Neutral citation [2024] CAT 8

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

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 February 2024

Before:

SIR MARCUS SMITH
(President)
CHARLES BANKES
CAROLE BEGENT

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

Heard at Salisbury Square House on 20 December 2023

RULING (CARRIAGE)

APPEARANCES

Marie Demetriou KC, Sarah Love and Tom Coates (instructed by Hausfeld & Co LLP) appeared on behalf of Julie Hunter.

Philip Moser KC and Ben Rayment (instructed by Charles Lyndon Limited and Hagens Berman EMEA LLP) appeared on behalf of Robert Hammond.

Jon Turner KC (instructed by Herbert Smith Freehills LLP) appeared on behalf of Amazon.com, Inc.

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A. INTRODUCTION

1. Ms Julie Hunter and Mr Robert Hammond have each filed applications for an opt-out collective proceedings order at the Tribunal pursuant to section 47A and B of the Competition Act 1998 ("CA 1998"). We refer to Ms Hunter and Mr Hammond collectively as the "Applicants", and their applications as the "Applications". Pursuant to the Applications, they apply for permission to bring "stand-alone" claims for damages under section 47A of the CA 1998. They each allege abuse of a dominant position by Amazon.com, Inc. and other Amazon companies (together, "Amazon") in alleged infringement of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") (prior to 31 December 2020) and section 18 CA 1998 (also known as the "Chapter II prohibition"). Ms Hunter's application, the first to be filed, was received by the Tribunal on 15 November 2022. Mr Hammond's application was received by the Tribunal on 7 June 2023. This Judgment concerns the preliminary issue of "carriage dispute" with a view determining which of the Applicants is most suitable to act as the proposed class representative for the purposes of Rule 78(2)(c) of the Competition Appeal Tribunal Rules 2015 (the "Rules").

2. The alleged abuses by Amazon – no doubt questions of market definition and dominance may arise if one or other of the Applications succeeds, but dominance can be taken as read for present purposes – concern the so-called "Buy Box", through which purchases can be made on the "Amazon Marketplace" online market and the related Featured Merchant Algorithm ("FMA"), which Amazon uses to select the "Featured Offer" featured in the Buy Box. It is alleged that, in selecting the Featured Offer, Amazon favoured its own retail offers and those of sellers that use Amazon's fulfilment service ("FBA Sellers"). Amazon denies the allegations made in both Applications.

3. Ms Hunter seeks an aggregate award of damages provisionally estimated at between £539.6 million to £753.3 million before interest in relation to the period between 14 November 2016 and 14 November 2022. Mr Hammond seeks an award of damages provisionally estimated at between £1.221 billion and £1.361 billion before interest in relation to the period between 1 October 2015 and at least 1 June 2020.

4. There have been a number of investigations by regulatory authorities into Amazon's business practices in relation to the online market platform that is relevant to these Applications. Only the Italian Competition Authority has found an abuse in relation to the FMA, finding that Amazon abused its dominant position by making certain benefits conditional on the purchase of its logistics service offered to third-party retailers, and imposing behavioural measures on Amazon.[1] In a decision of December 2021, it imposed a fine of €1.1 billion on members of the Amazon group of companies and imposed behavioural measures on Amazon.[2]

5. Both the European Commission and the Competition and Markets Authority have conducted investigations into the operation by Amazon of the Buy Box and the FMA. Each of those investigations was concluded without a formal finding of infringement against Amazon. Instead, those regulatory authorities chose to accept commitments from Amazon. Other regulatory authorities are also reported to be conducting similar investigations.

6. In the absence of a binding decision by the European Commission or the Competition and Markets Authority, any case against Amazon relating to the FMA and Buy Box selection will therefore be a stand-alone case, in which the claimant will have to prove, to the requisite standard, that Amazon have breached Article 102 TFEU and/or the Chapter II Prohibition. In particular, we note that the inferences to be drawn from commitments offered by Amazon are limited: Amazon would be perfectly entitled to say that their conduct and systems in this regard were competition law compliant in any event, and that the commitments offered by them were offered in response to regulatory concern which would ultimately not have been well-founded.

