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4 **IN THE COMPETITION**

Case No. : 1382/7/7/21

5 **APPEAL**

6 **TRIBUNAL**

7
8 Salisbury Square House
9 8 Salisbury Square
10 London EC4Y 8AP
11 (Remote Hearing)

12 Tuesday 9 November 2021

13
14 Before:
15 **THE HONOURABLE MRS JUSTICE BACON**
16 (Chairwoman)
17 **PROFESSOR ROBIN MASON**
18 **JUSTIN TURNER QC**
19 (Sitting as a Tribunal in England and Wales)

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21
22 **BETWEEN:**

23
24 **CONSUMERS' ASSOCIATION**

Applicant

25
26 v

27
28 **QUALCOMM INCORPORATED**

Respondent

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32 **A P P E A R A N C E S**

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34 Anneli Howard QC and Ciar McAndrew (instructed by Hausfeld & Co. LLP appeared on
35 behalf of the Applicant)
36 Tony Singla QC and David Bailey (instructed by Quinn Emanuel Urquhart & Sullivan UK
37 LLP appeared on behalf of the Respondent)

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Tuesday, 9 November 2021

(10.30 am)

(Proceedings delayed)

(10.38 am)

CMC Hearing

MRS JUSTICE BACON: Good morning, everyone.

These proceedings are being live-streamed and of course many are joining on the Microsoft Teams platform, so I need to start with the usual warning.

These are proceedings in open court as much as if they were being heard before the Tribunal physically in Salisbury Square House. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

That's the usual warning. Can I just check that everybody can see and hear me clearly? Yes. Very good. All right. Thank you very much.

And thank you very much, Ms Howard, for the revised draft composite order, which we've now all received.

If I can just go through what I think remains on the agenda for today. The first and the main issue is the timetable. Secondly -- can everyone see me all right? Yes, all right. Okay. I just had a question as to whether my camera was working properly.

Firstly, timetable.

Secondly, confidentiality, and I see that there's a green underlined provision in paragraph 2 of the draft order.

1 Thirdly, just to discuss whether any amendments need to be made to the proposed
2 publicity notice.

3 And fourthly, to make any directions regarding the hearing bundles.

4 Does anyone have anything else that I need to address on the agenda? No. All right.

5 Shall we start with the timetable, and can I let you know where we've got to
6 provisionally. We've considered the submissions of both sides and the dates
7 that have been set out in the various draft orders that we received. In terms of
8 the date for the hearing, having regard to the availability of the different Panel
9 Members for this Tribunal, it looks like the best dates are going to be 30 and
10 31 March, with 1 April in reserve.

11 Those are the dates which the Tribunal can do and also which accommodate the most
12 number of members of the counsel teams, according to the more detailed
13 counsel list that was sent to us yesterday.

14 Can I have any submissions on that date if that is going to cause enormous problems
15 for anyone.

16 I know, Mr Singla, that Mr Howard is not available for that date. But unfortunately
17 there are no -- well, from the Tribunal's perspective it's difficult to find a better
18 date that accommodates everybody.

19 MR SINGLA: Madam, that's noted.

20 Could I just check one point, please, because you said that that was the date, or those
21 were the dates that accommodate most of the counsel. As I understand it,
22 however, one junior member of the claimant team is actually unavailable in the
23 week commencing 28 March. So in fact it's Mr Howard plus a junior --

24 MRS JUSTICE BACON: Yes, that's right, sorry, I had noted that. Mr Howard on your
25 team and a junior member of the claimant team.

26 MR SINGLA: Yes, whereas the week commencing 4 April would enable all of our

1 counsel team to attend and all of the claimant's team except Mr Turner. So if
2 one was doing this on the basis of numbers -- which I appreciate you may not
3 be -- but in fact the week commencing 4 April would allow the majority of the
4 counsel teams to be in attendance.

5 MRS JUSTICE BACON: Yes. Well, I'm afraid the week beginning 4 April isn't as good
6 for the Tribunal.

7 MR SINGLA: Yes.

8 MRS JUSTICE BACON: I wasn't doing it on absolute numbers but I was doing it on
9 a date that could accommodate most numbers of the counsel team and also
10 the Tribunal. For various reasons the 28th and indeed any date earlier in the
11 window is better for the Tribunal.

12 MR SINGLA: Yes. I'm grateful. I was intending to address you on why 4 April is better
13 and Mr Howard needs to be there. But if it doesn't work for the Tribunal then
14 I won't address you on that.

15 MRS JUSTICE BACON: No, I'm afraid that's going to be quite difficult for us because
16 of other commitments, in particular my commitments later in April.

