Neutral citation [2023] CAT 51

Case No: 1382/7/7/21

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 July 2023

Before:

THE HONOURABLE MRS JUSTICE BACON
(Chair)
PROFESSOR ROBIN MASON
JUSTIN TURNER KC

Sitting as a Tribunal in England and Wales

BETWEEN:

CONSUMERS' ASSOCIATION

Class Representative

- v -

QUALCOMM INCORPORATED

Defendant

Heard at Salisbury Square House on 5 July 2023

RULING (PLEADING AMENDMENTS)
(NON-CONFIDENTIAL VERSION)

APPEARANCES

Rob Williams KC, Michael Armitage, Ciar McAndrew and Antonia Fitzpatrick (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Daniel Jowell KC, Nicholas Saunders KC and Jonathan Scott (instructed by Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP) appeared on behalf of the Defendant.

Note: Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. On 26 June 2023 the Class Representative ("Which?") made an application for permission to amend its Re-Amended Claim Form. The application was considered at the third case management conference ("CMC") held in these proceedings on 5 July 2023 (the second CMC since certification).

2. The proposed amendments fell into three categories, and the position of the Defendant ("Qualcomm") on each of those categories was different:

   (1) The first category of proposed amendments sought to clarify the relationship between the two primary forms of abusive conduct alleged by Which?. Qualcomm consented to those amendments and we therefore did not address them at the hearing.

   (2) Secondly, Which? sought to introduce amendments to plead that Qualcomm's alleged "no licence, no chips" policy involved an abuse of a dominant position on the market for 3G CDMA chipsets. It was common ground that these amendments set out a cause of action which would in principle cover claims dating back more than six years, for which the limitation period has now expired. The Tribunal's jurisdiction to permit an amendment is therefore as set out in Rule 32(2) of the Competition Tribunal Rules 2015[1] (which applies to collective proceedings by virtue of Rules 3(d) and 74). Applying that rule, Qualcomm contended that this amendment introduced a new cause of action which did not arise out of the same or substantially the same facts as those already pleaded. Accordingly, Qualcomm said that the order for amendment should provide that the claims in this regard were deemed to have been made on the date of the application to amend (26 June 2023) such that damages could only arise from 26 June 2017.

[1] Unless otherwise stated, all references to rules in this ruling are to the Competition Appeal Tribunal Rules 2015.

(3) Thirdly, Which? sought to plead that Qualcomm's alleged "no licence, no chips" policy also involved an abuse of a dominant position on the market for 5G chipsets. In that regard no limitation issue arose, since the dominant position in relation to 5G chipsets is only alleged to have been held since 2019. The question of whether the amendment should be permitted is therefore a matter of the Tribunal's discretion under Rule 32(1). In that regard, the only dispute was as to whether the amendments should await answers provided by Which? to questions set out in a letter from Qualcomm's solicitors dated 27 June 2023, seeking to clarify Which?'s case on these proposed amendments.

3. At the CMC the Tribunal heard submissions from both parties regarding the disputed proposed amendments. In relation to the allegations of abuse of dominance on the 3G CDMA chipset market, the Tribunal ruled in favour of Qualcomm and ordered that those amendments should be deemed to be (effectively) a new claim made on 26 June 2023. The Tribunal allowed the amendments relating to the allegations of abuse of dominance by the Defendant in the 5G chipset market, but made directions providing for Which? to respond to Qualcomm's questions.

4. These are the Tribunal's written reasons for its decision in relation to the 3G CDMA chipset market amendments.

B. LEGAL PRINCIPLES

5. There was no dispute as to the legal principles to be applied. As set out above, it was common ground that the applicable amendment provision as regards the proposed 3G CDMA chipset market amendments, given the limitation point, is Rule 32(2). That provides:

> "Where any relevant period of limitation has expired, the Tribunal may permit an amendment –
>
> (a) to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings; …"

6. It is established that this requires four questions to be answered (see *Mulalley v Martlet Homes* [2022] EWCA Civ 32 ("*Martlet Homes*"), at [38]):

(1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?

