Neutral citation [2023] CAT 34

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1572/7/7/22 and 1582/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 May 2023

Before:

SIR MARCUS SMITH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

CLAUDIO POLLACK

Applicant/Proposed Class Representative

- v -

(1) ALPHABET INC
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE UK LIMITED

Respondents/Proposed Defendants

AND BETWEEN:

CHARLES MAXWELL ARTHUR

Applicant/Proposed Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE UK LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 19 May 2023

JUDGMENT (CASE MANAGEMENT: HANDLING OF CARRIAGE DISPUTES)

APPEARANCES

Julian Gregory (instructed by Humphries Kerstetter LLP) appeared on behalf of the Proposed Class Representative, Mr Pollack.

Gerry Facenna KC, Nikolaus Grubeck and Alison Berridge (instructed by Hausfeld & Co LLP) appeared on behalf of the Proposed Class Representative, Mr Arthur.

Meredith Pickford KC, and Warren Fitt (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Proposed Defendants in the case of both applications.

CONTENTS

A. CARRIAGE DISPUTES: THE PRESENT POSITION

1. In *Michael O'Higgins FX Class Representative Limited v. Barclays Bank plc and others*,[1] this Tribunal (differently constituted) considered whether a "carriage dispute" between two, rival, applications for certification of collective proceedings before the Tribunal under section 47B of the Competition Act 1998 should be dealt with as a preliminary issue in advance of certification or at the same time as – and in combination with – the question of certification.

2. Although both applicants submitted that the question of carriage should be dealt with in advance of the question of certification, and the respondents were agnostic on the point,[2] the Tribunal nevertheless required full submissions on this case management question and – for the reasons given in the judgment – ultimately decided not to hear carriage as a preliminary issue in advance of certification.

3. A significant part of the thinking of the Tribunal was that: *(i)* the questions of carriage and certification were, to an extent at least, intertwined and difficult to separate; *(ii)* there was significant uncertainty about the certification process because the Court of Appeal's decision in *Merricks v. Mastercard Inc* was on appeal to the Supreme Court, and yet to be heard; and *(iii)* this was a novel jurisdiction, where experimentation and preliminary issues might be unwise.

4. That case management decision was not appealed and – after various adjournments so that the Tribunal would have the benefit of the Supreme Court's decision in *Merricks* – the combined carriage/certification issues were heard by the Tribunal in 2021 and a judgment handed down on 31 March 2022.[3]

5. As is clear from the Tribunal's preliminary issue judgment, the intention was that the *O'Higgins* case, as the first carriage dispute before the Tribunal, act as a guide for future cases. In the event, the *O'Higgins* case served far more as a bellwether for the *Pro-Sys* "blueprint to trial" test that is now prevalent in

[1] [2020] CAT 9.
[2] At [17] and [19].
[3] [2022] CAT 16.

certification applications than as a guide to the resolution of carriage disputes. Indeed, in a very long judgment, the question of carriage required and received specific consideration in only three paragraphs.[4]

B. THE PRESENT CASE MANAGEMENT QUESTIONS

6. This is a case management conference to manage the certification application of Mr Pollack, who seeks the Tribunal's authorisation to bring collective proceedings against the above-named proposed defendants (collectively, "Google").

7. Mr Arthur also seeks the Tribunal's authorisation to bring similar collective proceedings against Google. Mr Arthur's application is not formally before the Tribunal at this hearing, but (sensibly, and recognising the realities) both proposed class representatives have been in communication with one another, and (with the Tribunal's consent) Mr Arthur has made written and oral submissions on the matters arising.

8. At this case management conference, I therefore heard from Mr Pollack (the "Pollack PCR"), Mr Arthur (the "Arthur PCR") and Google.

9. It is unnecessary for me to articulate in any detail the claims that the Pollack PCR and the Arthur PCR wish to bring against Google. It is sufficient to stress that I proceed on the express assumption that it is not (without major concession by one or other PCR) possible to certify both applications. That is because: *(i)* the claims are very similar; and *(ii)* both PCRs seek (in large part) certification on an "opt-out" basis. Opt-out collective proceedings are the proceedings which (speaking generally) cause carriage disputes, because it is not right for the same class member to be in both classes, yet if two sets of similar proceedings are both certified as "opt-out", that will be precisely the outcome.[5]

---

[4] At [388] to [390], although these paragraphs do substantially draw on the earlier analysis.
[5] The whole point of "opt-out" proceedings is to leverage the inertia of the claiming class: people generally do not opt out, and so remain "in".

10. This case management conference thus represents a second opportunity to consider how carriage disputes ought to be approached, in light of lessons learned from the significant number of collective proceedings that are now in the process of being litigated before the Tribunal.

11. In case it is not obvious, I should state that I do not consider myself constrained by the Tribunal's decision in *O'Higgins*, where it was determined that carriage and certification should be heard together. That was – in my judgement – the correct decision in that case, given its "first in time" status and the (then) novel nature of the certification jurisdiction. But it may not be the correct answer for this case, nor generally. Whilst I am, of course, concerned only with these applications, the points being made by the parties before me as to the management of this carriage dispute were generic and not particularly specific to the applications before me.

