Neutral citation [2024] CAT 68

Case Nos: 1568/7/7/22
1595/7/7/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 November 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)

Sitting as a Tribunal in England and Wales

BETWEEN:

JULIE HUNTER

Applicant/Proposed Class Representative

- v -

AMAZON.COM, INC. AND OTHERS

Respondents/Proposed Defendants

AND BETWEEN:

ROBERT HAMMOND

Applicant/Proposed Class Representative

- v -

AMAZON.COM, INC. AND OTHERS

Respondents/Proposed Defendants

RULING (COSTS OF CARRIAGE DISPUTE)

A. INTRODUCTION

1. Both Ms Hunter and Mr Hammond filed applications pursuant to s. 47B of the Competition Act 1998 to act as the class representative and bring collective proceedings on an opt-out basis against various companies in the Amazon group ("Amazon"). Both claim forms alleged on behalf of substantially overlapping classes a broadly similar abuse of a dominant position by Amazon. This gave rise to what is commonly called a 'carriage dispute' between the two proposed class representatives ("PCRs") as to which of those proceedings would be the more suitable, if a collective proceedings order ("CPO") were to be granted: see rule 78(2)(b) of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules"). By order of 26 September 2023, and with the agreement of both applicants, it was directed that this dispute should be decided on a preliminary basis before the substantive CPO hearing.

2. The carriage dispute was heard on 20 December 2023. By its ruling on 5 February 2024, the Tribunal resolved the dispute in favour of Mr Hammond: [2024] CAT 8 (the "Carriage Ruling"). The Tribunal considered that the key differentiator for the purpose of determining the dispute was the methodology proposed by the two applicants' respective experts. The Tribunal found that the methodology proposed by Mr Hammond's expert was preferable, but it did not hold that the methodology proposed by Ms Hunter's expert was so unsatisfactory that it could be rejected as inevitably failing the *Pro-Sys/Microsoft* test[1] even before a contested CPO hearing: Carriage Ruling at [32]-[36]. Ms Hunter's application was stayed pending the outcome of the CPO hearing (such that if Mr Hammond failed to obtain a CPO, Ms Hunter could potentially seek to revive her application): *ibid* at [38].

3. Mr Hammond has applied for his costs of the carriage dispute as against Ms Hunter, and he has served a schedule of costs showing his total costs of hearing of the carriage dispute at £807,972 plus VAT, of which he seeks 70% by way

[1] i.e. the test derived from the judgment of the Canadian Supreme Court in *Pro-Sys Consultants v Microsoft Corp* [2013] SCC 57,

of interim payment. Both parties have agreed that this application should be determined on the papers.

4. This ruling uses the same abbreviations as the Carriage Ruling.

B. PRIOR CASES

5. There have been two prior decisions of the Tribunal on a carriage dispute.

6. In the FX collective action, the Tribunal was faced with two competing applications for a CPO for opt-out proceedings following-on from two parallel infringement decisions of the European Commission relating to FX spot trading. The substantive CPO applications were heard together, and a major dispute with the proposed defendants (a number of major banks) was as to whether the proceedings could proceed on an opt-out basis or only as opt-in collective proceedings. By a majority, the Tribunal held that the applications for opt-out proceedings should be refused, but that both applicants should be given the opportunity to submit a revised application for certification on an opt-in basis: *Michael O'Higgins FX Class Representative Ltd v Barclays Bank PLC and others, Evans v Barclays Bank PLC and others* [2022] CAT 16 ("*FX*"). In the light of this, it was perhaps unsurprising that the choice as to carriage between the rival PCRs (the "Evans PCR" and the "O'Higgins PCR") was addressed rather briefly, at [389] and [409]. The Tribunal held that if the proceedings were, contrary to the view of the majority, to be certified on an opt-out basis, the application of the Evans PCR was to be preferred, on the grounds that the claims he articulated "have been better thought through and represent, to our mind, a marginally better attempt at capturing an elusive loss than the attempt by the O'Higgins PCR": [389(4)]. The Tribunal observed that this was "an extremely marginal call": [409].

