whom Sportradar arranged to attend matches and transmit LLMD from the grounds ("the Scouts"). They are named as representative defendants for the purpose of CPR r. 19.6, as having the same interest as the class of all scouts engaged by Sportradar to attend matches in the Three Leagues and collect data after 8 May 2019 (the date of the FDC-Genius Agreement), alternatively as sample claims intended to determine the allegations regarding the nature of the Scouts' conduct that apply equally to all scouts.

25. The claims against the Scouts are relatively straightforward. It is alleged that they are bound by the Ground Regulations and the Ticket Conditions, and that their entry into the grounds for the purpose of collecting and transmitting LLMD accordingly constitutes a trespass and/or breach of contract. Further, on the basis that the LLMD was confidential, their activity in collecting and transmitting that data to Sportradar is alleged to constitute a breach of the equitable obligation of confidence, which was owed both to FDC and Genius.

26. As against Sportradar, it is alleged that it is liable as a joint tortfeasor for having procured the acts of trespass and breach of confidence, and that it itself breached the obligation of confidence by supplying the LLMD transmitted by the Scouts to its bookmaker customers. Further, it is alleged that it is liable for an unlawful means conspiracy arising out of the arrangement it made with Scouts, the unlawful means being the trespass, breach of contract and breach of confidence and/or of rights in a trade secret.

27. As well as serving a reply, which *inter alia* disputes that the LLMD is confidential or a trade secret within the TSER, Sportradar has helpfully

produced indicative defences to each of the draft counterclaims. Sportradar accepts that it engaged the Scouts to collect and transmit to it LLMD during matches, and that, but for the competition law issue, the Ground Regulations and Ticket Conditions would be contractually binding on the Scouts as spectators admitted to the grounds for such matches. However, both in its reply and its defences to the counterclaims, Sportradar contends that such restrictions are unenforceable *insofar as* they give effect to or implement the contractual exclusivity granted to Genius, since that exclusivity is unlawful and unenforceable for violation of competition law, as set out in the claim form.

28. Sportradar in addition disputes that the LLMD collected at the grounds is confidential. Alternatively, it contends that any such confidentiality is dependent on the ability to control the collection and dissemination of such information, which derives from the contractual restrictions that are unenforceable as set out above.

29. As regards the unlawful means conspiracy claim, Sportradar denies that there were any unlawful means (trespass, breach of contract, breach of confidence or any intellectual property rights) by reason of the competition law arguments summarised above. Further, it disputes in any event that what it submits are the other necessary ingredients of the tort are made out: i.e., a combination; an intention to cause harm to either FDC or Genius; or knowledge by Sportradar or the Scouts that their acts were unlawful.

D. THE RELEVANT LEGISLATION

30. Section 16 of the Enterprise Act 2002 ("EA 2002") makes provision for transfers as between the High Court and the CAT. It says, insofar as relevant:

> "**16 Transfers of certain proceeding to and from Tribunal**
>
> (1) The Lord Chancellor may by regulations –
>
> (a) make provision enabling the court –
>
> (i) to transfer to the Tribunal for its determination so much of any proceedings before the court as relates to an infringement issue;
>
> (ii) to give effect to the determination of that issue by the Tribunal;
>
> ...

(3) Rules of court may prescribe the procedure to be followed in connection with a transfer mentioned in subsection (1).

(4) The court may transfer to the Tribunal, 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.

(5) Rules of court may make provision in connection with the transfer from the Tribunal to the court of all or any part of a claim made in proceedings under section 47A of the 1998 Act.

(6) In this section –

...

"infringement issue" means any question relating to whether or not an infringement of -

(a) the Chapter I prohibition or the Chapter II prohibition; or

(b) Article 101 or 102 of the Treaty,

has been or is being committed;...."

31. The Section 16 Enterprise Act 2002 Regulations 2015 ("the Transfer Regulations"), made pursuant to s. 16(1), which came into force on 1 October 2015, enable the High Court to make a transfer in accordance with that provision.