C. AN APPROACH

(1) The importance of cost control

12. Collective proceedings are generally speaking expensive and – even to bring a case as far as a certification application – involve significant work and the investment of considerable time and money by the proposed class representative, the lawyers retained and the funders involved. It is important to stress that costs need to be kept to the proper minimum in order to ensure the continued viability of the collective proceedings regime which (as has been stressed many times) has its principled foundation in access to justice.

13. In light of the experiences since the *O'Higgins* preliminary issue ruling was made (including the *O'Higgins* "rolled up" certification/carriage hearing itself), it cannot be disputed that hearing carriage in advance of certification can save considerable costs. At the very least, on the resolution of the carriage dispute, only one proposed class representative will remain to incur costs in dealing with the question of certification. Also, given the nature of the carriage dispute (a dispute between two claimant representatives), the proposed defendant(s) (the respondent(s) to the certification application) inevitably have less to say.

Proposed defendants should not – save to assist the Tribunal – be entitled to have much of a say in picking the party that will be seeking to carry on collective proceedings against them.

(2) Can carriage fairly be separated from certification?

14. The question is whether a carriage dispute can fairly be resolved in advance of the question of certification. That question was very much at large in the *O'Higgins* preliminary issue decision. Since that decision, we have all had the benefit of the Supreme Court's decision in *Merricks*, which held that there was no merits test distinct from the usual jurisdiction to strike out claims that are not reasonably arguable. From this, it follows that questions arising on certification are likely to be quite technical, in terms of whether the various criteria for certification (what, in *O'Higgins*, were termed the "Authorisation Condition" and the "Eligibility Condition") are satisfied, and are unlikely materially to inform the outcome of any carriage dispute.

15. Neither the Pollack PCR nor the Arthur PCR contended that there was any advantage in hearing carriage and certification together – echoing the position of the proposed class representatives in *O'Higgins*. As in *O'Higgins*, these contentions are entitled to great weight – but they are not conclusive.

16. In almost all case management decisions, this Tribunal will accord substantial, but not conclusive, weight to the agreement of the well-advised and well-represented parties that appear before it. Collective proceedings fall into a different category, because the Tribunal acts not only as the decision-maker in relation to the substantive dispute, and not only as the case manager, but also (and uniquely in collective proceedings) as the ultimate protector of the interests of the class (to be) represented. The interest of the class is not directly represented before the Tribunal – although, of course, the class will have a (proposed) class representative – and that needs to be borne in mind.

17. However, having considered the matter, and having heard submissions from both PCRs and Google, I can see no advantage in this case in hearing carriage

with certification; and I suspect – although each case will have to be considered on its merits – that that will be the position in the case of most carriage disputes.

(3) The risk of delay

18. Carriage disputes do not emerge "fully formed". It would be a rare case – and so far unprecedented in the Tribunal's experience – for two applications for certification raising a carriage dispute to be filed at more or less the same time. Usually, there is a gap, often of some months, between the making of one application and making of a second, rival, application.

19. Clearly, the Tribunal cannot – when faced with an application for collective proceedings to be certified – simply "hang fire" and wait to see if another "rival" application emerges. Justice delayed is justice denied. That is a precept that applies as much to collective proceedings as it does to any other form of process. Accordingly, when an application for certification is made, the Tribunal will proceed as expeditiously as it can, consistently with the overriding interest of doing justice.

20. That means that there is clearly a risk of a clear procedural gap emerging between the status of the application first in time and the application second in time. In *O'Higgins*, the Tribunal was sceptical about utilising the "first to file" test as a means of differentiating the two applicants in that case.[6] Whilst "first to file" can never be discounted, it can (although it does not always) raise perverse incentives. Take, for example, a "follow on" claim, where a claim for damages rides on the back of a decision of the authority (i.e. the CMA): it would be unfortunate if there was a sense that speed of reaction to the authority's work should be significant in determining carriage. On the other hand, where a proposed class representative has spent time and money in framing a carefully considered, standalone, claim, some credit ought to be given for framing the claim first. These two cases lie at different ends of the spectrum, and there will doubtless be many cases in-between. All that I wish to stress is that no potential

[6] [2022] CAT 16 at [348] and [389(2)].

class representative, considering making an application for certification, should assume that speed trumps consideration.

21. I am going to say nothing more about "first to file" in this case, save to say that I do not regard the fact that the Pollack PCR filed on 30 November 2022 and the Arthur PCR filed on 29 March 2023 as in and of itself determinative of carriage. Clearly, the greater the gap in procedural development (unless it can be justified), and the closer the applicant first to file is to a substantive resolution, the harder it will be to displace that applicant.