7. When it came to the costs of, specifically, the carriage dispute, by Order of 28 November 2022 the President determined that there should be no order for costs. In explaining why this was the appropriate order, he stated:

> "The Judgment refused the applications for opt-out collective proceedings and permitted both the O'Higgins PCR and the Evans PCR to proceed with opt-in

> collective proceedings, and that they could do so in parallel. The Carriage Issue was an issue secondary to the basis for certification, which occupied the vast majority of the work done and time occupied before the Tribunal."

8. The second previous decision on carriage was made in the Trucks collective action. The Tribunal determined that the application by the Road Haulage Association ("RHA") to bring opt-in proceedings should be preferred, as against a rival application by UK Trucks Claims Ltd ("UKTCL") to bring proceedings on an opt-out basis: *Road Haulage Association Ltd v MAN SE and others / UK Trucks Claim Ltd v Stellantis NV and others* [2022] CAT 25 ("*Trucks"*). The decision was based on evaluation of a number of factors, and although the Tribunal found that both applications satisfied the criteria for certification it held that the RHA's claim was clearly the more suitable: see at [197]-[231] and [261]. However, as in *FX*, the carriage dispute was not heard separately but as part of the substantive CPO hearing, where opposition to both applications was advanced by the proposed defendants and third party objectors.

9. By its subsequent ruling on costs, the Tribunal held that UKTC should pay the RHA's costs insofar as it had incurred additional costs by reason of UKTC's opposition: [2022] CAT 51. The Tribunal said, at [31]:

> "In a situation where the unsuccessful applicant for a CPO causes the successful applicant to incur reasonable but additional costs in the certification process (i.e. over and above the costs involved in dealing with all the arguments of the respondents and any objectors), we do not think it is fair that the successful applicant (or its funder) should be left bearing those costs. In normal circumstances, we would expect those costs to be relatively modest. That is indeed the case here: in the schedule setting out its costs from the date of the filing of responses to the CPO hearing, only 4% of those costs are attributed to the "UKTC claim". We consider it is fair and reasonable in this case that UKTC should be liable to the RHA for that category of costs, to be assessed on the standard basis if not agreed."

It is notable that there the costs which the RHA accordingly sought to recover from UKTC amounted to around £70,000. Although UKTC appealed the Tribunal's judgment to the Court of Appeal, there was no challenge to this decision on costs.

10. In *FX*, both the Evans PCR and the O'Higgins PCR appealed the Tribunal's judgment to the Court of Appeal, and the appeal by the O'Higgins PCR included a challenge to the decision on the carriage issue. The Court of Appeal allowed

the appeal against the decision refusing to certify on an opt-out basis, but dismissed the appeal on the issue of carriage: [2023] EWCA Civ 876. The Court therefore determined that a CPO should be issued in the Evans proceedings. On the question of the costs of the carriage dispute, Green LJ (with whose judgment the Chancellor and Snowden LJ agreed) said at [169(ii)]:

> "In relation to the costs of the carriage dispute below, the CAT made no order for costs. There is logic in this. Based upon costs estimates before the Court the carriage disputes amount to expensive satellite litigation. Where there is competition for a single PCR berth the costs incurred might be viewed as an investment decision by a funder and proposed lawyers. If the CAT in the future brings forward the carriage decision, as suggested in the judgment, then the costs will be constrained. I can see no basis upon which the order of the CAT should be set aside…."

11. The Court of Appeal judgment in *FX* was issued after the costs ruling in *Trucks.*

12. Recently, there was a potential carriage dispute when two overlapping applications were issued seeking a CPO for opt-out collective proceedings against companies in the Google group. After hearing the parties, the President held that the carriage dispute should be heard in advance of the substantive CPO application: *Pollack v Alphabet Inc and others, Arthur v Alphabet Inc and others* [2023] CAT 34. However, the two PCRs then agreed to consolidate their proceedings and established a special purpose vehicle to take the consolidated proceedings forward. The Tribunal duly made a consolidation order under rule 17 of the CAT Rules: [2023] CAT 65.

C. THE COSTS SUBMISSIONS

13. In support of his application for costs of the carriage dispute, Mr Hammond submits that he was "clearly the 'winner'" and that he is therefore entitled to his reasonable and proportionate costs. He relies on what the Tribunal said in *Trucks*: para 9 above. And he says that if those costs are not recovered from Ms Hunter, then they will have to be met from Mr Hammond's funding and accordingly will to that extent reduce the resources available to advance the interests of the class against Amazon, which cannot be in the public interest.

