IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1606/7/7/23

BETWEEN:

NIKKI STOPFORD

Applicant/Proposed Class Representative

– and –

(1) ALPHABET INC.

(2) GOOGLE LLC

(3) GOOGLE IRELAND LIMITED

(4) GOOGLE UK LIMITED

Respondents/ Proposed Defendants

ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form dated 7 September 2023 (the "Claim Form")

AND UPON reading the Proposed Class Representative's application dated 3 October 2023 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Rules") for permission to serve the Claim Form and supporting documents on the First to Third Proposed Defendants out of the jurisdiction (the "Rule 31 Application")

AND UPON reading the Witness Statement of Luke Streatfeild dated 3 October 2023, made on behalf of the Proposed Class Representative in support of the Rule 31 Application, and the accompanying exhibit

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve the Claim Form and supporting documentation on the First to Third Proposed Defendants out of the jurisdiction at the following addresses:

    (a) Alphabet Inc. at 1600 Amphitheatre Parkway, Mountain View, California 94043, United States, or elsewhere in the United States.

    (b) Google LLC at 1600 Amphitheatre Parkway, Mountain View, California 94043, United States, or elsewhere in the United States.

    (c) Google Ireland Limited at Gordon House, Barrow Street, Dublin 4, Dublin, Ireland, or elsewhere in the Republic of Ireland.

2. This order is without prejudice to the rights of the First, Second and Third Proposed Defendants to apply pursuant to Rule 34 of the Rules to dispute the jurisdiction of the Tribunal. Any such application should take account of the observations set out in *Epic Games, Inc v Apple Inc.* [2021] CAT 4 at [3].

REASONS

(1) Background

1. These are collective proceedings brought pursuant to section 47B of the Competition Act 1998 ("the Act"). The claims they seek to combine concern the impact on consumers of the conduct of the Proposed Defendants (collectively, "*Google*") in the online search market (which is a two sided market comprising users conducting searches and businesses seeking to advertise products or services to those users), as well as certain adjacent markets concerning mobile device functionality.

2. Part of the proceedings involve a follow on claim, relying on the European Commission's *Google Android* decision, (Case AT.40099, dated 18 July 2018), which determined that the First and Second Proposed Defendants had committed an abuse of a dominant position and imposed a fine in excess of €4 billion for that infringement. Part of the proceedings involve a stand alone claim, focused on the arrangements which Google has entered into with Apple Inc., in relation to default search engine settings on Apple devices.

(2) The Claim

3. According to the Claim Form, both aspects of the proceedings concern practices on Google's part which have secured for it the status of default search provider on practically all mobile devices sold in the UK. These practices have prevented Google's competitors from securing distribution of their search engines, particularly on mobile devices. This has allowed Google to secure and exploit a dominant position in online search.

4. In the *Google Android* decision, the Commission found (among other things) that:

   (a) Google tied the Google search app with the licencing of Google's Play Store to device manufacturers, which was an abuse of a dominant position.

   (b) Google tied Google's Chrome browser with the Google search app and the Play Store, which was an abuse of a dominant position.

   (c) Google made the licencing of the Play Store and the Google search app conditional on device manufacturers agreeing "anti-fragmentation obligations, which prevented the development of amended versions of the Android operating system and which was an abuse of a dominant position.

   (d) All of the above constituted a single infringement on the basis that they pursued an identical objective, "*namely to protect and strengthen Google's dominant position in general search services and thus its revenues via search advertisements*" (Recital 1341).

5. The Proposed Class Representative relies on those findings and says (I summarise at a high level) that:

   (a) As a consequence of these abuses, Google has deprived competing search engine providers of the volume or scale required to make them competitive for users or advertisers.

   (b) This lack of competition on the advertising side of the online search market has allowed Google to increase the costs faced by advertisers, including by allowing Google to increase the number and prominence of advertisements, which reduces the opportunities for those advertisers to reach users without paying Google for advertising.

   (c) The businesses that use these services have passed on these higher advertising costs to consumers in the form of higher prices for the goods and services supplied by those businesses in the UK.

6. In relation to the stand alone claim, the Proposed Class Representative asserts that Google has arrangements with Apple, by which Google pays significant sums to Apple to ensure that Google is the default search engine on the pre-installed browser on Apple devices. This prevents effective competition by other search engines and leads to the same consequences as are described in [5] above.

7. The Proposed Class Representative's expert economist has undertaken a preliminary exercise to estimate the value of the claims, before interest, as being in the region of £5.8 billion.

(3) The Parties

8. The Proposed Class Representative seeks to bring collective proceedings on behalf of all UK domiciled consumers aged 16 or over who, since 1 January 2011, purchased goods and/or services from businesses selling in the UK which used search advertising services provided by Google.

9. The Proposed Defendants are members of the Google corporate group. The Proposed Class Representative describes them as follows in her application for service out:

(a) The First Proposed Defendant, Alphabet Inc., is the holding company for the Google group of companies and is responsible for setting global policies in relation to products and services delivered by its subsidiaries. Further or alternatively, Alphabet has some significant element of influence or control over Google LLC and Google Ireland (as well as Google UK) as its subsidiaries. Alphabet was an addressee of the Commission's *Google Android* decision.

(b) The Second Proposed Defendant, Google LLC**,** is the entity with which device manufacturers entered into agreements tying the Google Search and Google Chrome apps to access to the Google Play Store. It is therefore directly party to the Android Infringements. It was also an addressee to the Commission's *Google Android* decision.

(c) The Third Proposed Defendant, Google Ireland Limited is the entity which contracts with advertisers who use Google search advertising, including in the UK. Further, the ultimate holding company of Google Ireland is Alphabet.

(d) The Fourth Proposed Defendant is Google UK Limited, in respect of whom permission for service out is not required.

