Neutral citation [2023] CAT 40

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1590/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

12 June 2023

Before:

SIR MARCUS SMITH
(President)
PROFESSOR ANTHONY NEUBERGER
BEN TIDSWELL

BETWEEN:

MICROSOFT CORPORATION

Applicant

– and –

COMPETITION AND MARKETS AUTHORITY

Respondent

– and –

ACTIVISION BLIZZARD, Inc.

Intervener

Heard at Salisbury Square House on 12 June 2023

RULING (ADMISSIBILITY OF EXPERT EVIDENCE)

APPEARANCES

Mr Daniel Beard KC, Mr Robert Palmer KC, Mr Nikolaus Grubeck, and Mr Stefan Kuppen (instructed by Weil, Gotshal & Manges (London) LLP) appeared on behalf of the Applicant.

Mr Rob Williams KC, and Mr Richard Howell (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Lord Grabiner KC, Lord Pannick KC, and Mr Brian Kennelly KC (instructed by Slaughter and May) appeared on behalf of the Intervener.

1. We have before us various applications for the admission of expert evidence adduced by Microsoft in this matter, specifically three expert reports from economists (Professor Scott Morton, Dr Foschi and Dr Caffarra) and one expert report from a US lawyer (Professor Kraus).

2. A great deal has been said about the need to take a pragmatic approach in this case and it has very helpfully informed the CMA's approach regarding the question of factual evidence, where the CMA has helpfully agreed that factual evidence whose admissibility is in dispute should be included in the record *de bene esse*, purely because the time it would take to resolve this matter would be disproportionate, given that these are expedited proceedings.

3. This is a merger case and for the reasons I gave at the case management conference on 30 May 2023 it is appropriate, as with all merger cases, that this matter comes on quickly, and quickly it is coming on. The parties have agreed that the CMA's defence should be filed on 6 July and the hearing will take place with an extended time estimate of six days, hopefully to be reduced, on 28 July.

4. There is clearly a high degree of urgency in having to resolve the dispute regarding the admissibility of the expert evidence that I have described. It is not, given the detail of the submissions that we have heard from all of the parties, and we are very grateful to all of them, appropriate for us to hand down an *ex tempore* judgment. Equally, this is not a case where we can appropriately reserve the reasons for our decision and state only the outcome of the application today. The parties are entitled to reasons. They would be entitled, were we to give any concrete outcome today, to have the reasons for that outcome stated today.

5. It seems to us that it would be a matter of great injustice to the parties if we were to rush our fences and produce a judgment that dealt too quickly with the important matters that are before us. Therefore, it seems to us, that we ought to, and would in the ordinary case, reserve our judgment. However, the timetable, for reasons that are obvious, does not allow this. There is not enough time to reserve for, say, a week, and (if the outcome were adverse to the CMA) then to expect the CMA to adduce, within the agreed timetable, reply expert evidence.

6. It therefore seems to us that the only appropriate course in these circumstances is to admit the expert evidence *de bene esse* and that is what we propose to do.

7. However, we do want to be very clear that we are not admitting the expert evidence *de bene esse* on the basis articulated by Lord Pannick KC (counsel for Activision), who referred us to *Shagang Shipping Co Limited v HNA Group Company Limited* [2020] UKSC 34 at [58] and [59]. In those paragraphs, the Supreme Court considered that there was, as regards questions of admissibility in civil proceedings, no one size fits all approach and that a judge might very well want to take a line in terms of admitting evidence *de bene esse* in the hope that the matter of admissibility would not need to be dealt at all with if the evidence admitted *de bene esse* proved to be unimportant.

8. We are not admitting the evidence on this basis. It is appropriate in the ordinary case, as the CMA contended, to decide questions of admissibility in judicial reviews before the judicial review hearing, not at the judicial review hearing, and we want to make very clear that we have well in mind the concerns that the CMA might have regarding floodgates and the admission of expert evidence (if only *de bene esse*) as a matter of course in judicial review proceedings. It is quite clear from the authorities that that is not the position and that the admission of expert evidence must be treated and considered with great care.

9. But, as a pragmatic course in the special circumstances of this case, we are going to admit *de bene esse* this material. The reason we consider ourselves able to do so is because, as Mr Williams KC (counsel for the CMA) made clear in his submissions, there is no prejudice to the CMA in doing so. The timetable allows for the admission of this evidence and I repeat the assurance that we gave regarding the economic evidence, to which Mr Beard KC, counsel for Microsoft, acceded. The economic evidence will be treated in the manner that I described this morning.

10. Two further points by way of conclusion. The first is the question of costs. We fully recognise that this course will put the CMA to additional costs. The CMA is very likely to want to adduce expert evidence in response and, of course, it should do so within the timetable that has been agreed. Without in any way

prejudicing, we recognise (given the submissions we have heard) that it is quite possible that the material that Microsoft seeks to rely upon will be found to be inadmissible, as the CMA has contended. In those circumstances Microsoft need to be on notice that they will be at risk of costs in this regard for the money thrown away by the CMA in preparing material that was not needed on this basis, regardless of the outcome of the judicial review as a whole. We will obviously hear argument on the point after the matter has been decided, but that is a warning that we feel it is appropriate to give.

11. The second point is that we heard the CMA indicating that they might require further information about what the expert evidence adduced by Microsoft Corporation was going to. We expect, as has been the case in the past, that any queries the CMA may have regarding anything, but in particular the expert evidence, will be dealt with expeditiously by Microsoft and, to the extent relevant, Activision.

Sir Marcus Smith
President

Prof Anthony Neuberger

Ben Tidswell

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 12 June 2023