Neutral citation [2025] CAT 33

Case No: 1570/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 May 2025

Before:

JUSTIN TURNER KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

JJH ENTERPRISES LIMITED
(TRADING AS VALUELICENSING)

Claimant

- v -

(1) MICROSOFT CORPORATION
(2) MICROSOFT LIMITED
(3) MICROSOFT IRELAND OPERATIONS LIMITED

Defendants

Heard at Salisbury Square House on 13 and 14 May 2025

RULING (JURISDICTION)

APPEARANCES

Matthew Lavy KC and Jon Lawrence (instructed by Ghaffari Fussell LLP) appeared on behalf of the Claimant.

Geoffrey Hobbs KC, Robert O'Donoghue KC, Nikolaus Grubeck, Jaani Riordan & Kristina Lukacova (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Defendants.

A. THE JURISDICTION APPLICATION

1. This is an application by the Defendants ("Microsoft") for a ruling that this Tribunal does not have jurisdiction over this claim insofar as it raises disputed issues of copyright law. It is said that those matters should be decided by the High Court.

2. The background to the claim is that the Claimant ("VL") was a vendor of pre-owned licences for Microsoft software products, including *Windows* and *Office*. It contends that pre-owned perpetual licences may legally be resold in the UK and EU in accordance with the Court of Justice of the European Union's ("CJEU") decision in C-128/11 *UsedSoft GmbH v Oracle International Corp,* EU:C:2012:407; [2012] 3 CMLR 44 ("*UsedSoft*").

3. From about 2011, Microsoft migrated customers from the use of perpetual licences onto its subscription-based service, Microsoft 365. VL alleges that Microsoft stifled supply of pre-owned licences by, in exchange for discounts to its subscription-based service, requiring customers to surrender or retain the perpetual licences they no longer required. VL contends inter alia that:

> "Microsoft agreed to provide certain large customers with discounted Microsoft 365 pricing, subject to their accepting "custom anti-resale terms" (or "CAR Terms")
>
> Microsoft later amended its global licensing terms, which provided for discounted M365 subscriptions (known as "From SA" pricing) to enterprise customers that had migrated from perpetual licences, so as to require them to retain their old perpetual licences in order to keep the From SA discount. This requirement is referred to as the "New From SA Condition".

4. VL contends that Microsoft's said activities were breaches of Chapter I and Chapter II prohibitions under the Competition Act 1998 (the "1998 Act") and it claims damages arising from Microsoft's unlawful conduct.

5. On this application Microsoft submits that although this is a claim for damages for breach of competition law, at its heart is a copyright dispute. It does not argue that the copyright issues should be transferred to the Chancery Division as a matter of discretion, rather it contends that this Tribunal has no jurisdiction to decide the questions of copyright law which fall to be decided.

6. The claim was transferred to this Tribunal from the High Court by the order of Foxton J on 16 November 2022. In opposing that order, which was made on paper, Microsoft filed submissions pointing out that questions of copyright law will arise under *UsedSoft*. It did not at that stage take the point that this raised a hard-edged question of jurisdiction. Rather it submitted: "*For the avoidance of doubt the Defendants do not suggest that the CAT is necessarily the inappropriate forum for issues of this kind where they arise in the context of a competition law claim*". It follows that Microsoft has changed its position.

7. It is correct that the copyright issues have developed since the matter was considered by Foxton J and, if not before, are now a central aspect of this dispute. The parties are agreed that if those copyright issues are to be determined by this Tribunal, then questions of copyright law should be determined as preliminary issues. Subject to this application, I have directed that a hearing of the preliminary issues should take place in September 2025. The issues to be determined are:

    (1) Does the distribution right or the reproduction right enjoyed by the owner of the copyright in a computer program permit or prevent sub-division and resale of without the consent of the rightholder of the user right obtained by the lawful acquirer on first sale of a copy of that program within Article 4(2) of the Software Directive in circumstances where the user right acquired by the lawful acquirer was obtained for:

        (i) a licence covering a particular combination of multiple computer programs; and/or

        (ii) a licence covering a numerically specified plurality of users?

