Neutral citation [2022] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1342/5/7/20;
1409-10/5/7/21 (T)

AND

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Claim Nos: IL-2020-000040
IL-2021-000002
IL-2021-000003

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 16 February 2022

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
President of the Competition Appeal Tribunal

Sitting as a Tribunal in England and Wales and as a Judge of the High Court of England and Wales

BETWEEN:

(1) SPORTRADAR
(2) SPORTRADAR UK LIMITED

Claimants

- v -

(1) FOOTBALL DATACO LIMITED
(2) BETGENIUS LIMITED
(3) GENIUS SPORTS GROUP LIMITED

Defendants

AND BETWEEN:

FOOTBALL DATACO LIMITED

Claimants

- v -

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED
(3) PETER KENYON
(4) ISAIAH GARDNER
(5) FLOYD MARCH
(6) NICK MILLS
(7) PRZEMYSLAW DUBININ

Defendants

AND BETWEEN:

BETGENIUS LIMITED

Claimants

- v -

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED
(3) PETER KENYON
(4) ISAIAH GARDNER
(5) FLOYD MARCH
(6) NICK MILLS
(7) PRZEMYSLAW DUBININ

Defendants

AND BETWEEN:

(1) - (15) GENIUS SPORTS TECHNOLOGIES LIMITED

AND OTHERS

Claimants

- v -

(1) SOFT CONSTRUCT (MALTA) LIMITED
(2) ROYAL PANDA LIMITED
(3) VIVARO LIMITED
(4) SOFT CONSTRUCT CJSC
(5) SOFT CONSTRUCT UKRAINE LLC
(6) SOFT CONSTRUCT LIMITED

((1) and (3)-(6) being the "SCM Defendants")

Defendants

RULING

APPEARANCES

Alan Bates and Ciar McAndrew (instructed by Sheridans) appeared on behalf of Sportradar AG and Sportradar UK Limited, Peter Kenyon, Isaiah Gardner, Floyd March, Nick Mills and Przemyslaw Dubinin

Henry Edwards (instructed by DLA Piper UK LLP) appeared on behalf of Football DataCo Limited

Tom de la Mare QC (instructed by Macfarlanes LLP and Fieldfisher LLP) appeared on behalf of BetGenius Limited and Genius Sports Group Limited)

Conall Patton QC, Philip Roberts QC and Jennifer MacLeod (instructed by RPC) appeared on behalf of the SCM Defendants

Kendrah Potts (instructed by Baker and McKenzie LLP) appeared on behalf of IMG

1. This is a joint Case Management Conference in which I am dealing with three related actions. Because only some of the claims in these actions are competition claims over which the Tribunal has jurisdiction – the rest being claims in the Chancery Division of the High Court – I sit both in my capacity as President of the Tribunal and as a Justice of the High Court.

2. The three related actions that involve claims before the Tribunal and in the High Court are as follows:

   (1) Sportradar AG v. Football DataCo Limited (Case 1342/5/7/20);

   (2) Football Dataco Limited v. Sportradar AG (Case 1409/5/7/21(T); IL-2021-000002); and

   (3) Betgenius Limited v. Sportradar AG (Case 1410/5/7/21(T); IL-2021-000003).

   I am going to refer to those three claims as the **October Actions**, because at the moment, they are scheduled for final hearing at a trial that will begin shortly after the long vacation this year.

3. As I have said, the October Actions are what might be called "hybrid" actions in the sense they contain certain claims which are going to be within the jurisdiction of the Tribunal and a panel constituted for that purpose, whereas certain other claims are in the Chancery Division and will be determined by me independently of the two ordinary members as a Justice of the High Court.

4. The other matter that is before me is Genius v Soft Construct (Malta) Limited (or **SCM**). These proceedings are only in the High Court; they are docketed to me because of a degree of overlap that subsists between the October Actions and what I am going to call the **SCM Action**.

5. The SCM Action is somewhat behind the October Actions in terms of when it is going to be finally determined. The October Actions, self-evidently from the

name I have given them, will be tried in a long trial beginning in October 2022. The SCM Action is in the relative foothills of preparation, in the sense that joinder of certain parties, who are necessary to be joined in the action, have yet to be joined. In this regard I will do no more than refer to my ruling in the SCM Action under neutral citation number [2021] EWHC 3200 (Ch), in which I dealt with the question of joinder and identified how I thought matters should proceed.