(2) Do the proposed amendments seek to add or substitute a new cause of action?

(3) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?

(4) Should the Court exercise its discretion to allow the amendment?

7. In *Mastercard v Deutsche Bahn* [2017] EWCA Civ 272 ("*Deutsche Bahn*"), at [40], the Court of Appeal considered the test of "arising out of the same or substantially the same facts" in s. 35(5)(a) of the Limitation Act 1980 and Civil Procedure Rules ("CPR") Part 17.4. It endorsed the summary of the relevant authorities given by Tomlinson LJ in *Ballinger v Mercer* [2014] EWCA Civ 996, at [34]–[37], as follows:

> "34. Helpful guidance as to the proper approach to the resolution of this question was given by Colman J in *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549 where, at page 558, he said this:-
>
> > "52. At first instance in *Goode v. Martin* [2001] 3 All ER 562 I considered the purpose of Section 35(5) in the following passage:
> >
> > > "Whether one factual basis is 'substantially the same' as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim."
> >
> > 53. In *Lloyd's Bank plc v. Rogers* [1997] TLR 154 Hobhouse LJ. said of Section 35:
> >
> > > "The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to

> rely upon any cause of action which substantially arises from those facts."
>
> 54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts."
>
> 35. In the *Welsh Development Agency* case Glidewell LJ said, in an often quoted passage at page 1418, that whether or not a new cause of action arises out of substantially the same facts as those already pleaded is substantially a matter of impression.
>
> 36. Less well-known perhaps is the cautionary note added by Millett LJ in *Paragon Finance*, where at page 418 he said, after citing the passage from Glidewell LJ to which I have just referred:-
>
> "In borderline cases this may be so. In others it must be a question of analysis."
>
> 37. I would also point out, as did Briggs LJ in the course of the argument, that "the same or substantially the same" is not synonymous with "similar". The word 'similar' is often used in this context, but it should not be regarded as anything more than a convenient shorthand. It may serve to divert attention from the appropriate enquiry."

8. More recently, the meaning of the words "the same or substantially the same facts" in CPR Part 17.4 was considered by the Court of Appeal in *Martlet Homes* in a construction context. The Court began by referring (at [47]–[48]) to *Brickfield Properties v Newton* [1971] 1 WLR 862, where Cross LJ said at 880D–E (by reference to the equivalent provision in the old Rules of the Supreme Court):

> "… It is no objection to amendment under Ord. 20, r. 5(5), that some of the facts out of which the new cause of action arises are peculiar to it and that some of the facts out of which the old cause of action arises are peculiar to it. It is enough if the overlap is so great that the new cause of action can fairly be said to arise out of substantially the same facts as the old cause of action. …"

9. In *Martlet Homes* at [49] the Court then cited the passage from *Ballinger* set out above, albeit commenting at [50] that it was not sure how far those observations could take the Court. It did, however, emphasise the point that "substantially the same" was not synonymous with "similar".

C. APPLICATION TO THIS CASE

(1) Summary of the amendments sought in relation to the 3G CDMA chipset market

10. The Re-Amended Claim Form, as it currently stands, pleads that Qualcomm was (over the claim period, defined as running from 1 October 2015) and continues to be dominant on the LTE-UMTS-GSM and the LTE-CDMA chipset markets and the LTE SEP markets, and that it has abused its dominant position on those markets. As explained in the Re-Amended Claim Form, the proceedings are thus concerned with chipsets which are compatible with the LTE Standard, which is the principal standard used by 4G mobile phones.

11. The amendments proposed by Which? plead that Qualcomm was also dominant on the (legacy) 3G CDMA chipset market from around 2006–2016, and that it abused that dominant position (within the claim period) by leveraging its dominant position in respect of 3G CDMA chipsets to impose higher royalties for LTE SEPs.

12. As noted above, it was common ground before us that the amendments sought in relation to the 3G CDMA chipset market raised issues falling outside the limitation period (in that, if permitted, they would apply to claims going back to 1 October 2015, more than six years before the date of the application to amend). The questions were therefore whether they pleaded new causes of action, and if so whether those causes of action arose from the same or substantially the same facts as already in issue in the Re-Amended Claim Form. If the Tribunal found that to be the case, Qualcomm did not seek to argue that the Tribunal should as a matter of discretion nevertheless refuse the amendments.

