



Case No: 1592/7/7/23

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

ELISABETTA SCIAL LIS

Applicant /

Proposed Class Representative

- v -

- (1) **CASIO ELECTRONICS CO. LIMITED**
(2) **CASIO COMPUTER CO., LIMITED**

Respondents /

Proposed Defendants

REASONED ORDER

UPON considering the Proposed Class Representative’s (“PCR”) collective proceedings claim form dated 31 May 2023 and accompanying documents

AND UPON considering the PCR’s application, made by a First Witness Statement of Jeremy Evans dated 31 May 2023 and supporting exhibits, pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the “Tribunal Rules”) seeking permission to serve the collective proceedings claim form and accompanying documents on the Second Proposed Defendant out of the jurisdiction (the “Rule 31(2) Application”)

IT IS ORDERED THAT:

1. The PCR be permitted to serve the Second Proposed Defendant outside the jurisdiction.

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

REASONS

(1) Background to the claim

1. The PCR has applied for a Collective Proceedings Order (“CPO”) pursuant to section 47B of the Competition Act 1998 (“Competition Act”) so as to enable the commencement of collective proceedings on an opt-out basis claiming aggregate damages for loss suffered by purchasers of musical instruments (“Proposed Class Members”) as a result of unlawful resale price maintenance engaged in by the First Proposed Defendant, Casio Electronics Co. Limited (“Casio UK”), a company incorporated in England whose registered address is 10 Norwich Street, London EC4A 1BD.
2. The claims which the PCR proposes to pursue are a mix of follow on and standalone claims under section 47A of the Competition Act, and are claims for breach of statutory duty by infringing the Chapter I prohibition contained in section 2 of the Competition Act and/ or Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) (“the Claim”).
3. On 1 August 2019, the Competition and Markets Authority (“CMA”) issued a settlement decision in Case 50565-2 regarding RPM in the digital piano and digital keyboard sector (“the Decision”) addressed to Casio UK and the Second Proposed Defendant, Casio Computer Co., Limited (“Casio Japan”), a company whose correspondence address is 6-2 Hon-Machi, 1-Chrome, Shibuya-Ku, Tokyo 151-8543, Japan. The Decision related to what was referred to as “the Casio Pricing Policy”. In summary, the CMA found that the Casio Pricing Policy was an agreement and/or concerted practice entered into by Casio UK with one of its most important resellers (referred to as “Reseller 1”) that applied to online advertising and sales of digital pianos and digital keyboards (“the Relevant Infringement Products”) supplied by Casio UK

(“the Casio UK Relevant Infringement Products”) including when bundled with other accessory products (“Relevant Product Bundles”).

4. The Decision in this case is one of a number of RPM infringement settlement decisions issued by the CMA in the period 1 August 2019 to 17 July 2020 regarding musical instrument products and suppliers’ pricing policies. The PCR in this case has applied for a CPO in a number of other cases based on those CMA decisions. Those other cases also raise the issue of whether or not permission should be granted to serve proposed defendants out of the jurisdiction. The essential nature of the claim, and structure of the claim form is similar in each case, and similar issues arise when it comes to jurisdiction. The terms of the Reasoned Order on permission to serve out of the jurisdiction are also inevitably similar in each case.
5. The Decision relates specifically to the Casio Pricing Policy as it applied between Casio UK and Reseller 1 during the period 4 February 2013 to 5 April 2018 (“the Infringement Period”) whereby Reseller 1 would not advertise or sell online the Casio Relevant Infringement Products below a price (“the Minimum Price”) specified by Casio UK (“the Agreement”). The Agreement was found to infringe the Chapter I prohibition and Article 101 TFEU (“the Infringement”). The Decision is final as none of the addressees sought to appeal it.
6. The CMA attributed liability for the Infringement to both Casio UK and Casio Japan, such that they are jointly and severally liable for the Infringement.
7. Although the CMA considered that it had reasonable grounds for suspecting that the Casio Pricing Policy applied to more than 50 Casio UK resellers, and that resellers generally adhered to Casio UK’s requests to charge the Minimum Price, for reasons of administrative efficiency, the CMA chose to focus on the Casio Pricing Policy as it applied to Reseller 1. The CMA also decided to limit the scope of the investigation to the Casio Relevant Infringement Products, and to exclude accessories. The CMA concluded that the Infringement involving Reseller 1 was likely to have had a wider effect in the market, by reducing downward pressure on the retail price of the Casio Relevant Infringement Products through other resellers (including what are referred to as “mass resellers”).

8. The PCR intends to rely on the Decision in order to establish the Infringement in respect of Reseller 1 during the period 1 October 2015 to 5 April 2018 (“the Relevant Period”), including that there was an understanding between Casio UK and Reseller 1 that the Casio Pricing Policy applied to resellers in the UK more generally, and that the Agreement had a broader impact in the UK as identified by the CMA.
9. The PCR also intends to rely on findings in the Decision, evidence cited in the Decision, and other evidence to be obtained by way of disclosure (should a CPO be granted) to establish that during the Relevant Period such agreements and/or concerted practices applied to (1) all Casio UK’s resellers; and (2) to a wider range of products supplied by Casio UK (“Relevant Infringement Musical Products”),¹ and that this was also an infringement of the Chapter I prohibition and Article 101 TFEU.
10. Further, the PCR alleges that as a consequence the prices paid by the Proposed Class Members in the Relevant Period for (1) Relevant Infringement Musical Products (whether manufactured or supplied by Casio UK or a third party) and (2) acoustic pianos (together “Relevant Musical Products”) were materially higher than they would otherwise have been. The PCR maintains that the anti-competitive effects were such that other manufactures or suppliers, and other reseller channels were not subject to real price competition and their prices would also have been artificially inflated by virtue of “umbrella pricing”.
11. Further, the PCR contends that the prices did not return to competitive levels immediately following the Relevant Period, and that there is a “run-off period” of 12 months during which time the prices were inflated. The PCR also claims damages on behalf of Proposed Class Members who paid for Relevant Musical Products on finance in relation to the additional financing costs of the inflated prices.
12. The “Proposed Class” comprises² any person (including any deceased person through the personal or authorised representative of his or her estate) who purchased (1) a new

¹ The definitions adopted by the PCR in this and the other related proposed collective proceedings referred to in paragraph 4 above are rather tortuous and not entirely intuitive. This will need to be addressed as these cases proceed.