6. There are, in the October Actions and in the SCM Action, separate intellectual property claims and issues arising for determination in those trials. I am not going to articulate these further. No-one is suggesting that there is any kind of overlap between these claims and issues. To that extent the actions can and should proceed separately.

7. Where there is overlap is in relation to what I am going to call the **Competition Issues**. I do not propose to articulate these with any specificity, save to note that all of the persons who appear before me accept that there is a degree of overlap or synergy between the Competition Issues as they appear in the October Actions and the SCM Action such that it would be helpful for the court trying both sets of proceedings to be to some degree apprised of them and be able to take them into account across the two sets of proceedings.

8. Given the relatively early stage of the SCM Action, at least in terms of the court's grappling with issues of substance, I can say nothing about the extent and degree of the synergies in terms of the Competition Issues. However, I find that there is a sufficient synergy to mean that options other than trying these actions as purely independent claims ought to be explored.

9. It is also the case that it may be that the joinder of the additional parties to the SCM Action is not a matter that affects the common consideration of the Competition Issues across the October Actions and the SCM Action. That is something on which I cannot reach a final view because the parties to the SCM Action are still in flux. I would consider it to be dangerous to anticipate the sort of points that present non-parties but future parties to the action might take. It might well be true, as Mr de la Mare, QC for Genius Sports contended, that

these additional parties will only be interested in the intellectual property issues in the SCM Action and not in the Competition Issues. That may be right, but I cannot possibly make a ruling in this regard, and I do not do so. It follows that I cannot commit the potential future parties to a course of action on which they have not been able to make submissions.

10. Let me be clear that I include in the definition of potential future parties to the SCM Action IMG. Although it is not a party, IMG is represented before me today by Ms Potts of counsel. It seems to me that whilst it might, in the future, be said by Genius Sports that IMG was in a position to make objections to the course that I am going to articulate in a moment, that is a point that will only go to the weight of such future objections and not to the ability to make them. It seems to me that it would be entirely wrong for me to refuse in the future to hear submissions as to how an action should be constituted or conducted by a present non-party but potential future party, even if that (present) non-party is present before me today.

11. The question that is before me is how to deal with the synergies that may exist between the various actions that are docketed to me. The problem with competition law litigation is that many cases which would otherwise be entirely separate rest upon a common market background. That, I consider, is likely to be the case as regards the Competition Issues here.

12. So, although these actions may in many respects be divergent, the question of market definition (for instance) is something that ought to be resolved consistently rather than inconsistently between the October Actions and the SCM Action. Like issues should be decided consistently, even where they arise in independent actions.

13. The problem arises: how does one deal with various actions giving rise to potentially linked competition issues in circumstances where they are otherwise being tried separately?

14. There are, as I see it, three options, although I stress I see these options as three points on a scale. The first option, on one extreme, is complete detachment: that

is to try two or more actions raising related claims or issues as if they were separate, and to take no account of any synergies or similarities. That, in my judgment, would usually suggest the importance of a separate tribunal hearing those cases, so that there is no inadvertent cross-pollution of issues which appear to be similar but ought (given the manner in which the actions are being tried) to be decided separately. So that is one end of the scale.

15. At the other end of the scale there is what we call consolidation. Consolidation involves the articulation of issues that are common in all of the relevant proceedings, and determining what steps need to be taken in order to *(i)* hear those issues together and *(ii)* decide them together.

16. From the outset, the parties in the litigation that I have described have been aware of the need for some kind of reflection of the synergies that I have described in relation to the Competition Issues. No party, however, has made an application for formal consolidation. It is readily understandable why that should be. I do not consider that an order for consolidation is possible in these cases, for essentially two reasons. First of all, I do not believe that any judge would be right to order consolidation where one of the proceedings to be consolidated does not have a full constitution of parties. It seems to me that that is the case with the SCM Action. It would be wrong in principle to order the determination of issues in a trial, where those issues would be determined in a binding way, in circumstances where the parties in that action (the SCM Action) are not present before the court.

17. Now it may be that the position of joinder of parties could be rectified before the trial of the October Actions, and that I could await the resolution of the joinder issue. But, frankly, I do not consider that there is time to achieve this, and so consolidation, even of only the Competition Issues, is a non-starter.

