Neutral citation [2024] CAT 1

Case No: 1527/7/7/22

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 January 2024

Before:

BEN TIDSWELL
(Chair)
THE HONOURABLE LORD RICHARDSON
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

ALEX NEILL CLASS REPRESENTATIVE LIMITED

Class Representative

- v -

(1) SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED
(2) SONY INTERACTIVE ENTERTAINMENT NETWORK EUROPE LIMITED

Defendants

RULING (PERMISSION TO APPEAL)

A. INTRODUCTION

1. The Defendants seek permission to appeal the judgment of 21 November 2023, in which the Tribunal granted the Class Representative's application for a collective proceedings order and refused the Defendants' applications for summary judgment and to strike out aspects of the Class Representative's claim: [2023] CAT 73 (the "Judgment").

2. The grounds on which permission are sought are:

   (1) A challenge to the Tribunal's rejection of the summary judgment/strike out arguments, on the basis that:

      (i) The Tribunal erred in concluding that it was not necessary for the Class Representative to plead its exclusive dealing and tying allegations as a refusal to supply abuse.

      (ii) The Tribunal erred in failing to reach a conclusion as to the admissibility of the evidence of Mr Steinberg.

   (2) A challenge to the Tribunal's determination that the Class Representative's litigation funding arrangements are enforceable, following changes made to those funding arrangements consequent on the Supreme Court's decision in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("*PACCAR (SC)*"):

      (i) The Tribunal erred in treating as enforceable a clause which contained a phrase: "only to the extent enforceable and permitted by applicable law".

      (ii) The Tribunal erred in its approach to severance, which it dealt with in case it was wrong on the point in (i) above.

(iii) The Tribunal erred in finding that there was no cap which operated so that the funder's return was determined by reference to the damages recovered, so finding that *PACCAR* could be distinguished.

B. JURISDICTION

3. Under section 49(1A) of the Competition Act 1998:

> "An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—
>
> (a) as to the award of damages or other sum (other than a decision on costs or expenses), or
>
> (b) as to the grant of an injunction."

4. The meaning of the phrase "*as to an award of damages*" has been the subject of consideration by the Court of Appeal in recent decisions. See *Evans v Barclays Bank Plc & Others* [2023] EWCA Civ 876 and *Nippon Yusen Kabushiki Kaisha & Ors v Mark McLaren Class Representative Ltd* [2023] EWCA Civ 1471.

5. In the *McLaren* case at [38], Popplewell LJ summarised the current position as follows:

> "(1) The expression "as to" damages should be given as wide a construction as possible because of the desirability of challenges coming directly to the Court of Appeal by way of appeal from the experienced specialist CAT, rather than by an application to the Administrative Court, involving first an application for leave to bring a claim for judicial review ([57]-[58]).
>
> (2) The appeal route is not confined to end of the road and potential end of the road decisions ([143]).
>
> (3) It encompasses decisions on any issue capable of having "some causal effect" on the award of damages. The casual effect need not be very direct or close ([55]).
>
> (4) The decision need not be one which determines whether or not damages are awarded: s. 49(1A)(a) is engaged if the decision might (sufficiently) have causative effect on the quantum of damages ([55]). The test is whether it "could ultimately affect quantum" ([56)], in the sense that there is a real and material risk of it having such an effect.
>
> (5) Interlocutory case management decisions will often fulfil the "as to" damages requirement because they involve a sufficient risk of affecting how

> the case can be conducted, so as potentially to affect the amount of damages. Accordingly, as the CAT observed at [18] of *Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 50, approved by Green LJ at [54], in pragmatic terms, interlocutory case management decisions can be presumed to meet the requirement that they may affect the final substantive outcome in terms of the level of damages awarded and so are subject to the appeal route ([54]). This will not be true of all interlocutory decisions. Those concerned merely with timing are unlikely to do so. But those which concern the extent of disclosure of documents, or of admissible evidence, for example, are likely to do so.
>
> (6) There are outer limits where the causative link will be too remote or non-existent. *Paccar* is an example of the latter. It is to be explained as a case on its own particular facts because the CAT's finding about alternative sources of funding meant that the substantive decision would have no causative effect at all on the recovery of damages ([53]).”

6. The reference to *PACCAR* in the last subparagraph is to the judgment of Henderson LJ in *PACCAR Inc & others v Road Haulage Association Ltd* [2021] EWCA Civ 299, [2021] 1 WLR 3648, in which the Court of Appeal decided that an issue about the enforceability of funding arrangements was not a decision “as to damages”, and therefore was not subject to the appeal jurisdiction conferred by section 49(1A)(a). Crucially, however, in that case the Tribunal had found that there were alternatives to the funding arrangements under challenge and the proceedings would probably continue with some modified funding arrangements. Henderson LJ accepted that logic and based his decision about jurisdiction on that fact.

7. There is no such finding in this case. Further, the funding issues are intertwined with the Tribunal's decision to grant the CPO applications (including making an assessment of whether it is just and reasonable for a proposed class representative to act in that capacity, pursuant to rule 78(2) of the Competition Appeal Tribunal Rules 2015). Separating any aspect of the funding issues from the others would be inefficient and a waste of judicial resource.

8. We are therefore satisfied that we should treat the funding issues generally as arising from a decision “as to the award of damages”. There is no question that the issues relating to summary judgment/strike out fall within that description. Nor is there any question as to whether the proposed grounds of appeal are points of law.

