Neutral Citation Number: [2024] EWHC 710 (Ch)

Case No: HC-2016-001340

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/03/2024

Before:

MR JUSTICE MICHAEL GREEN

- -

Between:

COUSINS MATERIAL HOUSE LIMITED

Respondent / Claimant

-and-

(1) THE SWATCH GROUP AG

(2) ETA SA MANUFACTURE HORLOGÈRE SUISSE

(3) THE SWATCH GROUP (UK) LIMITED

Applicants / Defendants

- -

Robert O'Donoghue KC & Sophie Bird (instructed by **Maitland Walker LLP**) for the **Respondent/Claimant**

Ben Rayment (instructed by **Addleshaw Goddard LLP**) for the **Applicants/Defendants**

Hearing dates: 28 February 2024

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Approved Judgment

This judgment was handed down remotely at 3pm on Wednesday 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green :

Introduction

1. This is an application by the Defendants, which are members of the Swatch Group of companies (collectively "**Swatch**") for a declaration that the High Court has no jurisdiction to try the claim brought by Cousins Material House Limited ("**Cousins**"), or, alternatively, that the High Court should not exercise any jurisdiction that it may have. Swatch are thereby seeking to set aside or stay the Amended Claim Form that was issued on 5 June 2017. The basis for the application is that the claim between the same parties, pursuing the same causes of action, has been determined in Switzerland both at first instance and on appeal ("**Swiss Courts' Judgments**"). Swatch therefore rely on the principles of *res judicata* and the recognition and enforcement of judgments under the Lugano Convention.

2. Cousins accepts that the same parties and the same causes of action were determined in the Swiss proceedings but it says that there are two bases upon which it should be allowed to proceed with its claim here:

   (1) That the Swiss proceedings violated Cousins' right to a fair trial under Article 6 of the European Convention of Human Rights (the "**ECHR**") and it would be manifestly contrary to English policy to recognise the Swiss Courts' Judgments within Article 34(1) of the Lugano Convention; and

   (2) The Swiss Judgments did not deal with two matters – one aspect of the Article 101 claim and the applicability of s.60A Competition Act 1998 – and therefore these matters are not *res judicata*.

Factual Background

3. Cousins is a multi-generational family-run company that operates as a wholesale supplier of watch spare parts and other products to watch repairers and jewellers. Its business is predominantly UK-based supplying to independent watch repairers across the country but it does also supply some spare parts and components to independent watch repairers in the EU and elsewhere.

4. The Swatch Group is one of the largest watch manufacturers in the world and owns more individual watch brands than any other manufacturer. The First Defendant ("**SGAG**") is the parent company of the Swatch Group. It was incorporated and is registered in Switzerland. The Second Defendant ("**ETA**"), also incorporated and registered in Switzerland, is a wholly-owned subsidiary of SGAG and its business is the manufacture of spare parts and components for watches, including watch movements. The Third Defendant ("**SGUK**") is incorporated and registered in England and Wales and distributes watches and spare parts in the UK. It also operates a Swatch Service Centre in Southampton.

5. ETA and SGUK for many years, from around 1982, supplied Cousins with spare parts and components for watches. However this ceased as from 1 January 2016 in the circumstances described below. The termination of supply is the basis for the

proceedings brought by Cousins. These are not contractual claims; rather they arise out of competition law and are said to have constituted violations of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") and/or ss.2 and 18 of the Competition Act 1998 ("**CA 1998**").

6. From around 2006, Swatch has operated a selective distribution system across the EU and the UK and Switzerland (the "**SDS**"). Under the SDS, watch repairers who wish to receive spare parts from Swatch have to be authorised and that requires them to satisfy certain quality requirements applicable to Swatch brands that they are servicing so as to ensure that after-sales services and repairs are carried out properly in accordance with Swatch's specifications. Authorised repairers could choose to go into one of three levels, with level 1 being basic services such as battery replacement and level 3 being more complex servicing and repairs. At that time, according to Cousins, there was still a substantial number of independent repairers in the UK who chose not to become authorised repairers under the SDS. They could still buy their spare parts from wholesalers such as Cousins, as Swatch continued to supply wholesalers.

7. Swatch's SDS was the subject of a complaint to the EU Commission by the Confédération européenne des associations d'horlogers-réparateurs ("**CEAHR**"), an association of watch makers and repairers, complaining that the SDS, and other Swiss watch manufacturers' similar systems, infringed Articles 101 and 102 TFEU. The EU Commission initially rejected the complaint but that decision was annulled by the EU General Court on 15 December 2010. Following a further investigation, on 29 July 2014 the EU Commission again rejected the CEAHR's complaint.

8. Cousins said that the longstanding ability of independent watch repairers being able to access supplies of spare parts from wholesalers worked extremely well for UK customers and suppliers since it meant that most UK towns and all UK cities had repairers close to consumers. It also, it said, created a "virtuous circle" whereby apprenticeships and training could be offered to sustain the independent repair sector going forward. Swatch were able to compete both with the wholesalers and repairers. Consumers therefore benefitted from choice, competition, both on price and non-price metrics, and convenience.

9. However, Swatch made a decision in November 2013 that the Group would no longer distribute spare parts via wholesalers and that it would only supply its authorised repairers under the SDS. On 4 March 2014, Cousins was informed that, with effect from 31 December 2015, it would not be supplied by Swatch with watch spare parts. It was given the opportunity of applying to become an authorised repairer under the SDS so as to maintain supplies but this was unviable for Cousins as it would completely change their business model of acting as a wholesaler.

10. Cousins considered that the removal of wholesalers from the supply chain would have a highly detrimental effect on competition and consumers in the UK. But it was not just the effect on wholesalers that Cousins was complaining about. It was also the effect on the independent repairers in the UK who would no longer be able to source supplies in relation to spare parts of the Swatch brands. Cousins said that this would decimate the UK independent watch repair market and would give Swatch a monopoly in spare parts provision and a *de facto* monopoly in repair, resulting in reduced consumer choice and leading to increased repair prices and more inconvenience and longer waiting times.