17 MR SINGLA: I understand. I'm grateful.

18 MRS JUSTICE BACON: All right.

19 Ms Howard.

20 MS HOWARD: We are happy to proceed with those dates for the end of March and
21 April.

22 MRS JUSTICE BACON: All right. So the listing, then, will be 30 and 31 March and
23 1 April in reserve.

24 Now, with those dates in mind, we have a proposal for the other dates falling in before
25 then. And the proposal is this, that the dates for the Respondent to serve its
26 response to the CPO application, as well as, if so advised, any application for

1 summary judgment and/or strike-out, should be 22 December. And the
2 Applicant's response to both of those should be 11 February.

3 MR SINGLA: Madam, can I address you on those dates, please, or --

4 MRS JUSTICE BACON: Yes.

5 MR SINGLA: As you will have seen from our skeleton, we submit that serving the
6 response and any accompanying application before Christmas simply won't be
7 feasible.

8 We obviously understand the need to keep these proceedings moving, but the reality
9 of the situation is that until very recently we were preparing for the jurisdiction
10 challenge, and so in a sense the work is beginning in earnest now on the CPO
11 response. And with respect, if the hearing is not going to take place until
12 30 March there won't be, in our submission, any real prejudice to the other side
13 if they were to receive our response in January.

14 Our new proposal as of yesterday was 19 January, and that represents the concession
15 on our part. As you know, we originally proposed February. And we are really
16 asking the Tribunal to take account of what is feasible in the circumstances.
17 And the matter is a substantial matter for our clients. The application is
18 a complicated one and, as you know, the CPO criteria require some detailed
19 consideration both amongst the legal team but also in consultation with experts.

20 So we would invite the Tribunal to give us a little more time. Obviously we will have
21 to take into account the Christmas vacation as well. So 19 January is not so
22 much extra time but it would really help us in circumstances where conversely
23 there wouldn't be any prejudice to the other side.

24 MS HOWARD: Madam, if I may address you on that submission. Thank you.

25 We submit the dates have to be set in a balanced and fair manner that respects the
26 equality of arms at the same time as dealing with this case expeditiously. And

1 we say it would be unfair, in circumstances where Qualcomm has already had
2 eight months to consider the CPO application, to give them extra time to
3 prepare this CPO response and application for strike-out.

4 They have already had -- they will have had ten months from the date of service. And
5 if they have until 19 January that will give them over 42 weeks, which contrasts
6 with, as we have set out in our skeleton, the 15 weeks in the BT claim and the
7 18 weeks in the Gutmann claim. And we submit that that would give them
8 a very unfair advantage when they should already have a clear understanding
9 of the grounds of challenge by now.

10 And similarly, if that deadline is moved back, that will then put inordinate pressure on
11 the PCR as they will be expected to reply in very short order to both the
12 response to the CPO application and the strike-out application.

13 If we are left with a period of six weeks to respond, we are anticipating, like with the
14 jurisdiction challenge which ran to over 2,000 pages of exhibits, that the
15 response to the CPO application, and the strike-out application, with new expert
16 evidence -- and Qualcomm has already intimated it's going to file at least one if
17 not two expert reports. We are going to have to respond to that in short order,
18 engage with factual and expert witnesses, and we're going to be crunched into
19 a deadline in February which will then also coincide with any pre-hearing
20 review.

21 So we are gravely concerned we will be bounced into a timetable where we have to
22 respond to these heavy, substantial documents, at the same time as preparing
23 the skeletons for the pre-hearing review, if there is one, and then immediately
24 preparing skeletons for the CPO hearing in March.

25 And we submit that the Tribunal has to have regard to the considerable information
26 asymmetry and disparate resources between the parties in this case. The PCR

1 is a not-for-profit consumer association with limited resources, whereas the
2 Respondent is a heavily resourced international global corporation who is
3 already facing similar regulatory investigations on these very same issues
4 around the world and a number of class action litigation, including in Korea and
5 Canada.

6 So we submit that it is not fair to expose the PCR to a very tight timetable when it is
7 effectively working from scorched earth and having to respond with
8 limited resources.

9 We therefore think that the Tribunal's proposed timetable strikes a fair balance
10 between the parties and gives Which? sufficient time to respond and to prepare
11 for the final hearing in March, and we would urge you to stick with your proposed
12 deadlines.