C. THE GROUNDS OF APPEAL

(1) The Tribunal erred in concluding that it was not necessary for the Class Representative to plead its exclusive dealing and tying allegations as a refusal to supply abuse.

9. The basis for this challenge to the Judgment is essentially that the Tribunal misinterpreted the decision of the General Court in *Google LLC v Commission* Case T-612/17 ("*Google Shopping*"), and therefore wrongly concluded that the Class Representative was not required to plead the case as a refusal to supply abuse and that factual and expert evidence was required in order to determine the existence of an independent abuse in this case.

10. Beyond that, the precise basis on which the Defendants seek permission to appeal is unclear, save to observe that the *Google Shopping* decision is being appealed from the General Court to the CJEU. That in itself is an insufficient reason for granting permission, given that the Tribunal did not rely exclusively on *Google Shopping* in reaching its conclusion. See for example:

    (1) The Judgment at [116] and [117], where the Tribunal approaches the matter as one of principle and by reference to the policy underpinning the *Bronner* line of cases.

    (2) The Judgment at [119] and following, where the Tribunal notes that the outcome in *Google* turns on its facts and then considers the factors that are likely to be useful to consider in these proceedings.

11. It should also be noted that the Tribunal has not resolved the question of whether or not *Google Shopping* does in fact apply to these proceedings. All the Judgment does is confirm that there are reasonable grounds for the Class Representative to be able to proceed to trial and a real prospect of success if they do, largely because there are factual matters relevant to that question which ought to be explored at trial.

12. Accordingly, the existence of an appeal in *Google Shopping* itself provides a further reason why permission to appeal the strike out/summary judgment aspects of the Judgment should not be given, as the general rule is that it is not normally appropriate in a summary procedure to decide controversial or novel issues in a developing area. See *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804 at [84].

13. We consider that there is no real prospect of the Defendants succeeding in their strike out/summary judgment applications on appeal and there is no other compelling reason why the Court of Appeal should be asked to consider that question.

(2) The Tribunal erred in failing to reach a conclusion as to the admissibility of the evidence of Mr Steinberg.

14. At the CPO hearing, the Defendants raised two objections to the evidence of Mr Steinberg, an expert relied on by the Class Representative:

    (1) That his evidence was not properly responsive and should not therefore be permitted as reply evidence.

    (2) That Mr Steinberg had failed to establish that he was giving evidence in relation to a recognised body of evidence and Mr Steinberg's qualifications to provide expert evidence.

15. The Tribunal decided that the evidence was clearly responsive[1]. We declined to determine the second point because:

    (1) We were able to reach a conclusion on the summary judgment point (to which Mr Steinberg's evidence was directed) without relying on his evidence.

[1] Because it was tendered in response to the Defendants' strike out/summary judgment applications, and was not simply evidence in reply to the Defendants' response to the CPO application.

(2) Admissibility was a matter best dealt with at trial, where Mr Steinberg could be questioned about the subject matter of his report and his qualifications.

16. There is therefore no basis on which the Defendants can properly complain about the Tribunal's approach to admissibility of Mr Steinberg's evidence (which was essentially that it made no difference to the outcome of the applications) and no prospect of them succeeding in establishing on appeal that it should be inadmissible. Nor is there any other reason why the matter needs to be determined on appeal.

(3) The Tribunal erred in treating as enforceable a clause which contained a phrase: "only to the extent enforceable and permitted by applicable law".

(4) The Tribunal erred in its approach to severance, which it dealt with in case it was wrong on the point in ground (3) above.

(5) The Tribunal erred in finding that there was no cap which operated so that the funder's return was determined by reference to the damages recovered, so finding that *PACCAR* could be distinguished.

17. We can deal with these points together. We consider that there is no real prospect of the Defendants succeeding on these points on appeal:

(1) There is no reason why a party may not contract on a contingent basis, against a possibility that the law may change, and the Defendants produced no authority to the contrary.

(2) The agreement on its face contemplated that the relevant clauses could be severed and so there was no question that the third stage of the common law test for severance, as summarised in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2020] AC 154, could be met.

(3) There was no provision in the agreement applying a cap, which was a pre-requisite to the application of *PACCAR (SC)* to these proceedings.

18. However, we recognise that the decision in *PACCAR (SC)* has resulted in funders and class representatives in a number of collective proceedings amending their funding arrangements so as to avoid the consequences of that decision, which in turn has led to those amended funding arrangements being challenged by defendants in those cases. This is creating uncertainty and consuming the resources of the Tribunal and the parties, and that is unlikely to cease until there has been a conclusive decision on these points by the Court of Appeal. We do therefore consider there to be a compelling reason why we should grant permission to appeal in relation to the funding grounds. It is likely that permission will be granted in other similar cases and it would be expedient for those to be dealt with together in any hearing in the Court of Appeal.

D. DISPOSITION

19. We refuse permission to appeal in respect of Grounds (1) and (2). We grant permission to appeal in respect of Grounds (3), (4) and (5), on the basis that there is no real prospect of success, but there is a compelling other reason to grant permission.

20. This Ruling is unanimous.

Ben Tidswell Lord Richardson Derek Ridyard
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*) Date: 5 January 2024
Registrar