32. Provisions under s. 16(3)-(5) concerning procedure for transfers are set out in Practice Direction 30 ("PD 30"). PD 30 specifies requirements of a formal nature (e.g. regarding notices, case number, etc), and the only relevant provisions of PD 30 are paras 8.4 and 8.11 which concern transfers by the High Court to the CAT under, respectively, s. 16(4) and s. 16(1)/the Transfer Regulations. Those paragraphs provide, in identical terms:

> "When deciding whether to make an order under [the respective provision], the court must consider all the circumstances of the case including the wishes of the parties."

33. Rule 71 of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules"), in accordance with para 25 of Schedule 4 to the EA 2002, makes provision for transfer from the CAT to the High Court. Rule 71 provides, insofar as relevant:

> "**Transfer of claims from the Tribunal**
>
> The Tribunal may, at any stage of the proceedings, on the request of a party or of its own initiative, and after considering any observations of the parties, direct that all or part of a claim made in proceedings brought under section 47A

> of the 1998 Act (proceedings before the Tribunal: claims for damages etc.) be transferred to—
>
> (a) the High Court ... in England and Wales....”

34. Accordingly, as the present application is for transfer *from* the CAT *to* the High Court, it is made pursuant to rule 71 and not under s. 16 EA 2002 or the Transfer Regulations. However, I accept, as submitted for the Defendants, that the approach to such a transfer should be considered in the overall context of transfers as between the CAT and the High Court.

E. GUIDING PRINCIPLES

35. The CAT is a specialist tribunal set up by statute to deal with matters of competition law. Its jurisdiction covers public enforcement, by way of challenges to decisions of the Competition and Markets Authority and specialist regulators, and private enforcement in the form of claims under s. 47A and collective proceedings under s. 47B of CA 1998 and “infringement issues” transferred under s. 16(1) EA 2002 and the Transfer Regulations. As regards private enforcement, the jurisdiction of the CAT has been successively extended by both primary and secondary legislation since 2003 when the relevant provisions of the EA 2002 came into force.

36. The advantages of the CAT in dealing with competition law were set out by its then President, Barling J, sitting in the High Court, in *Sainsbury’s Supermarkets Ltd v Mastercard Inc* [2015] EWHC 3472 (Ch) at [15]-[17]:

> “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.
>
> 17 … 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 …."

37. I would add that since that judgment, several judges of the Queen's Bench Division, including judges of the Commercial Court, have also been nominated to sit as chairmen in the CAT pursuant to the amended s. 12 EA 2002.

38. In *Sainsbury's*, Barling J made an order under s. 16(4) transferring the whole of the proceedings to the CAT, where he proceeded to sit as chairman of the tribunal hearing the case. Two other large claims seeking damages for alleged infringement of competition law by Visa and Mastercard arising out of their setting of the multilateral interchange fee (or "MIF") for card transactions were not transferred but heard in the High Court. In determining appeals from all three judgments, Barling J's observations set out above were endorsed by a very strong Court of Appeal (the Master of the Rolls, the Chancellor and Flaux LJ): *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2018] EWCA Civ 1536. The Court of Appeal stated, at [357], that for those reasons claims in respect of infringement decisions of a competition authority or alleged infringements of the competition provisions of domestic or EU competition law "should in normal circumstances be transferred to the CAT".

39. The Court of Appeal added, at [358]:

> "Where proceedings raise issues with which the CAT is permitted to deal under section 47A, but also raise other issues, it is possible under section 16(4) of the 2002 Act to transfer to the CAT only those issues with which it is permitted to deal. Whether or not this course is appropriate will depend on considerations specific to the particular proceedings, such as how important, and how easily separable from the other issues, the competition issues are. Where this course is not appropriate, the case should remain in the Competition List of the Business and Property Courts."

40. The Court of Appeal was there expressly addressing a transfer under s. 16(4) not s. 16(1). Since that judgment, many cartel 'follow-on' damages claims have

been transferred from the High Court to the CAT. Even before that judgment, the competition issues in two linked claims in the High Court were transferred to the CAT under s. 16(1) and the Transfer Regulations: *Agents' Mutual Ltd v Gascoigne Halman Ltd* and *Agents' Mutual Ltd v Mognie James Ltd*, order of Sir Kenneth Parker (sitting as a deputy judge of the High Court) of 5 July 2016.