(2) The existing pleaded claims

13. Turning to the parts of the Re-Amended Claim Form relied upon by Which? to support the amendments, Mr Williams KC first pointed to the particulars currently pleaded as evidence of Qualcomm's dominance on LTE chipset

markets. It bears noting that the pleaded allegation is one of dominance on those markets during the period of the claim, i.e. from October 2015 onwards. That is apparent from the summary of the case at §6b, which states that "Over the claim period, Qualcomm has, in particular, been in a very strong market position as a supplier of LTE chipsets to smartphone manufacturers".

14. The more detailed particulars of dominance given in §62 include:

    (1) A statement at §62(a)(ii) that the judgment in *Federal Trade Commission v Qualcomm*, 411 F.Supp.3d 658 (N.D. Cal. 2019) dated 21 May 2019, found that Qualcomm possessed "monopoly power" in the global market for CDMA modem chips between 2006 and 2016.

    (2) A claim at §62(d) that Qualcomm is an "unavoidable trading partner for OEMs" arising from in particular the allegation that:

    > "(ii) Qualcomm is the only manufacturer with experience in the Legacy CDMA Standards required to operate on some networks in the United States. OEMs wishing to supply handsets which are compatible with these networks are dependent on Qualcomm for their supply of CDMA Chipsets."

    (3) A claim at §62(f) that OEMs are unlikely to have been able significantly to constrain Qualcomm's market power in the LTE chipset markets, because neither Apple nor Samsung was able to exercise significant countervailing buyer power in their dealings with Qualcomm "because, inter alia, of their dependence on Qualcomm for CDMA Chipsets".

15. §63 states that Qualcomm's market power on the LTE chipset markets is further discussed in Noble 1, §§5C–5C.3. That section of Mr Noble's expert report states at §§5.40–41 that "During the relevant period, Qualcomm was viewed as the only viable manufacturer of LTE-CDMA chipsets … OEMs are therefore dependent on Qualcomm for LTE-CDMA chips".

16. As regards abuse, Mr Williams relied in particular on §68(e)(iii) of the Re-Amended Claim Form which pleads that:

> "During licence renegotiations in 2008, Samsung sought a reduction in the royalty rate charged by Qualcomm. Samsung dropped its request after Qualcomm delayed the provision of software and technical support …".

(3) The draft amendments in relation to 3G CDMA chipsets

17. The essence of the proposed amended case on dominance in relation to 3G CDMA chipsets is set out in a new §6(ba) as follows:

> "Further or alternatively, Qualcomm has also held a dominant position on the markets for the sale of 3G CDMA and 5G chipsets at times material to the claim, and has leveraged those dominant positions to dictate the terms offered to smartphone manufacturers for licences which cover standard essential patents relating to LTE."

18. As regards the 3G CDMA chipsets claim, the relevant market is defined in a new §53(iii), as:

> "the market for the supply of 3G CDMA Chipsets which are at least backwards-compatible with 2G CDMA Standards but are not compatible with the LTE Standard …".

19. New §57A states that the pleaded 3G CDMA chipset market is worldwide in scope.

20. The claim of dominance on that market is then developed in a new §63A as follows:

> "In line with the finding pleaded in paragraph 62.a.ii above, Qualcomm held monopoly power in relation to CDMA Chipsets and was thus dominant on the 3G CDMA Chipset Market from around 2006 to around 2016.
>
> a. Qualcomm retained a persistently very high market share of the global CDMA modem chip market, of 95% or 96% in 2010, and of above 80% up to 2015 ….
>
> b. Qualcomm's competitors were unable to increase their output so as to exercise competitive constraints over Qualcomm's pricing …. In particular, Qualcomm was able to charge a premium on CDMA as compared to 3G UTMS chipsets, due to its undisciplined market power ….
>
> c. Qualcomm is likely to have possessed a first-mover advantage in CDMA chipsets, having first sold CDMA chipsets in commercial quantities in 1996 ....
>
> d. There were very few suppliers of CDMA chipsets other than Qualcomm …. Qualcomm viewed itself as the sole viable option as a supplier of CDMA chipsets, and OEMs did not view the CDMA chipsets manufactured by

