* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 07.01.2019
Pronounced on: 23.04.2019

\+ **FAO (OS) (COMM) 169/2017 & C.M. APPL.4963/2018**

MICROMAX INFORMATICS LIMITED .....Appellant

Through: Sh. S. Ganesh, Sr. Advocate with Sh. Ashok. K. Aggarwal, Sh. Samrat Nigam, Ms. Radhika, Ms. Snigdha Sharma, Ms. Ritwik Sneha and Sh. Gaurav Priyadarshi, Advocates.

Versus

TELEFONAKTIEBOLGET L.M. ERICSSON .....Respondent

Through: Sh. C.S. Vaidyanathan, Sr. Advocate, Sh. C.M. Lall, Sr. Advocate, Ms. Saya Choudhary, Sh. Ashutosh Kumar, Sh. Prateek Sehrawat, Sh. Adithya Jayaraj, Sh. Rupin Bahl, Ms. Karnika Kanwar, Sh. Devansu Khanna and Sh. Ujjwal Sinha, Advocates.
Sh. Prasanta Varma, Sr. Standing Counsel and Ms. Shalu Goswami, Advocates, for respondent.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

MR. JUSTICE S. RAVINDRA BHAT

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1. By order dated 4th December, 2017, this court had reserved orders on the merits of the appeal. However, was informed that in the meanwhile, by mutual consent, on terms acceptable to both, the parties had settled their disputes. In the circumstances, the court would formally dispose of this appeal, but with certain observations as regards the "hot tubbing" procedure which had been recommended

for acceptance by the parties, in the course of the suit. The court had observed about desirability of adopting the "hot tubbing" procedure in patent suit.

2. The appellant's application (CM 4963/2018) was filed for withdrawal of the appeal, in the light of the settlement arrived at by the parties.

3. "Hot-tubbing" is the phrase for experts giving their evidence concurrently, i.e., both together in the witness box. Although courts and tribunals may have varying practices, in general, the experts (two or more) are called together, sworn or affirmed, and given the opportunity to answer the same questions, to comment on each other's replies, to enter into a dialogue with each other and to put questions to each other.There are no specific rules governing the procedure, but a general format is as follows:

(a) The factual basis of the case needs to be set out first. Each side could call their principal lay witness, to be examined, cross-examined and re-examined.

(b) The respective experts would then be taken together. In practice, there are many variations in the approach, but under the court's direction, the basic method is for experts retained by the parties to prepare written reports in the normal way. The reports are exchanged and the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone.

(c) The experts prepare a joint statement incorporating a summary of the matters upon which they agree, and identifying the matters upon which they disagree. Before the trial, the parties produce an agreed agenda for taking concurrent evidence based on the joint statement. This contains a numbered list of the issues where the experts disagree and must be provided in sufficient time to enable the judge to consider it properly.

(d) At trial/court hearing, the experts are sworn together and take their place together at the witness table. Using the summary of matters upon which

they disagree, the judge chairs a "directed" discussion of the issues about which there is disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.

Judges' role

(e) Ideally, the judge then questions the experts, taking topic by topic, putting the same question to each expert in turn.

(f) At the end of the questioning on each topic the judge invites the respective advocates to further question the experts, a sort of cross-examination or re-examination but more of a process of clarifying what has emerged in the judge-expert exchanges.

(g) After the judge has finally finished with the experts, the advocates will be invited to further question both experts, principally by way of clarification, but not to introduce entirely new topics. As the judge plays a more active or interventionist role than normal, to a degree stepping down from his "umpire" role on the bench, he/ she needs to have a higher degree of preparedness, so as to be thoroughly aware of the background to the case.

4. Australia, which is a federal constitutional system, has, during the past two decades or so, witnessed wide-ranging efforts by the federal and state governments to introduce flexible arrangements in courts, simplification of proceedings, and policies to encourage and facilitate self-representation by litigants in person. Courts and super-tribunals in Australia have been experimenting with techniques to better assess expert evidence and to simplify the process of dealing with expert

evidence to ordinary persons, particularly litigants in person. One of these techniques is the concurrent evidence by experts during hearings.