(4) Likely forum for the proceedings

10. The Proposed Class Representative invites the Tribunal to find that the proceedings should be treated as proceedings in England and Wales for the purposes of Rule 18 of the Rules. This is because the majority of the members of the proposed class reside in England and Wales, the Proposed Class Representative resides in Brighton and the legal representatives for all parties are located in London.

11. It seems likely that the proposed proceedings are, given the likely preponderance of class members domiciled in England, at least in material respects to be treated as taking place in England and Wales and I will approach service out of the jurisdiction on the

same basis as the High Court by reference to the relevant principles in the Civil Procedure Rules 1998 ("CPR") (*DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18]).

(5) Legal principles for the Rule 31(2) Application

12. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, they involve determinations of whether:

    (a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.

    (b) There is a good arguable case that the claim falls within one of the "gateways" set out in CPR Practice Direction 6B ("CPR PD6B") at paragraph 3.1.

    (c) In all the circumstances, the UK is clearly or distinctly the appropriate forum for the trial of the claim.

13. The burden is on the Proposed Class Representative to satisfy the Tribunal that all three requirements are satisfied.

(a) Serious issue to be tried

14. In respect of part of her claim, the Proposed Class Representative relies on the *Google Android* decision. If she is entitled to do that, then there seems little doubt that there is a real prospect of success on that part of the claim, given that the decision will establish liability in relation to the infringements found in the decision and that the experts for the Proposed Class Representative have set out what appears to be a seriously arguable basis that the infringements relied on are capable of giving rise to loss which could properly be the subject of collective proceedings[1].

[1] In reaching this conclusion, I express no view on whether the claims are suitable for collective proceedings, which is a matter for the Tribunal which hears the collective proceedings application.

15. The Proposed Class Representative submits that she is entitled to rely on the *Google Android* decision:

(a) Notwithstanding the UK's departure from the European Union, because her claim is preserved by the operation of Part 6 of Schedule 4 of the Competition (Amendment etc.) (EU Exit) Regulations 2019/93 as amended, so far as relevant, by Regulation 39 of the Competition (Amendment etc.) (EU Exit) Regulations 2020/1343).

(b) Despite the *Google Android* decision still remaining subject to an appeal from the General Court (which substantially upheld the decision[2]) to the Court of Justice of the EU[3], by virtue of Rule 31(3) of the Competition Appeal Tribunal Rules 2003, as preserved by Rule 119 of the Rules , subject only to the need to seek the Tribunal's permission to proceed in relation to claims which arose prior to 2015.

16. These submissions appear to be correct (though I have not of course had the benefit of any argument from Google to the contrary), and support the proposition that there is a serious issue to be tried in respect of this part of the claim.

17. In relation to the stand alone part of the proceedings, and by analogy with the reasoning relating to the *Google Android* decision and the follow on claim, I also think it is seriously arguable that the matters relied on and alleged constitute abusive conduct and are capable of giving rise to loss which could properly be the subject of collective proceedings.

(6) The jurisdictional "gateway" under CPR PD6B

18. The Proposed Class Representative relies on the "tort gateway" under paragraph 3.1(9) of CPR PD6B, which provides as follows:

[2] Judgment of the General Court of14 September 2022 in *Google and Alphabet v Commission (Google Android* Case T-604/18.
[3] Case C-48/22.

"3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

...

(9) A claim is made in tort where –

(a) damage was sustained, or will be sustained, within the jurisdiction;

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or

(c) the claim is governed by the law of England and Wales"

19. The Proposed Class Representative relies particularly on paragraph 3.1(9)(a), arguing that damage has been suffered in the UK as a result of the overcharge being incurred by consumers in the UK because of the unlawful conduct of Google. The Proposed Class Representative relied in this regard on:

    (a) *FS* Cairo *(Nile Plaza) LLC v Brownlie* [2021] UKSC 45, in which a majority of the Supreme Court (Lord Leggatt dissenting) confirmed at [81] that "damage" in this gateway simply refers to "*actionable harm, direct or indirect, caused by the wrongful act alleged*".

    (b) The decision of Morgan J in *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat), where the judge held at [99] that "*if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought. If the loss comes from reduced sales then the loss would seem to be in the market where the seller suffers the loss of sales.*".

20. I consider that there is a good arguable case that the claim falls within the "tort gateway" under paragraph 3.1(9)(a) on the basis that damage is sustained within the UK. The alleged damage is the payment of an overcharge by consumers domiciled in the UK to businesses supplying goods and/or services in the UK, and is therefore likely to have been sustained in the UK.

(7) Appropriate Forum

21. I am also satisfied for the purposes of Rule 31(3) of the Rules that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings. The proposed class is comprised of a very large number of UK domiciled consumers who purchased goods and/or services from businesses based in the UK and using Google's advertising search services. The claim is based on UK and EU competition law and seeks to utilise the bespoke opt-out collective proceedings regime which is designed to provide redress to consumers in circumstances where that would otherwise not be viable.

22. In relation to the First and Second Proposed Defendants, who are registered in the United States, it appears likely that the proposed collective proceedings could not be brought in the United States in the way currently envisaged by the Claim Form. The US Sherman Act does not appear to apply extra-territorially so as to extend to claims of the present kind by UK consumers: see *Hoffmann-La Roche Ltd v Empagran* S.A. 542 US 155 (2004) and *Coll v Google*[4], *Gormsen v Meta*[5], *and Arthur v Google*[6] Reasoned Orders at [11], [17] and [31], respectively.

23. I therefore conclude that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction.

Ben Tidswell Made: 23 October 2023

Chair of the Competition Appeal Tribunal Drawn: 23 October 2023

[4] Case no. 1408/7/7/21.
[5] Case no. 1433/7/7/22.
[6] Case no. 1582/7/7/23.