Neutral citation [2023] CAT 36

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1570/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

9 May 2023

Before:

JUSTIN TURNER KC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

JJH ENTERPRISES LIMITED
(trading as ValueLicensing)

Claimant

- and -

MICROSOFT CORPORATION & OTHERS

Defendants

- and -

COMPETITION AND MARKETS AUTHORITY

Interveners

Heard at Salisbury Square House on 9 May 2023

RULING (FORMAT OF TRIAL)

APPEARANCES

Max Schaefer (instructed by Charles Fussell & Co LLP) appeared on behalf of the Claimant.

Robert O'Donoghue KC, Nikolaus Grubeck, Michael Armitage (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Defendants.

1. Today is the hearing of what is arguably a first case management conference, in this matter at least before this Tribunal. The Claimant commenced proceedings in the Commercial Court in April 2021 seeking permission to serve out of the jurisdiction. In July 2021 an application was made to strike out the claim as against the second defendant, the UK company, and jurisdiction was challenged in respect of the first and third defendants. Mr Justice Picken dismissed those applications in April 2022. Permission to appeal was sought and refused, and on 16 November this action was transferred to this Tribunal.

2. The Claimant resells pre-owned Microsoft software licences. Its claim, in summary, is that Microsoft has been migrating customers from perpetual software licences to its subscription-based offering, which is sold under the name M365. It has sought to incentivise such migration by offering Enterprise customers discounted subscription pricing on M365 and making those discounts conditional on those customers agreeing to certain contractual terms.

3. The Claimant alleges that the contractual terms in dispute have formed part of a wider ranging campaign to stifle the market for pre-owned licences for Microsoft's Software. They varied in form, but all have had the effect of preventing customers from reselling the perpetual software licences that they no longer need as a result of migrating to Microsoft 365. The Claimant contends that Microsoft has thereby in effect been paying potential competitors, potential suppliers of pre-owned licences for MS software, not to compete with Microsoft.

4. Microsoft denies its activities amount to an abuse. It makes various points, including the observation that one of the terms in issue is no longer in force and that the other term was only in place for a very limited subset of customers. This, it contends, raises a serious question as to the effects on competition as well as on causation and damage.

5. Microsoft seek to have a split trial with all the issues, save for the question of whether it is dominant and the definition of the relevant market, being heard at a first trial, and the question of dominance being heard in a second trial.

6. The principles to be applied in deciding whether there ought to be a preliminary issue were set out or recently summarised by Mr Justice Zacaroli in *Churchill Gowns Limited v Ede & Ravenscroft Limited & Others* [2020] CAT 22 at paragraphs 6 to 8:

> "6. The overall test to be applied is to ensure that proceedings are dealt with justly and at proportionate cost. The parties are in agreement that this test involves a pragmatic balancing exercise, taking into account numerous factors, including those helpfully summarised by Hildyard J in Electrical Waste Recycling Group 4 Limited v Philips Electronics UK Limited and Others [2012] EWHC 38 (Ch) at [5] and [6]:
>
> > "5. Where the issue of case management that arises is whether to split trials the approach called for is an essentially pragmatic one, and there are various (some competing) considerations. These considerations seem to me to include whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary; what are likely to be the advantages and disadvantages in terms of trial preparation and management; whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials; whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case; whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages); whether there are difficulties of defining an appropriate split or whether a clean split is possible; what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process; generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
> >
> > 6. Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and a pragmatic approach, may include whether a split would assist or discourage mediation and/or settlement; and whether an order for a split late in the day after the expenditure of time and costs might actually increase costs."
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> 7. These principles were recently applied in the case of Daimler AG v Walleniusrederierna Aktiebolag and Others [2020] EWHC 525 (Comm) ("Daimler") by Bryan J, particularly at [26] and following.
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> 8. Each party sought either to rely on or distinguish the Daimler case. There is, however, limited utility in comparing the application of the overall test and the particular factors in other cases. Every case is highly fact sensitive. It is important to recognise that the list produced by Hildyard J is a non-exhaustive list of relevant, in many respects overlapping, factors."