11. On 16 March 2016, Cousins sent letters before action to Swatch alleging that the refusal to supply Cousins constituted an abuse of Swatch's dominant position and threatening to issue proceedings in England if supply was not recommenced. On 29 April 2016, Cousins issued the Claim Form in the High Court.

The Swiss Proceedings

12. In the meantime, and in response to the letters before action, on 19 April 2016, Swatch filed a claim for negative declaratory relief in Switzerland on the basis that the case had substantial connecting factors to Switzerland (the "**Swiss Claim**"). Swatch sought declarations that:

    (1) They had no obligation to supply Cousins with the relevant spare parts; and

    (2) They were not liable in damages to Cousins for the refusal to supply those parts.

13. At this time, both the UK and Switzerland were signatories to the Lugano Convention, and the effect of Article 27 was that the English Claim Form could not be served on Swatch unless and until the Commercial Court of Bern, Switzerland (the "**Bern Court**") determined it did not have jurisdiction to hear the Swiss Claim.

14. Cousins initially disputed the Bern Court's jurisdiction but on 21 May 2019 the Swiss Federal Supreme Court ("**FSC**") held that the Bern Court had full jurisdiction over the Swiss Claim (the Bern Court and the FSC will be collectively referred to as the "**Swiss Courts**"). Thereafter Cousins submitted to the jurisdiction of the Swiss Courts.

15. The litigation on the substantive merits of the Swiss Claim for negative declaratory relief proceeded as follows:

    (1) Cousins submitted extensive pleadings and evidence in response to the Swiss Claim on 30 October 2019 (the "**Response**"), followed by a rejoinder on 2 June 2020 (the "**Rejoinder**") which ran to more than 300 pages in total, with 66 exhibits.

    (2) On 16 October 2020, Cousins informed the Bern Court that it would be willing to waive the right to an oral hearing.

    (3) On 28 October 2020, Swatch informed the Bern Court that they too would also be willing to waive the main hearing if no further taking of evidence appeared necessary to the Court.

    (4) On 7 December 2020 the Bern Court made a reasoned interlocutory order dealing with motions for evidence and disclosure and cancelling the oral hearing (the "**Interlocutory Order**").

    (5) On 22 December 2021 the Bern Court gave judgment on the Swiss Claim, ruling in Swatch's favour (the "**Bern Court Judgment**").

    (6) Cousins lodged grounds of appeal against the Bern Court's judgment on 1 February 2022 (the "**FSC Appeal**").

(7) On 13 September 2022, the FSC dismissed Cousins' appeal making the Bern Court's judgment final and binding upon the parties (the "**FSC Judgment**").

The English proceedings

16. During this time, Cousins' English Solicitors made 11 without notice applications for extensions to the time for serving the English Claim Form. Cousins also amended the English Claim Form on 5 June 2017 (the "**Amended Claim Form**"), to add a claim for breach of Article 102 TFEU / s.18 CA 1998. Finally, on 4 July 2023, more than half a year after the FSC Judgment against it, Cousins served on SGUK the Amended Claim Form and Particulars of Claim dated 5 May 2023 addressing the same causes of action.

17. SGUK wrote to Cousins on 19 July 2023 and 21 August 2023 requesting clarification of the basis on which Cousins claimed the English Courts should proceed to hear the English Claim given that it concerned the same causes of action and the same parties as the Swiss Claim. Having not received any such clarification, on 29 August 2023, Swatch issued the present application.

Recognition under the Lugano Convention

18. It is accepted that the relevant question before me on the application is whether the decisions of the Bern Court and the FSC in relation to the Swiss Claim should be recognised and enforced under the Lugano Convention. If they would be so recognised and enforced then they would have the force of *res judicata* and by virtue of the principles of cause of action and/or issue estoppel, or abuse of process, Cousins would be debarred from relitigating in the English Court.

19. As explained above, the Swiss Courts had jurisdiction under the Lugano Convention and by Article 33(1), their Judgments should be recognised in other Convention States "*without any special procedure being required*". This is partially qualified by Article 34(1), which states that a judgment shall not be recognised: "*1. If such recognition is manifestly contrary to public policy in the State in which recognition is sought*…" (the "**public policy exception**"). By Article 36: "*Under no circumstances may a foreign judgment be reviewed as to its substance*."

20. Mr O'Donoghue KC, leading Ms Sophie Bird, appearing on behalf of Cousins, accepted that the public policy exception must be interpreted strictly and that it can only be resorted to in exceptional cases. In particular, it cannot be used to mount an impermissible attack on the merits of the Swiss Courts' Judgments.

21. Mr Ben Rayment, appearing on behalf of Swatch, submitted that Article 36 prohibits the use of the public policy exception to make a collateral attack on the merits and substance of the Swiss Courts' Judgments. The relationship between the public policy exception and Article 36 has been considered a number of times by the Court of Justice of the European Union ("**CJEU**") (often looking at the same Articles in the Brussels Regulation (Regulation 44/2001)) and these cases were helpfully summarised by Butcher J in *London Steam-Ship Mutual Insurance Association Ltd v The Kingdom of*

Spain (M/T PRESTIGE) [2022] 1 WLR 99 ("***London Steam-Ship***") at [124]. Butcher J held that a party could not use the public policy exception to argue that the foreign court's findings of fact or law, or mixed fact and law, "*were ones which it was not entitled to reach on the basis of the material before it, and that* [would …] *be an impermissible invitation to review the substance of the decision*."

22. Cousins relies on alleged breaches of the fair hearing rights in Article 6(1) ECHR to say that the Swiss Courts' Judgments should not be recognised because of the public policy exception. But Switzerland is a Contracting Party to the ECHR and subject to the jurisdiction of the European Court of Human Rights ("**ECtHR**"). Butcher J in [125] of *London Steam-Ship* referred to the strong presumption that Courts of Contracting Parties to the ECHR have "*provided a procedure which is compliant with Article 6*" (see also *Maronier v Larmer* [2002] EWCA Civ 774). Mr Rayment submitted that Cousins should therefore have raised its Article 6 arguments in the FSC Appeal and/or thereafter made an application to ECtHR and its failure to do so means that it did not exhaust its remedies in Switzerland and cannot now complain to this Court under the public policy exception. Similar points were made by Cooke J in *Smith v Huertas* [2015] EWHC 3745 (Comm) ("***Smith v Huertas***") at [26].