41. Ms Kreisberger submitted that in considering whether to make a transfer under rule 71, the test is purely objective. I do not think that is quite correct. It is true that there is no reference under rule 71 to the wishes of the parties, in contrast to the provisions concerning transfer *to* the CAT in PD 30: paras 32 and 33 above. However, the discretion under rule 71 is expressed in entirely general terms. I consider that the wishes of the parties are a relevant factor, in that if all parties agree in seeking a transfer, the CAT is likely to be cautious about declining to transfer; and conversely, if all parties oppose a transfer, the CAT is likely to be cautious about ordering a transfer. However, where as in the present case an application to transfer is strongly contested, I accept that the CAT has to consider objectively what is the most appropriate and sensible course to adopt.

42. Ms Kreisberger also suggested that there must be a good reason for depriving the claimant of its choice of forum when it has started a pure competition claim in the CAT. However, the guidance given by the Court of Appeal makes clear that if a pure competition claim is started in the High Court it should normally be transferred to the CAT, which suggests that the claimant's chosen forum is of little consequence in considering whether to transfer out of the High Court under s. 16(4). Similarly, in my view, the fact that a claim has been started in the CAT is not *in itself* a factor that should carry much weight under rule 71. More particularly in the present case, FDC and Genius had made clear to Sportradar before these proceedings were started that they intended to claim for breach of confidence and unlawful means conspiracy. The fact that Sportradar launched proceedings in the CAT before FDC and Genius started proceedings themselves in the High Court should not affect the outcome of this application. To find otherwise would create an incentive for a race to start proceedings in the chosen forum, whereas parties should be encouraged to try to settle their disputes and avoid litigation where possible.

43. Equally, I do not think that the fact that the defence to the claim potentially raises difficult issues of private law – here the law of confidence and, possibly, database rights and the TSER – is a good reason for transfer out of the CAT. Ms Smith was somewhat reluctant to accept that in the absence of the counterclaims there would be no ground to seek a transfer (while fairly emphasising that this was not the situation). However, stand-alone competition proceedings under s. 47A CA 1998 will often raise legal issues outside pure competition law. I consider it most unlikely that this would serve as a good ground for transfer out of the CAT. As noted in *Sainsbury's*, the tribunal hearing such a case can be chaired by a High Court judge, and if, say, the defence to a competition claim raised questions of intellectual property law, the judge chairing the tribunal hearing the case may be no different from the judge who would hear the case in the Chancery Division if it were transferred. The fact that he or she would be hearing the case in the CAT along with two other members having expertise relevant to other aspects of the case is hardly a good reason for transfer.

44. Ms Smith submitted that where a defendant seeks to raise a counterclaim along with its defence, the normal course is that the claim and counterclaim should be heard together. Since here the counterclaim falls outside the CAT's circumscribed jurisdiction, she argued that this justifies transfer to the High Court so that the whole case can be heard together. I do not accept that submission. It seems to me contrary to the legislative intention underlying s. 16(1) CA 1998. That makes provision for "so much of any proceedings as relates to" an infringement issue to be transferred to the CAT. This expressly envisages that there may be particular competition issues within wider proceedings that can benefit from the advantages of being determined by the specialist competition tribunal. Accordingly, there is no presumption that the CAT should exercise its rule 71 power when non-competition issues arise on a counterclaim to ensure that all aspects of a case are heard in the same forum.

