IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1582/7/7/23

1572/7/7/22

BETWEEN:

AD TECH COLLECTIVE ACTION LLP

Class Representative

- v -

(1) ALPHABET INC.

(2) GOOGLE LLC

(3) GOOGLE IRELAND LIMITED

(4) GOOGLE UK LIMITED

Defendants

(the "Proceedings")

REASONED ORDER (PERMISSION TO APPEAL, COSTS)

UPON the Class Representative's ("Ad Tech's") application for a collective proceedings order ("CPO") dated 2 October 2023 ("CPO Application")

AND UPON the Tribunal's Order dated 26 October 2023 granting the joint application to consolidate the respective applications by Mr Claudio Pollack on 30 November 2022 (with case number 1572/7/7/22) (the "Pollack Proceedings") and by Mr Charles Arthur on 29 March 2023 (with case number 1582/7/7/23) (the "Arthur Proceedings") to bring collective proceedings under section 47B of the Competition Act 1998 (the "Amalgamation Application")

AND UPON the Defendants' ("Google's") response to Ad Tech's CPO Application dated 14 December 2023 ("CPO Application Response")

AND UPON hearing counsel for the Ad Tech and Google at a hearing on 8-10 May 2024 ("Certification Hearing")

AND UPON the Tribunal having handed down its Judgment on 5 June 2024 ([2024] CAT 38) (the "Judgment") approving the CPO Application

AND UPON reading Google's application for permission to appeal the Judgment dated 26 June 2024**,** Ad Tech's response to Google's application for permission to appeal dated 10 July 2024 and Google's reply to Ad Tech's response dated 12 July 2024

AND UPON reading the submissions in respect of costs from Ad Tech dated 28 June 2024 and 19 July 2024, and from Google dated 12 July 2024

IT IS ORDERED THAT:

1. Google is refused permission to appeal the Judgment.

2. The costs incurred by Mr Pollack, Mr Arthur and Ad Tech in applying for certification are to be costs in the case, such costs to be subject to detailed assessment and assessed on the standard basis by a costs officer of the Senior Courts of England and Wales if not agreed.

3. Google is to pay Ad Tech's costs of and arising out of the hearing for the Amalgamation Application, such costs to be subject to detailed assessment and assessed on the standard basis by a costs officer of the Senior Courts of England and Wales if not agreed.

4. Google must make an interim payment to Ad Tech in the amount of £1,000,000 within 14 days of the date of this order.

REASONS

Permission to Appeal

1. Google seeks permission to appeal on the following grounds:

   (a) **Ground One:** The Tribunal erred in holding that the test in *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57 ("*Microsoft*") is not a precondition to certification. The Tribunal did not apply the necessary degree of scrutiny to Ad Tech's methodology and erred in concluding there was a sufficient blueprint to trial in this case.

   (b) **Ground Two:** The Tribunal applied the wrong approach in assessing Ad Tech's pleading of the counterfactual. Google says that the claim has not been particularised with sufficient specificity for it to know the case it has to meet for each abuse and how it is said to have caused loss. It says the counterfactual proposed by Ad Tech is at a level of generality and abstraction that does not meet the requisite standard.

   (c) **Ground Three:** The Tribunal erred in declining to hear or rule upon Google's application to strike out Ad Tech's claim for damages in the period prior to 1 October 2015.

2. The test for permission to appeal requires that the Tribunal considers that the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard. For the reasons given below, we find that the test for permission to appeal is not met.

Ground One

3. The Tribunal's statement at [39] in the Judgment that the *Microsoft* test is not a pre-condition to certification reflects Green LJ's observations on the *Microsoft* test in *London & South Eastern Railway Limited and Others v Justin Gutmann* [2022] EWCA Civ 1077. Green LJ noted at [53] that "[t]he Microsoft test is not a statutory test…It confers upon the court or tribunal a broad discretion to approve of the methodology to be used at trial".

4. Notwithstanding these comments, the Tribunal considered the methodology put forward by Ad Tech in light of the *Microsoft* test, in keeping with its gatekeeper function. It found that the averments in the Claim Form were triable because the proposed methodology was capable of ascertaining the loss and damage suffered by the class in respect of the pleaded abuses. The Tribunal has a broad discretion to approve of the methodology (as noted by Green LJ in the comment cited above), and we consider it was appropriately exercised in this case. Acordingly, we do not find that there is a real prospect of success in relation to Ground One.

Ground Two

5. As the Tribunal noted in *Gormsen v Meta* [2024] CAT 11 at [7(2)(iii)-(3)]: "The Tribunal attaches great importance to theories of harm, their clear articulation, and an explanation as to how the facts supporting the theory will be obtained so that the Tribunal can be assured that the claim, as pleaded, is triable and can be case managed. There is, inevitably, a nexus between the manner in which a case is put (what has to be pleaded) and how that case is to be vindicated in court at trial [...]". Properly articulated pleadings enable a party to know the case it has to meet, and allow an arguable case to be tried.

6. The Tribunal considered that Ad Tech's case was triable based on the counterfactual as pleaded and as articulated in the methodology, and exercised its discretion to certify the case. Accordingly, we are similarly not satisfied that Ground Two has a real prospect of success.

Ground Three

7. In its CPO Application Response, Google sought that claims in respect of damage suffered pre-October 2015 be struck out on the basis they were time-barred (the "Strike-Out Application"). At paragraph [136], Google stated that this application could and should be addressed at the Certification Hearing.

8. After setting out the case management matters it had considered, the Tribunal held that "these questions of limitation should be dealt with not as questions of strike out but as part of the main trial itself" (paragraph [48] of the Judgment). Google contends this

amounted to an effective dismissal of the Strike-Out Application without having heard any argument on the substance of the application.