14. Moreover, referring to what happened in the *Pollack/Arthur v Alphabet* proceedings (para 12 above), Mr Hammond points out that his solicitors repeatedly sought to explore the options for 'co-counselling' with Ms Hunter's solicitors, both before Ms Hunter's claim was filed in November 2022 and in October 2023, several months after Mr Hammond filed his claim. In May 2022, Mr Hunter's solicitors rejected that approach but said that as and when a claim was close to being issued they were open to discussion to see if they can agree suitable terms to avoid a carriage dispute.[2] However, Mr Hammond says that Ms Hunter's representatives did not subsequently engage substantively on the question of co-counselling. He argues that where no effort has been made by a PCR to attempt to compromise a potential carriage dispute, a costs order against the losing PCR is "clearly appropriate".

15. In response, Ms Hunter submits that the general approach, at least where the Tribunal finds that both applications were capable of certification, is that there should be no order as to the costs of the carriage dispute. She relies strongly on what was said by the Court of Appeal in *FX* (para 10 above). She argues that the Tribunal's ruling on the costs of the carriage dispute in *Trucks* has been superseded by that Court of Appeal judgment, and that in any event the circumstances in *Trucks* can be distinguished as there the Tribunal held a 'rolled up' hearing of carriage and certification.

16. Ms Hunter also submits that an approach whereby each PCR bears their own costs accords with broader policy reasons. She says that it is in the class members' interests for there to be competing CPO applications that will encourage rival PCRs to improve the quality of their applications. She says that rival PCRs should not be deterred from bringing competing applications for fear of an adverse costs order whereas an adverse costs order may deter a further CPO application once the first has been issued, and therefore indirectly favour a 'first to file' approach. Further, Ms Hunter argues that routinely making no order as to costs will encourage parties not to incur excessive or disproportionate costs on carriage disputes, and make it more likely that the parties will seek to

[2] By a ruling given on 25 October 2024, Mr Hodge Malek KC sitting as a chair of the Tribunal held that this correspondence was not privileged and could be relied on: [2024] CAT 60.

consolidate their applications. In addition, Ms Hunter contends that the costs of fighting a carriage dispute should be regarded as part of the sunk costs of investment which the funders and lawyers make in the case. She submits that if the case succeeds, "[t]he successful PCR ought in any event to be in a position to recoup that investment on behalf of the funder and the lawyers out of the ultimate proceeds of the case."

D. GENERAL PRINCIPLES: COSTS IN CARRIAGE DISPUTES

17. Rule 104 of the CAT Rules provides a broad discretion for the Tribunal on matters of costs. It states, so far as relevant:

> "(2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> …
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—
>
> (a) the conduct of all parties in relation to the proceedings;
>
> …
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 Offer to which costs consequences under rules 48 and 49 apply;"

18. The CAT Rules do not include a "general rule" that the successful party should recover its costs, equivalent to CPR rule 44.2(2)(a). Accordingly, there is no "entitlement" for the winner of a dispute to obtain its costs.

19. Nonetheless, the general approach of the Tribunal is to award the costs of a claim or an appeal to the successful party, including the costs of any interim stage determined separately: see *Merricks v Mastercard Inc* [2024] CAT 57, at [16]-[22]. However, a carriage dispute between two PCRs is very different. It is not a claim for any remedy by one PCR against another. It is effectively a competition for selection as the party that is able to pursue a claim. And if the carriage dispute is determined before the substantive CPO hearing and both

applications appear to satisfy the criteria to bring collective proceedings, the unsuccessful application is not dismissed but stayed. The PCR who was unsuccessful in the carriage dispute can then apply to restore its application if the preferred application should subsequently fail to obtain a CPO: see the Carriage Ruling at [38].

20. I consider that neither *Trucks* nor *FX* establish clear, still less binding, principles on this question. Those were the first occasions when the Tribunal had to address the costs of a carriage dispute, in a field where the jurisprudence of the Tribunal is developing. Both were 'rolled up' hearings, in which the objections to each PCR's application came largely from the potential defendants. In *Trucks*, only 4% of the RHA's costs of the hearing were said to be attributable to opposition from UKTC: para 9 above. And in *FX*, Green LJ prefaced the observations on costs quoted at para 10 above with the statement:

> "These considerations apply on the facts of this case. They do not reflect principles which would necessarily apply in other cases."