18. Consolidation is also a non-starter for altogether more prosaic reasons. If there were to be consolidation of the Competition Issues, so that parts of the SCM Action would be heard with the October Actions, then a number of steps would have to be taken between now and the end of the Summer term this year. First of all, the issues to be determined in the pleadings would have to be identified

with absolute precision, so that the court would know what it was deciding and what it was not deciding. Then there would have to be disclosure from the parties to the SCM Action which would be consistent with the matters that would be decided in the consolidated proceedings. Such disclosure has not taken place in the SCM Action, whereas it has taken place in the October Actions. Then there would have to be factual and expert evidence appropriate to those issues, so that the court could reach final and conclusive decisions in relation to the consolidated issues.

19. There simply is not time to take all these steps. That is tolerably clear from the submissions of all concerned, and it seems to me the only way in which consolidation could be achieved would be by adjourning the October Actions, and probably adjourning them for a year, even two years. That is not a course that was advocated by any party, and is, frankly, unacceptable. One of the many factors that one must consider is the swift disposal of proceedings in these and other courts. Whatever the synergies that exist between the Competition Issues in the October Actions and the SCM Action, these do not, in my mind, justify the adjournment of a trial that can otherwise take place. So, for all those reasons, the option of consolidation, which lies at the other extreme of the scale that I have described, is unavailable.

20. The question then arises whether there is a third way, lying between these two extremes, as a means of reflecting the synergies or commonality that exist or may exist between the October Actions and the SCM Action that falls short of consolidation, but nevertheless is rather different from simply hearing the actions entirely independently. I call this third, intermediate, option the **Read-Across Option** because what it entails is the potential – I want to stress that word, "potential" – for reading across findings, analysis and legal conclusions from the October Actions into the SCM Action, when that action is heard later on.

21. I want to absolutely stress that this is a facultative and not a binding process. It is intended to enable the court in the later action to reflect the sort of synergies or commonalities that may exist with the earlier action. It is important to be very clear what is intended by this process of Read-Across. In the ordinary case,

where one has related cases which are being heard separately, the courts need to be particularly careful about the "pollution" of the later case by the consideration that occurs in an earlier case. Ordinarily, where cases are being heard separately, one would seek to ensure that there was a different judge hearing both, or a differently constituted tribunal hearing both. That is not always possible but it is certainly something that one must bear in mind. Absolutely, one would not go to the other extreme of positively seeking to have the same court or tribunal hear both cases.

22. The point about the Read-Across Option is that this usual course is not pursued. To the contrary, the aim is to have the same or similarly constituted tribunal hearing both the October Actions and the SCM Action. Specifically, that commonality would be me as the chair and docketed judge in the October Actions and as the docketed judge in the SCM Action. It needs to be made clear – and it has been made clear on the record – that all of the parties before me have bought into this course because they see the importance, in terms of efficiency and consistency, of adopting this kind of process. So they have waived, and waived expressly, their right to contend for a separate tribunal to hear the SCM Action.

23. I make clear that I regard that waiver as only being made by the parties presently in the two actions, and that it will be open for any new party, including IMG, to object to a Read-Across in the SCM Action. I see no difficulty in making clear that proviso because the decision to Read-Across or not to Read-Across is a fairly fluid one that can be unmade at any time before the commencement of the hearing of the SCM Action.

24. So, I am going to make a Read-Across order today, but I make clear that I will be very prepared to hear from future parties, including IMG, as to why that course is not appropriate. Obviously, I am sure any party in the future making such an objection will read and consider this ruling and articulate their objections by reference to the points I have made in this ruling.

25. The Read-Across process is explicitly intended as an informal process. It means that there will be a liberty to the court in the second action, the SCM Action,

effectively to translate or read across facts, matters and decisions from the earlier October Actions into the later SCM Action.

26. I am insufficiently versed in the detail of the various matters to give any concrete example, and it would probably be unwise for me to do so. But let me give a hypothetical example of what might happen in a Read-Across case. It may be that the issue of market definition, let us say, is so similar between the two actions that, in effect, it is possible to cut and paste paragraphs from the earlier judgment, disposing of the October Actions, into the later SCM Action. That is something which would not ordinarily happen on a question of fact like market definition, but it is something that could happen in the process that I am envisaging.