7. After the filing of Mr Hammond's Application, the Applications were case managed together. A case management hearing took place on 28 June 2023. At that hearing, the question whether carriage and certification should be determined together or at separate hearings was considered. By order of the

[1] *Authorità Garante della Concorrenza e del Mercato*, Case No. A528, 9 December 2021.
[2] Amazon is currently appealing this decision.

President made and drawn on 26 September 2023, it was directed that the question as to which of the Applicants would be the most suitable to act as class representative for the purpose of Rule 78(2) of the Rules 2015 would be heard separate to, and before, the issue of certification. This is the first occasion on which the Tribunal has heard a "carriage issue" as a preliminary issue in advance of the certification issue. This was not a controversial matter between the parties: the parties were in agreement that carriage should be dealt with first, following the approach of the Tribunal set out in *Pollack v Alphabet and Others* and *Arthur v Alphabet and Others* ('Pollack').[3]

8. The Applications that Ms Hunter and Mr Hammond seek to bring are sufficiently similar that it would not be possible for the Tribunal to make an opt-out collective proceedings order in respect of both claims. That is due to the overlapping class members and the similarity of the claims. According to Rule 79(2)(c) of the Rules, in determining whether claims are eligible for inclusion in collective proceedings, the Tribunal will take into account whether any separate proceedings making claims of the same or similar nature have already been commenced by members of the class.

B. LEGAL FRAMEWORK: CARRIAGE DISPUTE

9. In *Evans v. Barclays Bank plc and Michael O'Higgins FX Class Representative Limited v Barclays Bank plc*,[4] the Tribunal considered both carriage and certification in a single hearing. In its judgment on appeal of that decision in *Evans v Barclays Bank plc*,[5] the Court of Appeal made the following points:

(1) The Tribunal should apply a test of "suitability". The discretion conferred on the Tribunal was broad and multifaceted in relation to carriage (at [139]).

(2) The Tribunal is expert at how proceedings (in collective actions) play out "at the nuts-and-bolts level"; and is thus vastly better placed than the

[3] [2023] CAT 34.
[4] [2022] CAT 16.
[5] [2023] EWCA Civ 876.

Court of Appeal to form a view on the weight to be attached to the various considerations (at [146]).

(3) It is possible for the Tribunal to reach a decision on a carriage question without taking account of the merits of either case and that is what the Tribunal had done in that case (at [147]).

(4) The mere fact that one putative class representative crafts a broader claim is not an indication that that claim is preferable (at [148]).

(5) The question of which claim was the first to file is largely an irrelevant factor (at [153]).

10. The Court of Appeal also said that the timing of a carriage decision was a matter for the Tribunal. It was open to the Tribunal "applying a robust approach" to make a decision on carriage before any hearing on certification. That is the course we have taken here, as described. As a result, as the Court of Appeal observed, there may be a "degree of rough and readiness about the exercise but, equally, the CAT, armed with its rapidly growing expertise in the area will know what sorts of facts and matters are relevant" (at [154]).

11. A key aspect of the Tribunal's consideration of a carriage dispute (when heard independently of, and prior to, certification) is that it is required only to consider which of the cases is most suitable to advance first to a certification hearing. This requires a relative assessment of the two Applications; and is a different assessment to that which the Tribunal is required to make at the certification stage. We stress that this Ruling, and our consideration, is and has been limited to the question of carriage only. Certification thus constitutes an important, background, factor. The point we make is that nothing in the resolution of this carriage dispute can affect our future consideration of matters at the certification stage. In the Tribunal's judgment on case management and the handling of carriage disputes in *Pollack*, the President said (at [25]):

> "I am satisfied that…ordering carriage to be heard as a preliminary issue will not determine any of the aspects of either the Authorisation Condition or the Eligibility Condition…"

And at [25(3)]:

> "There can be no question of the Tribunal's consideration of the Authorisation Condition or the Eligibility Condition on certification being either diluted or distorted by the anterior consideration of carriage…The Tribunal must exercise its judgement according to what is the best case management outcome."

12. It is at the certification stage that an applicant for certification must place a methodology, a so-called "blueprint", before the Tribunal setting out how the claim will be advanced to trial. The test for the adequacy of this methodology is called the *Pro-Sys* test, derived from the judgment of the Canadian Supreme Court in *Pro-Sys Consultants v Microsoft Corporation*[6]. This test, which has undergone substantial articulation and development in this jurisdiction, requires the methodology advanced by a potential class representative to be:

> "…sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis".