21. I consider that carriage disputes are not to be encouraged. Although necessarily couched in terms of what best serves the interests of the potential class members, the commercial reality underlying most such cases is that the dispute is as to which lawyers will have the opportunity to earn substantial fees from conducting complex and often prolonged proceedings, and which litigation funder will have the potential to gain substantial returns from proceedings seeking vast damages. In case management terms, it is beneficial to determine a carriage dispute in advance of the main CPO hearing, but in consequence that main hearing will be significantly delayed. And the costs of a carriage dispute are substantial: as noted above, Mr Hammond's costs of the present dispute that involved a one-day hearing before the Tribunal are over £800,000.

22. Although the decision as to the costs of a carriage dispute will always have regard to the facts of the particular case, it is appropriate to set out some guiding principles:

    (1) If one application is found by the Tribunal to fail to meet the criteria for a CPO, for example because the methodology proposed does not satisfy

the *Pro-Sys/Microsoft* test, and is accordingly dismissed, then it may be appropriate to order the PCR of the dismissed application to pay the successful PCR its costs of the dispute.

(2) By contrast, if two (or more) well-founded overlapping applications for a CPO are made, the PCRs should be encouraged to consolidate their proceedings, as occurred in the *Pollack/Arthur* proceedings. I understand that the courts in Australia, where there is a well-developed class actions regime, actively direct the parties to explore this option. If a PCR should unreasonably reject a proposal to consolidate, that is a relevant factor which the Tribunal can take into account in exercising its discretion on costs. Proposals to consolidate can appropriately be made "without prejudice save as to costs" to reflect this position, and if such correspondence involves discussion of the merits of the claims, a costs application can be placed before a different panel of the Tribunal from the panel which will hear the substantive CPO application.[3]

(3) Subject to (1) and (2), the costs incurred in contesting a carriage dispute can be regarded as an investment decision by the proposed funder and lawyers (who are frequently closely cooperating): see per Green LJ in *FX* (para 9 above). On that basis, it is generally appropriate to make no order for costs.

23. However, I am concerned by the suggestion made on behalf of Ms Hunter that the funder and lawyers may nonetheless seek to recover those costs from an award of damages if the claim is successful or from payment received on a settlement. In that regard, I note that the Ontario Class Proceedings Act 1992, following amendments in 2020, now provides at s. 31.1(7):

> "Solicitors for the representative plaintiffs who are parties to the carriage motion shall bear the costs of the motion, and shall not attempt to recoup any portion of the costs from the class or any class member, or from the defendant."

[3] As may happens with a proposed settlement of collective proceeding. Arrangements can be made to preserve the confidence in such correspondence.

That is of course a statutory proscription that does not apply to the UK regime. However, if opt-out proceedings proceed to judgment, the payment of any undistributed damages towards costs or expenses requires the approval of the Tribunal: s. 47C(6); and any proposed settlement of such proceedings requires the Tribunal to be satisfied that the terms are just and reasonable: s. 49A(5). Parties should expect that the Tribunal will scrutinise any such requests for approval to determine whether it is appropriate for the proposed treatment of the costs of a carriage dispute to reduce payment to the nominated charity under s. 47C(5), or impair the amount recovered by class members on a settlement.

E. THE PRESENT CASE

24. This is not a case where the Tribunal found that one of the two applications failed to meet the criteria for certification. Quite the opposite: the Tribunal stated that Ms Hunter's application was "well put together, and has simply come second in a hard-fought race" (Carriage Ruling at [38]). As a result, Ms Hunter's application was stayed, and might yet revive if Mr Hammond's application for a CPO proves unsuccessful.

25. I have considered whether the approach on behalf of Mr Hammond to those acting for Ms Hunter to cooperate means that it is appropriate to order Ms Hunter to pay Mr Hammond's costs. However, the material produced by Mr Hammond on this costs application, as summarised above, in my view falls far short of justifying the imposition of that liability. The approach was in very general terms, and there is no evidence that specific proposals for cooperation, or to consolidate the two applications, even on the basis of alternative methodologies, was made.

26. Accordingly, I conclude that the general approach should apply. There will be no order for the costs of the carriage dispute.

The Hon. Mr Justice Roth
Acting President

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 26 November 2024