> Qualcomm's rivals as competitive and/or viable alternatives to Qualcomm's CDMA chipsets …. Qualcomm was therefore an unavoidable trading partner for OEMs requiring CDMA chips.
>
> e. There were significant barriers to entry into the global CDMA modem chip market, including the need to make onerous upfront investments, and as a result competitors were slow to enter ….
>
> f. OEMs were unable to constrain Qualcomm's market power. Even powerful OEMs lacked countervailing buyer power in their dealings with Qualcomm because they were dependent on Qualcomm for their CDMA chip supply. In particular, OEMs needed to accede to Qualcomm's patent royalty demands, or risk the critical harm of being unable to sell handsets …."

21. As regards abuse, a general allegation is pleaded at new §68(da) that:

> "Further as and pleaded in paragraph 62.d and f and 63A above, from at least 2006 until – around 2016, Qualcomm's ability to implement the ["no licence no chips"] Policy was reinforced by its market power and its dominant position on the 3G CDMA market, and OEMs' dependence on Qualcomm for 3G CDMA Chipsets, and Qualcomm leveraged that market power to obtain inflated royalty rates in respect of LTE SEPs."

22. That is followed by an amendment to §68(e)(iii) which reads (added text underlined):

> "During licence renegotiations in 2008, Samsung sought a reduction in the royalty rate charged by Qualcomm. Samsung dropped its request after Qualcomm delayed the provision of software and technical support and acceded to Qualcomm's royalty demands in an amendment to its SEP licence entered into in 2009 …".

23. The amendments then add a new §68(i) which reads:

> "Further or alternatively, the amendment to Qualcomm's 1993 licence with Samsung in 2009 (see paragraph 68.e.iii above) established […][✂]. At the time of that amendment, Which? understands that […][✂]. Qualcomm leveraged its dominant position in respect of 3G CDMA Chipsets to impose higher royalties for LTE SEPs."

(4) Whether the proposed amendments plead a new cause of action

24. Which?'s skeleton argument suggested (somewhat fleetingly) that the proposed amendments did not plead a new cause of action, but merely provided particulars of an existing plea. Following the Tribunal's indication of its

provisional view, that contention was not pursued at the hearing by Mr Williams.

25. To the extent that Which? nevertheless maintains this contention, we have no hesitation in rejecting it. The Re-Amended Claim Form alleges dominance and abuse in relation to LTE chipsets and LTE SEPs. Although we note that the Re-Amended Claim Form states at §28 that CDMA chipsets (i.e. chipsets which are compatible with the CDMA family of standards) are also of relevance and at §29 that Qualcomm holds many SEPs relating to the 2G CDMA, 3G CDMA and 3G UMTS Standards, nothing in the existing pleaded case alleges an abuse of dominance in relation to 3G chipsets compatible with the old (legacy) CDMA family of standards, on any basis, let alone the claim of an abuse through leveraging 3G CDMA chipsets dominance to impose higher royalties for LTE SEPs as Which? now seeks to plead.

26. We note the oft-cited admonition that a competition law claim must be pleaded properly. As Roth J noted in *Sel-Imperial v The British Standards Institution* [2010] EWHC 854 (Ch), at [17]–[18], a competition law claim involves a serious allegation, and a defendant to such a claim is entitled to know what specific conduct or agreement is complained of and how that is alleged to violate the law. This is to enable a defendant to know what case it has to meet and for the Court to exercise its case management powers effectively. A claim of an abuse of a dominant position cannot, therefore, be pleaded by inference or implication: it must be pleaded expressly, with particulars of the market on which it is alleged that the relevant defendant was dominant, the facts and matters said to give rise to dominance on that market, and the conduct alleged to constitute an abuse.

