PTA Template 269C1 - First Appeal

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2025-000403**

BIRA TRADING LIMITED –v– AMAZON.COM INC AND OTHERS

CA-2025-000403

ORDER made by the Rt. Hon. Chancellor of the High Court

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal against the Ruling of the Competition Appeal Tribunal ("CAT") on Carriage dated 20 January 2025

Decision Permission to appeal refused

Reasons

1. The CAT's Ruling preferring Professor Stephan as class representative to the applicant was a multifactorial evaluation by an expert tribunal. As Green LJ said in *Evans v Barclays Bank* [2023] EWCA Civ 876 at [146] (a case which also concerned a "carriage" dispute as to which of two candidates should be the class representative in collective proceedings): "The choice made by the CAT majority was a quintessential multifactorial evaluation. The CAT considered in the round a variety of factors relevant to who could conduct the proceedings best. The challenge is as to the weight the CAT attached to the various considerations as to which the CAT, as the expert in how proceedings play out at the nuts and bolts level, is vastly better placed than the Court of Appeal to form a view. The threshold for persuading the Court of Appeal to reverse the CAT's decision is commensurately high." That statement of principle is equally applicable here. The applicant does not meet that high threshold in this case.
2. Looking at the matter in the round, as Professor Stephan says in his Statement under PD52C.19 , the proposed appeal does not challenge the CAT's central finding at [73]-[74] that the applicant's narrow case which focuses on product entry issues was not persuasive and differed from the approach of the CMA and the European Commission whereas Professor Stephan's case reflects the decisions of those competition authorities.
3. The first ground of appeal alleges that the CAT erred in not concluding that there is a conflict of interest between class members using FBA and those using FBM. Contrary to the applicant's submissions, the CAT did not introduce an "overwhelming" threshold into the test for whether there was a conflict of interest. Rather it carefully analysed the facts and concluded that there was no conflict for a number of reasons: (i) at [79] it found that there was no clear division between merchants using FBA and those using FBM, but many merchants use both; (ii) again at [79] it accepted that in the counterfactual some merchants might switch away from FBA as the advantages of using it would have been removed; (iii) it accepted at [80] that the claim in respect of abuse in relation to self-preferencing of offers using FBA (so-called Abuse 3) was to the benefit of both categories of merchant as Abuse 3 led to overcharges for both FBA and FBM services; it concluded at [81] that Professor Stephan's case does not assert the alleged abuse had a very substantial diversionary effect on sales to merchants using FBA and that, as counsel for Professor Stephan pointed out, it was inherently unlikely that Amazon would argue the contrary; (v) at [82]-[83] it rejected the argument that merchants using FBA would necessarily have to give credit for any increase in sales caused by Abuse 3, leaving the question open to argument at a later stage; and (vi) it rejected at [84] the applicant's argument that pursuant of Abuse 3 would be against the interests of merchants using FBA, concluding that example given by the applicant's expert was not very plausible and the sort of speculative example in which it is inappropriate to engage at this stage of collective proceedings.
4. Contrary to the applicant's submissions, when the CAT said that there was "no overwhelming problem of conflict of interest" it was not saying that there was in fact a conflict but rather that there was no problem of conflict which would preclude Professor Stephan from being the class representative.
5. The CAT's overall conclusion was that sellers of products via both FBA and FBM were affected by Amazon's conduct, albeit in different ways but that did not mean that the two categories of merchant were in conflict with each other. That conclusion was one the CAT was entitled to reach on the facts and demonstrated no error of law.
6. Ground 2 alleges that the CAT erred in law in giving no weight to the two respects in which the applicant's claim is broader in scope than Professor' Stephan's: that the claim is for a longer period of time and that it includes an opt-in provision for foreign merchants. Contrary to the applicant's suggestion, the CAT did consider these factors but concluded that they were neutral. This was a conclusion by the CAT as to the weight to be given to factors which it did consider and did not involve any error of law.
7. Ground 3 alleges that the CAT erred in law in treating funding as a neutral factor. The applicant contends

that the CAT erred in permitting Professor Stephan to resile from the LFA he had agreed without being required to provide an explanation or justification for having entered a LFA with a term which the CAT regarded as unsatisfactory and giving disproportionate power over the proceedings to the funder. However, as Professor Stephan points out in his Statement the CAT has previously contemplated the possibility of one of the rivals in a carriage dispute making a "late improved offering": *O'Higgins* [2022] CAT 16 at [406] and it is hardly conducive to promoting the interests of the class members to deny a class representative the chance to improve the funding terms when faced with competition from a rival. The suggestion by the applicant that the unsatisfactory nature of the original LFA (which was, as just stated, amended to remove the offending provision) meant that Professor Stephan was unsuitable to act as a class representative is unwarranted and the comparison with *Riefa* is not appropriate.

8. The related complaint that the CAT erred in concluding that a "binding KC opinion" process to deal with settlement disputes is misplaced. As Professor Stephan points out in his Statement, the CAT adopted a similar approach in *Trucks* and this accords with clause 13.2 of the Association of Litigation Funders Code of Conduct. The conclusion of the CAT was well within the ambit of its discretion and, contrary to the applicant's submission, there is no need for a decision of the Court of Appeal on this issue.
9. Ground 4 alleges that the CAT erred in law in its approach and conclusions about the respective methodologies of the economist experts in the two claims. The applicant relies on the difference in approach, whereby the CAT gave Professor Stephan permission to file evidence from another expert (employed by the same company) to address criticisms of his methodology whereas it required the applicant's expert to give oral evidence. The applicant contends that the CAT's approach was unfair and irrational. The CAT found that the applicant's methodology satisfied the *Microsoft* test but preferred the methodology of Professor Stephan's expert, Dr Houpis. The applicant contends that the CAT had reached no conclusion as to whether Dr Houpis;s methodology was workable but this is a misreading of the CAT's conclusion at [96]:

   "Faced with such conflicting expert evidence [i.e between the parties' rival experts], we obviously cannot come to any firm conclusion at this point. We can only say that we found Mr Dorrell's evidence reassuring, and we do not see that we can possibly conclude that Dr Houpis' primary approach is not feasible or will not produce sufficiently robust results".

   On the basis of that conclusion, the evidence of Professor Stephan's experts satisfied the *Microsoft* test.

10. The CAT explained at [97] why it required the applicant's expert Dr Nitsche to give evidence: "By contrast, we have some concerns regarding Dr Nitsche's methodology. To help us get a better understanding of what he proposes, at the Tribunal's request he appeared at the hearing to answer some clarificatory questions". As Professor Stephan points out in his Statement, the applicant did not resist the request for Dr Nitsche to answer questions orally, nor did it propose that Dr Houpis should do the same. The suggestion that the CAT's approach was unfair or irrational is wholly without merit.
11. Overall, none of the grounds of appeal has a real prospect of success and there is no other reason, let alone a compelling one, for an appeal to be heard.

Signed: BY THE COURT
Date: 17 March 2025

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).