45. The *Agents' Mutual* case provides an apposite illustration of how such matters can appropriately be handled. The claim there, started in the Chancery Division of the High Court, was a breach of contract claim seeking an injunction and damages. By its defence, Gascoigne Halman denied that it was in breach, disputed the damages claimed and also raised a competition law argument that

various provisions in its agreement with the claimant were void as they infringed the Chapter I prohibition under CA 1998.[1] Those competition infringement issues were transferred to the CAT but the non-competition issues remained in the Chancery Division: see [2017] CAT 15 at para 4. After the CAT gave judgment dismissing the competition law defence, the case resumed in the Chancery Division (following a delay while Gascoigne Halman unsuccessfully appealed to the Court of Appeal) and was set down for a five-day trial to determine the non-competition issues, and indeed an additional defendant was joined for that trial which involved significant further disclosure: see *Agents' Mutual Ltd v Gascoigne Halman Ltd* [2019] EWHC 3104 (Ch). The judge due to hear the trial in the Chancery Division (the case settled before trial) was the same judge who had chaired the tribunal which heard the case in the CAT.

46. As I have indicated, the proceedings should be viewed as a whole, including therefore any potential counterclaim which the defendant seeks to advance. On that basis, in my judgment, considerations of particular relevance when considering transfer where proceedings involve both competition issues within the jurisdiction of the CAT and non-competition issues which fall outside its jurisdiction are: (a) the relative significance and complexity of the competition issues for the proceedings; (b) whether the competition issues are separable in practical terms from the non-competition issues; and (c) the likely consequences in terms of delay and cost. Whether or not it is sensible in case management terms for the competition issues to be heard before the non-competition issues may also be material, in particular as regards the time for transfer. Altogether, the separate but overlapping jurisdictions of the CAT and the High Court should be made to serve, not to constrain, the sensible case management of the proceedings.

47. I therefore do not accept the submissions of Mr de la Mare for Genius that competition issues should not remain in the CAT (or, it follows, should not be transferred to the CAT under s. 16(1) and the Transfer Regulations) unless they satisfy what is sometimes expressed as a relatively high test for directing a preliminary issue set out in such authorities as *Steele v Steele* [2001] CP Rep

[1] The position was the same in the parallel proceedings against Moginie James which were also transferred to the CAT but that case settled before it was heard.

106. Whether the court which hears the entire proceedings should sensibly determine certain issues first is not the same question as whether issues of a particular kind should sensibly be determined by a specialist court established to deal with such issues. There is nothing in s. 16(1) or the Transfer Regulations supporting the approach advocated by Mr de la Mare, and I think it is contrary to the guidance given by the Court of Appeal in *Sainsbury's* which instead points to the considerations I have set out above.

48. The decision of the High Court refusing to order a transfer of competition issues under the Transfer Regulations in *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2016] EWHC 958 (Pat) is entirely consistent with, and indeed illustrates, the approach which I set out above. In what were major and very substantial patent proceedings, the case was split into a series of distinct trials. One of the major issues was whether the claimant ("Unwired Planet"), as the patentee, had offered to license the patents on FRAND (i.e. fair, reasonable and non-discriminatory) terms. The patent defendants (Huawei and Samsung) contended that the licences which Unwired Planet had offered were not FRAND. Since Unwired Planet accepted that by reason of the policy of the standard-setting body ("ETSI") it owed contractual obligations to offer FRAND licences, this issue arose on the basis of those obligations; but the patent defendants also alleged that the failure to offer FRAND licences was a breach of Art 101 TFEU on the basis of the arrangement whereby Unwired Planet had acquired many of the patents from Ericsson; and further, that by seeking an injunction to restrain alleged patent infringement without having offered FRAND licences Unwired Planet was in breach of Art 102 TFEU. The sixth of the trials in the proceedings was a so-called non-technical trial to consider FRAND, the competition issues and a further defence concerning a patent licence which one of the defendants held from Ericsson. Samsung applied for an order transferring the competition issues to the CAT (Huawei adopted a neutral position).