13 MR SINGLA: Madam, may I respond very briefly?

14 MRS JUSTICE BACON: Yes.

15 MR SINGLA: A number of points have been made which simply miss the mark, if
16 I may say so. The first is the unfair advantage, allegedly. Ms Howard says in
17 their written submissions, and she just said now, we've been sitting on this
18 application for 42 weeks. It is simply the wrong starting point because, as
19 I explained and as should be obvious, we were pursuing the jurisdiction
20 challenge and it would have been wholly inefficient for us to be preparing a CPO
21 response in parallel, which seems to be the logical consequence of what
22 Ms Howard is saying.

23 We are starting afresh. The CPO criteria need to be looked at. The application needs
24 to be assessed by reference to those criteria. Referring to other proceedings
25 in other jurisdictions has no relevance whatsoever.

26 The reality is, how long do we genuinely need to prepare our CPO response? And

1 this is a considered estimate of what is feasible in all the circumstances.

2 Now, the claim that they will be under significant pressure is again misconceived. They
3 will have, I think between four to six weeks -- we can budget for in the timetable,
4 which should be ample for a reply, which obviously should be narrowly
5 confined.

6 And my learned friend speaks of what happens in other cases. But again, that is utterly
7 irrelevant. The question is what this case requires. And in a very substantial
8 matter it is of the utmost importance that our clients have time to respond and
9 prepare in conjunction with their experts.

10 I would just finally submit -- my learned friend talks about fairness and equality of arms.
11 The Tribunal has set the hearing date at a time when leading counsel, who has
12 been engaged for a considerable period of time, will not be able to make it, as
13 things stand. So if one actually is taking fairness-type points, I respectfully
14 submit that an extension from 22 December to 19 January is a reasonable
15 request.

16 MRS JUSTICE BACON: All right.

17 What I'm going to do is, we're going to go into the retiring room for a few minutes to
18 discuss, and then we will come back and let you know what we are going to do.

19 (10.53 am)

20 **(A short break)**

21 (10.54 am)

22 MRS JUSTICE BACON: Are we live again? Thank you.

23 Mr Singla, Ms Howard, the dates will remain as indicated provisionally: 22 December
24 and 11 February.

25 We consider that there's a large overlap between the two applications, and in our view
26 a party cannot stop the clock running by bringing a jurisdiction challenge. That

1 would be wholly inappropriate.

2 The Respondent team have had this application for many months now. They are
3 a well-resourced team, and we think it's appropriate that they should file their
4 evidence in response and any summary judgment or strike-out application
5 before Christmas.

6 We have considered whether it might be possible to push the timetable back. We
7 don't think that that's going to be feasible, because we then get into the time
8 that is necessary for the preparation of the skeleton arguments and the
9 pre-hearing review.

10 The current timetable that we have set would allow a little bit more than a month
11 between the finalisation of the Applicant's evidence and the filing of skeleton
12 arguments before the CPO hearing, which we think is about right. We would
13 not want the parties to be squeezed further during that time period.

14 So it will be 22 December and 11 February. Those are, I think, the only outstanding
15 dates on the timetable.

16 Can I then go to confidentiality, unless there's anything else on the timetable that you
17 want to address?

18 MS HOWARD: My Lady, can I just raise one point.

19 This has been trailed in correspondence but I just want to bring it to the Tribunal's
20 attention because you may not have seen it in the bundle.

21 We have notified the Respondent that we are looking at the class definition in the light
22 of the Merricks ruling and the position of deceased persons. We raised this
23 with Qualcomm on 1 November and we are looking at whether we need to
24 amend the class definition, and we hope to reach a position on that very shortly.
25 But I just wanted to flag that. It shouldn't impact the timetable at all, and we will
26 obviously act as expeditiously as we can. We don't think it will affect the timing

1 of the response. But I just wanted to bring that to the Tribunal's attention.

2 MRS JUSTICE BACON: Right. Does that imply any change to the publicity notice
3 which will -- well, maybe we will get on to that in a minute, and you can tell me
4 if you think that that would necessitate a change in that.

5 All right.

6 Confidentiality. We have the composite draft, paragraph 2 of which seems sensible
7 to us. Is there any objection to that?

8 MR SINGLA: Madam, I think we just have a small point on the date.

9 My instructions are that 23 November will be too tight, in particular because of
10 Thanksgiving, and so we would ask for until 3 December, really, or alternatively
11 30 November.

12 We don't see this as being problematic, in the sense that we don't envisage any
13 documents being disclosed, as it were, before those dates.

14 MRS JUSTICE BACON: No.

15 MR SINGLA: I haven't had a chance to put those dates to my learned friend but
16 hopefully 3 December can be agreed.

17 MRS JUSTICE BACON: Yes.

18 Ms Howard, do you have any objection to either -- sorry, I'm getting feedback here.
19 Am I the only one getting feedback? No. All right.

