Neutral citation [2022] CAT 45

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 October 2022

Before:

BEN TIDSWELL
Chair
WILLIAM BISHOP
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

APPLE INC.
APPLE DISTRIBUTION INTERNATIONAL LIMITED

Defendants

Heard at Salisbury Square House on 12 and 13 September 2022

RULING
(PRELIMINARY ISSUE APPLICATION)

APPEARANCES

Michael Armitage and Matthew Kennedy (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Brian Kennelly KC and Daniel Piccinin (instructed by Gibson, Dunn & Crutcher LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This is the Tribunal's Ruling setting out our reasons for refusing Apple's application for the hearing of a preliminary issue on the issues of market definition and dominance. That application was made at a Case Management Conference which took place on 12 and 13 September, following our grant of a Collective Proceedings Order (see our judgment at [2022] CAT 28). Our judgment granting the Collective Proceedings Order provides more details on the nature of the Class Representative's claim and Apple's Defence, which are summarised below.

2. Apple is well known as the creator of devices such as the iPhone and the iPad, along with its proprietary mobile operating system (the "iOS"). The Class Representative alleges that Apple has contravened the Chapter II prohibition contained in section 18 of the Competition Act 1998, and Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), by engaging in exclusionary and exploitative abuses of dominant positions respectively in the market for the distribution of individual software applications ("apps") and the associated payment processing market.

3. In essence, the Class Representative alleges that Apple has foreclosed all competition from potential or actual rivals through its restrictive terms and conditions, and other restraints, imposed in the iOS, so that it is dominant (and indeed holds a monopoly position) in app distribution and payment services. The Class Representative contends that Apple has abused that dominant position by: imposing restrictions on app developers, to force them to distribute iOS apps exclusively via its proprietary store; charging excessive and unfair prices in the form of the commission charged on transactions; and requiring payments for app purchases to be made using Apple's proprietary payment system. The Class Representative claims that significant parts of overcharged commission have been passed onto consumers, being iOS device users.

4. The Class Representative brings the proceedings on an opt-out basis on behalf of all users of iOS devices (iPhones and iPads), which is estimated to include some 19.6 million UK consumers who have made purchases relating to apps.

5. Apple denies every aspect of the Class Representative's claim. It denies that it is dominant in any relevant market and says that, in any event, it has not engaged in conduct that would constitute an abuse of any dominant position in any relevant market. It also says that the abuses alleged by the Class Representative have not caused the class any loss in aggregate.

B. THE PRELIMINARY ISSUE APPLICATION

(1) Overview

6. Apple seeks an order under Rule 53(2)(o) of the Tribunal's Rules that there should be a preliminary issue trial of the issues of market definition and dominance. These issues comprise questions of relevant product markets, relevant geographic markets, the temporal scope of the relevant markets and whether Apple is dominant in any relevant market.

7. There is a sharp difference of approach between the Class Representative and Apple on their pleaded cases in relation to the relevant product market. The Class Representative asserts a discrete economic market for the distribution of iOS apps to iOS device users, along with a distinct payment processing service for purchases made in relation to or within iOS apps. Apple argues that the relevant product is the facilitation of digital transactions, with multiple transaction markets reflecting different genres of apps (for example, gaming transactions or video streaming transactions). Apple says there is no separate market for payment processing services, which are simply a component of the transaction service which Apple provides.

8. This difference in approach underpins Apple's application for a preliminary issue trial. In essence, Apple argues that a decision in its favour on the question of market definition would dispose of the proceedings, as the Class Representative advances no alternative case to the pleading of a monopoly position arising from the closed nature of the iOS. In that event, a significant saving of cost and time would arise, as the complex issues of abuse and any assessment of damages would not need to be addressed.

(2) Legal Framework

9. It was common ground that the application should be considered as one for a split trial, to be approached in accordance with the factors identified by Hildyard J in *Electrical Waste Recycling Group v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch), which were conveniently summarised by Bryan J in *Daimler AG v Walleniusrederierna Aktiebolag and Ors* [2020] EWHC 525 (Comm) at [27]:

> "[Factor 1] whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary;
>
> [Factor 2] what are likely to be the advantages and disadvantages in terms of trial preparation and management;
>
> [Factor 3] whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;
>
> [Factor 4] whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues or place an undue burden on the judge hearing the case;
>
> [Factor 5] whether a split trial may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);
>
> [Factor 6] whether there are difficulties in defining an appropriate split or whether a clean split is possible;
>
> [Factor 7] what weight is to be given to the risk of duplication, delay, and the disadvantage of bifurcated appellate process;
>
> [Factor 8] generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
>
> Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and pragmatic approach, may include:
>
> [Factor 9] whether a split trial would assist or discourage mediation and/ or settlement and [Factor 10] whether an order for a split late in the day after the expenditure of time and cost might actually increase cost."

