Neutral citiation [2023] CAT 65

IN THE COMPETITION APPEAL TRIBUNAL

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

BETWEEN:

CHARLES MAXWELL ARTHUR

Proposed Class Representative

- v -

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

Proposed Defendants

AND BETWEEN:

CLAUDIO POLLACK

Proposed Class Representative

- v -

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

Proposed Defendants

ORDER (CONSOLIDATION)

UPON the application by Mr Claudio Pollack on 30 November 2022 to bring collective proceedings under section 47B of the Competition Act 1998 (with case number 1572/7/7/22) (the "Pollack Proceedings")

AND UPON the application by Mr Arthur on 29 March 2023 to bring collective proceedings under section 47B of the Competition Act 1998 (with case number 1582/7/7/23) (the "Arthur Proceedings")

AND UPON reading the Proposed Class Representatives' ("PCRs") joint application to consolidate the Pollack and the Arthur Proceedings (the "Amalgamation Application"), including the consolidated collective proceedings claim form ("Consolidated Claim Form") and accompanying documents

AND UPON reading the written submissions of the parties filed in advance of the hearing of the Amalgamation Application on 16 October 2023

AND UPON hearing Leading Counsel for the parties, Gerry Facenna KC for the PCRs and Ad Tech Collective Action LLP, and Meredith Pickford KC for the Proposed Defendants ("Google"), at the hearing of the Amalgamation Application on 16 October 2023

AND UPON a hearing to determine an application for a collective proceedings order by the PCRs having been listed for 29 to 31 January 2024 (the "Certification Hearing")

AND UPON the Tribunal indicating that the costs in each of the Arthur and/or Pollack Proceedings as from 16 October 2023 shall be costs in the Consolidated Proceedings (as defined in paragraph 5 below), and Google's indication that they have no objection to that approach

AND UPON reading the written submissions filed by the parties on 23 and 24 October 2023

AND HAVING REGARD TO the Tribunal's powers under The Competition Appeal Tribunal Rules 2015 (the "Rules"), including without limitation Rules 4, 17, 32, 74 and 88

IT IS ORDERED THAT:

1. All issues of limitation arising out of or in connection with the making of this order are reserved to a later hearing, to be fixed. This order is expressly without prejudice to any and all rights that Google may (if so advised) assert by way of a limitation defence and the amendments ordered in paragraphs 2 and 3 below are subject to a condition subsequent that the PCRs and Ad Tech Collective Action LLP are not to take any point which contends or has the effect of contending that Google's rights to challenge the PCRs' claim forms or their amendment (including its rights in respect of limitation in relation to rule 32 of the Tribunal Rules) are prejudiced in any way by the making of this order.

2. The Pollack PCR's Claim Form is to be deleted and replaced with the Consolidated Claim Form.

3. The Arthur PCR's Claim Form is to be deleted and replaced with the Consolidated Claim Form.

4. Ad Tech Collective Action LLP (of which both Mr Pollack and Mr Arthur are members, together with Ms Kate Wellington) shall act as the proposed class representative in each of the Pollack Proceedings and the Arthur Proceedings.

5. The Pollack Proceedings and the Arthur Proceedings shall be consolidated (the "Consolidated Proceedings").

6. The Consolidated Proceedings shall proceed under Case Nos. 1572/7/7/22 and 1582/7/7/23.

7. The Carriage Issue (as defined in the Order of 14 June 2023) is resolved in accordance with and on the terms of this Order.

Application of existing Orders

8. The Consolidated Proceedings shall be deemed to have been served on the Proposed Defendants.

9. Subject always to the Tribunal's powers under Rule 18 of the Rules, the Consolidated Proceedings shall be treated as proceedings in England and Wales.

10. For the avoidance of doubt, and pursuant to points 4 and 5 of the Order of 14 June 2023, all documents that have been disclosed, served or filed to date in the Arthur Proceedings and/or in the Pollack Proceedings may be used by all parties in the Consolidated Proceedings.

11. The Confidentiality Ring established by the Confidentiality Ring Order of 14 June 2023 shall apply to the Consolidated Proceedings, with the following amendments:

    (a) The definition of "Party" shall be amended so as to include the parties to the Consolidated Proceedings; and

(b) The definition of "Proceedings" shall be amended so as to include the Consolidated Proceedings.

