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Putting the Carriage into Reverse: The CAT Resolves to Determine a Carriage Dispute in 'Opt-Out' Class Action Proceedings as a Preliminary Issue

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In a break with the previous practice of the Competition Appeal Tribunal ("**CAT**"), the President of the CAT[1] has recently decided that the resolution of a 'carriage' dispute (i.e., the question of which proposed class representative ("**PCR**"), where there is more than one, should have conduct of the proceedings) should generally be decided by way of a preliminary issue, *before* the certification hearing (the "**Judgment**").[2] As we discuss further below, this decision is likely to be followed in subsequent cases and may streamline the process of commencing and certifying a class action where there are multiple PCRs vying with each other to take carriage of the dispute – to the potential benefit of both PCRs and defendants.

The proposed collective proceedings and the CAT's decision

The Judgment was given in proposed collective proceedings against Google concerning an alleged abuse by Google of its dominant position in the online advertising market to the alleged detriment of online publishers. The claim is a standalone action,[3] although, to some extent it follows on from a decision of the French competition authority (which has no binding authority in England) in which Google was fined EUR 150 million for abusing its dominant position in the search advertising market.[4] The U.S. Department of Justice and the Attorneys General of a number of U.S. states have also sued Google in the U.S. District Court for the Eastern District of Virginia concerning alleged abuses relating to key digital advertising technologies.[5]

The first application for a collective proceedings order ("**CPO**") was made by Mr Pollack on 30 November 2022, with Mr Arthur filing a subsequent application on 29 March 2023. The issue of whether to determine

1 Sir Marcus Smith.
2 *Claudio Pollack v Alphabet and Ors; Charles Arthur v Alphabet and Ors* [2023] CAT 34.
3 It does not rely on any binding regulatory finding as to liability and, instead, the claimant must prove all aspects of its claim.
4 See Summary of Collective Proceedings Claim Form and see also *French court upholds 150 mln euro fine against Google for opaque ad rules*, Reuters, 7 April 2022.
5 See DoJ press release dated 24 January, 2023

the carriage dispute by way of a preliminary issue was heard by the President on 19 May 2023, who handed down judgment very soon after on 26 May 2023.

At the outset, the Judgment notes that, in *Mr. Phillip Evans and Michael O'Higgins FX Class Representative Limited v. Barclays Bank plc and others*,[6] the CAT had decided not to hear the carriage dispute as a preliminary issue in advance of certification. The carriage dispute in the *Trucks* litigation was also resolved at the certification stage,[7] although the issue of carriage in that case was intrinsically linked to whether the proceedings should be certified on an 'opt-in' or 'opt-out' basis,[8] with the two PCRs taking different approaches in this regard.

In considering the previous decision in *FX*, the President noted that there was, at the time, "*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*"[9] and "*this was a novel jurisdiction* [in relation to class actions]*, where experimentation and preliminary issues might be unwise*".[10] In the circumstances, the President noted that the case management conference in the Google proceedings offered 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*".[11]

With that in mind, the President determined that the hearing of the carriage dispute by way of a preliminary issue should be listed as soon as possible, and in advance of the certification hearing. In reaching that decision, he made the following observations that are likely to be of general relevance to the resolution of future carriage disputes:

1. Determining carriage disputes first can produce significant costs savings (not least because, following resolution of the carriage dispute, only one PCR will participate in the certification hearing).[12]

2. In this case, there were no advantages to hearing the carriage dispute alongside certification, and the President noted that this "*will be the position in the case of most carriage disputes*", although he did recognise that each case will turn on its own merits.[13]

3. There is generally no need for the proposed defendant (Google in this case) to participate in the carriage dispute at all, and it "*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*".[14]

4. It is "*fanciful*" to suggest that the proposed defendant "*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*" and "[t]*here can be no question of the Tribunal's consideration of the Authorisation Condition or the Eligibility Condition being either diluted or distorted by the anterior consideration of carriage*".[15] There would be "*no "following wind"*

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6 Preliminary issue judgment of 6 March 2020: [2020] CAT 9, before a Tribunal comprised of Sir Marcus Smith, Paul Lomas and Professor Anthony Neuberger.

7 *UK Trucks Claim Ltd v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others* and *Road Haulage Association Ltd v Man SE and Others* [2022] CAT 25.