20 Ms Howard, do you have any objection to either 30 November or 3 December?

21 MS HOWARD: No, we have no objections.

22 MRS JUSTICE BACON: Which of those would you prefer? Or are you entirely happy
23 with 3 December, which is the longer date proposed?

24 MS HOWARD: I think we are happy with 3 December. I don't think there's going to
25 be too many documents that are exchanged by then.

26 MRS JUSTICE BACON: All right.

1 So that date will then be 4.00 pm on 3 December.

2 The next item on my agenda was publicity notice. Most of the dates I think can then
3 be filled in.

4 MS HOWARD: There was just a small point on publicity, my Lady, on which I have
5 liaised with my learned friend. It is just that the proposed class representative
6 has capacity constraints, and whilst we will try to deal with publicity by
7 11 November we have agreed we should change that deadline to 15 November
8 in clauses 3, 4 and 5 of the draft order, just to give ourselves a bit of leeway in
9 case there are technology constraints.

10 MRS JUSTICE BACON: 15 November. Yes. All right. So that's an amendment to 3,
11 4 and 5 of the draft order.

12 Is everybody happy with the proposed publicity notice, subject to the dates which will
13 need to be filled in now?

14 MS HOWARD: Yes. And I can confirm that any change to the class definition will not
15 affect the publicity notice.

16 MRS JUSTICE BACON: All right.

17 Mr Singla, did you have any comments?

18 MR SINGLA: No, we don't, Madam.

19 MRS JUSTICE BACON: One question from the Tribunal -- and this is probably for
20 Ms Howard.

21 In terms of the exclusions, are they all covered in the fourth bullet point on page 1?
22 Or are there other material exclusions that needs to be flagged there?

23 MS HOWARD: I just need to take instructions on that. (Pause).

24 I'm instructed that the PCR can clarify any exclusions in the actual website notice and
25 in the FAQs. It doesn't necessarily have to be in the notice itself.

26 MRS JUSTICE BACON: Yes.

1 MS HOWARD: I think the accompanying media documents will make the position
2 clear.

3 MRS JUSTICE BACON: All right. So you are saying there isn't anything very
4 substantial that we should include in addition in this fourth bullet point?

5 MS HOWARD: No, I think it's fine as stated.

6 MRS JUSTICE BACON: Right.

7 So then perhaps you can insert the missing dates and any other missing information
8 into this. And could you then send over the revised draft to the Competition
9 Appeal Tribunal so that we can review it. I think there are a few small stylistic
10 changes that we wanted to make before this goes out.

11 MS HOWARD: We will, my Lady. Thank you.

12 MRS JUSTICE BACON: Can you do that by close of business today?

13 MS HOWARD: Yes, we will.

14 MRS JUSTICE BACON: Right.

15 Hearing bundles. In terms of hearing bundles what we propose is that there should
16 be a single hard copy core bundle, which should be a single lever-arch file,
17 copied double-sided, and that everything else, including the authorities bundle,
18 should be electronic only, in accordance with the requirements set out in
19 the Tribunal's remote hearing guidance.

20 We leave it to you as to whether you are going to need to use one of the specialist
21 platform providers such as Opus. We won't make any direction as to that.
22 Obviously, if that is going to be done then we would need to be told so that the
23 Tribunal can be set up with that in due course. But if the parties are agreed
24 that the hearing bundles could simply be provided to the Tribunal electronically
25 as PDFs, then that is acceptable to the Tribunal.

26 I think that that was all of the points that I had on my list.

1 MS HOWARD: There was just a disagreement on the deadline, I think, for the
2 bundles, and we put --

3 MRS JUSTICE BACON: Yes, that's right.

4 MS HOWARD: -- the 14th, just so that we have the bundles ready in time for the
5 skeletons so that we don't have to update the skeletons.

6 MRS JUSTICE BACON: Yes. We will propose that hearing bundles should be
7 provided 14 days before and the authorities bundles should be provided seven
8 days before.

9 MR SINGLA: That's fine.

10 I actually just had another question. This is not something that I have had a chance
11 to discuss with the other side, but there's been a reference to the remote
12 hearings guidance that's just triggered a thought, which is whether the CPO
13 hearing is to take place remotely or in person or whether you would like to leave
14 that sort of issue over.

15 MRS JUSTICE BACON: Well, we do need to actually say that in the publicity notice.
16 I think that at the moment the notice should say that the hearing should take
17 place at the Competition Appeal Tribunal or, if necessary, virtually, in
18 accordance with the relevant protocols. So I think the default will be that the
19 hearing will be in person but of course that doesn't mean that everyone has to
20 be there in person, because they will be able to follow it remotely if they aren't
21 there in person. So it will be essentially a default of a hybrid hearing. If
22 necessary we will go to a fully remote hearing if, for example, there are people
23 that were unable to attend a hearing in person.