9. In considering whether to exercise its power to strike out a claim in whole or in part under Rule 41(1)(b) of the Competition Appeal Tribunal Rules 2015, the Tribunal will apply the principles set out by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) ("*Easyair*") at [15]. A key question to be answered is whether the relevant claim has a realistic prospect of success; both Ad Tech and Google directed submissions to this point in their skeleton arguments for the Certification Hearing.

10. At the Certification Hearing, Google stated that it was "not moving [the "Strike-Out Application"] before you today, but we are not seeking to withdraw the application. Of course, it is a question as to when it should be heard" (Transcript Day 3, p 44, lines 9-10). Counsel for Google then proceeded to address the Tribunal "effectively as if this were an application for a preliminary issue" (Transcript Day 3, p 51, line 1) but stated that the application was one that was "pending before the Tribunal which you ought to rule on in the same way that one rules on applications for strike out or summary judgment in all proceedings before the Tribunal" (Transcript Day 3, p 51, lines 7-9).

11. The Tribunal stated (Transcript Day 3, p 52, lines 10-13) that it has a discretion as to when questions of strike out are dealt with, and noted that generally strike out applications do not complicate the process but narrow and simplify matters. Having found at paragraph [47] of the Judgment that this was an instance in which the Strike-Out Application could complicate the process, the Tribunal determined that the relevant limitation issues would be dealt with as part of the main trial.

12. Noting Google did not move the Strike-Out Application at the Certification Hearing, case management considerations were relevant to determining when the application would be heard. The Tribunal has a broad discretion in relation to case management decisions, and appeal courts will not interfere with such decisions lightly.

13. The Judgment was not dispositive of the limitation questions which are the subject of the Strike-Out Application, which will be considered as part of the Tribunal's overall case management duties. As the Judgment notes, the Tribunal considered that the certification hearing was not the time for hearing the Strike-Out Application, and all parties acceded to this. The Tribunal made no determination beyond this, but to express

the view that (given the nature of the issue) strike-out ought to be considered at the main trial. That, however, is a matter that can be re-considered if hearing the Strike-Out Application earlier will be more case efficient. The Tribunal appropriately exercised its discretion as to case management on the question of scheduling, which (if there is a change in circumstance, can and should be reconsidered) and there is no real prospect of Google persuading the Court of Appeal to overturn this aspect of the Judgment.

Costs

14. Ad Tech seeks:

(a) 85% of its costs of the CPO Application incurred from the date of the CPO Application Response;

(b) its costs of and occasioned by Google's opposition to the Amalgamation Application, being Ad Tech's costs of the Amalgamation Application incurred from the date of Google's objection on 10 October 2023;

(c) the balance of the costs of the CPO Application and those of its antecedent applicants, Mr Pollack and Mr Arthur, to be costs in the case (excluding the costs of the Amalgamation Application);

(d) interest on the costs sought under (a) and (b) above:

(i) from the date on which they were paid by or on behalf of Ad Tech, Mr Pollack or Mr Arthur to the date of the CPO at a rate of 4% per annum above the Bank of England base rate from time to time; and

(ii) from the date of the CPO to the date of payment at a rate of 8% per annum;

(e) a payment on account of the costs sought under (a) and (b) above in the sum of £1,386,216.49 (including VAT), pending detailed assessment.

15. Google contends for the following:

(a) Mr Arthur should pay Google's costs of his CPO application;

(b) the costs of Mr Pollack, and the costs of Ad Tech from 17 October to 13 December 2023 inclusive, should be costs in the case (subject to the reservation at (c) below in respect of carriage and amalgamation);

(c) costs in the case shall exclude any costs referrable to carriage or amalgamation (to include the costs of the hearing of the Amalgamation Application), and there should be no order in respect of those costs;

(d) costs of the CPO Application from and including 14 December 2023 to 5 June 2024 should be payable as follows:

(i) 25% to be costs in the case;

(ii) 75% to be paid to Ad Tech;

(e) Ad Tech's applications for interest on costs or an immediate detailed assessment should be refused;

(f) Google will make a payment on account of the CR's costs which are payable in any event, which should not exceed £763.859.95 (including VAT).

16. Generally speaking, the costs of applying for certification (to the extent not unsuccessfully resisted by the defendant/s) ought to be in the case. The costs incurred by Mr Pollack and Mr Arthur in making their respective CPO applications will be costs in the case, given the Ad Tech claim is a product of the work completed by each former proposed class representative in preparing and making their applications. Similarly, the costs of Ad Tech's CPO Application will be costs in the case. Mr Pollack and Mr Arthur have acted responsibly in avoiding a carriage dispute, and any duplication of cost (if any) or any costs not reasonably incurred (again, if any) can be dealt with and considered on detailed assessment.

17. The Tribunal indicated in its Order of 26 October 2024 that the costs in each of the Arthur and Pollack Proceedings would be costs in these proceedings from 16 October 2023. Google unsuccessfully resisted the consolidation of the proceedings, and should therefore pay Ad Tech's costs of the hearing of the Amalgamation Application.

18. Ad Tech succeeded in its CPO Application, and ought to receive its costs of and arising out of the Certification Hearing.

19. The above costs should be subject to detailed assessment, if not agreed. Google should make an interim payment to Adtech in the amount of £1,000,000 within 14 days of the date of this order. Questions of interest on costs are reserved to the detailed assessment.

Sir Marcus Smith President	John Alty	Dr Maria Maher

Made: 28 October 2024
Drawn: 28 October 2024