PTA Template 269C1 - First Appeal

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2024-002520**

HER MAJESTY'S COURT OF APPEAL CIVIL DIVISION
[illegible]
29 Jan 2025
CA-2024-002520

Alphabet Inc & Ors –v– Ad Tech Collective Action LLP

ORDER made by the Rt. Hon. Lord Justice Green

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: REFUSED

Reasons

1. The applicants, collectively Google, apply for permission to appeal against the judgement of the CAT dated 5 June 2024. By that judgement the CAT granted a collective proceedings order (CPO) in favour of the respondent to the present application, Ad Tech.

2. Before the CAT Add Tech alleges that Google infringed the prohibition against abuse of a dominant position under section 18 competition act 1998. It complains of a number of overarching abuses each with a variety of sub-abuses. The essence of the claim is that Google preferred itself over other competitors in digital advertising markets. It is said that the abuses constitute individual infringements but also a single and continuous infringement.

3. Google opposed certification upon the basis that the claim was insufficiently pleaded and that the methodology in support of the claims was insufficiently articulated by reference to the Microsoft test (see *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57 as adopted into domestic law).

4. Google sought permission to appeal from the CAT. It argued: that the CAT had erred in the application of the Microsoft test; that it incorrectly concluded that the claim was arguable based upon the pleaded counterfactual and methodology; and that, in its judgement refusing to consider at the certification stage a strikeout based upon limitation the CAT had effectively dismissed the strike out application without having heard argument upon it.

5. The CAT rejected these proposed grounds. Without going into detail this was upon the basis that, in substance, all the matters complained of amounted to matters of case management and/or issues of discretionary evaluation in respect of which the CAT had a broad discretion.

6. Permission to appeal is now sought in relation to 3 grounds. First, that the CAT erred in law in certifying the claim in circumstances where the fundamental elements of the statutory test were not pleaded; secondly, that the CAT erred in law in concluding, contrary to authority of the Court of Appeal, that definitive satisfaction of the *Microsoft* test was not a precondition of certification; and thirdly, that the CAT erred in law in declining to hear and rule upon the application of Google to strike out the claim for damages in any period prior to the 1st of October 2015.

7. None of these grounds are arguable. All seek, one way or another, to challenge the otherwise legitimate exercise of case management discretion and evaluation of the CAT.

8. This court has, now in a number of cases, emphasised that the CAT has a broad case management discretion. At the early certification stage this extends to the evaluation of the adequacy of evidence including as the methodology. Whilst the Court of Appeal will intervene where the CAT has exceeded the limits of its reasonable discretion or otherwise made an error of law, this will be rare.

9. AS to proposed ground I, Google contends that there are 15 separate alleged abuses and that a counterfactual must be pleaded for each. The CAT, however, was entitled to conclude that Google was in a position to know the case that it had to meet from the pleaded counterfactual in view of the claim form and the report of Dr Latham. If and insofar as the CAT concludes that there is a lack of clarity in the Class

Representatives case going forward it can require elucidation as proceedings evolve.

10. As to proposed ground II the CAT, having considered the expert report of Dr Latham, concluded, at least at the certification stage, that the *Microsoft* test was satisfied. That conclusion fell within the legitimate discretion of the CAT. Again, if the CAT concludes that further clarification is required as the proceedings evolve it can so direct.

11. S to proposed ground III, it is incorrect to say that the CAT has effectively dismissed Googles strike out application. The CAT exercised its case management power directing that the limitation issue be heard at trial. It set out, in paragraph [47] of the judgement, a number of considerations justifying that conclusion. All of these factors are proper and relevant. It did not arguably err.

12. For all of the above reasons the applications for permission to appeal are rejected.

Information for or directions to the parties

Court of Appeal Mediation Scheme (CAMS)

Where permission has been granted or the application adjourned:

a) Does the case fall within the Automatic Referral Scheme (see below)? Yes/No (delete as appropriate)

Automatic Referral Scheme categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

b) If yes, is there any reason not to refer to CAMS mediation under the Automatic Referral Scheme? Yes/No (delete as appropriate)

c) If yes, please give reason:

d) Cases outside the Automatic Referral Scheme: Do you wish to make a recommendation for mediation? Yes/No (delete as appropriate)

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)

b) any expedition

Signed: BY THE COURT
Date: 27.01.2025

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).