24 What I'm not keen to do is for the hearing to go ahead with maybe some but not all of
25 the Panel Members there, or some but not all of the counsel team. If there are
26 numbers of the counsel team who can't get there in person then we'll have to

1 consider going to a remote hearing to ensure equality of arms between
2 everybody.

3 MR SINGLA: Yes, I'm grateful.

4 MRS JUSTICE BACON: You can put that in the order if you want, I think, that in
5 principle the hearing should take place in person, but if necessary the Tribunal
6 will consider switching to a fully remote hearing, depending on the
7 circumstances at the time. And let's hope that things will have improved by
8 then.

9 MR SINGLA: Yes.

10 Paragraph 13 of the order provides for a pre-hearing review to be listed on a date to
11 be determined once the CPO hearing date --

12 MRS JUSTICE BACON: Yes.

13 MR SINGLA: I don't know whether you are about to come on to that.

14 MRS JUSTICE BACON: I did have that as one point to flag. Certainly one issue is
15 how long that pre-hearing review is. It definitely does not need to be more than
16 half a day. It doesn't need to be a day. I think that you should simply liaise with
17 the CAT Registry to fix a suitable date for the hearing.

18 MR SINGLA: Yes, I'm grateful.

19 MRS JUSTICE BACON: Is there anything else that either of you, Mr Singla or
20 Ms Howard, want to raise?

21 I think that's everything for you, Mr Singla.

22 Ms Howard?

23 MS HOWARD: No, the only thing was skeletons and whether ten days is -- that's
24 agreed between the parties but just to make sure that's acceptable for
25 the Tribunal.

26 MRS JUSTICE BACON: Yes, that is acceptable for the Tribunal, and actually the

1 dates set for the hearing and authorities bundles I think will be consistent with
2 skeleton arguments coming ten days before the hearing.

3 MS HOWARD: I don't think there's anything else. Thank you very much.

4 MR SINGLA: Sorry, Madam, this really is my final point.

5 The Practice Direction I think limits us in terms of the length of our skeleton argument.

6 I wonder whether the thing to do is just to reserve our position now and to take
7 a view once we've seen the reply. But I think 20 or 25 pages may be
8 inadequate for a case of this scale and complexity. I don't know if you wish to
9 deal with that now or whether we can come back to it perhaps in writing nearer
10 the time.

11 MRS JUSTICE BACON: I think you should probably do that. We did check the length
12 of the skeleton arguments for the last comparable two-day hearing, which was
13 Le Patourel, which also involved a strike-out application, and they came in at
14 around 20 pages for each side. Obviously each case turns on its own facts.

15 So I think the best thing to do is for the default to be that the normal page limits should
16 apply and then if the parties consider that's wholly inadequate then you can
17 apply to the Tribunal and then we will consider that on the papers.

18 MR SINGLA: Yes, I'm grateful. I just wanted to put down a marker.

19 MRS JUSTICE BACON: Yes. Having just said that we will consider it on the papers,
20 actually it seems to me that one possibility could be that if the pre-hearing
21 review does go ahead that might be a time at which that could be discussed.
22 Otherwise, if that hearing is vacated, because everything else is agreed, then
23 we will need to decide it on the papers, if you make such an application.

24 MR SINGLA: Yes. It also rather depends on when the pre-hearing review --

25 MRS JUSTICE BACON: Absolutely.

26 MR SINGLA: I'm not sure that in the BT case there was expert evidence, or at least

1 as much expert evidence. So there may be a distinction. But we can see in
2 due course.

3 MRS JUSTICE BACON: Yes. All right.

4 Can I just check if either of the other Panel Members has anything else they want to
5 raise at this stage?

6 MR TURNER: Nothing else from me.

7 PROFESSOR MASON: And likewise.

8 MRS JUSTICE BACON: All right.

9 Thank you very much for your co-operation, enabling us to get through everything
10 quite quickly this morning. We will then await, first of all a revised draft of the
11 publicity notice, and secondly a revised draft of the order from you -- are you
12 able to send that also by the end of today?

13 MS HOWARD: Yes. We've been marking it up as we've been going and I will liaise
14 with my learned friend to agree and submit that this afternoon.

15 MRS JUSTICE BACON: All right. Thank you very much.

16 (11.10 am)

17 **(The hearing concluded)**

18

19