Neutral Citation [2023] CAT 29

Case No: 1576/6/12/23

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(3) APPLE EUROPE LIMITED
(4) APPLE (UK) LIMITED

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

REASONED ORDER (PERMISSION TO APPEAL)

UPON reading the Notice of Application for review under section 179 of the Enterprise Act 2002 **("EA 2002")** dated 18 January 2023 (the **"Application**") and the Respondent's Defence dated 15 February 2023

AND UPON hearing counsel for the Parties at a hearing on 10 March 2023 (the "**Hearing**")

AND UPON considering the Tribunal's judgment dated 31 March 2023 [2023] CAT 21 (the **"Judgment**")

AND UPON reading the Respondent's application for permission to appeal the Judgment filed on 13 April 2023 (the **"PTA Application"**)

AND UPON reading the Applicants' submissions in response to the PTA Application dated 25 April 2023 (the **"Response"**)

AND UPON reading the letter from the Respondent dated 25 April 2023 (the **"CMA Letter"**)

AND UPON reading the Respondent's submissions to the Response dated 28 April 2023 (the "**Reply"**)

AND UPON the Tribunal having considered the PTA Application, the Response, the CMA Letter and the Reply

AND UPON this Order adopting the definitions as used in the Judgment

IT IS ORDERED THAT:

1. The Respondent is refused permission to appeal the Judgment.

REASONS

The Judgment

1. On 31 March 2023, the Tribunal issued its judgment in relation to an application by Apple for a review under section 179 EA 2002 of the CMA's Decision to make a market investigation reference under section 131 EA 2002 in relation to the supply of mobile browsers and mobile browser engines and the distribution of cloud gaming services through app stores on mobile devices in the UK.

2. The Tribunal determined that section 131A EA 2002 did apply to the Decision, as the CMA had published a market study notice, and was proposing to make a reference under section 131 EA 2002 in relation to the matter specified in the June 2021 Market Study Notice. The time limits in section 131B EA 2002 therefore applied. As a result of the CMA's failure to comply with the deadlines, the Decision lacked the statutory pre-requisites for a valid decision, was *ultra vires*, and must be quashed.

The PTA Application

3. In the PTA Application, the CMA raised two grounds of appeal (the "**Grounds of Appeal**")

   (a) **Ground 1:** The Tribunal erred in interpreting and applying sections 131A and 131B(1) EA 2002. Those provisions (including the relevant time limits) apply where the CMA consults on a proposed reference under section 131 EA 2002 as

part of the preparation of a market study. They do not curtail the CMA's general power to consult on and make a market investigation reference outside the market study process, as occurred in the present case.

(b) **Ground 2:** the Tribunal erred in law by failing to address the CMA's case that changes in circumstance had in fact occurred between the Market Study Interim and Final Reports, which entitled the CMA to propose to make a reference when it did and, following a separate consultation, to adopt the Decision. The CMA did rely on a material change in circumstance in relation to (i) unforeseen delays to the primary legislation which would form the basis of the Digital Market Unit's new and distinct statutory powers; (ii) new submissions and evidence from web developers and cloud gaming providers which identified concerns and proposed remedies that had not been raised with the CMA before the 6-month point; and (iii) new work and analysis which the CMA had not been able to carry out in the initial six-month period, but which was directly relevant to the suitability of remedial action at the end of a reference and, as such, to the suitability of making a reference. Further or alternatively, the Judgment does not address the CMA's pleaded case that the principle of good administration required the CMA to take such circumstances into account and required it to make decisions that reflected the facts at the time of the Market Study Final Report.

4. The CMA further submitted that there are compelling reasons under CPR Rule 52.6(1)(b) for the Court of Appeal to hear the proposed appeal:

(1) This is the first occasion on which the Tribunal has interpreted the power under section 131(1) alongside sections 131A and 131B EA 2002. The Judgment identifies substantial limits on the CMA's powers which inhibit the CMA from intervening to improve the functioning of markets in the interests of consumers and in according with the CMA's duty under section 25(3) of the Enterprise and Regulatory Reform Act 2013. The Judgment is of wider significance and raises novel and important questions of law of general application to the markets regime in the UK. The importance and novelty of such issues are eminently suitable for the Court of Appeal to consider. There is a good reason in the public

interest to determine a discrete point of statutory construction where similar cases which turn upon it are likely to occur in the future.

(2) The Judgment will bring to an end the extant market investigation into suspected restrictions on mobile browsers and cloud gaming. That investigation is and had been in the public interest. The CMA is concerned that the premature end of the investigation will impede its ability to investigate and, if appropriate, remedy any restrictions on the distribution of mobile browsers, browser engines and cloud gaming services on Apple iOS and Android devices.