13. We received written submissions on the carriage issue from both Ms Hunter and Mr Hammond. Those submissions, rightly, placed stress on the extent to which the Applications met (or did not meet) the *Pro*-Sys test. Each Application was supported by a report from an economics expert setting out a proposed methodology for assessing market definition, dominance and estimating the aggregate damages suffered by each of the proposed claimant classes. The expert in Ms Hunter's case is Mr Harman of Berkeley Research Group; and in Mr Hammond's case, Dr Pike of Fideres Partners LLP. We also received brief written submissions from Amazon. We heard oral submissions at a hearing held on 20 December 2023. Further to these oral submissions, the methodology proposed by each expert in their reports in relation to the operation of the FMA was additionally clarified (at the request of the Tribunal) in subsequent written reports, a fourth report from Mr Harman dated 22 December 2023 ("Harman 4"), and a fourth report from Dr Pike dated 9 January 2024 ("Pike 4").

[6] [2013] SCC 57.

C. DIFFERENCES BETWEEN THE TWO APPLICATIONS

(1) Introduction

14. Both applications are unsurprisingly technical and voluminous. What follows is a necessarily broad-brush articulation of the general thrust of both applications. It would be inappropriate to go further into the detail, and we trust that both experts will be satisfied that we have done broad justice to their careful work. Expert evidence will, of course, be very important on the certification issues, which is a matter for a subsequent hearing. However, for present purposes in relation to the carriage issue, the expert evidence represents a key differentiator between the two Applications.

(2) Abuse

15. We assume dominance in each case. Neither market definition nor dominance represents a basis for differentiating the Applications.

16. In terms of abuse, Ms Hunter alleges that Amazon's selection of the offer set out in the Buy Box is systematically and unjustifiably biased in favour of Amazon's own retail offers and those of FBA Sellers (and in discriminating between Amazon and FBA Sellers, favours the former). This systemic bias is compounded by the prominent presentation and operation of the Buy Box presenting a Featured Offer without making easily accessible to consumers information of other options available for the same product. Ms Hunter also alleges that, by favouring FBA Sellers in the FMA, Amazon are likely to be disincentivising third party sellers from using cheaper logistics alternatives to FBA.

17. Mr Hammond alleges that, by preferentially promoting its own products and those using FBA in its platform, in particular through the products featured in the Buy Box, Amazon have reduced the competitive constraints on those products with the result that customers pay more than they otherwise would for those products. Furthermore, the discriminatory selection of offers using FBA, Amazon foreclosed competition in the logistics market. Mr Hammond's claim

goes further than Ms Hunter's in relation to logistics, in that it argues that Amazon's conduct has excluded competitors from the logistics market.

18. It is quite obvious – and neither applicant sought to contend otherwise – that the abuse of dominance alleged by the Applicants substantially overlaps: the differences are ones of nuance and – certainly at this stage of the proceedings – it would be impossible to suggest that one abuse was (in a relative sense) better framed than the other. Neither Applicant suggested otherwise.

(3) Methodology

19. There are substantial differences in the methodology proposed by Mr Harman (the expert retained by Ms Hunter) and that proposed by Dr Pike (the expert retained by Mr Hammond) in relation to the proof of abuse and or quantification of the overall loss suffered by consumers.

20. In brief outline, Dr Pike's methodology focusses on the FMA. In order to establish a relevant counterfactual, Dr Pike proposes, if practical, to re-run a non-discriminatory version of the FMA. In other words, he proposes to operate the algorithm that was in fact operated by Amazon with the abuse "stripped out". If this is not possible, he proposes to model the outcome of such an exercise. In order to quantify the consumer loss, he proposes to look at two counterfactuals based on an "unbiased counterfactual"; one in which he holds sales volume constant, and one in which he holds sales prices constant.

21. Mr Harman, on the other hand proposes to focus his analysis on actual consumer preferences to establish an appropriate counterfactual on which to assess consumer loss. In order to do so, he proposes to supplement data received on disclosure from Amazon with a conjoint analysis implemented through a consumer survey. He identifies three categories of loss: a universal loss which is suffered by class members where a cheaper alternative offer was available; a choice loss which is suffered by class members where a more preferred offer (whether on the basis of price or delivery time) was available with at least the same delivery speed and a further loss arising from dampened competition. Mr

Harman's methodology considers the FMA (Harman 1 at [7.4.11 (iii)-(iv)]) but does not seek to re-run it in the same manner as Dr. Pike's.