23. It is important to bear in mind that, if Cousins wishes to rely on the public policy exception, it has to show that there was "*a manifest breach of a rule of law regarded as essential in the legal order in this country or of a right recognised as being fundamental within it*" – see [26] of *Smith v Huertas*. For a breach to be manifest "*it must be apparent that the judgment is plainly or obviously contrary to public policy*" – see *London Steam-Ship* at [49].

24. While the right to a fair hearing embodied in Article 6(1) ECHR is clearly a fundamental right within the UK's legal order, it seems to me that when a party seeks to rely on an alleged violation of that right, the English Court must be astute to recognise whether this is really a disguised attack on the substance of the foreign Court's decision contrary to Article 36 of the Lugano Convention. In this case, Cousins is displeased about the outcome in Switzerland and bases its claim here on the allegation that the Swiss Courts did not properly consider the evidence that it put forward as to the effect on competition in the UK and also on the alleged failure to direct further disclosure. When examining whether the Swiss Courts did or did not take into account and deal with certain evidence, there is a great risk of straying into the forbidden arena of challenging and scrutinising the merits of the decisions in question.

25. Mr Rayment also addressed recognition of the Swiss Courts' Judgments at common law, as it had been raised by Cousins in correspondence. But as it was common ground that recognition under the Lugano Convention was the only relevant issue for the purposes of the *res judicata* principles in this case, it is unnecessary for me to deal with the common law position, and I heard no submissions on it. In any event the common law principles seem to me to be largely aligned with the Lugano Convention, in particular that there can be no challenge to a foreign judgment on the merits and there would need to be a significant procedural defect that amounted to a breach of substantial justice for recognition to be refused.

The public policy exception: manifest breach of Article 6(1) ECHR

(a) Failure to consider Cousin's evidence

26. Cousins' central argument is that the Bern Court must have ignored its voluminous evidence because it was not referred to in the Bern Court Judgment. In particular Cousins refers to the extensive evidence it submitted as to how its position in the supply chain added value to the benefit of customers and consumers and the refusal to supply Cousins would eliminate those advantages, which would in turn have a negative effect on competition in the UK and ultimately on UK consumers. Cousins identified five different ways in which its activities as a wholesaler were said to have a pro-competitive effect:

(1) Cousins was Swatch's only competitor on the market for the supply of spare parts and could use its purchasing power to obtain better discounts and terms for spare parts than the independent watch repairers.

(2) There were significant benefits to repairers of being able to use Cousins as a "*one-stop-shop*" for the supply of spare parts. Cousins could supply spare parts for more than 200 watch brands, whereas Swatch only supplied spare parts for 17 of its brands. Therefore, it was far simpler and efficient for repairers to order all their spare parts from Cousins which also avoided manufacturers' minimum order quantities and different delivery and payment conditions. Without the wholesale level providing this service, Cousins said that repairers' costs would be higher and this would be passed on to consumers via higher prices.

(3) Cousins relieved watch repairers of the need to maintain expensive central warehouses and large quantities of stock, as Cousins carried several millions of items of stock and could efficiently supply repairers whenever they needed particular spare parts. Furthermore Cousins had state-of-the-art IT and logistics systems enabling delivery of items to repairers without delay. The removal of wholesalers would only benefit the manufacturers like Swatch as the difficulties faced by even authorised repairers would mean that their own in-house repair centres would increase their business.

(4) Cousins said that without wholesalers there would be no parallel trade of spare parts, as cross-supplies of spare parts between authorised repairers would be extremely unlikely without an infrastructure and the know-how to engage in that sort of trade.

(5) Cousins supplied watch manufacturers including Swatch and authorised repairers with spare parts.

27. Mr Rayment accepted that these points were made to the Bern Court. Indeed this was all clearly stated in the pleadings, i.e. Cousins' Response and Rejoinder, which exhibited voluminous evidence in support. Mr Rayment showed me the Interlocutory Order of the Bern Court made on 7 December 2020 (translated from the German) which stated that it was admitting "*all evidence submitted by the Parties in the proceedings on the record*" and then explained, in its reasons, as follows (underlining added):

> "1 The Court assumes that primarily legal questions are to be clarified in the present proceedings and that the Parties have written detailed statements in this regard. The documents submitted by the Parties are sufficient – <u>in the</u>

> **anticipatory consideration of evidence** – to sufficiently substantiate the facts presented by the Parties, insofar as they are contested by the other Party in a concrete and substantiated manner and the Court considers them to be relevant for legal subsumption.
>
> …
>
> 3 The Court does not expect any additional new findings from the **questioning of the Parties** (on the side of the Respondent with Anthony Cousin) with reference to what has been stated under No. 1 above. Both Parties already provided in their written submissions – each from their own point of view – conclusive and to a large extent (partly explicitly) undisputed information about their mode of operation, organisational form and business processes. Experience has shown that they would confirm this during the questioning of the Parties."

In other words, the Bern Court considered that the documentary evidence submitted by the parties substantiated the facts that they were relying on and that in its view the case turned on the application of the law to those facts.