49. In his judgment on the application, Birss J noted that FRAND would be at the heart of the dispute in the non-technical trial. However, Birss J emphasised that the question of FRAND arose in two different ways: as a matter of the contractual obligations and under competition law. He recognised that the two were interrelated, but explained that this did not mean that these different heads

(FRAND in contract derived from the ETSI policy and FRAND by reason of competition law) may not matter to the determination. He observed that this was "new legal territory". He considered whether the jurisdiction of the CAT was broad enough to cover the entire FRAND question, both contractual and under competition law, to be transferred, but held that the CAT's jurisdiction could not embrace the former. He concluded, at [45]-[46]:

> "45. Therefore to transfer the competition law aspects of this claim to the CAT would leave the interrelated contract claims in the High Court….
>
> 46. …I do not think it is practical to divide the decision making in this way given the centrality of FRAND to this case. If the issues are split the tribunal would have to be constantly mindful about who should be making a particular decision. The interrelationship between the issues makes that problem worse, not better. If the legal landscape was clear, again it might be a different matter, but it is not. Transferring competition law FRAND but not transferring contractual FRAND would be a recipe for confusion."

50. In those circumstances, Birss J's exercise of discretion to refuse a transfer is hardly surprising. I would only add that Birss J's decision in that regard was, with respect, amply justified by his comprehensive judgment following the non-technical trial, which shows how questions relating to FRAND under competition law were very much dependent on the distinct and complex determination of the FRAND rates for the purpose of the ETSI policy: [2017] EWHC 711 (Pat) (see e.g. at [153]).

F. THE PRESENT APPLICATION

51. In the present case, the entirety of the claim concerns competition law. Indeed, there is no dispute that the claim falls within the jurisdiction of the CAT. Moreover, on the defences served by FDC and Genius, the case raises a range of significant competition law issues, including definition of the relevant market, whether the FDC-Genius Agreement has any appreciable effect on competition, whether there is a restriction by object, whether there are ancillary restraints, whether the criteria for exemption under Art 101(3) and s. 9 of CA 1998 are satisfied, whether FDC held a dominant position, and whether conduct that might otherwise constitute an abuse is objectively justified. Determination of these issues would be significantly assisted by the particular features of the CAT as a specialist tribunal (including the inclusion of an economist on the tribunal hearing the case) to which the Court of Appeal referred in *Sainsbury's.*

52. As well as contesting those competition issues, FDC and Genius by their respective defences refer to, and rely upon, the Ground Regulations and Ticket Conditions, the asserted IP rights, and the alleged confidentiality in the data, to assert that Sportradar is not in any event entitled to collect LLMD for commercial purposes at the football grounds. Sportradar anticipated this line of argument in its claim form, where it set out its contention that such rights could not prevail over competition law: see para 19 above. Unsurprisingly, that is therefore Sportradar's primary response to those arguments in its reply.

53. Whether Sportradar is right or wrong in its contention that if the FDC-Genius Agreement infringes competition law, that has the consequence that such private law rights cannot be enforced to prevent the collection of LLMD is a matter for trial and not for this application. But in my view, resolution of that contention, which FDC and Genius strongly dispute, manifestly depends on questions of competition law. Indeed, the position of Sportradar, as explained by Ms Kreisberger during the hearing but as is in any event clear from its pleading, is that it does not dispute the existence of the contractual or property rights, and even assuming that there are also the alleged IP rights or obligations of confidence (which Sportradar does dispute), nonetheless such private law rights cannot be relied on to give effect to an exclusive agreement which violates competition law. The position, submitted Ms Kreisberger, is analogous to that in *Purple Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch). That was an abuse of dominance case challenging restrictions imposed by the defendant ("HAL") on the parking facilities at the Heathrow airport terminals made available to the claimant for use in its valet parking business. It was not disputed that HAL had property rights in the terminal forecourts on which the dispute centred, and HAL further relied on the fact that the controls which it was imposing on the use of the forecourts were also contained in byelaws. However, in his judgment Mann J stated, at [240]:

> "Because of the position which HAL occupies at Heathrow it is in a position to control access through byelaws and not merely through the enforcement of proprietary rights. In my view that makes no difference. That is merely the control mechanism, and its position as the maker of bye-laws merely gives it another method of control, and not a special method of control which is exempt from the effects of competition law.... This judgment is not concerned with the validity of those byelaws (there was no challenge as to that in these proceedings); it is concerned with HAL's decisions as to how and when to enforce them."

