Neutral Citation Number: [2020] EWHC 1994 (Ch)

Case No: CP-2018-000038

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMPETITION LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 24/07/2020

Before :

THE HONOURABLE MR JUSTICE ROTH

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Between :

PHONES 4U LIMITED (In Administration)	**Claimant**
- and -	
EE LIMITED (1) **(2) DEUTSCHE TELEKOM AG** **(3) ORANGE SA** **(4) VODAFONE LIMITED** **(5) VODAFONE GROUP PUBLIC LIMITED COMPANY** **(6) TELEFONICA UK LIMITED** **(7) TELEFÓNICA, S.A.** **(8) TELEFONICA O2 HOLDINGS LIMITED**	**Defendants**

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Kenneth MacLean QC and Owain Draper (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**

Robert O'Donoghue QC and Hugo Leith (instructed by **Covington & Burling LLP**) for the **Second Defendant**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE ROTH

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

Mr Justice Roth :

1. INTRODUCTION

1. This is my judgment on an application by the Second Defendant ("DT") for an order that the Claimant ("P4U") produce specific factual particulars in response to a request under CPR Part 18. That application was one of a large number of issues before the Court at a two-day CMC held on 2-3 July 2020, but in the end there was no time to hear oral argument upon it. Both DT and P4U therefore said that they were content for the application to be resolved on the papers, on the basis of their respective skeleton arguments.

2. To appreciate how this issue arises, it is necessary briefly to explain the nature of the proceedings and the development of the pleadings. As regards the factual background, I largely repeat what I said in my two reserved judgments given following the CMC.

2. THE PROCEEDINGS

3. P4U was one of the two major retail intermediaries for mobile telephones in the UK until it went into administration in September 2014. The other major retailer of that kind was Carphone Warehouse ("CPW"), which merged with Dixons in mid-2014. These proceedings, which are brought by the administrators, are principally concerned with the events of 2013-2014, leading up to what was effectively the financial collapse of P4U.

4. The First Defendant ("EE") was at the time a 50-50 joint venture ("JV") between DT and the Third Defendant ("Orange"). At the material time, EE, the Fourth Defendant ("Vodafone") and the Sixth Defendant ("O2") were all mobile network operators ("MNOs") providing connections in the UK. The Fifth Defendant ("Vodafone Group") is the parent of Vodafone, and it is common ground that the two Vodafone defendants constitute a single undertaking for the purpose of EU and UK competition law. Similarly, the Seventh and Eighth Defendants are related companies to O2 and it is common ground that those three companies constitute a single undertaking for the purpose of EU and UK competition law. I shall refer to the Fourth and Fifth Defendants together as "Vodafone" and to the Sixth to Eighth Defendants together as "Telefonica".

5. P4U had a series of agreements with each of the MNOs for the supply of connections to retail customers, whereby P4U could arrange for a customer to 'sign up' for supply through one of the MNO networks. At various points between about January 2013 and September 2014, the agreements which each of O2, Vodafone and EE had with P4U either expired and were not renewed or the relevant MNO gave notice terminating its agreement. P4U alleges, in summary, that these events were not the result of independent action by these competing MNOs but followed exchanges or commitments between the Defendants, which infringed the prohibitions on anti-competitive agreements or arrangements under UK and EU competition law; and that such conduct was at least the principal reason why the MNOs ceased to deal with P4U. Further, P4U contends that the MNOs would have continued to deal with it in the absence of such anti-competitive conduct, in which case P4U would not have been forced to go into administration.

6. Hence the Particulars of Claim ("POC") state, in the summary of P4U's case at para 3(j):

> "… P4U avers both as a primary fact based on the existence of the "commitments" and as a reasonable inference from the commitments and the other pleaded circumstances that the Defendants (or some of them) unlawfully colluded:
>
> (i) to each cease trading with one or other of the retail intermediaries in the UK market (which intermediary, in the event, was P4U);
>
> (ii) alternatively, to cease trading with P4U specifically; and/or
>
> (iii) further or alternatively, to put P4U out of business and then to acquire the whole or parts of P4U's business and/or assets at a fraction of their value once P4U was placed into administration."