5. The term 'hot tub' is colloquially used in Australia to mean the process whereby experts give concurrent or joint evidence; it was developed in Australia during the 1980s for some specific tribunals and court proceedings and subsequently adopted widely in Australia and elsewhere. Although 'hot tubbing' has become part of the common vocabulary, it is not a term of art in Australia; phrases such as 'joint evidence' or 'concurrent evidence' are used contemporaneously to mean the same. The term was referred to more than 30 years ago for the first time by Justice Rogers in the matter of *Spika Trading Pty Ltd v. Royal Insurance Australia Ltd* (1985) 3 ANZ. According to Justice Rares the process of concurrent evidence:

> "*...offers the potential, in many situations calling for evidence, of a much more satisfactory experience of expert evidence for all those involved. It enables each expert to concentrate on the real issues between them. The judge or listener can hear all the experts discussing the same issue at the same time to explain his or her point in a discussion with a professional colleague. The technique reduces the chances of the experts, lawyers and judge, jury or tribunal misunderstanding what the experts are saying.*"

6. Australian courts have been the driving force behind the development of hot tubbing and, in particular, Justice Peter McClellan. Concurrent expert evidence seems to have originated in some Australian tribunals and in judicial experiments in the Commercial List (Common Law Division) of the Supreme Court of New South Wales. Commentators generally credit Justice McClellan for bringing concurrent expert evidence "into the mainstream" and for playing a key role in educating the Australian judiciary about the benefits of concurrent expert evidence in articles, papers etc. For instance, Justice McClellan, says that when he presides over the process, "*[c]ounsel may also ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against*

a contrary opinion" thus, highlighting that distinctions exist in the conducting of hot tubbing sessions, however, the attorneys for each side still have a valuable role in the concurrent evidence process.

7. There is widespread agreement in courts and tribunals in Australia that, generally speaking, concurrent evidence saves "considerable court time" and crystallizes areas of agreement and disagreement more effectively than traditional processes of cross-examination. In these traditional processes, the atmosphere is often more litigious, experts feel constrained due to their close relationship with their client and substantial time is spent on issues of credibility of expert witnesses rather than the merits of disagreement between the witnesses. In this manner, substantial costs and time can be saved, since a hearing focuses on the real issues rather than becoming entrapped by matters that are not directly relevant or issues on which there is no real disagreement between the experts. In general, the examination of experts focuses on a specific issue, and once it is completed, the hearing moves to the next item in dispute.

8. Observation reports from the Federal Court of Australia suggest that having both parties' experts present their views at the same time is very valuable. In their report on civil justice in Australia more than a decade ago, the Australian Law Reform Commission reported that:

> "*In contrast to the conventional approach, where an interval of up to several weeks may separate the experts' testimony, the panel approach enables the judge to compare and consider the competing opinions on a fair basis. In addition, the Court has found that experts themselves approve of the procedures and they welcome it as a better way of informing the Court. There is also symbolic and practical importance in removing the experts from their position in the camp of the party who called them.*"

Canada

9. In *Hryniak v. Mauldin* 2014 SCC 7 and its companion case *Bruno Appliance and Furniture Inc. v. Hryniak*2014 SCC 8, the Supreme Court of

Canada posed a challenge to bench and bar: execute a shift in culture away from the bias favouring trials and toward non-trial procedures that favour a system of justice that is accessible, proportionate, timely and affordable. Recent changes to the Federal Court Rules in Canada, as well as provincial jurisdictions, allow for hot-tubbing. Rules 282.1 and 282.2 of the Federal Court Rules, for example, state:

> "***Expert witness panel***
> *282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witness of each party or at any other time that the Court may determine.*
> ***Testimony of panel members***
> *282.2 (1) Expert witnesses shall give their views and may be directed to comment and to make concluding statements. With leave of the Court, they may pose questions to other panel members.*
> ***Examination of panel members***
> *282.2(2) On completion of the testimony of the panel, the panel members may be cross- examined and re- examined in the sequence directed by the Court.*"

10. The Federal Court Rules also allow for hot- tubbing in advance of appearance in the courtroom, Rule 52.6 specifying an order the court may exercise to have "expert witnesses confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ." For example, in *Apotex Inc. v. Astrazeneca Canada Inc.* 2012 FC 559the court first followed the traditional approach for expert evidence — direct examination, cross examination and reply. The court then conducted a "hot tubbing" session where both experts testified concurrently to answer questions from the judge (under oath). Each litigant's counsel was then permitted to ask follow up questions (to both experts) arising from the hot tubbing exchange with the judge.

