Neutral citation [2023] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 February 2023

Before:

THE HONOURABLE MRS JUSTICE BACON
(Chair)
PROFESSOR ROBIN MASON
JUSTIN TURNER K.C.

Sitting as a Tribunal in England and Wales

BETWEEN:

CONSUMERS' ASSOCIATION

Class Representative

- v -

QUALCOMM INCORPORATED

Defendant

Heard at Salisbury Square House on 13 January 2023

RULING (STRIKE OUT)

APPEARANCES

Michael Armitage and Ciar McAndrew (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Daniel Jowell KC, David Bailey and Emma Mockford (instructed by Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP) appeared on behalf of the Defendant.

A. INTRODUCTION

1. On 17 May 2022, this Tribunal gave judgment on the application by the Consumers' Association, commonly known as "Which?", for a collective proceedings order ("CPO") pursuant to section 47B of the Competition Act 1998 ("CA98"), [2022] CAT 20 (the "CPO Judgment"). A CPO was made on 4 July 2022 and, at the request of Which?, the list of smartphone models at Appendix A of the CPO was varied by an order made on 21 July 2022.

2. The Defendant ("Qualcomm") filed its Defence on 29 July 2022 and Which? filed its Reply on 21 October 2022. A case management conference ("CMC") was held on 13 January 2023, in advance of which Qualcomm made an application to strike out a passage of Which?'s Reply on the basis that it was contrary to the rule *Hollington v Hewthorn* [1943] KB 587. The parties filed written submissions for the CMC, made oral submissions at the CMC and filed further brief submissions after the CMC.

3. This Ruling is the Tribunal's unanimous decision that the disputed second sentence at paragraph 4 of Which?'s Reply should be struck out.

B. THE RELEVANT PLEADINGS

4. The collective proceedings commenced by Which? combine "standalone" claims under section 47A CA98 alleging that Qualcomm has abused its dominant position in breach of the Chapter II prohibition in section 18 CA98 and (until 31 December 2020) Article 102 of the Treaty on the Functioning of the European Union in relation to Qualcomm's licensing practices in respect of 4G Standard Essential Patents, and in particular the royalties charged by Qualcomm to smartphone manufacturers (including Apple and Samsung) for the licensing of its patents for chipsets.

5. In its Amended Collective Proceedings Claim Form (the "Amended Claim Form"), Which? refers to a number of foreign decisions by regulators and courts, such as the European Commission decision dated 24 January 2018 in Case AT.40220 – *Qualcomm (Exclusivity payments)*, the US district court

decision in *FTC v Qualcomm*, 411 F.Supp.3d 658 (N.D. Cal. 2019) and decisions by the South Korean Fair Trade Commission, the Seoul High Court and the Taiwanese Fair Trade Commission.

6. Paragraphs 41 and 42 of the Amended Claim Form state that:

> "41. For the purposes of this CPO application, Which? does not rely on these foreign decisions to prove the correctness of the conclusions of fact or economic assessment reached by the decision-makers concerned. Nor does Which? contend that the legal conclusions reached in those decisions amount in themselves to a sufficient basis for proceeding with the Claims under UK or EU competition law (indeed, the FTC CA judgment controversially overturned the lower court ruling against Qualcomm: see the FTC Petition, and the Amici Brief).
>
> 42. Rather, Which? contends that the Relevant Decisions are highly material to the question of whether the Proposed Collective Proceedings meet the threshold for certification. In this regard, it is of particular relevance that the combined evidential record resulting from the Relevant Decisions provides significant information about Qualcomm's business practices, their impact on the competitive process, and the resulting effects on prices paid by customers, and ultimately by final consumers purchasing smartphones. The Decisions show that Which? is likely to be able to obtain disclosure of documents, and/or the provision of information, which will materially assist in establishing the necessary factual, economic and legal elements of the Claims."

7. Qualcomm in its Defence contends that Which?'s Amended Claim Form has been pleaded exclusively by reference to certain foreign judicial and regulatory decisions notwithstanding that those decisions have been fully or partially overturned by appellate courts and/or are the subject of ongoing appeals, and/or are inadmissible as evidence of their findings (Defence, paragraph 4). While Qualcomm admits that it has been the subject of legal proceedings or administrative antitrust enforcement in the US, the EU, South Korea and Taiwan, it denies that these foreign decisions are relevant (Defence, paragraph 69).