7. As there indicated, P4U relies in support of its case on collusion at this stage both on certain facts and on inference. The inference is based on what has been called P4U's 'economic case' that it would otherwise have been irrational for the MNOs to allow the arrangements with P4U to come to an end. Hence the POC state at para 129:

> "In summary, the MNO Defendants acting without collusion and independently, would have concluded that, taking account of the risks involved, the likely behaviour of P4U, its customers, and competitors acting independently, any benefits of ceasing to supply P4U would be outweighed by the costs of doing so. In the circumstances, it is reasonably to be inferred that, absent unlawful anti-competitive concertation and/or commitments and/or conduct set out below, the MNO Defendants would have continued to supply P4U."

8. In addition, P4U raises a distinct breach of contract claim against EE and related claims in tort against DT and Orange, but those claims are not material to the present application.

3. THE PLEADED CASE AGAINST DT

9. As noted above, DT was not at the material time itself an MNO and it had no direct contractual relations with P4U. Its involvement in the relevant market arose through its 50% share in EE. In those circumstances, it is material to see how the allegations in competition law against DT are framed.

10. Beyond general allegations against all the Defendants collectively, the lengthy POC contain very limited allegations specifically as against DT (which is not an MNO Defendant). At para 119, it is alleged that EE, DT and Orange together constituted a single undertaking for the purpose of EU and UK competition law; that the JV parents were able to and did exercise decisive influence over it; and that in ceasing to supply P4U, EE was acting "so as to further its parent companies' commercial objectives."

11. At paras 136-138, the POC set out allegations of anti-competitive commitments and/or disclosures as against EE, including at para 137(d):

> "P4U relies on a presumption that EE's decision to cease supplies to P4U and/or its decision to enter into exclusive arrangements with CPW was caused or at least influenced by the collusion."

Then, at para 137(g), it is stated:

> "The presumption pleaded at subparagraph (d) above applies also to the conduct of [DT] and Orange (as constituent parts of a single undertaking with EE) in relation to supplies to P4U and/or retail intermediaries in the UK generally. Further or alternatively in this regard, it is to be inferred that the

> information obtained by EE as a result of unlawful contacts with O2 and/or the fact of its involvement in the collusion was communicated by EE to [DT] and/or Orange as its shareholders and joint controllers, and was thereafter acted upon by both [DT] and Orange, at least by the time that they decided to refuse to approve the extension of the EE Agreement…."

12. Para 140(a) of the POC is as follows:

> "The anti-competitive commitments and/or disclosures, of which Mr Dunne [the CEO of O2] informed Mr Whiting [of P4U], were made and received, and/or it is reasonably to be inferred were made and received, at the level of the parent companies of the Defendant MNOs (i.e. [DT] and/or Orange for EE, Vodafone Group for Vodafone and Telefónica for O2)."

13. Further, at para 147(b), it is alleged that:

> "EE's decision not to extend the EE Agreement … was taken at the behest of and/or instruction of its parent shareholders, [DT] and Orange. Such decision was part of an agreement and/or understanding and/or as a result of informal concerted action or coordination among the Defendants (and/or some of them) to put P4U out of business and/or to reduce or eliminate their respective reliance on retail intermediaries in the UK…"

14. P4U's Reply reasserts that DT and Orange "were able to and did impose their commercial objectives on EE" as alleged in the POC, and as regards the anti-competitive approaches pleaded in the POC (which did not directly involve DT), alleges, at para 23:

> "It is to be inferred from the extent and seriousness of the anti-competitive approaches admitted by EE that [DT] was made aware of these matters by EE at or around the time."

The Reply proceeds to state that it does not appear that DT took any steps to publicly distance itself or EE from those collusive contacts.

15. On 22 November 2019, DT served a Part 18 Request, which included as Request 6 (of 15):

> "Does P4U allege that DT itself made anti-competitive commitments or disclosures? If so, please provide full particulars."