22. Each Applicant made substantial criticisms of the methodology proposed by the other; and suggested that the other's methodology would face substantial difficulties at the certification stage. We found the oral submissions of counsel particularly helpful and would like to express our gratitude to each of Ms Demetriou, KC (for Ms Hunter) and Mr Moser, KC (for Mr Hammond) for the clarity of their expositions, and their ability to respond precisely to the questions of the Tribunal. As we will come to describe, we considered the expert evidence on different methodological approaches adopted by the Applications to be the key differentiator, and (although neither expert gave oral evidence before us) we found the oral representations of counsel in regard to methodology particularly helpful.

(4) Class definition

23. Ms Hunter's proposed class definition includes both natural and legal persons who were direct customers of Amazon. Mr Hammond limits his class definition to natural consumers. Mr Hammond submitted that the inclusion of legal persons in Mr Hunter's class would introduce analytical complexity, including in relation to VAT treatment and pass on; and might give rise to the risk of class conflict. In response, Ms Hunter contended that the inclusion of legal persons presents no intractable differences which justify their exclusion; and that their exclusion arbitrarily narrows the class and excludes persons who have suffered loss. We can see force on both sides of the case. Although the point is obviously material in terms of class definition, we do not consider it to be a helpful indicator in terms of carriage.

(5) Other issues

24. Ms Hunter's application was filed some five months before Mr Hammond, though Ms Hunter has appropriately not sought any advantage from being the first to file.

25. Criticisms were made by each party about the start and end date of period of claim asserted by the other. During the course of the hearing, each party acknowledged that they are likely to need to make changes to the alleged period of claim.

26. We have not attached weight to either of these two issues in reaching our conclusion. They do not, in this case at least, seem to us to be material.

D. OUR DECISION ON CARRIAGE

(1) Overview

27. These are complex claims. Both Applicantss have advanced claims which reflect a significant amount of thought and work. It is clear to us that both experts have engaged with the issues in order to develop their methodology. Equally, each has made serious criticisms of the other and has questioned whether the other will pass the tests that must be met for certification.

28. In our view, each party was successful in raising doubt and challenges about the methodology of the other; but neither was successful in persuading us that the other was inevitably bound to fail. We also recognise that this case is still at a very early stage, and these applications are (each of them) doing no more than articulating a claim that will develop and change as it progresses toward trial, assuming certification is ordered.

29. It is also clear, given the complexity and differences between these two cases, that it is appropriate to make a decision on carriage at this early stage, however "rough and ready" the basis of that decision may be. To do otherwise, and to take both cases forward to certification, would lead not only to a lengthy and expensive certification hearing; but – given the experience of the Tribunal in *Evans* (referred to in [10] above) – "rolled up" carriage and certification hearings are not only more expensive, but do not appear to assist in resolving carriage disputes. The experiment of resolving carriage in a "rolled up" hearing (*Evans* was the first carriage dispute heard by the Tribunal) did not justify the

delay and expense. Such a course will (in future cases) need to be justified, if it is to be repeated.

(2) Our approach

30. We do not intend to parse the Applications for differences that may or may not exist as between them, where these differences were not emphasised by the Applicants themselves. Of the differences that were articulated before us, we intend to focus on those (in the event, there was only one) that clearly and distinctly separate the Applications, and in relation to which we can express a rational preference.

31. We consider that the applications can rationally be differentiated by reference to the different methodologies that we have described at [20] to [21] above. We propose to consider those rival methodologies under two heads:

    (1) First, why we consider one methodology to be clearly and distinctly better – more suited – to articulating and resolving the claims that the Applicants wish to bring.

    (2) Secondly, whether there is a difference between these methodologies in terms of their practical workability and whether – taken at its most extreme – it can fairly be said that one or other of them simply "will not work".

    We consider these two (related) questions below.