8. Which? in its Reply disputes Qualcomm's position regarding the foreign decisions: in principle at paragraphs 4 and 41, and with further specificity at paragraphs 42 to 52. Which?'s Reply paragraphs 41, 42, 44, 46, 48 and 50 also repeat paragraph 4 of its Reply.

9. The particular sentence in paragraph 4 of Which?'s Reply to which objection is taken by Qualcomm is:

> "Reasoned findings made by foreign courts and regulators may be taken into account in proceedings before the Tribunal, at least to the extent that such findings have not been specifically reversed on appeal."

10. Qualcomm submits that this sentence offends against the rule in *Hollington v Hewthorn*. It accepts that reference can be made to foreign judgments for the purpose of identifying, as a matter of record, evidence and submissions that were before the relevant court or regulator, but that account may not be taken of a reasoned decision of that court or regulator in those proceedings.

C. THE APPLICATION

11. The application by Qualcomm is to strike out the second sentence of paragraph 4 of the Reply. The issues which arose during the course of argument were as follows:

(1) Is the ruling in *Hollington v Hewthorn* binding on this Tribunal? Alternatively, even if not binding, should the rule in *Hollington v Hewthorn* be applied by this Tribunal?

(2) Should this matter proceed to trial on the current pleadings and the question of admissibility be determined at trial?

12. In Which?'s skeleton argument for the hearing, Which? appeared to be contending that its position in paragraph 4 of the Reply was simply that the Tribunal may take into account "matters of fact recorded in the foreign judgments", and that it did not contend that the Tribunal should rely on foreign findings "in the sense of assessments of the evidence made by the foreign courts and regulators". In his oral submissions, however, Mr Armitage clarified that Which? was indeed contending that it should be open to the Tribunal, if appropriate, to place weight on the assessments of evidence of the courts and regulators cited in the Amended Claim Form.

D. THE RULE IN *HOLLINGTON V HEWTHORN*

13. The modern interpretation of the rule in *Hollington v Hewthorn* is that, absent the operation of estoppel, factual findings in civil cases in England and Wales are inadmissible in subsequent proceedings. The rule does not extend to criminal convictions. The development of the law in this area, and the reasons for it, were explained by Christopher Clarke LJ in *Rogers v Hoyle* [2014] EWCA Civ 257. He recorded that the rule has been extended to findings of facts of arbitrators (*Land Securities v Westminster City Council* [1993] 1 WLR 286), coroners (*Bird v Keep* [1918] 2 KB 692) and extra statutory inquiries (*Three Rivers District Council v Governor and Company of The Bank of England (No3*) [2001] UKHL 16, [2003] 2 AC 1). In his judgment at [39]–[40] he stated:

> "39. As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.
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> 40. In essence, as the judge rightly said, the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone."

14. There are exceptions to the rule. Under section 11 of the Civil Evidence Act 1968, criminal convictions are admissible as evidence that an offence has been committed: this reverses the position in *Hollington v Hewthorn* itself which concerned a criminal conviction for careless driving. Under sections 47A and 58A CA98, final decisions of the European Commission in competition cases were admissible before the courts and this Tribunal and were binding in follow-on actions (and could otherwise be considered persuasive (see *Inntrepreneur Pub Company (CPC) v Crehan* [2006] UKHL 38, [2007] AC 333 at [69])), and this remains essentially the case for relevant decisions or statements of the

European Commission made before IP completion day and not withdrawn: see section 60A CA98.

15. In *re W-A (Children: Foreign Conviction)* [2022] EWCA Civ 1118, [2022] 3 WLR 1235, the question arose as to whether a man's conviction for sexual offences against a child in Spain was admissible as evidence of relevant underlying facts in care proceedings before the Family Court in Northampton. The Court of Appeal held that it was settled law in family proceedings that the Court may give weight to earlier findings. The reason for this was that any other approach would severely conflict with the Court's overriding duty to get at the truth in the interests of the child. It follows that care proceedings are a recognised exception to the rule in *Hollington v Hewthorn* for special reasons.