12. Certification of the Consolidated Proceedings shall be considered at the Certification Hearing (see point 17 of the Order of 14 June 2023). Pursuant to paragraph 14 of that Order the Proposed Defendants shall file and serve on Ad Tech Collective Action LLP their response to its CPO Application by 4pm on 14 December 2023. The directions at paragraphs 15 to 16 of the Order shall continue to apply as if "Ad Tech Collective Action LLP" were substituted for "Continuing PCR".

Publicity

13. Ad Tech Collective Action LLP shall publicise the CPO Application described in the Consolidated Claim Form in accordance with the proposal set out in section 6 of the Notice and Administration Plan that is exhibited to the Second Witness Statement of Mr. Claudio Pollack at CP6/2.

14. Ad Tech Collective Action LLP shall publicise, in accordance with paragraphs 13 and 16 to 18 of this Order, the right under Rule 76(10)(c) of the Tribunal Rules of persons with an interest to object to the certification of the Consolidated Proceedings or the authorisation of Ad Tech Collective Action LLP as class representative by 4pm on the day 7 days from the date of this Order.

15. Ad Tech Collective Action LLP shall publicise, in accordance with paragraphs 13, 16 and 17 of this Order, the right under Rule 79(5) of the Tribunal Rules of members of the proposed class to make an application to the Tribunal for permission to make oral submissions at the Certification Hearing by 4pm on the day 7 days from the date of this Order.

Objections to the CPO Application and applications for permission to make observations

16. Any person with an interest (including any member of the proposed class) may object to the certification of the Consolidated Proceedings or the authorisation of Ad Tech

Collective Action LLP by writing to the Tribunal stating their reasons for objecting by 4pm on the day 6 weeks after the date in paragraph 14 above.

17. Any member of the proposed class may also seek permission to make oral observations at the Certification Hearing, by making an application for such permission, with reasons, as part of his/her/its written objections.

18. Any third party with a legitimate interest (who is not a member of the proposed class) who seeks permission to make written and/or oral observations at the Certification Hearing is to make such application, supported by reasons, to the Tribunal by 4pm on the day 6 weeks after the date in paragraph 14 above.

19. Costs reserved.

20. Liberty to apply.

REASONS

1. In a ruling dated 26 May 2023, under Neutral Citation Number [2023] CAT 34, I gave directions for the resolution of a carriage dispute between the Pollack Proceedings and the Arthur Proceedings. Both Proceedings are applications to be certified as collective proceedings under the Rules.

2. As is described in a witness statement of Mr Toby Starr (his second in these proceedings, dated 2 October 2023, "Starr 2"), the PCRs have respectively concluded that "their respective CPO applications should be amalgamated in the best interests of the proposed class members" (paragraph 7 of Starr 2). Starr 2 helpfully sets out the relevant history, the reasons why the PCRs seek amalgamation, and the differences between the present application and the claims articulated in the Pollack and Arthur applications, which applications will be superseded if the amalgamation application (the "Application") is granted.

3. Provided the Tribunal is content to accede to the Application, the carriage dispute between the Pollack PCR and the Arthur PCR will no longer be effective. There will, in substance if not in form, and subject to any issues of limitation (which are unaffected

by this Order), only be a single application for a collective proceedings order. The question before me is whether the Application should be acceded to.

4. It is to my mind clear that it should be. Where a carriage dispute is resolved by agreement between those persons having conduct of rival applications for certification, this Tribunal will be slow to second guess that agreement. Rather, it is the Tribunal's function, in such cases, to facilitate "consolidation" and enable the application(s) to proceed to the certification stage as quickly as possible. It follows from this that my approach in considering the Application must be extremely light touch. Each PCR was entitled to frame their application for certification as they saw fit, without the Tribunal's audit or approval. The question of carriage made the question of certification more complex, but now that this issue has (subject to the Tribunal's order) resolved itself, it seems to me that the position reverts to how it would be if there were a single application for certification before the Tribunal.

5. I should make clear, at the outset, that it is no part of my function at this stage of the process to consider whether a collective proceedings order should or should not be made or on what terms.

6. I make the Order above.

Sir Marcus Smith
President of the Competition Appeal Tribunal

Made: 26 October 2023
Drawn: 26 October 2023