54. The indicative counterclaims, which FDC and Genius would in the absence of a transfer have to bring by way of a separate action in the High Court, are based as set out above on these private law rights. Unsurprisingly, Sportradar raises by way of defence to those counterclaims the same competition law argument which it puts forward to overcome the reliance on the same private law rights in opposition to its own claim. It puts forward additional defences to the assertion of IP rights and rights of confidence, and to the claim for an unlawful means conspiracy, although, as I understand it, in response to the allegations of breach of contract and trespass by the Scouts Sportradar relies only on the competition law argument and does not otherwise challenge the contractual obligations or property rights. Therefore, resolution of that competition law argument is necessary for determination of the counterclaims. Moreover, logically I consider that its resolution should come before addressing any disputed issues on the scope and content of the private law rights, e.g. whether there was an obligation of confidence at all.

55. Much argument at the hearing of this application was devoted to the question of whether a judgment of the CAT on Sportradar's competition claim would be determinative of the counterclaims (assuming they were brought as separate claims in the High Court) if Sportradar won in the CAT or, conversely, if it lost. That is to some extent informative, but in my judgment it is not the central issue. Once it is appreciated that the defences to the counterclaims raise the same competition issue as is raised in the CAT proceedings, and that this is a distinct issue from other issues concerning the existence or scope of private law rights or the correct interpretation of the elements of the tort of unlawful means conspiracy, I consider it is clear that, absent special considerations, the claim which directly raises this issue should remain in the CAT. It seems to me that determination of the issue by the CAT would be binding on FDC and Genius in any High Court proceedings they may bring against Sportradar. But insofar as there is doubt on that score, once the pleadings are closed in such High Court proceedings, Sportradar's competition defence in those proceedings can be transferred to the CAT by the High Court under the Transfer Regulations, where it can be heard alongside Sportradar's claim: cf. the transfer of Gascoigne Halman's competition law defence to Agents' Mutual's breach of contract claim: para 45 above.

56. Are there any special considerations here which should lead to a different conclusion? The Defendants between them advanced several considerations.

Factual overlap with the counterclaims

57. The Defendants pointed out to the factual overlap between their counterclaims and Sportradar's claim and submitted that this made it inefficient if the claims and then the counterclaims were heard by different courts. However, if this case proceeds in the CAT the tribunal would be chaired by a High Court judge and such potential inefficiency can readily be avoided by arranging that the same judge should hear the claims brought by FDC and Genius in the High Court. That indeed was the procedure adopted in the *Agents' Mutual* litigation.

Overlapping issues as to damages and potential set-off

58. The Defendants pointed out that Sportradar was claiming damages as well as an injunction. Even if its claim in the CAT were to succeed, then (depending on the competition law argument discussed above) the Defendants might nonetheless have valid claims for damages. In that eventuality, the calculation of the various damages may be very different, but any damages found due one way should be set off against any found due the other way. Moreover, the question of market definition may be very relevant to the assessment of damages, since the assessment would involve consideration of the extent to which off-tube data was substitutable for LLMD. However, as regards market definition, as indicated above I think any determination of that question in the CAT would be binding on FDC and Genius in any High Court proceedings against Sportradar. And I consider that the other computation issues can be addressed by sensible case management. Thus in the CAT proceedings, as is not uncommon in stand-alone competition cases, issues of the quantum of damages can be split off to be determined at a separate trial after determination of liability. If and when that stage is reached, the CAT could transfer those quantum issues to the High Court under rule 71, so that all damages questions are heard together. Alternatively, payment of any damages awarded in one forum could be stayed pending determination of the damages in the other, so that mutual set-off can be achieved.

The claims against the Scouts

59. Mr de la Mare emphasised that the Defendants had claims against the Scouts whom they would join as Part 20 defendants to their counterclaims if the case was transferred. The Scouts may raise the same competition defence as Sportradar, but they would not be bound by a judgment in Sportradar's claim in the CAT. Moreover, the six individuals named as proposed Part 20 defendants did not comprise all the Scouts and the Defendants may well seek an order under CPR rule 19.6. However, there was no power to seek an equivalent representation order under the CAT rules.