28. It must be assumed that the Bern Court had read this documentary evidence, some of which went to support the five points made above by Cousins. As Mr Rayment submitted, it is somewhat outlandish for Cousins to say that the Bern Court did not consider the position and effect of the wholesaler in the supply chain and on competition. That it had already done so is clear from the Interlocutory Order at paragraphs 5, 6 and 7 of its reasons for not seeking more evidence or hearing from witnesses or obtaining legal opinions on EU or UK law. The Interlocutory Order stated as follows (underlining added):

> "5 …The mode of operation and the effects of a "one-stop shop" are clear to the Court even without the testimony of the witness called in this regard. His testimony will not be able to provide any new insights into the central question of the "definition of markets and their delimitation"
>
> 6 The **legal opinion** on EU and UK law requested by the **Respondent** at various points in its written submissions is immediately qualified by the Respondent itself on p. 153 of the rejoinder by stating that "the Respondent is of the opinion that the present dispute can also be decided without obtaining a legal opinion"…
>
> The Court considers it unnecessary to obtain an economic expert opinion on the effects of the presence of wholesalers in the markets for the supply of spare parts for prestige watches, as further requested by the Respondent, because the clarification of the function and role of wholesalers in competition will be its own task in the decision-making process – the economic aspect would only be one of several aspects.
>
> 7 With regard to the following requests for disclosure, the Court once again expressly refers to its anticipatory consideration of evidence. Based on this, the Court considers the disclosure of the documents mentioned in the following applications to be unnecessary for the clarification of the facts

relevant to the ruling, unless already proven otherwise. The individual applications will be dealt with in detail, as far as necessary, within the framework of the final ruling.

Edition: Evidence or documents regarding the size ratios (in terms of quantity and turnover) between in-house distribution and the distribution of spare parts via wholesalers for the period from 01.01.2011 to 31.12.2015

Edition: List of all Level 3 service providers in the United Kingdom per brand a) at the time of implementation of the selective distribution system as well as b) at the time of filing the statement of defence.

Edition: Standard distribution contracts with Authorised Repair Centres for all brands of the Claimants.

Edition: Statement of the average delivery time, calculated from the date of receipt of the order to the date of delivery, for the period from 01.01.2016 to 31.12.2019 in respect of all Swatch spare parts for prestige watches, broken down per spare part and per month.

Edition: List of the turnover achieved with Swatch spare parts from 01.01.2010 to 31.12.2019 (by volume and value), broken down by spare part and year.

Edition: Statement of the evolution of prices for repair and maintenance services for the Claimants' prestige watches in the United Kingdom from 01.01.2010 to 31.12.2019, broken down by brand and type of repair or maintenance service."

29. The rejection of the requests for further information and documentation is separately complained about by Cousins but the reasons for that rejection show that the Bern Court had already by this stage considered the evidence adduced by Cousins as to the advantageous effects of having wholesalers in the supply chain. The Bern Court would then have to go on to consider the legal and factual significance of this evidence but it seems to me that the Bern Court cannot properly be accused of ignoring the evidence as to the position of wholesalers and the effect on competition of their removal. Cousins did not appeal the Interlocutory Order (it claims that it would have been extremely difficult to do so).

30. The focus of Mr O'Donoghue KC's criticisms of the Bern Court Judgment were paras. 70.5 and 70.6 which he described as "*lamentable*" in that they only cursorily dealt with Cousins' evidence as summarised above and, he said, made it appear as though Cousins had not put in any evidence on the effect on the repair market. Those paragraphs said as follows (underlining added):

> "70.5.2 It should be noted that the essential facility doctrine has not been fully clarified in European competition practice…In any case, it seems to be more relevant in the context of the refusal of access offence, but not to the supply disruption. Moreover, the distribution market of wholesalers such as the Respondent in the present case does not only consist of spare parts for watches, but - at least in the meantime undisputedly - also of completely

independent products that do not compete with spare parts for watches. Thus, the Applicants' spare parts would not be equally necessary components for the Respondent as, for example, films are for cinemas. More important, however, is the fact that cinemas, unlike wholesalers, are not merely an intermediate distribution stage, but are active at the "distribution stage" to the end customer. As a result, the mere supply of spare parts - unlike the screening of films - is not associated with any comparable special added value, even if wholesalers provide certain advantageous services, for example by being a one-stop shop for watch repairers to obtain spare parts from various watch manufacturers. However, this alone does not constitute significant value creation. As a result, the present case does not constitute a special situation in which an abuse of a dominant position could be assumed by way of exception.

This also distinguishes the present case from *Commercial Solvents* and *Hugin*, in which market power was also extended to the product and repair market, whereas in the present case only a restructuring of the sales organisation is to be assessed (cf. also Consideration 70.6 below).

70.5.3 In line with these statements German case law also recognises that a relatively powerful company may change its distribution in such a way that it sells its goods or services only by direct distribution in the future, as long as it grants the independent sales intermediaries previously working for it an appropriate conversion period. Something else could apply if the intended change of distribution provided the norm addressee with a monopoly on a downstream market on which undertakings previously independent of it had offered their own performance result on the basis of their own considerable value creation, for which the goods or services previously procured from the norm addressee were a prerequisite. This could be the case, for example, if a manufacturer wanted to take over the entire distribution of spare parts and all repair services for its products itself and therefore did not (any longer) supply independent shops with spare parts. Such a restriction of distribution, which would amount to the establishment of a monopoly also on the market for maintenance and repair services, would be incompatible with the objective of the law aimed at the freedom of competition….German doctrine also recognises that even companies with market power can exclude certain market levels in the distribution system, such as switching to direct distribution to retailers to the exclusion of wholesalers…

70.6 According to what has been said, it must in any case be assumed that the operational reorganisation in the form of the vertical integration of the Applicants' sales through the general exclusion of the wholesale level constitutes an objective reason for the supply disruption to the Respondent. This finding is all the more valid because the present case concerns trade in spare parts for watches, which are purchased by repair companies (and not by end consumers) in order to install them in the Applicants' watches as part of their maintenance and repair work: As the Applicants rightly argue, such goods require proper handling (Claim, para. 96), which is ensured by training and specialised personnel of the Swatch Group as well as close quality control (application, para. 71). The Applicants then continue to supply watch repairers who are affiliated with their selective distribution

> system. According to the ECJ's assessment, there is still competition on this repair market and the selective distribution system is open to all interested watch repairers who fulfil the conditions (cf. *CEAHR v. Commission*, para. 97)."

31. The Bern Court therefore explicitly referenced the "*one-stop-shop*" argument and the "*advantageous services*" provided by wholesalers to the watch repairers (see para. 70.5.2). That was really Cousins' overarching argument in this respect. The Bern Court distinguished the situation with the supply of films to cinemas because cinemas actually screen the films to the end consumer and cinemas need films for their business. The dismissal of Cousins' argument could be said to be somewhat terse but one needs to understand how the Bern Court got there.