7. "This pragmatic approach was adopted by this tribunal in *David Courtney Boyle v Govia Thameslink Railway & Others* [2022] CAT 46:

> "12. Case management, including the splitting of trials and the framing of preliminary issues, is quite fundamentally an exercise in pragmatism. The Tribunal must bear in mind how far it can proceed in hiving off certain issues, and in doing so it must consider two things. First of all, the cost-benefit in hiving off; but secondly, the viability of any trial where those issues have been hived off.
>
> 13. These are questions which cannot, obviously, be finally determined at this, early procedural stage. We are in the early foothills of this litigation and it would be wrong to reach a finally concluded view on anything substantive. Hence the pragmatic view. This Tribunal is concerned with risk management and the risks that we must ensure are avoided are (i) the unnecessary escalation of costs, but (ii) also the need to have an effective trial that is not derailed by a risk of certain points not being before the court at the relevant and appropriate time.
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> 14. So, that is broadly the pragmatic exercise that we are seeking to resolve. With that introduction, we turn to the question of whether this should be a three-stage trial or a two-stage trial

8. Being dominant is a condition precedent to there being abuse and it is, in some respects, odd that the issue of dominance should be heard after the issue of abuse has been determined, rather than before or at the same time. Microsoft submit that this is a common approach, and for good reason. It contends that organising a trial this way could lead to a substantial saving of costs, because if the case of abuse fails then there is no need to hear the weighty question of dominance. Microsoft contends that defining the relevant market and determining dominance is likely to require a complicated and time-consuming analysis. Microsoft also makes the observation that in other cases where the question of dominance has been stayed the action has settled without ever having to go on and determine the question of dominance.

9. Turning to how the issue of dominance is pleaded, the Claimant states at paragraph 39 to 43 of the amended particulars of claim:

> "39. The definition of the relevant markets will be a matter for expert evidence in due course. Pending such evidence, VL's case is as follows.
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> 40. The relevant product markets are those for (1) desktop operating systems; and (2) office productivity suites.
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> 41. The relevant geographic market comprises the Relevant Territories.
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> 42. Microsoft has a dominant position in the relevant markets:
>
> > (1) Windows' share of the desktop operating system market is at least 75%.

(2) Office's share of the office productivity suite market is at least 75%.

(3) Of those market shares, the part resulting from the sales of pre owned licences is extremely small. Microsoft monopolises the remainder, being the exclusive supplier of new perpetual licences for, and grantor of subscription licences for, Windows and Office.

(4) Windows and Office benefit from very strong brand loyalty, particularly among business and enterprise customers.

(5) Windows and Office benefit from very strong network effects, and users choosing competing software face considerable switching costs. In particular, and without limitation:

> (a) Corporate users are overwhelmingly familiar with using and, corporate IT professionals are overwhelmingly familiar with supporting, both products. Switching to alternative software would require costly retraining of existing staff, and significantly reduce the available pool of skilled job applicants.
>
> (b) Word processing, spreadsheet and presentation documents are nearly ubiquitously shared, in electronic form, in Word, Excel and PowerPoint's native file formats respectively, a situation that has persisted since many years before the start of the relevant period. While competing office software suites may be able to read and write files in Office's native file formats, none of them reliably and consistently achieve full file compatibility or feature parity.

(6) Windows and Office also benefit from very strong barriers to entry:

> (a) Very significant time and costs are required to develop new desktop operating systems and office software suites.
>
> (b) In light of the dominance of Windows and Office, and the network effects and switching costs from which they benefit, any investment in the time and costs required to develop competing software would also be very risky.
>
> (c) Microsoft has very large economies of scale, the incremental cost of a new perpetual software licence being close to zero.

(7) Microsoft's market power is further demonstrated by its success in increasing average revenue per user over time.

43. Although the two product markets identified at §40 above are distinct, Microsoft is able to leverage and reinforce its dominance in each through its practice of bundling, which happens at several levels:

> (1) First, Office is itself a bundle of applications that could in principle be sold separately, but in practice almost never are.
>
> (2) Second, Microsoft's volume agreements for perpetual licences offer significantly better prices when customers take a bundle of

> licences together most commonly, Windows, Office and the Core or Enterprise CAL Suite.
>
> (3) Third, Microsoft's subscription licences for enterprise customers positively require those customers to take bundles including all three of Windows, Office, and one or other CAL Suite, as explained above."