60. Since the Scouts are represented by the same solicitors as Sportradar, I agree that they are likely to put forward the same competition law argument in their defence. As I was told that the Scouts have very little money (many of them are students), it seems highly improbable that if Sportradar lost that argument in the CAT, the Scouts would nonetheless seek to run it again in the High Court. But in any event, that theoretical risk can be avoided by sensible case management making use of the potential for transfer. Once the Scouts have pleaded that defence to the claims by FDC and Genius in the High Court, the High Court can transfer that competition issue under the Transfer Regulations to the CAT, where it can be heard together with Sportradar's claim. In much the same way, in director's disqualification proceedings brought against an individual (which the CAT has no jurisdiction to determine), the High Court recently made an order under the Transfer Regulations transferring a competition issue raised in those proceedings so that it could be heard in the CAT alongside the same question raised in an appeal by the company of which he was a director: *Competition and Markets Authority v Sonpal*, order of Marcus Smith J of 15 September 2020. Moreover, if FDC and Genius obtain orders under CPR rule 19.6, then the CAT's determination of the transferred issue would be binding on the represented parties.

The Three Leagues and the member clubs

61. A not dissimilar argument was advanced concerning the Three Leagues and their individual member clubs. It was pointed out that Sportradar was asserting that the Ground Regulations and Ticket Conditions recommended by the Three

Leagues and adopted by the clubs are in certain circumstances unenforceable, or indeed that the holders of property rights in the stadia are required to grant access to the Scouts where barring their entry infringes Art 102 and/or the Chapter II prohibition: para 93 of the Claim Form. Mr de la Mare stressed that none of the Three Leagues or the clubs were parties to the proceedings in which those allegations were being advanced with significant implications for their rights. If the action was in the High Court, the Three Leagues could apply to be joined, as could the clubs, and some of the clubs could do so seeking a representation order under CPR r. 19.6.

62. However, if any of the Three Leagues or indeed the clubs wish to become parties, it can similarly apply to do so under rule 38 of the CAT Rules. It is true, as noted above, that the CAT Rules do not allow for representative proceedings. But if the Three Leagues did wish to become parties, I see no difficulty about the three of them joining together. I would only observe that this action has now been before the CAT since February and there has been no indication that any of the Leagues wish to join. That is perhaps not surprising, since no relief is being sought against them. The injunction sought is to prevent FDC and Genius giving effect to the FDC-Genius Agreement, "including by maintaining in force and applying and/or procuring the application of the [Ground Regulations and Ticket Conditions, including the alleged arrangement between FDC and the Three Leagues to require the clubs to impose those conditions] to scouts representing suppliers of [SDSB services] other than Genius." Accordingly, there is a clear contrast between the position of the Scouts and the position of the Three Leagues. Moreover, FDC is owned by two of the Three Leagues so any arguments they may wish to advance can be put forward by FDC. As for the clubs, they are still further removed from the allegations (unlike the Three Leagues, it is not alleged that they are parties to the concerted practice or agreement pleaded at para 64(d) of the claim). Each club is a shareholder in one of the Three Leagues: para 8 above. There has been no indication that any club wishes to become a party to these proceedings in its own right. As for the potential for an order under CPR r 19.6 if the case were in the High Court, that rule provides:

> "(1) Where more than one person has the same interest in a claim –
>
> (a) the claim may be begun; or

(b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other person who have that interest." [emphasis added]

Accordingly, the rule concerns representative claimants or representative defendants whereas the clubs are neither. I think it would be very unusual for the court to make an order under CPR r. 19.6 that a party be made a defendant to a claim as representative of other parties whom the claimant does not wish to sue. Moreover, while the Defendants wish to rely on the property rights of the clubs, (i) Sportradar is not challenging those rights, and (ii) the Defendants' argument is of general application: they do not for this purpose distinguish between particular clubs. Therefore, if (which I doubt) it were thought necessary or appropriate for the clubs to have a separate voice in the proceedings, it would be proportionate for one or a few clubs to become parties in just the same way as the Defendants suggest that the named Scouts could be sample defendants. As noted above, that is equally possible in the CAT and the High Court.