    (2) Does the first sale or transfer of ownership of a digital copy of Microsoft Office or Microsoft Windows in electronic form by or with the consent of the owner of the copyright in the non-computer program works made accessible or perceptible by means or use of that product exhaust the distribution right or the reproduction right of the copyright owner in relation to the non-computer program works under either, neither or both

of: (i) Article 4(2) of the Software Directive; (ii) Article 4(2) of the Information Society Directive?

8. These are important questions of copyright law which fall for determination on the facts of this case and which, as Microsoft submits, are at the heart of this dispute.

9. The jurisdiction of this Tribunal is founded in the Enterprise Act 2002 ("EA 2002") which provides, in section 16(3), that "*so much of any proceedings before it as relates to a claim to which section 47A of the 1998 Act applies*" may be transferred to the Tribunal. Section 47A of the 1998 Act provides:

> "**47A Proceedings before the Tribunal: claims for damages etc.**
>
> (1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.
>
> (2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—
>
> (a) the Chapter I prohibition, or
>
> (b) the Chapter II prohibition,
>
> (3) The claims are—
>
> (a) a claim for damages;
>
> (b) any other claim for a sum of money;
>
> (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.
>
> …
>
> (4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded.
>
> (5) The right to make a claim in proceedings under this section does not affect the right to bring any other proceedings in respect of the claim.
>
> (6) In this Part (except in section 49C) "infringement decision" means—
>
> (a) a decision of the CMA that the Chapter I prohibition or the Chapter II prohibition has been infringed, or

> (b) a decision of the Tribunal on an appeal from the decision of the CMA that the Chapter I prohibition or the Chapter II prohibition has been infringed."

10. The Section 16 Enterprise Act 2002 Regulations 2015 (S.I. 2015 No. 1643) (the "2015 Regulations"), made pursuant to section 16(1) of the EA 2002, enable the High Court to make a transfer to the Competition Appeal Tribunal "*for its determination so much of*" any proceedings before the court as relates to an infringement issue falling to be determined in those proceedings. "*Infringement issue*" is defined in subsection 16(6) EA 2002 (so far as relevant) as "*any question relating to whether or not an infringement of (a) the Chapter I prohibition ... or (b) Article 101 ... of the Treaty has been or is being committed*".[1]

11. As a result, the High Court has the power to transfer a competition law infringement issue to the Tribunal. Further under Rule 71 of the Competition Appeal Tribunal Rules 2015 the Tribunal can itself at any stage of proceedings transfer "*all or part of a claim made in proceedings brought under section 47A of the 1998 Act*" to the High Court.

12. Microsoft submit that the reference to "*so much of any proceedings before it as relates to a claim to which section 47A of the 1998 Act applies*", in section 16(1) of the EA 2002 and "*so much of the proceedings as relates to the infringement issue*" in the 2015 Regulations should be construed narrowly to mean that only questions of dominance and abuse should be determined by this Tribunal, and that other questions which arise in the course of determining damages under section 47A should not be heard by the Tribunal. Another way Microsoft put it, is to say that the questions of copyright infringement are questions anterior to the question of abuse. They are said to be anterior in the sense that if the acts of resale amount to copyright infringement the question of abuse cannot arise.

13. In my judgment, there is no reason to read the legislation narrowly in this way. During proceedings before this Tribunal many issues may arise which might be said to be adjacent to, or distinct from, the narrow questions of dominance or

[1] Subsequently amended pursuant to The Competition (Amendment etc) (EU Exit) Regulations 2019.

abuse. For example, questions of interpretation of contractual documents may arise, as may questions of limitation or causation. Nothing in the legislation suggest this Tribunal is not competent to decide such questions insofar as they arise in the context of a claim for damages under section 47A of the 1998 Act for breach of the Chapter I or Chapter II prohibitions. This case, insofar as it raises issues of copyright infringement, does so in the context of a claim for damages under section 47A of the 1998 Act.