(3) The Arguments

10. Much of the argument before us focused on Factor 6 and the prospects of establishing a clean split between the first trial and the second trial. In a Chapter II/Article 102 TFEU case, one would ordinarily expect there to be significant

overlap between the factual material relevant to market definition and dominance and the factual material supporting the allegations of abuse. To take an example, the identification of the price for the calculation of the "Hypothetical Monopolist" or "SSNIP" test (being a conventional tool for assessing the closeness of product substitutability for market definition purposes) may overlap with an enquiry into whether prices were excessive, which is one of the species of abuse pleaded by the Class Representative.

11. However, Mr Kennelly KC submitted on behalf of Apple that we need not be concerned about such an overlap in this case. He argued that the Class Representative's case was narrowly founded on the existence of a monopoly by Apple, by virtue of the closed nature of the iOS. As a result, it was not necessary to conduct any SSNIP test by reference to a competitive price. If the Class Representative's approach to the product market was right, then logically there were no substitutes for the iOS apps (although Apple would argue that there were other constraints on it, for example from the device markets). Further, the assessment of a competitive price was not suggested by the Class Representative's expert as a necessary step.

12. Similarly, in relation to profitability (which is a factual point which might be relevant both to the question of market definition/dominance and also the issue of abuse), Mr Kennelly noted that the Class Representative had not advanced a positive case on her pleadings in relation to the relevance of profitability to market definition/dominance, so no question of overlap arose.

13. More broadly, Mr Kennelly acknowledged that there might be some other areas where factual material relevant to market definition/dominance overlapped with factual material relevant to alleged abuses. However, he drew a distinction between the findings of fact and the legal issues to be determined. The findings of fact could usefully be made in the first trial and would then bind the parties for the purposes of determining relevant abuse issues in any second trial. There would therefore be limited scope for duplication arising from any such overlap (Factor 7 from *Electrical Waste*).

14. In relation to the other factors, Mr Kennelly submitted that:

(1) Even if Apple lost the preliminary issue, there would be a reduction in the complexity of the second trial and therefore a saving in cost and time and a less complex task for the Tribunal (Factors 2 and 4). Similarly, a split trial would make trial preparation easier (Factor 2).

(2) The Class Representative's time estimates for a split trial and a composite trial were essentially the same. The suggestions from the Class Representative that there were significant fixed costs which would be increased by the split trial were not correct – most of the costs were variable and there would be little material difference in cost between either approach. The real position was that a split trial offered a prospect of a significant saving of costs, if the first trial disposed of the proceedings without the need to work on items in the second trial (Factor 1).

(3) A split trial would be more efficient and fairer (Factor 8) and would promote the prospects of settlement by producing more certainty on key issues at an earlier stage (Factor 9).

(4) Factor 10 did not apply, as the application was being made at an early stage.

15. Mr Armitage, for the Class Representative, noted the absence of any precedent for the approach proposed by Apple, which he said reflected the impracticability of Apple's proposal. He drew our attention to a number of aspects of the pleadings which he submitted showed anything but a clean split between market definition, dominance and abuse. These included:

(1) The Class Representative's pleaded case on the restrictions imposed by Apple on app developers and their relevance to the questions of both market definition and abuse. In particular, Mr Armitage noted that in order to identify the relevant market it was necessary to consider potential competition absent the restrictions.

(2) A similar point in relation to the payment processing market and the need to determine whether this is a separate market, along with the alleged abuse of tying, which is concerned with whether the distribution and payment activities are in separate products.

(3) The manner in which Apple's Defence incorporates by reference the same factual material into both the market definition and abuse sections of that pleading.

16. Mr Armitage also noted that the pleadings were likely to develop following disclosure and that the expert evidence submitted so far should be considered to be at an early stage of development. Indeed, the Class Representative was critical of Apple's Defence and Mr Armitage drew our attention to a Request for Information which has been served to elicit greater clarity.

17. On the question of timing, Mr Armitage stressed the likely delay caused by the almost inevitable appeal of the outcome of the first trial (Factor 7). He submitted that there would inevitably be additional cost and delay caused by the need for two trials.