E. DISCUSSION

16. Mr Jowell KC, appearing for Qualcomm, submitted that the rule in *Hollington v Hewthorn* was binding on this Tribunal. He did not, however, cite any authority to support this proposition other than the passages in *Rogers v Hoyle* to which we have referred above, in conjunction with the submission that this represents a "fundamental rule of fairness".

17. Mr Armitage, appearing for Which?, drew attention to Rule 55(1) of this Tribunal's rules:

> **"55.**—(1) The Tribunal may give directions as to—
>
> (a) the provision by the parties of statements of agreed matters;
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> (b) the issues on which it requires evidence, and the admission or exclusion from the proceedings of evidence;
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> (c) the nature of the evidence which it requires to decide those issues;
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> (d) whether the parties are permitted to provide expert evidence;
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> (e) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
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> (f) the way in which evidence is to be placed before the Tribunal;
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> (g) the submission in advance of a hearing of any witness statements or expert reports;

(h) the examination or cross-examination of witnesses."

18. Mr Armitage placed particular reliance upon Rule 55(1)(b) as indicating that this Tribunal has broad discretion as to what evidence should be admitted in all the circumstances. He contended that the strict rules of evidence applicable to High Court proceedings do not apply in the Tribunal, and that consequently the rule in *Hollington v Hewthorn* likewise does not apply. He relied in that regard on the ruling of the Tribunal in *Agents' Mutual Limited v Gascoigne Halman Limited* [2017] CAT 5, at [8]:

> "As has been made clear on a number of occasions (see e.g. *Argos and Littlewoods v OFT* [2003] CAT 16 at [105]; *Claymore v. OFT* [2003] CAT 18, *Aberdeen Journals v. OFT* [2003] CAT 11 at [126] and [134]), strict rules of evidence do not apply before the Tribunal. The Tribunal will be guided by circumstances of overall fairness, rather than technical rules of evidence."

19. We reject Qualcomm's submission that the rule in *Hollington v Hewthorn*, if it applies, is binding on this Tribunal. No cogent basis has been made out as to why a High Court rule of evidence should necessarily bind this Tribunal and we accept Which?'s submission that the discretion given to this Tribunal as to the evidence to be admitted is broad. The submission that *Hollington v Hewthorn* is fundamentally fair does not of itself support a position that it should be regarded as binding on this Tribunal. Moreover, as shown by the exceptions, the rule does not embody a universal principle of fairness.

20. During the course of argument we raised the question as to whether the parties had investigated if a similar rule of evidence to that in *Hollington v Hewthorn* applies in Scotland. The answer given was that such investigations had not been made. Qualcomm suggested that this was not relevant because the Tribunal made an order on 9 November 2021 that these proceedings are to be treated as proceedings in England and Wales.

21. We are not sure that is a complete answer to the point. If this Tribunal is to hold that it is *bound* by the rule in *Hollington v Hewthorn*, it should have a full picture of the position in Scotland and Northern Ireland. The Tribunal's rules relating to evidence do not, on their face, make a distinction between proceedings in England and Wales and proceedings Scotland and Northern Ireland.

22. Having arrived at the position that we are not bound by the rule in *Hollington v Hewthorn*, the question then arises as to whether this Tribunal should nevertheless adopt the same principle.

23. We are of the view that at the trial of these collective proceedings it would not be appropriate to attach any weight to the findings reached by other courts, tribunals or regulators. The principal reason for this is the reason given by Christopher Clarke LJ in *Rogers v Hoyle*, being that it is for *this* Tribunal to assess the evidence and make primary findings of fact. Relying upon the evaluative judgments of other decision-makers necessarily circumvents that role. To place weight on their findings, however distinguished or authoritative, risks the decision being made at least in part on evidence which is not before the Tribunal.

24. Mr Armitage relied upon *Otkritie International Investment Management v Gersamia and Jemai* [2015] EWHC 821 (Comm) to support the submission that even in the High Court the rule in *Hollington v Hewthorn* does not wholly preclude a court from taking account of reasoned findings in earlier judgments.