(3) A preferred methodology

32. Although the abuses alleged by the Applicants are sufficiently similar to oblige us to decide the question of carriage (see [9] and [18]), the Applicants' respective methodologies in seeking to demonstrate and quantify the alleged abuses are very different. Through Dr Pike, Mr Hammond seeks to re-run the algorithms without the abuses as alleged. The counterfactual, in this case, is thus closely aligned to the abuse. Should the process fail or not work as expected, Dr

Pike's fall-back is to model the operation of the algorithm without the features said to constitute the abuse.

33. By contrast, Mr Harman's approach seeks to ascertain consumer preferences by other means, and to define the counterfactual outcome in this way. It will readily be appreciated that the approach does not necessarily align itself with the true counterfactual (the operation of Amazon's algorithm without the abuse), and runs the risk of importing a different way of ascertaining consumer preference which is at variance with the non-infringing aspects of the operation of the Amazon algorithm.

34. Dr Pike (Pike 4 at [22] – [23]) puts the point as follows:

> "22. …my model of Amazon's algorithm is based on input data on offers and information on the Buy Box winners selected by the actual algorithm. It therefore approximates the functioning of the actual algorithm. In contrast, Mr Harman's conjoint analysis, proposed as a method to determine an idealized, ahistorical "average" consumer preference across billions of purchases, uses no input or outcome data from the actual algorithm. As such, it is not a model of the algorithm but a replacement, which, instead of focusing solely on the discriminatory elements, substitutes Mr Harman's view of the relative importance to consumers of different offer characteristics for Amazon's.
>
> 23. This difference stems from the fundamentally different conceptual approaches taken to identifying the counterfactual…Mr Harman's proposed methodology fails to distinguish between honest differences in predicted consumer preferences and abusive discrimination."

35. If Dr Pike's approach were so unfeasible as to inevitably fail the *Pro-Sys* test, then this would be a reason for preferring Mr Harman's approach as a less satisfactory, but more workable, proxy for Dr Pike's better methodology. Mr Harman raises a series of concerns with Dr Pike's approach, culminating in his view (Harman 4 at [2.15]) that:

> "I am sceptical that the analysis that is central to Dr Pike's proposed methodology of "re-running the algorithm without discriminatory provisions" is feasible, robust or able to respond to defences Amazon has already indicated it will raise."

On the present evidence, and bearing in mind the approach to the resolution of carriage disputes described above, Dr Pike's methodology appears to be

sufficiently workable, either as a "re-run" without the abuse or as a "proxy" of that "re-run", to merit a more detailed examination in the context of a certification hearing. We are satisfied of this for, essentially, three related reasons. First, Dr Pike has been clear as to his methodology. He has clearly considered the difficulties, and considers that they can be overcome. We are reluctant to substitute our (inexpert) views for those of an expert. We are fortified in that approach by the evidence of Mr Harman. This is our second reason: whilst Mr Harman certainly expressed scepticism in regard to Dr Pike's proposed methodology, he stopped well short of saying that this approach could not be undertaken or was impossible. Thirdly, we are very conscious that proceedings of this sort – assuming this litigation is to proceed beyond certification – will require particularly careful, and likely quite intrusive, case management on the part of the Tribunal. We anticipate that Amazon's experts will be required to co-operate with those of any successful Applicant in establishing a case to trial.

36. Accordingly, on the basis of the Tribunal's views on methodology, Mr Hammond is determined most suitable to act as the proposed class representative for the purposes of Rule 78(2)(c) of the Rules 2015.

E. DISPOSITION

37. For the reasons given above, we resolve the carriage dispute in favour of Mr Hammond. We determine that he is the most suitable to act as proposed class representative.

38. Ms Hunter's Application is stayed: should Mr Hammond's Application stumble, then the Tribunal would be prepared to consider lifting the stay, were:

    (1) Mr Hammond's Application for certification to fail or (possibly) were a successful application for certification to be revoked; and

    (2) Ms Hunter to continue to be willing to move her Application.

Amazon's position was that an application that lost on the issue of carriage should be dismissed. In the case of a hopeless application, that would be right: but Ms Hunter's Application is not hopeless. It is well put together, and has simply come second in a hard-fought race. In these circumstances, access to justice requires that we keep (insofar as we can) this alternative Application alive.

39. We invite the parties to draw up an agreed order.

40. This ruling is unanimous.

Sir Marcus Smith
President

Charles Bankes

Carole Begent

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 5 February 2024