The SCM proceedings

63. On 12 March 2020, the Second Defendant and other companies in the Genius group started proceedings against Soft Construct (Malta) Ltd ("SCM") and two operators of online gambling websites, in the Intellectual Property list of the Chancery Division. SCM (which trades as "Betconstruct") is a competitor of Genius and Sportradar. Genius alleges that SCM has been 'scraping' its database involving over 150 data rights agreements covering a number of sports, including basketball and volleyball, and football in, among others, the UEFA, FIFA and South American leagues. Genius' claim is for infringement of database rights under the EU Database Directive (96/9/EC) and the corresponding UK Regulations. The defence of SCM, which has been shown to me, raises a host of arguments as regards the alleged database rights and the Directive, and then pleads in the alternative that the data rights agreements infringe Art 101 TFEU and/or the Chapter I prohibition. There is no allegation of abuse of dominance.

64. The Defendants recognise that the SCM proceedings differ significantly from the present case. But Mr de la Mare pointed to various similarities in the issues which would arise, including important questions of market definition. He submitted that there would be significant overlapping issues of disclosure – indeed he suggested that all the disclosure in the SCM proceedings would be disclosable in the present proceedings. On that basis, while not suggesting that the two actions should be tried together, he submitted that if Sportradar's claim was transferred to the High Court the two proceedings could sensibly be case-managed together and that this would give rise to significant efficiencies.

65. The SCM proceedings clearly range much more widely than the present proceedings and Genius is there represented by different solicitors from its solicitors in the present action. I recognise that there may be some overlapping issues, although Mr de la Mare indeed described the competition argument raised by SCM as "much more ambitious" and, indeed, Genius' skeleton argument said that it is likely to apply for summary judgment on SCM's competition defence. Given that the SCM case covers other sports and probably other geographic markets, I cannot accept that much of the disclosure that may be made in those proceedings would be relevant in the present action, particularly as both the CAT and the High Court now emphasise the need to keep disclosure proportionate. I note that SCM wrote by its solicitors to state that it would oppose joint case management and Sportradar would of course also oppose it.

66. Even if Genius' summary judgment application should fail, I consider that any benefit in joint case management of the two actions is likely to be outweighed by significant disadvantages. The main focus of the SCM proceedings is a dispute concerning database rights and the scope of those proceedings are much wider. Moreover, the present action is more advanced than the SCM case, so any such course would be likely to cause delay. I also note that if there is a discrete competition issue of substance in the SCM proceedings that merits trial before the database issues, there is always the option for the High Court to transfer that issue to the CAT under the Transfer Regulations. Altogether, while I do not dismiss the SCM proceedings as irrelevant, when considered alongside all the other considerations discussed above, I regard them as of little weight in the exercise of my discretion on the question of transfer of the present action.

G. CONCLUSION

67. Accordingly, for the reasons set out above, I refuse this application to transfer. I consider that the appropriate way forward, having regard to the governing principles in rule 4 of the CAT Rules, which closely mirror the overriding objective under the CPR, is for the tribunal having the conduct of this action in the CAT to be chaired by a High Court judge. Once FDC and Genius bring their claim or claims in the High Court, those proceedings can sensibly be docketed to the same High Court judge. It will then be open to him or her to hold a joint CMC sitting both as a High Court judge and a CAT chairman, a course followed by Marcus Smith J at one stage of the *Agents' Mutual* litigation. Consideration can be given to the various procedural issues discussed above (e.g. whether the trial in the CAT should be split as between liability and quantum, and whether any issues in the High Court proceedings should be transferred to the CAT). In that way, the different jurisdictions can be made to work together to promote the just, sensible and efficient conduct of this litigation.

The Honourable Mr Justice Roth
President

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

Date: 2 December 2020