32. Insofar as Cousins was relying on the SDS and the effect of the exclusion of the wholesale level, the Bern Court considered its evidence in the context of the rejection of its case under Article 101 TFEU. At para. 61 of the Judgment, the Bern Court stated: "*it remains to be examined whether the selective distribution system that the Applicants maintain with the independent watch repairers or the complete exclusion of the wholesale level is compatible with Article 101 TFEU*". Then in para. 61.1, the Bern Court specifically referenced paragraphs in Cousins' Response and Rejoinder where these points were raised. (Cousins had said in its evidence on this application that those paragraphs had not been considered by the Bern Court.)

33. After looking at some of the evidence, including specifically the Sony Pan-European Dealer Agreement case and parallel trade, which Cousins had relied upon in its submissions but which was rejected, the Bern Court ultimately concluded that the SDS, which only applied to the watch repairers, was not directly relevant to the removal of the wholesale level and that the latter was a unilateral decision that therefore only arose for consideration under Article 102 TFEU – see para. 62 of the Bern Court Judgment.

34. The Bern Court then went on to discuss whether Article 102 TFEU imposed a duty on Swatch to supply Cousins with spare parts. It considered various case law of the CJEU, including the case of C-22/78 *Hugin v Commission* which concerned the supply of spare parts for cash registers (see paras 68.3 and 68.4). It then discussed whether there might be an objective justification for withdrawing supply to a wholesaler such as Cousins. In the course of that, it looked at the "*essential facility doctrine*" of EU law, which was the framework for its conclusions in paras 70.5 and 70.6, set out above, that the wholesale level did not add sufficient value such as would require Swatch to continue to supply spare parts to it.

35. As to the impact on competition in the repair market, this was dealt with in paras. 70.5.3 and 70.6, set out above, where the Bern Court found that the removal of the wholesale level would still mean that there was competition in the repair market. Mr O'Donoghue KC strongly criticised the lack of reference to Cousins' evidence that disputed this conclusion and he particularly focused on the lack of evidence from Swatch as to the numbers of authorised repairers in the UK which he said was information that Swatch should have provided. However the Bern Court, in the Interlocutory Order, had already decided that it did not need this extra information. Simply because it was not specifically mentioned in the Bern Court Judgment does not mean that it was not considered by the Bern Court.

36. Mr O'Donoghue KC also submitted that the Bern Court failed to consider Cousins' evidence that the "*seamlessness*" of the SDS did not require the elimination of wholesalers who could, in any event, have been obliged only to supply to authorised repairers. But the Bern Court did specifically reference this point in the Rejoinder in para.71.7 of the Judgment, which then concluded with: "*As already explained under Article 101 TFEU, the exclusion of the wholesale level leads to the internalisation of double marginalisation, which can be accompanied by lower prices*." While recognising that this "*tiny point*" was dealt with by the Bern Court, Mr O'Donoghue KC then criticised it for not referring to an email from December 2011 which suggested that there was no such double marginalisation.

37. This exemplifies the problem with the arguments that Cousins seeks to make about the Bern Court Judgment. It requires looking at the wording of the Bern Court Judgment and testing whether particular points that Cousins ran or on which it put in evidence, were dealt with in the Bern Court Judgment and concluding that, if they were not expressly referred to, it must mean that they were not even considered. This engagement on the merits feels very much as though it is an attack on the substance of the Bern Court Judgment because the Bern Court found against Cousins.

38. Mr O'Donoghue KC took me to a ECtHR decision in *Perez v France* 47287/99 [2004] ECHR 72 at [80]:

> "80. The Court notes that the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective…this right can only be seen to be effective if the observations are actually "heard", that is duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant…"

39. Mr O'Donoghue KC submitted in fairly trenchant terms that this constituted a manifest breach of Cousins' right to be heard. He said that the reference to two "*tiny points*" from Cousins' evidence shows a "*lack of respect for Cousins' right to be heard and, further, makes it inexcusable that the other evidence referred to by Cousins is not considered at all.*"

40. I do not accept that that is a fair way to describe the Bern Court Judgment and it involves a flawed leap of logic in its suggestion that because certain parts of Cousins' evidence were not specifically referred to, the Bern Court did not consider that evidence. If Cousins is going so far as to say that the Bern Court violated its right to be heard, it has to show that the Bern Court wrongly ignored Cousins' evidence by not reading it or considering it. Yet such a contention is unsustainable.

41. The Bern Court first of all examined Cousins' evidence for the purposes of making its decisions on the Interlocutory Order. It accepted that that evidence substantiated the facts relied on by Cousins. Then in its substantive Judgment, it had well in mind Cousins' arguments and evidence, in particular Cousins' core case that its removal from the supply chain would eliminate the pro-competitive advantages it brought to

customers and consumers. The "*one-stop-shop*" was not a "*tiny point*", as it really underpinned all of Cousins' arguments, as set out above, and the Bern Court took into account the "*advantageous services*" that were being provided to watch repairers. However the Bern Court concluded that that did not mean that Swatch was obliged to maintain supplies to Cousins.

42. But perhaps more fundamentally, and as would be expected of a party claiming that it had not been heard in breach of its Article 6 rights, the FSC Appeal raised similar issues. In its detailed brief to the FSC, Cousins complained that the Bern Court ignored its evidence and that this was "*arbitrary and constitutes a denial of the right to be heard.*" Curiously Cousins did not refer to Article 6 ECHR in any of the 54 pages of its appeal brief. It did refer to breaches of its right to a fair hearing contrary to Article 29(2) Bundesverfassung, the Swiss Federal Constitution; and to the findings of the Bern Court being arbitrary/manifestly incorrect contrary to Article 97 Bundesgerichtsgesetz, the Federal Supreme Court Act. Mr O'Donoghue KC claimed that these Articles protected the same "right to be heard" as contained in Article 6 ECHR. Therefore he must be taken to accept that a rejection of the FSC Appeal must necessarily amount to a rejection of any case that could have been made under Article 6 ECHR.