10. In its defence Microsoft, at paragraphs 40 to 43 states:

> "As to paragraph 39:
>
> 40.1. The first sentence is admitted. The Defendants will rely on expert evidence on the definition of the relevant markets and plead below without prejudice to such evidence.
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> 40.2. The second sentence is noted. It is for the Claimant to plead and prove, with proper supporting particulars, the nature and definition of the relevant markets and dominance.
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> 41. Paragraphs 40 41 are insufficiently particularised and the Defendants are accordingly unable to plead to them. No admission is made.
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> 42. Paragraph 42, including subparagraphs 42(l) (7), is contingent on the insufficiently particularised market definitions pleaded in paragraphs 40 41 and the Defendants are accordingly unable to plead to them. No admission is made.
>
> 43. Paragraph 43, including subparagraphs 43(1) (3), are contingent on the insufficiently particularised market definitions pleaded in paragraphs 40 4 1 and the Defendants are accordingly unable to plead to them. No admission is made. The relevance of paragraph 43, including subparagraphs 43(l) (3), is in any event denied."

11. I am going to refuse the application to order a split trial at this stage for the following reasons.

12. First, I do not consider that the issues are sufficiently well defined on the pleadings to form a view as to the scope of the dispute with regards to dominance. The undertaking in this case is a company, or group of companies, which are well known in this field. I am told by Microsoft that determining whether it is dominant will require heavy and complex issues that will occupy a substantial proportion of additional court time and potentially £2 million to £4 million of additional costs. As yet, I do not know how Microsoft, a company with a significant presence in the market, is going to contend that it is not dominant. I accept that it might not be, but it has not chosen to explain the basis upon which it will be resisting that contention with any specificity.

13. Mr O'Donoghue KC for Microsoft observed that the relevant geographical area in issue extended to in the region of 30 countries. It will be necessary to consider whether this area operated as a single market or was heterogenous. Mr O'Donoghue also submitted that it may be necessary to consider whether the market for pre-owned licences is distinct from new perpetual licences and subscription licences.

14. At this stage, Microsoft is not in a position to say whether it will be running a positive case as to the relevant market, and if so what that case will be. Consequently, I cannot form a view today as to the length or complexity of the issues which will be before the court at trial.

15. Second, I am not sure how much significance this Tribunal can attach to the fact that, in other cases where split trials have been ordered, it was not necessary to go on and determine whether the defendant was dominant. I doubt the sample size is sufficient to attach statistical significance to it. One interpretation might be that at least in some of these cases, there was no sound basis for disputing dominance in the first place.

16. Third, Microsoft submits that this case would proceed on the assumption that the Claimant has succeeded on its pleaded case as to the relevant markets. What happens at trial if the relevant market is different? The parties either weren't clear or at least could not agree on the consequences for trial if the relevant market turns out to be different than that which had been assumed.

17. Mr O'Donoghue, in his submissions on behalf of Microsoft and at paragraph 23(b) of its skeleton argument, contended that it is simply not open for the Claimants to say at a later date that there might be some alternative market not pleaded by the Claimant in which Microsoft is dominant, or in which Microsoft's alleged conduct may have restricted competition. If an error as to the relevant market emerges during the second trial on dominance, the Claimant may lose the case overall even if it has succeeded in the first trial on abuse.

18. Mr O'Donoghue's further submitted that the Claimant will have the opportunity to plead its case in the alternative at this stage: to argue its case on the basis of

alternative relevant markets. Furthermore, he points to Rose J's decision in *Arriva the Shires v London Luton Airport Operations* [2014] EWHC 64 where, at paragraph 109, the precise definition of the downstream market did not matter in determining abuse. He also makes reference to the decision of Roth J in *Streetmap v Google Inc & Others* [2016] EWHC 253 for similar purposes.

19. In summary, Mr O'Donoghue contends that the market definition only has to be approximated when one is considering abuse and that, equally well, it is open to the Claimant to plead alternative market definitions at this stage.

20. Mr Schaefer, in his submissions on behalf of the Claimant, pointed to *BGL Holdings Limited v Competition and Markets Authority* [2022] CAT 36 ('Compare the Market'). An aspect of that appeal from the decision of the CMA was an allegation that the wrong definition of the relevant market had been arrived at. It was stated in this context, at paragraph 33:

> "We would only observe at this stage that the last sentence of paragraph 65 of the Notice, just quoted, overstates matters. It was common ground between the parties – and we agree – that market definition is an important tool in assessing the existence of anti-competitive effects. Getting it wrong may materially undermine a conclusion that there have been anti-competitive effects, but that is not necessarily the case. It is perfectly possible – even using an incorrect market definition – nevertheless to discern an anti-competitive effect. That is because market definition – at least when used as part of the Framework – is not concerned with effects (whether pro- or anti-competitive) at all, but merely in identifying the context in which these effects are to be tested for.59 We do not, therefore, accept that even if the CMA incorrectly defined the market, it automatically follows that the Decision cannot stand.