8 In "opt-out" proceedings claimants falling within the class definition are included automatically in the claim, whereas in "opt-in" proceedings claimants need to actively opt into the claim.

9 *Walter Merricks CBE v Mastercard Incorporated & Ors* [2020] UKSC 51; see our client insight in relation to that judgment here.

10 Judgment, paragraph 3.

11 Judgment, paragraph 10.

12 Judgment, paragraph 13.

13 Judgment, paragraph 17. More generally, it was noted that certification issues are likely to be quite technical (with a focus on whether the various criteria for certification are satisfied) and are "*unlikely materially to inform the outcome of any carriage dispute*", such that carriage disputes can fairly be separated from the question of certification (Judgment, paragraph 14).

14 Judgment, paragraphs 13 and 25(1).

15 Judgment, paragraphs 25(2) and (3).

emanating from the carriage hearing", nor would it be appropriate (save in exceptional circumstances) for separate Tribunals to hear the carriage and certification issues.[16]

5. When an application for certification is made, the Tribunal will proceed as expeditiously as it can, and will not "*"hang fire" and wait to see if another "rival" application emerges*", which gives rise to the risk of a procedural gap emerging if a second application for certification is made.[17] It was also noted that "*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*".[18] However, in the Google case, the gap in time between the filing of the two PCRs claims (around 4 months) was not regarded "*as in and of itself determinative of carriage*".[19]

6. In terms of the method for determining a carriage dispute (which was not explored in any detail), it was noted that favouring the applicant who is first to file *"can (although it does not always) raise perverse incentives*",[20] although credit should be given where a PCR has "*spent time and money in framing a carefully considered, standalone, claim*" first. The President also stressed that "*no potential class representative, considering making an application for certification, should assume that speed trumps consideration*".[21]

7. Although the risk of procedurally disruptive appeals against carriage decisions could not be ruled out, the parties accepted that a successful application for permission to appeal was unlikely. However, "[i]*f, in due course, the risk* [of disruption from appeals] *shows itself as being more than theoretical, matters can (of course) be re-visited in later cases*".[22]

Commentary

The CAT's change of approach, in favouring the resolution of carriage disputes as a preliminary issue prior to considering certification, is likely to lead to efficiencies for all parties. It limits the costs for an unsuccessful PCR, and it means that the proposed defendant will ultimately only need to engage with one PCR at the certification hearing (and any appeals).

The change of approach is also perhaps unsurprising when viewed in light of recent (reported) commentary from the judiciary on these issues. On the last day of the hearing of the appeal of the combined CPO and carriage judgment in *FX* in April 2023,[23] Sir Julian Flaux (Chancellor of the High Court) noted that the carriage dispute between the two PCRs in that case should have been determined at the "*outset*" and that this was an "*absolutely classic example that it should not have been dealt with in the way that it has been*" because "*the amount of money that will have been wasted by this issue is just mind-boggling*"[24] (a difficulty anticipated in our 17 June 2022 client insight).

Additionally, the change of approach brings the UK more closely in line with the approach taken in Canada, a common law jurisdiction on whose class action regime the UK's regime is closely modelled.[25]

That said, it remains to be seen how the approach will work in practice. Notwithstanding the observation that there will generally be no need for potential defendants to participate in the carriage dispute at all, some defendants may still wish to do so in case the substance of the potential claim is discussed. In addition, and despite the comments of the President, potential PCRs will still be incentivised to commence

16 Judgment, paragraph 25(2).
17 Judgment, paragraph 19.
18 Judgment, paragraph 21.
19 Judgment, paragraph 21.
20 Judgment, paragraph 20.
21 Judgment, paragraph 20.
22 Judgment, paragraph 26.
23 *Mr. Phillip Evans and Michael O'Higgins FX Class Representative Limited v Barclays Bank Plc and Others* [2022] CAT 16; see our client insight in relation to that judgment here.
24 See here https://globalcompetitionreview.com/article/uk-appellate-judge-criticises-cats-handling-of-forex-carriage-dispute.
25 See the discussion in *FX* regarding the position in Canada, [2020] CAT 9, paragraphs 36-38.

proceedings as soon as possible in order to seek to achieve as large a procedural gap as possible before any subsequent rival application for certification is made. Although, care will need to be taken by PCRs to ensure that speed does not compromise quality, because a subsequent, higher quality, application may be preferred.

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