27. Mr Williams did not identify anything in the Re-Amended Claim Form that defines the 3G CDMA chipset market on which Qualcomm is now said to be dominant. Still less is there any allegation of dominance on that market, or particulars of such dominance. Nor could Mr Williams identify anything that comes close to suggesting abusive leveraging from dominance in 3G CDMA chipsets into the LTE SEP market as is now claimed. The fact that those

allegations are simply not there in the Re-Amended Claim Form is, no doubt, precisely why Which? now seeks to add them by way of amendment.

28. The proposed amendments therefore undoubtedly seek to add a new cause of action. They do not simply particularise an existing pleaded cause of action.

(5) Whether the amendments arise from the same or substantially the same facts as already pleaded

29. The remaining question is whether the proposed amendments arise from "the same or substantially the same facts" as the existing pleaded case. Mr Williams contended at the hearing that this was the case, on the basis of the passages of the Re-Amended Claim Form that we have identified. We do not accept that submission.

30. Starting with the question of dominance, it is right to say that the Re-Amended Claim Form pleads in very general terms that OEMs were (during the relevant period) and are dependent on Qualcomm for their supply of CDMA chipsets, as evidence of Qualcomm's dominance on the defined LTE chipset markets. The claim period runs from October 2015. The pleaded case is therefore that from October 2015 onwards OEMs have been dependent on Qualcomm for their supply of CDMA chipsets.

31. That is very different to a claim of dominance by Qualcomm on a specifically-defined global 3G CDMA chipset market during the period 2006–2016. The latter, unlike the former, requires investigation of whether the market has been correctly defined, and the specific economic features of that market which are alleged to have led to a position of dominance during the entirety of the period of time identified. As the proposed new §63A itself exemplifies, this will include consideration of, over that time period, Qualcomm's market shares, the viability of competitive products, barriers to entry and other constraints to market power such as countervailing buyer power. This will quite obviously require a far more extensive factual enquiry than would be required for investigation of the existing pleaded case of dependence on Qualcomm during the claim period.

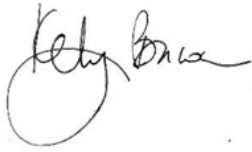
32. Furthermore, given that the 3G CDMA standard was adopted in the year 1999, and the particulars of dominance now pleaded include reference to Qualcomm's sale of chipsets from 1996 onwards (new §63A(c)), adjudication of Qualcomm's alleged dominance in the defined global 3G CDMA chipset market during the period now sought to be pleaded is likely to require factual investigation of a period going back to the 1990s, which will further extend the scope of the factual enquiries required.

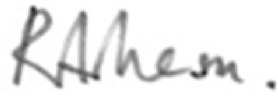
33. As to the issue of abuse, all that Mr Williams is able to point to in the Re-Amended Particulars of Claim is the discrete point that, in 2008 licence renegotiations between Qualcomm and Samsung, Samsung sought a reduction in the royalty rate charged by Qualcomm, which was then dropped after Qualcomm delayed the provision of software and technical support. There is a gulf between the facts on which that claim turns, concerning a single set of licence negotiations with Samsung, and the factual investigation required for the new pleaded claim that from at least 2006 to around 2016 Qualcomm leveraged its market power in 3G CDMA chipsets to obtain inflated royalty rates in respect of LTE SEPs.

34. We therefore reject Which?'s submission that its claim of abuse of dominance on 3G CDMA chipset markets arises out of the same or substantially the same facts as are already in issue in the claim.

D. CONCLUSION

35. Our conclusion is therefore that the amendments sought by Which? in relation to the 3G CDMA chipset market fall outside the scope of Rule 32(2). Those amendments may therefore be permitted, but only on the basis set out in *Deutsche Bahn*, at [4], namely that the Tribunal will make an order stipulating that the amendment is deemed (for limitation purposes) to have been made on the date on which the application to amend was served, in this case 26 June 2023.





The Hon Mrs Justice Bacon Chair	Professor Robin Mason	Justin Turner KC

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

Date: 31 July 2023