25. In that case an application was made against the second respondent Mrs Jemai for contempt. She did not serve any evidence in response to the application. Eder J held at [23]:

> "In relation to grounds 2 and 3, the applicants rely on my Judgment dated 10 February 2014 following the lengthy trial. In that context, Mr Stanley accepted that the Judgment did not create any issue estoppel as between the applicants and Mrs Jemai because she was not herself a named party. He also accepted that the opinions expressed in that Judgment are not, as such, admissible by virtue of the rule in *Hollington v Hewthorn* [1943] KB 587. Notwithstanding, he submitted that the Court is entitled to have regard to matters of primary fact recorded in that Judgment and if those matters of fact justify the conclusions reached in that Judgment the Court is entitled to reach the same conclusion. That submission was based on the analysis of Leggatt J in *Rogers v Hoyle* [2013] EWHC 1409 (QB), [2014] EWCA Civ 257, [2014] 2 WLR 148 especially at [53]-[55], [58]-[59] and [79]-[90] and [100]-[104] of Leggatt J's judgment and [39]-[40] of Christopher Clarke LJ's judgment. I accept that submission."

26. That passage does not suggest that the judge was departing from the rule in *Hollington v Hewthorn*. Rather, he was saying that he was entitled to have regard to "matters of primary fact" recorded in a previous judgment (which

happened to be his own judgment following a lengthy trial), and having considered those matters was entitled to reach the same conclusions as reached in that previous judgment.

27. The factual matters in question, as set out at [24] of the judgment of Eder J, included evidence which had led him to conclude in his trial judgment that a particular loan agreement was a fake or sham, and that various other documents were forgeries. As Eder J noted, Mrs Jemai had not put forward any evidence or argument to the contrary in her response to the contempt application. In those circumstances the judge was clearly entitled to refer to the reasons given in particular paragraphs of his trial judgment, in the sense of the evidence referred to in those paragraphs, and reach the same conclusions reached in the trial judgment.

28. As we have explained above, Qualcomm does not object to references to the decisions of foreign courts or regulators for that purpose, i.e. to identify the evidence before those decision-makers. What it objects to is the suggestion that the Tribunal can give any weight to the evaluative findings of those decision-makers as part of the process of reaching its own decision on the evidence before it.

29. Mr Armitage also contended that the correct approach of this Tribunal, particularly having regard to Rule 55(1), should be that a finding of another court or regulator should not be excluded *ab initio* but should be given appropriate weight in all the circumstances at trial, which could at that stage include considerations of fairness to both parties.

30. We see, however, that this could present considerable difficulty. How would this Tribunal, at trial, go about assessing how much weight should be given to a particular decision of another court or regulator? That would almost inevitably involve a detailed consideration of the evidence that was before the other decision-maker and the nature of the decision-making process. It might also require an assessment of the way in which the arguments were put to that decision-making body, on both sides. There would in consequence be what HHJ Paul Matthews (sitting as a judge of the High Court) described at [51] of *Crypto*

Open Patent Alliance v Wright [2021] EWHC 3440 (Ch) as "satellite litigation about the circumstances in which the earlier decision was come to, and how far it could properly be helpful in the later proceedings".

31. Which? accepted that, if paragraph 4 of its Reply was to remain in its current form, evidence might indeed be required in relation to the proceedings on which it relies. This is another reason why in our view it would not be appropriate to accept that evaluative assessments of other courts and regulators may be taken into account at trial. Such a satellite debate would, in our view, be an entirely unnecessary additional complication to the proceedings. The task of this Tribunal is not to second-guess the quality of the assessment of another decision-making body. It is to evaluate the body of evidence before the Tribunal in the proceedings in hand and reach its own assessment based on that evidence.

32. That point also answers Mr Armitage's final submission, which was that it would be inappropriate to rule now on the admissibility of the relevant findings; rather, he said, the question of admissibility should be determined at trial. It would in our view be entirely inappropriate to put the parties to the expense of adducing potentially voluminous evidence at trial as to what did and did not happen in the prior proceedings, given our conclusion that a debate as to the weight to be given to that evidence is not a debate which should properly form part of the decision-making process of this Tribunal.

33. For these reasons, although *Hollington v Hewthorn* is not binding upon this Tribunal, we find that it is appropriate to adopt the same principle in these proceedings. We therefore rule that the second sentence of paragraph 4 of Which?'s Reply should be struck out.

The Hon. Mrs Justice Bacon
Chair

Professor Robin Mason

Justin Turner K.C.

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

Date: 17 February 2023