11. Ontario's 2010 amendments to its Rules of Civil Procedure allow for a court- ordered meeting between experts to determine areas of agreement and to

seek resolution if possible on subjects of disagreement. Specifically, according to Rule 20.05(2)(k):

> "*If an action is ordered to proceed to trial…the court may give such directions or impose such terms as are just, including an order, that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,*
>
> *(i) there is a reasonable prospect for agreement on some or all of the issues, or*
>
> *(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties of the court…*"

12. Hot tubbing promotes the independence of experts, as it separates their evidence from the factual evidence of the party by whom they have been retained. Other key advantages of hot tubbing include:

a) A greater capacity for witnesses to explore and fully understand the issues about which they are expressing an opinion, by questioning and interacting with other experts.

b) The creation of a less adversarial environment than the traditional procedure. The panel aims to have the feel of a roundtable discussion between colleagues. This makes it less likely that experts will defensively maintain extreme positions or partisan opinions that are not genuinely held, as here too experts may be required to justify these views to their professional peers.

c) Removal of experts from questioning by counsel until after all relevant

expert opinions have been espoused. This should make it easier for experts to make concessions where appropriate, without feeling as though they are weakening the case of the party by whom they are retained.

d) The capacity for expert issues to be dealt with on a more advanced level, and in a manner that is more relevant to the question at hand, because panel evidence is led by the experts themselves with little or no interference by counsel.

13. As a procedure for enhancing the quality of judicial decision-making and, perhaps, getting to the truth, there also seem to be potential benefits, in appropriate cases, as compared with sequential evidence. The hot tubbing procedure encourages representatives, experts and the judge to focus on the issues prior to the trial and to clearly identify areas of disagreement. Time at the trial is saved by this degree of focus and the job of the judge in evaluating disagreements is made easier by dealing with each area of disagreement before moving on to the next.

14. It is however, clear that some burden is placed on the judge if the procedure is to be effective. Hot tubbing requires judges to do more pre-reading and their role in the trial necessitates a substantial shift from the passive judge who sits waiting for the case to unfold before her, to an active inquisitor who has the responsibility for ensuring that the discussion agenda is comprehensive and that the evidence is properly heard and tested. This requires the involvement of judges who are enthusiastic about the procedure, who are conscientious about their role and diligent in undertaking the additional work. It is asking a lot of judges who are already under time pressure. If hot tubbing is to be used more widely, the Courts will need support for necessary preparation time, and appropriate training for the shift of emphasis in their role.

15. In view of the foregoing discussion, and given that at present, there is no norm or rule that guides the courts in the country, with respect to the procedure that can be used to arrive at a swifter resolution of disputes (such as in patent

cases, involving technology and scientific experts' testimony and evidence), this court is of the opinion that patent disputes and those that involve examination of expert evidence should adopt the hot-tubbing procedure. The Delhi High Court rules have been amended; they include resort to the "hot tubbing" procedure in Rule 6 (Chapter VI) of the Rules read with Annexure G. The broad steps for the procedure are:

(i) It is necessary that before the beginning of the recording of evidence, the ground rules relating to the "hot tubbing" are made known to the parties.

(ii) The factual basis of the case needs to be set out first. Each side could call their principal non expert witness, to be examined, cross-examined and re-examined.

(iii) The respective technical/scientific experts would then depose together. In practice, there are many variations in the approach, but under the court's direction, the basic method is for experts retained by the parties to prepare written reports in the normal way. The reports are exchanged and the experts are required to meet without the parties or their representatives to discuss those reports.

(iv) The experts prepare a joint statement incorporating a summary of the matters upon which they agree, and identifying the matters upon which they disagree. Before the trial, the parties produce an agreed agenda for taking concurrent evidence based on the joint statement. This contains a numbered list of the issues where the experts disagree and must be provided in sufficient time to enable the judge to consider it properly.

(v) At trial/ court hearing, the experts are sworn together and take their place together at the witness table. Using the summary of matters upon which they disagree, the judge chairs a "directed" discussion of the issues about which there is disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the

court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.

(vi) The judge- during the above process questions the experts, taking topic by topic, putting the same question to each expert in turn.

(vii) At the end of the questioning on each topic the judge invites the respective advocates to further question the experts, a variation of cross-examination or re-examination but more of a process of clarifying what has emerged in the judge-expert exchanges.

(viii) After the judge has finally finished with the experts, the advocates will be invited to further question both experts, principally by way of clarification, but not to introduce entirely new topics.

16. In the light of the above discussion, the appeal is disposed of, having regard to the parties' statements, and the application for withdrawal. It is clarified that the hot tubbing steps and guidelines indicated above are an amplification of the normative standards prescribed in the Rules.

The appeal is formally disposed of.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

APRIL 23, 2019