14. These are proceedings alleging breach of Chapter I and Chapter II prohibitions for which VL is claiming damages. They therefore fall within the explicit scope of subsections 47A(2) and (3) of the 1998 Act. Such proceedings are to be distinguished from, say, a claim for damages arising from breach of the Copyright Designs and Patents Act 1988, in respect of which this Tribunal may not have jurisdiction because such proceedings would not fall within the scope of section 47A.

15. That is not to say that it can *never* be appropriate to transfer a copyright dispute, insofar as it arises in the context of a competition law dispute, to the High Court. That is not a matter I have been invited to decide and therefore express no opinion. The point being taken is the binary question of whether this Tribunal has jurisdiction to resolve this matter.

16. Both parties referred me to *Unwired Planet International Limited v Huawei Technologies and others* [2016] EWHC 958 (Pat) in which Birss J declined to order that certain competition law issues arising in the case be transferred to the CAT. The competition issues concerned whether a Master Sales Agreement ("MSA") which divided a patent portfolio, transferring patents to the Claimant, was a breach of competition law. Other questions which arose in the case included whether royalty rates were FRAND (essentially a question of contractual interpretation) which was closely related to questions of construction which arose in respect of the MSA. Birrs J had to consider inter alia whether the contractual matters could be transferred to the CAT along with the competition issues. The learned judge held:

> "43. Ericsson's position was that contractual FRAND "might" not be capable of being transferred, in other words that paragraph 2 [of the 2015 Regulation] and s16(1)(a) [of the EA 2002] might not be wide enough to permit it.
>
> 44. Although Ericsson only put the matter in this qualified way, I do not have the luxury of avoiding making a decision on the point. In my judgment the words of s16 and paragraph 2, construed purposively and giving them as wide a meaning as I can, are not wide enough to transfer for determination a distinct cause of action which is not itself an infringement issue for it to be determined by the CAT. The provisions are expressed in a limited way. Their purpose was not simply to empower the court to transfer the whole proceedings to the CAT if those proceedings involve an infringement issue, on the contrary they only empower transfer of so much of those proceedings as relates to the infringement issue to the CAT. The approach Huawei took at one stage of advancing the FRAND issues as matters of contract demonstrates why they are legally distinct questions from those brought under competition law even though they plainly interrelate. The contractual FRAND issues do not relate to an infringement issue in the sense that they need to be addressed in order to decide any infringement issue. Rather the two things interrelate with each other because they arise in the same context and raise closely related factual, legal and policy questions. Patent and contract claims fall to be decided by the High Court. The fact that the specialist expertise of the CAT could be usefully brought to bear in grappling with those issues since they are so closely intertwined with factors which arise under competition law, does not mean they can be transferred. The CAT is a specialist tribunal for dealing with infringements of competition law. Nothing in the Act or the regulation demonstrates any intention by the legislator to broaden the scope of its responsibilities beyond that."

17. In this passage Birss J is not dealing with the submission being made in *this* case but it is of note that he is identifying the dividing line between issues which arise in the context of an "infringement" decision in a competition claim, which may be determined by the CAT, and issues which are legally distinct, being the contractual claims, which cannot be transferred under section 16 of the EA 2002.

18. Finally, Mr O'Donoghue KC for Microsoft submits that this Tribunal is not acknowledged to have particular expertise in IP law and that this is why it has not been given the jurisdiction to deal with copyright matters as they arise. It is not clear to me that that is the case. Chairs are drawn inter alia from the Chancery Division of the High Court which comprises specialist IP judges.

19. For these reasons I rule that this Tribunal does have jurisdiction to hear all aspects of this claim for breach of competition law including copyright disputes insofar as they arise in the context of this claim.

Justin Turner KC
Chair

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 23 May 2025