27. Whether it does, of course, depends upon all of the circumstances. I want to make clear that whilst it may be that in the future there would be an argument as to the "bindingness" of any findings in the October Actions in the SCM Action, I am not making any ruling in advance as to this. It seems to me that there may be points that can be made, but I am certainly not holding – by ordering this process – that "bindingness" in fact follows. It seems to me that what can and what cannot be read across is entirely fact-sensitive and will depend upon precisely the evidence and the issues and, indeed, the argument that occurs in both sets of actions that I will be involved in.

28. That said, I do expect the parties to the later action to behave in a responsible manner. I am sure they will, but it is important also to put that on the record. By responsible manner, I mean really two things. I mean, first, that it would obviously help the process if there were articulation by those having an interest in the SCM Action of both points of similarity and points of difference between the Competition Issues in the two sets of proceedings. In particular, it would be helpful for there to be warnings as to whether there were points which could be ducked in the October Actions because they would require further and more nuanced articulation in the later case. There are often ways of framing issues so that one does not go too far in deciding them, and that, as it seems to me, is a matter of particular importance, when one is seeking to achieve consistency of results.

29. To be clear, the objective of the Read-Across Option is not to decide the later case in advance. It is to ensure, or at least facilitate, consistency between related or common issues in independent actions where neither *res judicata* nor issue estoppel can exist. That is the point of the process. It will, I suspect, have the inadvertent benefit of saving time and cost, but that is, as I see it, an incidental benefit and not the real driver of this process.

30. In a similar way, there will be an obligation on the parties to the later action – an informal obligation, I am not ordering this – to ensure that rabbits are not pulled out of hats. The whole point of the goal of informal consistency is that differences between the various actions are articulated as early as possible, as well as their similarities. It would not assist, and as I said in argument, I would take a dim view, of new points being pulled out of the hat, like the magician's rabbit, between the conclusion of the October Actions and the commencement of the SCM Action, whenever it does substantively commence for trial.

31. From that overall analysis of the Read-Across Option, a number of orders follow. First of all, I am going to ensure that in the undertakings to the order, there is recorded the consent of all of the parties before me today to the same tribunal disposing of the SCM Action and the October Actions. I am not making any commitment on the part of the court that it will in fact be the same tribunal, but that obviously is the aspiration.

32. Secondly, there will be an order that SCM (the only party to the SCM Action presently a stranger to the October Actions) participate as an intervener in the October Actions. The nature of that intervention I am not going to spell out any further, because it seems to me it is going to rely very largely on the judgement of the SCM legal team precisely what they say and when. That, I am afraid, is inherent in the informal and non-binding nature of the Read-Across Option that I have defined. The overriding objective is, as I have said, to ensure that if one were, as an outsider, to read the judgments in both sets of proceedings, one would not sit back and scratch one's head and say, "How could the same tribunal reach this decision, they are so inconsistent?" That is the objective that I have: it is that of consistency.

33. Thirdly, the next order that arises is the service of what I am going to call a "statement of intervention". But it seems to me it is actually going to be more like a form of submissions, directed to precisely this point of consistency or inconsistency, as the case may be. The best time for that document to come in, as it seems to me, is after the experts have done their job in the October Actions, so that the position, at least in the October Actions, is as clear as it can be to those interested in the outcome of the SCM Action. So I am going to order that there be a statement of intervention at around that time.

34. The question follows next as to whether there should be any further production of material by SCM. In particular, there was a suggestion by Genius Sports that a report produced in the SCM Action, the "Latham report", be produced in the October Actions, so that it could be used by the experts in that case, and ultimately the advocates, if so advised. I am not going to order that the Latham report be disclosed, because I consider that that is liable to create a distraction from the process that I am envisaging, rather than a benefit. I say that without having looked at the Latham report, so my conclusion is somewhat tentative on this. But it does seem to me that what I would be doing by ordering disclosure of the Latham report would be to attach too much significance to it. It seems to me that what is being done by the Read-Across process that I have articulated is the resolution only of the issues in the October Actions. The purpose of the intervention and the Read-Across is to enable those claims to be determined with more than half an eye on the future proceedings, with a view to achieving consistency. It therefore seems to me that the primary point of the process is to assist in framing that which must be determined in the October Actions, and not that which must be determined in the SCM Action. So it seems to me that the disclosure of material that goes only to the SCM Action, even though it goes to the areas of synergy, namely the Competition Issues, should not be ordered, and I am not going to do so.

Sir Marcus Smith
President

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

Date: 16 February 2022