43. Cousins raised four broad points in the FSC Appeal which it accepts were accurately summarised at para. 7.4 of the FSC Judgment:

    (1) The Bern Court's assumption that the elimination of all competition was objectively justified and proportionate was arbitrary;

    (2) The Bern Court arbitrarily ignored the effects on competition in the specific case when assessing the objective justification of the supply stoppage;

    (3) It criticised as arbitrary the Bern Court's assumption that a supply stoppage was *per se* objectively justified under Article 102 TFEU or s.18 CA 1998 if a dominant company decides to change its distribution system and no longer supply the wholesalers; and

    (4) The Bern Court made a finding that was contrary to the record and arbitrary when it assumed that there was no dependence on Swatch.

44. All these grounds of appeal were rejected by the FSC. The FSC Judgment is admittedly not straightforward to follow, but the main basis for dismissing the FSC Appeal seems to have been that there was no substance to the unfairness complaint, based on the Bern Court's alleged arbitrary findings and that what Cousins was really complaining about was the Bern Court's legal assessment of the issues before it. Mr O'Donoghue KC accepted that Cousins' grounds of appeal in (1) to (3) above were the same as its arguments in relation to its Article 6 rights in this court. Even though he also described the FSC Judgment as "*lamentable*", he does not complain about a breach of Cousins' Article 6 rights in the FSC Appeal itself. The fact that his present arguments have already been considered and rejected by the FSC indicates that there was no violation of its Article 6 rights in the Swiss Courts.

45. In my judgment, Cousins is not really challenging the Swiss Courts' Judgments on the grounds of procedural unfairness in denying its right to be heard. Rather its attack on the Swiss Courts' Judgments is effectively a further appeal on the merits and substance,

dressed up as a complaint about a breach of its Article 6 ECHR rights. There was no breach, let alone a manifest breach, of such rights in the way the Swiss Courts dealt with Cousins' evidence.

(b) Failure to call for further evidence

46. I have dealt above with the Interlocutory Order and the relevant terms of it have been set out in [27] and [28] above. The Bern Court rejected Cousins' requests for additional evidence, including for oral evidence from its witnesses, disclosure of evidence that might indicate the effect of Swatch's actions on the relevant markets and for a court-appointed economist on the effects of the presence of wholesalers in the markets for the supply of watch spare parts. The Bern Court did not consider that this was necessary, largely because the parties had put in detailed written statements and exhibits which had been admitted by the Court and which sufficiently substantiated the facts that they relied upon. Furthermore, the issues for decision were primarily legal and so matters for the Bern Court to decide based on that evidence.

47. While both parties had wanted to call certain witnesses to give oral evidence, the Bern Court did not think this was necessary. In para. 5 of the reasons in the Interlocutory Order, it stated that the operation and effects of the "*one-stop-shop*" was clear to it without requiring witnesses to be called in such respect.

48. Both parties then waived the right to an oral hearing as recorded in para. 4 of the Interlocutory Order. Cousins said in its evidence that this was largely because of the difficulties in conducting such a hearing at the height of the Covid pandemic restrictions and that it only did so on condition that the Bern Court's Judgment would not be based on unproven allegations (it said that this was reflected in para. 2 of the Interlocutory Order). But, as Mr Rayment submitted, the decision to waive its right to an oral hearing was made voluntarily and with the benefit of Swiss legal advice which presumably weighed all the relevant factors. In such circumstances, Cousins cannot properly complain about a violation of its Article 6 ECHR rights to a fair hearing, when it made an informed choice to proceed without an oral hearing.

49. The decision of the Bern Court not to request further evidence or disclosure from Swatch was made in the Interlocutory Order in respect of which Cousins does not complain that it was denied a fair hearing. As I said above, it did not appeal the Interlocutory Order, although it says that its Swiss legal advice was to the effect that it would have been extremely difficult to appeal it because Cousins would have had to establish irreparable harm. But it was not raised as part of the FSC Appeal either and so, in my view, it is not now open to Cousins to complain about the Interlocutory Order. Furthermore, the significance of the Interlocutory Order is that it shows that the Bern Court had considered and accepted all of Cousins' written evidence, and having done so, concluded that no more evidence was required to determine the legal effect of that evidence.

50. Accordingly I do not think that there was any breach of the right to a fair hearing in the way the Bern Court handled the application for further evidence and/or disclosure.

Public policy exception: exhaustion of legal remedies

51. Mr Rayment submitted that the public policy exception requires Cousins to show not only a material breach of a fundamental right but also that there were insufficient remedies in Switzerland to protect and guarantee its rights. Further, he said that it was necessary to exhaust available remedies in relation to Article 6 ECHR including by way of an application to the ECtHR. These points are derived from *Smith v Huertas* at [26] and [53]. However, in that case, as Mr O'Donoghue KC pointed out, the complainant had made an application to the ECtHR but he had not relied on the Article 6 ECHR grounds that he was later relying on in the English Court to get within the public policy exception.

52. I have referred above to Cousins' failure to raise Article 6 ECHR itself in the FSC Appeal, instead relying on similar rights granted domestically in Switzerland. But I do not think that Cousins can fairly be accused of not arguing in the FSC that it did not receive a fair hearing in the Bern Court.

53. I do not need to decide if there is any principle that a party must exhaust all remedies in relation to Article 6 ECHR if it wishes to rely on the public policy exception. Cousins has not made an application to the ECtHR even though it could have done so. I can see the sense of requiring the exhaustion of remedies available in the foreign Court because otherwise the English Court would be asked to rule on the propriety of that foreign country's legal processes, which could be very different to its own, and without the benefit of the opinion of Courts within that legal system as to whether there has been such a breach.

54. Nevertheless, I have decided that the public policy exception cannot be relied on by Cousins as there has been no manifest breach of Article 6 ECHR and therefore this issue does not arise.