Disposition

5. We are not satisfied that either of the CMA's Grounds of Appeal have a real prospect of success.

6. Ground 1 is, in essence, a repeat of the submissions made by the CMA during the Hearing. The CMA argues that the Decision was not made as part of its market study, and instead was proposed following a separate consultation period carried out subsequently to the Market Study Final Report. For the reasons given in the Judgment, it is clear that section 131A EA 2002 did apply to the Decision. The CMA had published the June 2021 Market Study Notice, the CMA was proposing to make a reference under section 131 EA 2002, and the proposal to make the market investigation reference in the Market Study Final Report was in relation to the matter specified in the June 2021 Market Study Notice. Furthermore, the purported decision to propose and consult on an MIR was announced with and explained in the Market Study Final Report arising from that process.

7. This is not a case where we are in sufficient doubt about our interpretation of the statutory provisions, or where we were called to choose between complex, competing precedents, which might satisfy us that an appeal would have a real prospect of success. The EA 2002 is unambiguous regarding the deadlines in sections 131A and 131B, and when they apply.

8. Ground 1 also argues that the interpretation of section 131A EA 2002 in the Judgment imposes a substantial yet vaguely defined fetter on the CMA's free-standing power to

make a reference under section 131 EA 2002. Our conclusion in the Judgment arises inevitably out of the wording of the EA 2002. The inconvenience and difficulties caused by this interpretation for the CMA do not permit for another reading of the clear meaning of the statute. Further, whilst the Judgment found that the CMA can only make a stand-alone reference under section 131 EA 2002 where it is not "in relation to a matter specified in a market study notice", this does not mean that a market could not be the subject of subsequent market studies or investigations where the proposed reference was no longer in relation to that specified matter. Whilst the Judgment made clear that we were not deciding on the precise meaning of the words "in relation to the matter specified" in section 131A(1)(a) EA 2002, it did indicate that certain situations, such as in cases of mistake of fact, misrepresentation and/or change of circumstance, may permit the making of another MIR.

9. Ground 2 is surprising, given we did not hear any argument about the precise meaning of the words "in relation to the matter specified". The essence of the CMA's contention in the hearing was *not* that the Decision was no longer in relation to the matter specified in the Market Study Notice, but rather that the Decision was taken under the free-standing power under section 131 EA 2002. The CMA now seeks to re-write its submissions in a manner which misconstrues the basis of the Judgment, as well as the pleadings made before the Tribunal.

10. The CMA also argues that the Judgment does not address the CMA's pleaded case regarding the principle of good administration. This is incorrect. The wording of Sections 131A and 131B EA 2002 is clear – Parliament has set a timeframe for the process of investigations in the context of a market study notice, with which the CMA must comply. The Judgment sets out why the constraints in Sections 131A and 131B 2002 also make good administrative and commercial sense. The CMA accepted that if the limits applied, they were hard-edged jurisdictional limits. However, the Judgment also sets out situations where it is possible that a market could be the subject of a subsequent market study or market investigation.

11. The parties are reminded that they have a responsibility, on receipt of a draft judgment, whether invited to do so or not, to raise with the judge and draw to their attention any material omission or any perceived lack of reasons – see *In Re A (Children) (Judgment: Adequacy of Reasoning) (Practice Note)* [2011] EWCA Civ 1205. It is unsatisfactory

for a party to draw a judge's attention to a perceived material omission at the permission to appeal stage, where it had a ready opportunity to notify the judge of this previously – see *Re S (Children)* [2007] EWCA Civ 694, *Ocado Group plc and another v McKeeve* [2020] EWHC 1463 (Ch).

12. We have considered whether there is any other compelling reason why permission to appeal should be granted in this case. Although we appreciate the CMA's policy concerns about the markets concerned, we conclude there is no legally relevant compelling reason to grant permission.

13. Market investigation references are, of course, very important. However, the restrictions set out in EA 2002 are clear. The letter of the law matters, even if it generates undesirable or unfortunate results. The EA 2002 did not permit the CMA to make the Decision.

14. This is a narrow case, without prejudice to the overall market investigation regime, that can proceed with the clarification given in the Judgment regarding the time limits in cases where a market study notice has been published. The Judgment is clear that it is *not* creating a fetter for future MIRs in a general sense. In the specific circumstances of this case, i.e. a decision by the CMA not to make a MIR at the six-month point, we found that the CMA was then bound by that decision and could not then decide to make a reference almost a year later, unless it was no longer in relation to the matter specified in the notice. The CMA could, given its concerns even at the time of its Market Study Interim Report, have decided to propose to make a reference, subject to consultation and the possibility of Digital Market legislation being forthcoming, so leaving its options at the 12 months stage open. Consequently we see no reason to consider that the MIR regime is itself compromised by our Judgment and therefore this provides no compelling reason to grant permission to appeal in this case. This sets out a clear process for the CMA to follow in future cases where similar circumstances arise.

15. As acknowledged in the Grounds of Appeal, the Tribunal was careful to consider "ways out" of the present situation. The Earlier Decision was, in the view of the Tribunal, questionable on public law grounds, and a course of action lies open to the CMA to seek to resolve the situation. This is not a case where the CMA is at least arguably without a remedy.

Sir Marcus Smith
President

Michael Cutting

Anna Walker, CB

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 3 May 2023