22. Where there are two rival applicants for certification, the proposed class representatives should (as they have here) co-operate so as to ensure that a hearing of the issue of carriage is listed before the Tribunal as soon as possible. The applicants should not allow considerations of service to delay the fixing of a carriage dispute hearing. Service can be a real cause of delay, as is pointed out in the Pollack PCR's written submissions:

> "19. Among other things: (a) almost six months have passed since Mr Pollack's CPO Application was filed; and (b) almost three months of delay has resulted from the unwillingness of the foreign proposed Google defendants to instruct HSF to accept service on their behalf.
>
> 20. Google considers there is no need to justify this approach, notwithstanding the resulting delay: "[t]he regime for service outside of the jurisdiction is clearly established under Rule 31 of the CAT Rules 2015. No further justification for Google's position in adhering to that regime is required…""

23. Be that as it may, issues of service should not hold up resolution of carriage issues, particularly where the proposed defendants are on notice of the applications for certification (as they are here).

(4) Is this a preliminary issue?

24. Google stressed that notwithstanding the procedural advantages articulated in paragraphs 14 to 17 above, this was not a case where it was appropriate for me to order a preliminary issue. Mr Pickford, KC, who appeared for Google, laid great stress on the fact that a carriage dispute was not a discrete matter capable of being determined as a preliminary issue. He stressed that this was precisely

the conclusion that the Tribunal had reached in *O'Higgins*.[7] There the Tribunal concluded that (using the terms defined in that case) it was not possible to separate the Authorisation Condition from the Eligibility Condition, and it is significant that neither PCR sought to contend otherwise. Mr Pickford also referred me to the decision of Neuberger J in *Steele v. Steele*,[8] and he pointed out (rightly) that ordering carriage as a preliminary issue would not meet a number of the criteria laid down by Neuberger J in that case.

25. These are questions that go to discretion, not jurisdiction. I am satisfied that although ordering carriage to be heard as preliminary issue will not determine any of the aspects of either the Authorisation Condition or the Eligibility Condition – and so will neither dispose of the case nor even a part of the case – there will nevertheless be a significant saving in terms of time and money if, before the certification hearing takes place, one or other of the Pollack PCR or the Arthur PCR is removed from the scene. I am completely satisfied that to take such a course would not only be fair to the PCRs (indeed, this is the course that they advocate) but also to Google:

(1) Google will not, unless they choose to do so, have to participate in the carriage dispute at all, and would be perfectly entitled to reserve their position until the certification hearing (when the nature of the certification application will be completely clear, and Google will not have to fight on two fronts).

(2) I dismiss as fanciful Google's suggestion that Google's position might in some way inadvertently be prejudiced by the Tribunal favouring one PCR over another at the carriage hearing and thereby be predisposed into thinking that the PCR that succeeds in the carriage dispute should also succeed at the certification hearing. The questions that arise at each stage are different, and Google can be assured that there will be no "following wind" at the certification hearing emanating from the carriage hearing. It follows that the suggestion that separate Tribunals

[7] [2020] CAT 9 at [54]*ff*.
[8] [2001] CP Rep 106.

should hear the carriage and certification issues is to be rejected save in wholly exceptional circumstances – which these are not.

(3) There can be no question of the Tribunal's consideration of the Authorisation Condition or the Eligibility Condition on certification being either diluted or distorted by the anterior consideration of carriage. All that carriage does is remove from the equation one applicant who could, in any event, withdraw of their own volition. It is not for Google but the Tribunal to determine how best the issues of carriage and certification are to be resolved and – provided Google is not prejudiced – the Tribunal must exercise its judgement according to what is the best case management outcome.

26. The one point that has given me pause for thought is the prospect of the carriage ruling itself being appealed to the Court of Appeal. That was a concern in *O'Higgins*,[9] and an appeal hearing of a carriage dispute would undoubtedly be procedurally disruptive. In the course of submissions, all accepted that a successful application for permission to appeal by the losing PCR was unlikely, but could not be closed out. It seems to me that that is right, and that the prospect of a disruptive appeal should not be used as a theoretical reason for refusing to order a preliminary issue to determine carriage. If, in due course, the risk shows itself as being more than theoretical, matters can (of course) be re-visited in later cases.[10]

D. CONCLUSION

27. A hearing of the carriage dispute will be listed as soon as practicable, and in advance of any application for certification. I will leave the discussions as to precise timetabling to follow this judgment, but the general aim would be to have carriage heard in October 2023 (a one-day hearing should be sufficient) with certification heard in January 2024 or as soon as possible thereafter.

---

[9] See [74(1)].

[10] Another, rather more fanciful issue, was the question of whether a PCR, whose application was stayed at the end of the carriage dispute, might nevertheless resurrect their application if something went wrong with the favoured application at certification or beyond. I accept that this is a theoretical possibility: but not one sufficiently serious to deter hearing carriage as a preliminary issue.

28. It will not be necessary to list a separate case management conference in the case of the Arthur PCR: all issues relevant to that hearing have been dealt with at this hearing; and to the extent any remain outstanding, they can be dealt with on the papers.

Sir Marcus Smith
President

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 26 May 2023