Neutral citation [2024] CAT 30

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 April 2024

Before:

SIR MARCUS SMITH
(President of the Competition Appeal Tribunal)
DEREK RIDYARD
TIMOTHY SAWYER, CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

**DR LIZA LOVDAHL GORMSEN**

Applicant and Proposed Class Representative

- and –

**META PLATFORMS INC**
**META PLATFORMS IRELAND LIMITED**
**FACEBOOK UK LIMITED**

Respondents and Proposed Defendants

# RULING (PERMISSION TO APPEAL)

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## A. INTRODUCTION

1. The Proposed Defendants seek permission to appeal the judgment of 15 February 2024 [2024] CAT 11 (the "CPO Judgment"), which found that the Proposed Class Representative's ("PCR") application for a collective proceedings order pursuant to section 47B of the Competition Act should be certified to proceed.

2. The test for jurisdiction to appeal is set out in section 49(1A) of the Competition Act 1998. The Proposed Defendants contend that they have jurisdiction to appeal because their grounds give rise to points of law, and the statutory expression in section 49(1A) "as to" damages should be constructed to avoid costly diversion of appellants protectively seeking permission to judicially review proceedings in parallel (*McLaren Class Representative v MOL (Europe) Limited* [2023] EWCA Civ 1471). We agree that they have jurisdiction to appeal.

3. The test for permission to appeal requires that the Tribunal considers that the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard. For the reasons given below, we find that the test for permission to appeal is not met.

4. The Proposed Defendants seek permission to appeal on the following grounds:

   (1) Ground One: The Tribunal erred in certifying the PCR's unfair pricing case because the PCR adopts an incremental approach. That approach is not permitted under the test in *United Brands*, which requires an assessment of the entire price and the entire economic value of the product.

   (2) Ground Two: The Tribunal mischaracterised the PCR's case in the CPO Judgment, finding that the PCR's case alleges that (i) the price before Off-Facebook Data collection was on the cusp of being unfair such that any price increase without a corresponding increase in the value of the

product was necessarily unfair; and (ii) an unfair price can be ascertained on the basis that part of it is inherently unfair.

(3) Ground Three: The Tribunal erred in certifying proceedings where the PCR did not include as part of her proposed methodology a means for applying the test in *United Brands* on the orthodox basis.

(4) Ground Four: The Tribunal erred in certifying the proceedings on the basis that the PCR seeks negotiating damages in circumstances where the PCR does not advance - and expressly disavows - a claim based on negotiating damages.

(5) Ground 5: The Tribunal erred in finding that negotiating damages are available in respect of breaches of competition law.

## B. ANALYSIS

### (1) Grounds One and Three

5. Both of these grounds relate to the Proposed Defendants' contention that the test in *United Brands* requires as assessment of the entire price and the entire economic value of the product. They argue that the PCR's adoption of an incremental approach to unfair pricing within the *United Brands* framework, focusing on whether users received a sufficient value transfer from Facebook in exchange for the collection of Off-Facebook Data only, impermissibly excludes from consideration parts of the price and parts of the economic value of the product. The PCR failed to plead that the economic value of Facebook as a whole has no reasonable relation with the price users paid for the service.

6. The Proposed Defendants further contend that the CPO Judgment erroneously finds it is legally permissible to find an unfair price by reference to increments of the price paid and corresponding increments of the product, without taking into account the full price paid and the entire economic value of the product. They also raise that the authorities cited by Meta in support of its position were not addressed by the Tribunal.

7. The Tribunal is very familiar with the authorities raised by the Proposed Defendants, including *Attheraces*, *Flynn Pharma*, *Scandlines* and *Kent*.[1] The CPO Judgment squarely addressed the issue of whether an incremental price increase could be assessed under *United Brands*. It acknowledged that, generally speaking, both excess and unfairness are assessed by considering the overall price charged for a service in light of the totality of that service and that incremental increases are not the way the *United Brands* jurisdiction has typically been seen. However, the CPO Judgment went onto explain why the PCR's case is not one purely of an incremental price increase, such that an application of *United Brands* was arguable and triable in these proceedings.

8. In any case, as noted in the CPO Judgment, and as stressed in *Flynn Pharma Ltd v CMA* [2020] EWCA Civ 339, the *United Brands* test is flexible and its application will vary depending on the context.

9. The Proposed Defendants also submit that even if this incremental approach were possible, the PCR has failed to include as part of her methodology a means to apply *United Brands* on an orthodox basis i.e. considering the entire price by reference to the entire economic value of the product, because the Proposed Defendants will apply the test on such a basis. Without such a proposal, the proceedings may "go off the rails" as the parties will take different approaches to the assessment. The Tribunal, it is said, accordingly misapplied the *Pro-Sys* test.

10. The Tribunal considered the Claim Form and expert reports of Professor Scott Morton with great care and concluded that they applied the principles from *United Brands* in manner which would be triable. As noted by the PCR, the Claim Form applied the test in a before and after analysis of the kind routinely applied in unfairness cases, and Professor Scott Morton's first report compares the features of Facebook's behaviour when there was some competition with the period following the tipping of the market into dominance. Professor Scott Morton considered the profitability of the entire Facebook platform, and the contribution of Off-Facebook Data to its profits, and included an analysis of the

[1] [2007] EWCA Civ 38; [2020] EWCA Civ 339; Case COMP/A.36.568/D3; [2022] CAT 28.

assessment of the economic value of Facebook. The PCR applied the two limbs of *United Brands*, considering overall and incremental profits under limb one and other contextual matters under limb two. More detailed arguments as to the parties' approach to assessing pricing is for trial.