Issues which may not be *res judicata*

55. Cousins has raised two issues which it says were in any event not decided by the Bern Court and so could not be the subject of cause of action or issue estoppel. These are: (a) the claim pursuant to Article 101 TFEU and/or s.2 CA 1998 in relation to the SDS; and (b) the issue raised by s.60A CA 1998. I will deal with each in turn.

(a) Article 101 TFEU in relation to the SDS

56. This point was raised for the first time in Mr O'Donoghue KC's skeleton argument for this hearing. It was not referred to in Cousins' evidence in answer to the application.

57. In its Particulars of Claim, Cousins included a claim that the agreements between Swatch and their authorised repairers under the SDS constituted agreements, or a concerted practice, that have as their effect the prevention, restriction and/or distortion of competition in breach of Article 101 TFEU and/or s.2 CA 1998. Mr O'Donoghue KC submitted that this claim was not determined by the Bern Court. He said, effectively, that the Bern Court only decided that the termination of supply to Cousins (i.e. not the SDS) was not within Article 101 TFEU because there was no agreement with Cousins as to that and it was a unilateral decision by Swatch.

58. Swatch's application to the Bern Court for negative declaratory relief had two legal claims as follows (and as set out in [12] above):

    (1) That Swatch have no duty towards Cousins to supply spare parts for products of Swatch or of companies affiliated with them;

    (2) That Swatch owe Cousins nothing, in particular no damages, due to the termination of supply to Cousins of spare parts for products of Swatch or of companies affiliated with them.

    The Bern Court granted those declarations at the end of its Judgment.

59. There is no mention in either declaration of either Articles 101 or 102 TFEU and/or ss.2 or 18 CA 1998. But they were the context for considering whether the negative declaratory relief should be given. It was Cousins that raised whether there were breaches of those Articles and/or sections and it was part of its defence of Swatch's application that the SDS constituted a breach of Article 101 TFEU and/or s.2 CA 1998.

60. Section VI of the Bern Court Judgment, paras. 54 to 62, dealt with the alleged breaches of Article 101 TFEU and/or s.2 CA 1998. In para. 57, the Bern Court recorded Cousins' argument that the SDS, as well as the termination of supply to Cousins, were contrary to Article 101 TFEU. At para. 60.7 of the Judgment, the Bern Court concluded that: the "*interruption of deliveries in any case does not qualify as an agreement within the meaning of Article 101(1) TFEU and is therefore not subject to examination on the basis of these facts*."

61. The Bern Court then went on to consider whether the SDS "*or the complete exclusion of the wholesale level is compatible with Article 101 TFEU*" (para.61). At para 61.2, the Bern Court referred to the finding of the European Commission that there was a "*low probability of a violation of Article 101 TFEU in connection with the* [SDS]". The Bern Court was of the view that the SDS, which did not involve the wholesale level, did not in itself relevantly breach Article 101 TFEU because, so far as Cousins was concerned, "*the more fundamental question [was] of the compatibility of the total exclusion of the wholesale level with Article 101 TFEU*" (see paras.61.4 and 61.5). Then at para 61.6, the Bern Court said as follows:

> "It can thus be stated that [Swatch's] conduct towards [Cousins] is not to be examined under the facts of Art. 101 TFEU, but under Art. 102 TFEU. The question of the admissibility of the selective distribution system that [Swatch] maintain with the independent watch repairers is in any case only indirectly related to this."

    And at para.62:

> "In summary, it must be stated that [Swatch's] conduct towards [Cousins] must be qualified as a unilateral measure that is not covered by Article 101 TFEU, in particular also not by the [SDS] that [Swatch] maintain with the independent watch repairers, but must be examined under the facts of Article 102 TFEU."

62. The Bern Court therefore considered Cousins' claim that the SDS was a breach of Article 101 TFEU. However, it decided that, so far as any claim by Cousins was concerned, this was not particularly relevant. The exclusion of the wholesale level by

refusing to supply spare parts to Cousins could not properly be considered under Article 101 TFEU because that was a unilateral decision by Swatch.

63. Furthermore, Cousins complained in the FSC Appeal that the Bern court had not properly considered whether the SDS was compatible with Article 101 TFEU. In para. 5.2 of the FSC Judgment, this ground of appeal was rejected, partly on the basis that Cousins had failed properly to appeal it, but also because it was wrong to say that the Bern Court had wrongly not considered this part of Cousins' defence.

64. In my view it is appropriate to conclude that this issue was decided by the Bern Court against Cousins and that therefore it is properly considered to be *res judicata*. Accordingly, it cannot be relitigated by Cousins in the English Court.

(b) Section 60A CA 1998

65. Cousins suggests that there is a case for UK competition law diverging from EU competition law under s.60A(7) CA 1998 and that it should be able to run this argument in the English Court because it was not decided by the Swiss Courts. It therefore wishes to run the same factual case in its English proceedings as was put forward and rejected in Switzerland but to claim that those facts amount to a breach of ss.2 and/or 18 CA 1998, even if not a breach of Articles 101 and 102 TFEU. This has very much the feel of a second bite of the cherry in the speculative hope that the English Court will now, post-Brexit, seek to establish its own principles of competition law that will in this case work in Cousins' favour.

66. The trouble with the argument is that not only did Cousins not seek to argue for divergence in the Swiss Courts but also it effectively conceded that there was no divergence between UK and EU competition law. The Bern Court recorded this and the argument was further considered on the FSC Appeal (see below).

