



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

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### Procedural Developments in the CAT

**Date:** 18 July 2023

**Venue:** Bristows LLP, 100 Victoria Embankment, London EC4Y 0DH

**Speakers:** Conall Patton KC, (One Essex Court), Genevieve Quierin (Stephenson Harwood), Joanna Christoforou (Morgan Lewis), Stephen Wisking (Herbert Smith Freehills)

**Chair:** Sophie Lawrance (Bristows)

#### Disclosure and confidentiality (Conall Patton KC)

Mr Patton explained that these developments stem from Mr Justice Marcus Smith's (**Marcus Smith J**) judgment in *Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd*,<sup>1</sup> (which was before the High Court Chancery Division, though there were similar proceedings before the CAT).

#### Disclosure

*Genius Sports* was a standalone case about intellectual property rights being enforced anti-competitively, so no regulatory decision (e.g. a fine) could be the starting point for disclosure. When faced with two competing disclosure lists, Marcus Smith J therefore ordered '*massive over-disclosure*', whereby the parties identify and exclude all completely irrelevant material and privileged material. All other documents are disclosed to the other side.

There appeared to be two drivers for this development:

- Marcus Smith J's view that litigators are trapped in an out-of-date mind-set regarding disclosure, using old-fashioned methods like keyword searches. His view is that modern technology has two consequences:
  - There is no longer an issue dumping huge volumes of documents on the other side, because the receiving party can use technology to scour for relevant material (rather than lawyers manually reading it all).
  - Courts can no longer rely on the integrity of lawyers: using technology instead may result in relevant documents not being handed over.
- Marcus Smith J was disappointed that in the CAT case, there was a dispute about disclosure close to trial.

Marcus Smith J also proposed using targeted searches to identify privileged material.

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<sup>1</sup> *Genius Sports Technologies Limited, Others v Soft Construct (Malta) Limited, Others* [2022] EWHC 2637 (Ch) ("**Genius Sports**").



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### **Confidentiality**

In *Genius Sports*, Marcus Smith J ordered that instead of using a confidentiality ring, each party should sign an undertaking to only use disclosed documents for the purpose of the proceedings. He suggested the following safeguards:

- Anytime anyone accessed the document database, there would be an audit trail kept.
- The KCs would be the gatekeeper to decide if a client should see a particular document.

Marcus Smith J left open the possibility of a traditional confidentiality ring but explained that this would only be used for exceptional material.

### **Ambulatory drafts (Joanna Christoforou)**

Ms Christoforou explained that ambulatory drafts have been tested in three appeals at the CAT against the CMA's infringement decisions in Hydrocortisone, Liothyronine and Prochlorperazine.

The purpose of ambulatory drafts is to distil uncontroversial points and identify areas of disagreement between the parties.

In practice, ambulatory drafts:

- are time-consuming and expensive to produce, since the parties dispute most issues;
- should not only include agreed wording – Marcus Smith J recognised that this would be unworkable;
- are not limited to referencing laws and regulations – they can also reference witness statements, expert reports etc;
- involve tracked changes, with each party using a different colour code, adding comments where there is disagreement and replying to other parties' comments; and
- would probably be used rarely in cases raising complex issues (and may have a prohibitive effect on litigation, due to the high costs, if applied more generally).

### **Umbrella proceedings (Genevieve Quierin)**

Ms Quierin explained that umbrella proceedings were introduced by CAT Practice Direction 2/2022 to group together proceedings which raise ubiquitous issues, matters or concerns. Umbrella proceedings have so far only been used in the VISA/Mastercard interchange litigation.

There are risks to using umbrella proceedings:

- cases being reactivated: may happen where a judgment is binding on a stayed claimant whose position is somehow different e.g. period of claim is not fully covered by the judgment;
- costs: unclear what happens regarding common costs if there are multiple claimants;
- pass-on: unclear what proportion should go to merchant claimants versus consumers;
- delay: if claimants issue different claims months apart, the defendant may use differences in the claimants' cases to drive a wedge between them; and
- may impact litigation funding.



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### Certification (Stephen Wisking)

#### Carriage disputes

Mr Wisking explained that carriage disputes come into play when there are two overlapping applications for certification – the CAT expects there to be just one for efficiency.

In *Michael O'Higgins FX Class Representative v Barclays Bank*<sup>2</sup>, the parties suggested dealing with carriage before certification but Marcus Smith J disagreed and the CAT dealt with certification on an obiter basis, saying which claim was preferred on balance.

In *Claudio Pollack v Alphabet*<sup>3</sup> and *Julie Hunter v Amazon*<sup>4</sup>, the CAT noted that *FX* is not seen as a success, and decided at both CMCs to deal with carriage before certification. At the *Amazon* CMC, Marcus Smith J indicated that the CAT is testing this method out and if it does not work well, the CAT will change its approach.

#### The CAT's gatekeeper role in certification

The CAT has seized on a gatekeeper role in certification – the developments are as follows:

- *Merricks v Mastercard*:<sup>5</sup> included a remittal where the compound interest claim was not certified.
- *Justin Gutmann v Govia Thameslink Railway*:<sup>6</sup> the Court of Appeal discussed the Microsoft process test from Canada, which determines whether loss is common to the class.
- *MOL (Europe Africa) v McLaren*:<sup>7</sup> Court of Appeal judgment found that the CAT had committed an error of law.
- *Gormsen v Meta*:<sup>8</sup> the CAT did not refuse to certify, but required the PCR to resubmit their economic methodology.
- *CICC I v Visa*:<sup>9</sup> the CAT took a similar approach to *Gormsen v Meta*.

This demonstrates the CAT turning certification into a case management tool, whereby PCRs must set out the methodology for their claim; and list possible defences and disclosure.

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<sup>2</sup> *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others* – 1329/7/7/19 (“**FX**”).

<sup>3</sup> *Claudio Pollack v Alphabet Inc. and Others* – 1572/7/7/22.

<sup>4</sup> *Julie Hunter v Amazon.com, Inc. and others* – 1568/7/7/22 (“**Amazon**”).

<sup>5</sup> *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* – 1266/7/7/16.

<sup>6</sup> *Justin Gutmann v London & South Eastern Railway Limited* – 1305/7/7/19.

<sup>7</sup> *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* – 1339/7/7/20.

<sup>8</sup> *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others* – 1433/7/7/22.

<sup>9</sup> *Commercial and Interregional Card Claims I Limited v Visa Inc. & Others* – 1443/7/7/22.