11. Further, the Tribunal's case management powers provide it with the ability to carefully control the expert evidence and ensure that each party's case meets the other, contrary to the Proposed Defendants' contention that the Tribunal's approach risks the parties taking fundamentally different approaches to the assessment under *United Brands*.

12. These grounds of appeal have no real prospect of success. They rely on an overly prescriptive approach to *United Brands*, accompanied by a mischaracterisation of the PCR's methodology.

**(2) Ground Two**

13. Both sub-grounds of this ground contend that the Tribunal has mis-characterised the PCR's case.

14. Following receipt of the Proposed Defendants' application for permission to appeal, the Tribunal wrote to the PCR requesting clarification as to whether the Tribunal had misstated or reframed her case. The PCR has confirmed in her consequential submissions that the Tribunal correctly summarised the approach of the PCR and her expert. In particular, she has confirmed it is part of her case that following the imposition of Off-Facebook data tracking, there was no corresponding increase in the economic value of the Facebook product.

15. The Proposed Defendants also contend that *United Brands* does not permit an unfair price to be ascertained "on the basis that part of the price is inherently unfair (without there being a need to consider whether the price has any reasonable relation to the economic value of the product)", by reference to [25(2)(vii)] of the CPO Judgment. The PCR's case clearly considers the economic value of the product, and the Tribunal certified the case on this basis.

16. This ground accordingly has no real prospect of success.

**(3) Grounds Four and Five**

17. Similarly to ground two, the Proposed Defendants contend that the Tribunal certified proceedings on a basis not advanced by the PCR, namely that the PCR was seeking a remedy of negotiating/user damages. They also submit that such damages are not available for breaches of competition law given such breaches are vindicated as statutory torts in respect of which a claimant must prove ordinary compensatory loss. The Proposed Defendants also raise that the CPO Judgment does not address the authorities cited in relation to this issue.

18. We consider this point to be totally without merit in the context of an appeal against a decision to certify what need only be an arguable claim. Quantification of loss is – within extremely broad parameters – a question of fact, decided within broad legal principles. The attachment of labels can be analytically helpful, but can also lead to unnecessary technical points or distinctions. More specifically:

    (1) As above, this ground mischaracterises the CPO Judgment, which the PCR has confirmed accurately summarises her case. The PCR seeks a conventional form of compensation, that is to say a loss-based and not a restitution-based claim. To be absolutely clear, the proceedings have been certified on the normal measure of tortious loss and damage, viz. that the class needs to be put in the position it would have been in had the tort alleged not been committed.

    (2) How this measure of loss is assessed on the facts is a matter that will have to closely case managed. The issue of what the counterfactual would have been is clearly a difficult one, but the Tribunal does not see how damages based on the negotiation payment that would have been made by Facebook to Users in the counterfactual (i.e. if the tort had not been committed) can be unarguable.

(3) The PCR is here claiming ordinary compensatory loss, where the damage is the difference between the payment Users received for their Off-Facebook Data, and the payment they would have received in the counterfactual. The Tribunal will address the authorities on loss and damage (to the extent it needs to) if and when this matter comes to trial. One thing is – or should be – clear from the Tribunal's initial refusal to certify the proceedings - it is in no sense endorsing an approach to gain-based or "user damages" (i.e. account of profits, or a proportion of defendant profits). This ruling, in this regard, should be read with the Tribunal's first ruling: [2023] CAT 10.

19. Accordingly, we conclude that these grounds have no real prospect of success

**(4) Other Compelling Reason**

20. The Proposed Defendants submit that there is a compelling reason to grant permission to appeal on ground one, as it would be beneficial for the parameters of *United Brands* to be clarified. We do not agree. The *United Brands* test is flexible and can clearly accommodate the claim advanced by the PCR.

21. Similarly, in relation to ground three, we do not find there to be a compelling reason to grant permission. The Proposed Defendants submit clarity is necessary regarding whether a PCR must at the certification stage anticipate and address "inevitable" or "pivotal" issues that arise as part of the dispute. This issue has already been addressed in [2023] CAT 10 in these proceedings, and does not arise here as the PCR's methodology does address the pivotal issues required.

22. There is also no compelling reason to grant permission in relation to ground two (split into two sub grounds) or four. The Tribunal did not substitute the PCR's case for its own assessment, as the PCR has since confirmed.

23. Finally, there is no compelling reason to grant permission on ground five as the Tribunal did not find that the law permits negotiating/user damages in respect of breaches of competition law.

## C. DISPOSITION

24. We refuse permission to appeal on all grounds.

25. The CPO Judgment set out the Tribunal's expectation that these proceedings be tried in the first half of 2026 at the latest. If permission to appeal the CPO Judgment is granted by the Court of Appeal, the Tribunal is anxious to explore options to mitigate the almost inevitable delay in the hearing of these proceedings (should such appeal be unsuccessful). The Tribunal will accordingly list a directions hearing following receipt of the decision of the Court of Appeal: in the event that permission is not granted, to manage the progression of the proceedings, and in the event that permission is granted, to explore if there are any cost-effective and efficient ways to progress aspects of the case whilst that appeal is ongoing.

26. This decision is unanimous.

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| Sir Marcus Smith<br>President | Derek Ridyard | Timothy Sawyer, CBE |

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| Charles Dhanowa, OBE, KC (Hon)<br>Registrar | Date: 29 April 2024 |