² Subject to certain specified exclusions.

Casio Relevant Musical product and/or (2) a new Relevant Musical Product (supplied other than by Casio UK) in the UK during the period 1 October 2015 and 5 April 2019.

(2) Application under Rule 31(2) of the Tribunal Rules

13. The PCR contends that the majority of the Proposed Class Members are likely to be domiciled in England and Wales. Casio UK is a company incorporated in England and Wales. The PCR also contends that the damage in question occurred in the jurisdiction on each purchase during the Relevant Period of a product the subject of the proposed claim by Proposed Class Member(s). I think it is likely, for the purposes of Rule 31(2) of the Tribunal Rules, that the proceedings are to be treated as taking place in England and Wales. Accordingly, the Tribunal approaches 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]).

(a) Serious Issue to be Tried

14. For the purposes of Rule 31(2)(b) of the Tribunal Rules, I am satisfied that there is a serious issue to be tried on the merits of the claims the PCR seeks to combine, and that there is a real, as opposed to fanciful prospect of success.
15. As regards the follow-on claims, the PCR intends to rely as against the Proposed Defendants on the Decision, which found the Infringement at least as regards Reseller 1, and at least as regards Casio Relevant Infringement Products, and further the CMA identified that the conduct would have had a wider impact on the market. The Decision was a settlement decision and addressed to both Proposed Defendants. It is binding on the Tribunal and the Proposed Defendants pursuant to s. 58A(2) of the Competition Act.
16. As regards the standalone claims, I note that the CMA recorded that on the basis of the evidence it had seen (1) it had reasonable grounds for suspecting that at least 50 of Casio UK’s resellers were subject to the Casio Pricing Policy; and (2) that it was not confined to the Casio Relevant Infringement Products. I note that in addition to the evidence available to the CMA, if a CPO is made, the PCR will seek further disclosure.

In the circumstances I am satisfied that there is a real prospect of establishing infringement in relation to the broader range of Relevant Musical Instrument Products, and that it extended to products manufactured by third parties and supplied through UK resellers. I am also satisfied that there is a real prospect of Casio Japan being found to be jointly and severally liable with Casio UK for these claims, if established.

17. I am also satisfied that, at this early stage and for present purposes, there is a real prospect of an expert economist being able to estimate the relevant price effects not just in relation to Casio products, but also in relation to products provided by third party manufacturers and suppliers, and in relation to acoustic pianos, by virtue of “umbrella pricing”. In that regard, I have seen the Expert Report of Iestyn Williams dated 30 May 2023 on the Quantification Methodology, a copy of which was filed with the collective proceedings claim form. Mr Williams’ report specifically addresses the potential overlap in the effects of various RPM infringements that affected the musical instrument industry sector, which the CMA has investigated, and in relation to which it has issued a number of decisions and in respect of which applications for CPOs are now pending. That report will obviously be considered further at any hearing of the application for a CPO.

(b) The jurisdictional gateways under CPR Practice Direction 6B (“PD6B”)

18. The PCR relies on two of the jurisdictional gateways specified in paragraph 3.1 of PD6B: paragraphs 3.1(3) and 3.1(9). Paragraph 3.1(3) requires there to be a real issue which it is reasonable for the court to try as between the claimant and a defendant on whom the claim form will be served other than in reliance on paragraph 3.1, and that the person in relation to whom permission to serve out of the jurisdiction is sought is a “*necessary or proper party to the claim*”. I am told that the PCR will serve the collective proceedings claim form on Casio UK in any event. For the reasons I have explained, I am satisfied that there is a serious issue to be tried as regards Casio UK which it is reasonable for the Tribunal to try.
19. Casio UK is 100% owned by Casio Japan. The CMA attributed liability for the infringement to both Casio UK and Casio Japan. Casio Japan is therefore plainly a necessary and proper party to these proceedings. The first gateway is therefore met.

20. Given my decision in relation to paragraph 3.1(3), I do not need also to reach a conclusion on the second gateway: paragraph 3.1(9). In short, the PCR contends that the claims sought to be combined are a tort claims where damage was sustained within the jurisdiction. In my view, there is a good arguable case that this gateway is also met on the basis that the claims arise out of tortious breaches (or alleged breaches) of statutory duty by Casio UK committed in the UK by virtue of its arrangements with UK resellers. Further, damage was allegedly caused in the UK when relevant purchases were made. Again, Casio UK and Casio Japan are alleged to be jointly and severally liable for all damage proved.

(c) Appropriate Forum

21. It seems to me that for the purposes of Rule 31(3) of the Tribunal Rules the UK (and this Tribunal) is the proper place in which to bring the claims. The Proposed Class Members are likely to be largely made up of individuals domiciled in the UK; on the information available, the products which are the subject of these proceedings were marketed and sold in the UK; the First Proposed Defendant is incorporated in England and Wales; the claims relate to the Decision of the CMA based on a breach of UK competition rules, and the applicable law will be English law.
22. In my view, this Tribunal is clearly the appropriate forum for the trial of the Claim.
23. For the reasons given, permission is granted for the service of proceedings outside the jurisdiction.