21. Mr Schaefer said that this supported his position that he would not be entrapped by a wrong decision or a wrong assumption as to market dominance, but said that if, in the event that this were to occur, there may be a need for a third trial, or it may not matter. Clearly, if it was necessary to go back for a third trial, which effectively would be the rehearing of the first trial, that would only increase costs, not save costs.

22. I agree that alternative definitions of relevant market definition could be advanced at this stage. But if the Tribunal identifies a relevant market at the second trial which was not contemplated at the first trial this could lead to significant complexity. I cannot say today whether the Claimant may be

estopped or may not be entitled to go back and reargue the first trial. I cannot say whether that difference will or will not matter. These are matters which simply cannot be decided in the abstract.

23. Fourth, there is considerable dispute as to the extent to which questions of the relevant market for the purpose of abuse and dominance overlap. The Claimant says the relevant market for considering abuse and market distortions and quantum is the same as the relevant market that needs to be considered for dominance and that, consequently, there may be a considerable overlap in evidential issues.

24. Mr O'Donoghue disagrees. At this stage of the litigation there is little to get to grips with on this issue. My provisional view, which is all I can form at this stage, is that I agree with Mr Schaefer on this point. An issue that potentially arises is whether the relevant market is pre-owned licences or licences in general. This would seem potentially to be a factor which is not only relevant to dominance but is also relevant when considering evidence of abuse and the impact of abuse on trade.

25. Moreover, at paragraph 53 of the Amended Particulars of Claim, the Claimant pleaded:

> "By requiring customers to accept one or more of the impugned terms in exchange for discounted subscriptions Microsoft has effectively been paying those customers (via those discounts) to protect Microsoft from competition, by restricting the supply of pre-owned licences to Microsoft's competitors, such as VL (indeed if they did supply such competitors those competitors would indirectly themselves compete with Microsoft. Microsoft is thus paying potential competitors not to compete with it)."

26. In answer to this allegation, Microsoft stated, at paragraph 54.3:

> "The second and third sentences [that is of the paragraph I have just read out] are contingent on the definition of the relevant markets and the defendants are accordingly unable to plead to them, save to their general denial of anti-competitive effects set out above. Paragraph 41 ... is repeated."

27. It does seem, at least at this stage, that the relevant market is being considered by Microsoft not just from the perspective of whether there was dominance, but also for the purposes of abuse.

28. Fifth, the saving of costs and time are not assured by splitting the question of dominance from the other issues. There will be a saving if there is no abuse, plainly. If there is abuse, then the question will arise as to what happens next. Further in both cases there will then be the question of whether the matter should go to appeal after the first trial or after the second trial. There could be significant delay to a final judgment unless the defendant is wholly successful in the first trial.

29. Dominance issues may be more complicated in the second trial than they would have been if they were heard with the first trial, and then, as I have said, I cannot rule out the possibility that there would need to be a revisiting of the findings in the first trial in order to achieve an overall result. Further, I would observe that as a general matter, having two trials, even if in theory there is meant to be nothing overlapping, tends to lead to more court time than a single trial.

30. I am not suggesting that there are not cases where it is not attractive to split trials in this way, nor am I finally ruling out a split trial in this case, but I am not prepared to order a split trial at this stage, where the issues between the parties are so poorly defined.

31. Subject to further argument, I am minded to require Microsoft to set out in a statement of case (a) what it contends the relevant market to be by which dominance should be assessed, (b) what facts and matters Microsoft rely upon to contend that it is not dominant in the relevant market as identified by the claimants (c) and what facts and matters it relies upon to contend that it is not dominant in the relevant markets market as identified by Microsoft. Of course, Microsoft, as Mr O'Donoghue pointed out, does not have to run a positive case if it does not wish to. But if it is going to run a positive case the claimants should have an opportunity of knowing that case.

32. For the reasons set out in this Ruling,

IT IS ORDERED THAT:

(1) The Defendants' application for a split trial in these proceedings is refused.

Justin Turner KC
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 9 May 2023