67. Section 60A CA 1998 relevantly provides as follows:

> **"Certain principles etc to be considered or applied from IP completion day**
>
> (1) This section applies when one of the following persons determines a question arising under this Part in relation to competition within the United Kingdom –
>
> (a) a court or tribunal;
>
> (b) the CMA;
>
> (c) a person acting on behalf of the CMA in connection with a matter arising under this Part.
>
> (2) The person must act (so far as is compatible with the provisions of this Part) with a view to securing that there is no inconsistency between –
>
> (a) the principles that it applies, and the decision that it reaches, in determining the question, and
>
> (b) the principles laid down by the Treaty on the Functioning of the European Union and the European Court before IP completion day, and any relevant decision made by that Court before IP completion day, so far as applicable immediately before IP completion day in determining any corresponding question arising in EU law,

> Subject to subsections (4) to (7).
>
> …
>
> (7) Subsection (2) does not apply if the person thinks that it is appropriate to act otherwise in light of one or more of the following –
>
> (a) differences between the provisions of this Part under consideration and the corresponding provisions of EU law as those provisions of EU law had effect immediately before IP completion day;
>
> (b) differences between markets in the United Kingdom and markets in the European Union;
>
> (c) developments in forms of economic activity since the time when the principle or decision referred to in subsection (2)(b) was laid down or made;
>
> (d) generally accepted principles of competition analysis or the generally accepted application of such principles;
>
> (e) a principle laid down, or decision made, by the European Court on or after IP completion day;
>
> (f) the particular circumstances under consideration."

68. Section 60A CA 1998 came into force on IP completion day which was on 31 December 2019. It requires a Court to ensure there is no inconsistency between UK competition law and EU competition law as established prior to IP completion day. However if any one or more of the factors set out in s.60A(7) are present, there can be a deviation by the UK. I am not aware of any UK Court decision which has considered the scope or application of s. 60A(7) CA 1998.

69. Mr Rayment submitted that the Swiss Courts have ruled on the application of s.60A CA 1998 in this case and so it should be considered to be *res judicata*. Alternatively he submitted that Cousins is estopped from arguing that there should be a divergence from EU competition law because it chose not to raise that issue before the Swiss Courts.

70. As to the former, in para. 44.4 of the Bern Court Judgment, there is reference to s.60A CA 1998 and it is recorded that neither party had been arguing for divergence between UK and EU competition law. The Bern Court actually went on to say that there was no apparent reason for any such divergence.

71. Cousins did raise s.60A CA 1998 in the FSC Appeal arguing that the Bern Court failed to have regard to any UK competition law literature in reaching that conclusion as to no divergence. The one piece of such literature referred to by Cousins was the textbook *Bellamy & Child's European Union Law of Competition*. In para. 8.2.2.3 of the FSC Judgment, the finding of the Bern Court as to s.60A CA 1998 was upheld and it was found not to be necessary to analyse Swatch's conduct separately under EU and UK competition law. The FSC rejected Cousins' argument that the Bern Court had arbitrarily disregarded English legal sources and held that, in any event, the extract from *Bellamy & Child* did not support Cousins' contention.

72. Mr Rayment further submitted that the Bern Court's unified analysis for determining whether Swatch had breached competition law, necessarily assumed that there was

convergence between UK and EU competition law and that there were no conditions for divergence.

73. As to Cousins' failure to raise this issue, Mr Rayment said that it had made conflicting submissions throughout the Swiss Claims. In its Response, Cousins said that there was no reason to consider UK competition law separately from EU competition law. Mr O'Donoghue KC said that this was because the Response was filed on 30 October 2019, prior to the coming into force of s.60A CA 1998. In its Rejoinder, which was filed on 1 June 2020, after the UK had withdrawn from the EU, Cousins still argued that there was "*no reason in the present proceedings*" for UK and EU competition law to diverge. It went on to say that "*irrespective of the date of the judgment in the present proceedings, EU competition law (namely Articles 101 and 102 TFEU) will at least de facto remain relevant ... even after the end of the transitional period*". Cousins did reserve "*the right to further elaborate on the applicable law at a later date*", but I do not believe that it did in this respect.

74. Mr O'Donoghue KC said that Cousins' primary case remained that Swatch's conduct breached Articles 101 and 102 TFEU. But if it is not able to run that case because it has already been decided against it by the Swiss Courts, as I have found it has, then it should be able to argue its alternative case set out in the Particulars of Claim that, even if Swatch's conduct did not breach Articles 101 and/or 102 TFEU, it nonetheless constituted a breach of ss. 2 and/or 18 CA 1998 read with s.60A(7) CA 1998 in the light of differences between UK and EU competition law and differences between the markets in the UK and the EU. Mr O'Donoghue KC therefore submitted that Cousins' alternative case raises novel issues not considered before, involving public policy and an analysis of the differences between the respective markets such as might justify a departure by the UK from established EU competition law. This in itself, he said, is a good enough reason for not striking out the claim.

75. In my view this is opportunistic and highly speculative. It involves a complete change of position by Cousins from that which it adopted in the Bern Court where it was content to accept that there was no divergence in competition law. When that went against it, it sought to raise some sort of issue in the FSC Appeal, but that too did not get anywhere. And now, in these proceedings, Cousins is suggesting that this could be the first case where an English Court will be satisfied that the time had come for UK competition law to move away from EU competition law in this respect and find that the same facts are a breach of ss.2 and/or 18 CA 1998, when they are not a breach of Articles 101 and 102 TFEU, despite them being in materially identical terms.

76. I think Mr Rayment was right to refer to the Supreme Court's judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [22]. Cousins' opportunity to make a specific case on divergence was when this matter was properly before the Swiss Courts. It chose not to do so before the Bern Court. And when it was sort of raised in the FSC Appeal, the FSC plainly rejected any such argument that there were grounds for a divergence. Cousins therefore either failed to raise the issue when it should have done or it was raised but decided against it. Whichever way this is looked at, Cousins is estopped from relitigating this issue in the English proceedings.

Conclusion

77. In the light of my reasons set out above, there is no reason for the Judgments of the Swiss Courts not to be recognised under the Lugano Convention. Accordingly, Cousins is estopped by the principles of *res judicata* from pursuing its case in England. And on Cousins' alternative position that its Article 101 TFEU claim in relation to the SDS and the s.60A CA 1998 point were not decided by the Swiss Courts, I consider that Cousins is estopped from arguing those claims separately in the English proceedings.

78. Accordingly I will make the declaration sought by Swatch that the High Court will not exercise any jurisdiction it may have to try Cousins' claim and will set aside the Amended Claim Form issued on 5 June 2017.

79. Any consequential matters, if they cannot be resolved by agreement, can either be dealt with by written submissions or, if necessary, by a hearing to be arranged.