16. P4U's response served on 15 January 2020 made clear that it is alleging that all the Defendants (i.e. including DT) participated in a collusive agreement, understanding or concerted practice. The response states, at para 6(c):

> "P4U sets out in paras 64, 66, 137(e), 137(g) and 140 of the Particulars of Claim the matters on which, pending disclosure and witness evidence, it relies in averring that [DT] and Orange participated directly and actively in the infringement, in addition to forming part of the same undertaking as EE and exercising decisive influence over EE in relation to the subject matter of the collusion. Further, [DT] did not distance itself, publicly or otherwise, from the public statements pleaded at paras 64 and 66 of the Particulars of Claim.…"

As regards the first sentence of that response, it seems to me that paras 64 and 66 of the POC concern Orange and not DT, and para 137(e) simply refers back to paras 64 and 66.

17. At the first CMC held on 3 - 4 March 2020, DT applied for an order that P4U serve a further response to Request 6 so that DT would be clear as to the case it has to meet on direct involvement in any collusion. In that hearing, I made clear that I recognised that at this stage P4U may have only very limited information as to what it alleged was covert anti-competitive activity and therefore may not be able to supply further details. However, I ordered that P4U should provide "the best specific factual particulars" that it can give.

18. In its response, served on 18 March 2020, P4U stated at para 1:

> "It is inherent to the secretive nature of the Defendants' unlawful conduct (as particularised in the Particulars of Claim) that P4U has incomplete information as to the precise content and timing of the unlawful agreements, understandings, concerted practices and instructions that it alleges. P4U relies on inferences that it contends should be drawn from the pleaded primary facts. P4U anticipates providing further and better particulars following disclosure and/or witness evidence. Without prejudice to the generality of the foregoing:…"

The response then proceeds to set out the inferences which it contends support its allegation "that DT made anti-competitive commitments and/or disclosures".

19. DT has not applied to strike out the case of collusion against it on the basis of the pleading or to seek 'reverse' summary judgment on this issue.

4. THE PRESENT APPLICATION

20. Apparently accepting that it will not obtain further particulars at this stage, DT now applies for a further order that 42 days after DT provides disclosure, P4U should further respond to Request 6 of the Part 18 Request "providing the specific factual particulars requested by [DT]". The application is made both under CPR Part 18 and under CPR rule 3.1(2)(m) which gives the Court a broad power to make any order for the purpose of managing the case and furthering the overriding objective.

21. In its application, DT contends that P4U's response of 18 March 2020 was "evasive and unsatisfactory" and asserts that:

> "… the information sought is essential for the Second Defendant to understand the case it is expected to meet, and is in particular necessary for the Second Defendant to be able to prepare witness evidence to respond to the specific case of direct participation advanced against the Second Defendant, which, as matters stand, remains wholly unparticularised. Providing such information would therefore be proportionate in the circumstances."

22. I appreciate that P4U as a claimant alleging that there was covert, unlawful collusion faces a very significant asymmetry of information in seeking to advance its case. At the same time, it is essential that at some point DT should be able to understand the specific case it has to meet, and whether that case is based entirely on inference or rests also on particular instances in which it is alleged to have engaged in collusive activity.

23. Nonetheless, in my judgment, it would be premature to make an order for such particulars now, and inappropriate to do so in the form sought. I am somewhat concerned that in its pleading P4U has asserted that it will provide further particulars "following disclosure *and/or witness evidence*" [my emphasis]. In my view, given the seriousness of the allegations which P4U is making, it is incumbent upon it to consider the position following its review of the Defendants' disclosure and if it then considers that it is able better to particularise the allegations against DT, it should do so. It will not be satisfactory for it to wait until the Defendants serve their evidence,

in the hope that this will produce something helpful. However, there may be argument as to whether disclosure has been properly carried out; or the scale of disclosure from all the Defendants may be such that it is unreasonable to allow P4U only six weeks to review it. Once disclosure has been given, it should be sufficient for DT by its solicitors to write to request further particulars, and the matter can be pursued in the first instance by correspondence. I would expect P4U to respond appropriately in the light of this judgment. A formal order may therefore be unnecessary, or if it is then sought the Court can consider the terms of relief in light of the actual circumstances.

24. I do not consider that it makes any difference whether the matter is considered in terms of general case management under CPR rule 3.1(2)(m) or the specific provisions about the provision of further information in CPR rule 18.1: the conclusion is the same. Accordingly, this application by DT is dismissed.