18. There was also a suggestion by the Class Representative that a preliminary issue on market definition/dominance in 2023 would deprive the Tribunal of the benefit of seeing the outcomes of the investigations by regulatory authorities (the Competition and Markets Authority ("the CMA") and the European Commission), which would be available if there was a later unitary trial.

C. OUR DECISION

19. We agree with Mr Armitage that, as the case is currently pleaded, there is a material overlap between factual matters relating to market definition/dominance and abuse issues. We also anticipate that the pleadings are likely to evolve, including following disclosure and the preparation of expert reports. As a result, the overlap is likely to increase in extent, rather than decrease.

20. While we see the logic behind Mr Kennelly's point that factual issues need only be determined once, we are sceptical that things will actually work out that way. We consider there to be a material risk, even on the pleadings as they currently stand, that problems will arise between a first trial, where facts are determined for the purposes of market definition/dominance purposes, and a second trial, where those facts are also relevant to issues of abuse. These might include:

    (1) Complexity in determining which factual matters should be determined in the first trial, as opposed to the second, and how that is to be done in practice (for example, what evidence should be called in which trial).

    (2) Concern about the consequences of deciding factual (and indeed expert) matters in the first trial in isolation from the issues to which they are relevant in the second trial. By way of example, further material might arise in the second trial which called into question findings already made in the first trial.

    (3) Disputes about the existence, nature or extent of factual findings in the first trial, which could be time consuming, confusing for witnesses, and potentially difficult to resolve when attempting to apply them in the second trial.

21. In short, a clean split between the two proposed trials is not possible, and we foresee real practical difficulty in managing the overlaps between the two components. This means that Factors 6 (clean split), 7 (duplication) and 2 (trial preparation and management) appear to weigh firmly against the proposed preliminary issue trial.

22. We do accept that the preliminary issue trial would offer the prospect of substantial savings in time and money if Apple were to succeed (Factor 1). On the other hand, we also see the possibility of significant delay arising from likely appeals of the first trial (whoever wins), which would push back the second trial by at least a year (Factor 7). These considerations largely cancel each other out.

23. Apple suggested that there would be some savings of time and cost in the second trial, by reason of a reduction in complexity. It was not clear to us what issues would be resolved so as to reduce complexity, at least as the case is currently pleaded. As things stand (and as Mr Kennelly himself submitted), the Class Representative has not pleaded an alternative case to her allegations of an effective monopoly position by Apple in the markets identified. If those markets (and that monopoly position) turn out to be incorrect, the Class representative will fail in her claim.

24. Mr Kennelly suggested, as an alternative, that there might be permutations of outcome between that pleaded by the Class Representative and that pleaded by Apple once the matter was tried. This seems quite possible (and is consistent with our view that pleadings might evolve). It is also correct that, in this more nuanced situation, a complete win by the Class Representative in the first trial would obviate the need for her team to prepare the alternative issues which would otherwise have to be dealt with in advance of any unitary trial. This could lead to a reduction in complexity and to costs savings in relation to the second trial. However, the scenario postulated by Mr Kennelly only serves to reinforce the risk that there might be overlaps between the first and second trials. If the first trial is in fact going to involve a series of possible outcomes on market definition and dominance, a clean split with the abuse issues in the second trial seems even less likely and the consequences of that more problematic.

25. To the extent that Apple relied on this argument to engage Factor 4 (the complexity of issues arising in a unitary trial), we are confident that these will be manageable for the Tribunal and the parties.

26. Turning to other factors, these were largely neutral in our view. It is clear that some witnesses might have to give evidence twice (Factor 3), but they were likely mostly to be experts and that seemed manageable. We do not consider that the ongoing regulatory activity should affect the progress of this case – the Class Representative has chosen to bring her claim without basing it on a prior regulatory decision of binding effect and the case needs to be progressed on that basis. The CMA has indicated its intention to submit written observations in the

proceedings, and may apply to make oral submissions, so the Tribunal will have the benefit of the CMA's views in any event.

27. Standing back (and considering Factor 8, the assessment of the overall best course), the lack of a clean split, and the consequences of that, are decisive factors in what would otherwise be a reasonably balanced assessment, given the weight we attach both to the prospects of costs savings in resolving the preliminary issues and the potential for delay through appeals of a first trial. Having carefully considered the arguments, which were very competently advanced by counsel, and considering all the relevant factors, we have not been persuaded that the advantages of a preliminary issue on market definition/dominance outweigh the disadvantages.

28. This case will therefore proceed towards a unitary trial, which has now been fixed for October 2024.

29. This Ruling is unanimous.

Ben Tidswell
Chair

William Bishop

Tim Frazer

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 18 October 2022