

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM IN THE COMPETITION APPEAL TRIBUNAL

Case 1570/5/7/22 (T)

BETWEEN:

JJH ENTERPRISES LIMITED

(TRADING AS VALUELICENSING) Respondent/Claimant

— *and* —

(1) MICROSOFT CORPORATION

(2) MICROSOFT LIMITED

(3) MICROSOFT IRELAND OPERATIONS LIMITED

Appellants/Defendants

4 AUGUST 2025

**RESPONDENT’S APPEAL SKELETON
ARGUMENT**

Introduction and Overview

1. This appeal concerns the jurisdiction of the Competition Appeal Tribunal (“*the Tribunal*”) to determine issues of copyright law that arise for determination in the context of a claim for damages for breach of competition law falling within section 47A of the Competition Act 1998 (“*section 47A*”).
2. The Tribunal (Justin Turner KC) ruled that the Tribunal *does* have such jurisdiction. It was right to do so. Determining the copyright issues that arise in this claim is a necessary step in determining the Respondent’s claim for damages for breach of competition law.

Therefore, if the Tribunal cannot decide the copyright issues, it cannot decide the Respondent’s claim. Such an outcome that would be contrary to section 47A, which confers express jurisdiction on the Tribunal to try claims for damages for breach of competition law (and does not limit the jurisdiction to claims that raise no legal issues *other* than competition law).

3. Thus, the Respondent’s case on appeal can be stated shortly:

- (1) The claim, as set out in the Amended Claim Form¹ and Re-Amended Particulars of Claim², is squarely a claim for damages for breach of competition law, and it falls within the ambit of Section 47A;
- (2) It is necessary, in order to rule on that claim, for the Tribunal to determine the copyright issues. That being so, the Tribunal has jurisdiction to do so, such being the effect of the plain wording of Section 47A;
- (3) Although the claim was issued in the Commercial Court in 2021, and was subsequently transferred to the Tribunal by Order of Foxton J dated 16 November 2022 (*“the Transfer Order”*), [Supp/8/82-83] that does not affect the analysis. The Transfer Order was broad: it transferred the entire claim save for those aspects that could not be transferred.³ Section 16(4) of the Enterprise Act 2002 (*“the EA 2002”*) states in terms that claims falling within section 47A may be transferred; accordingly, the entirety of the Respondent’s claim for damages for breach of competition law could be, and therefore was, transferred. That necessarily included all factual and legal matters that need to be decided in order to determine that damages claim – including the copyright issues.
- (4) For the reasons the Tribunal gave at paragraphs 9-18 of the ruling under appeal, [Core/6/70-73] there is no basis for construing narrowly to produce a result that would mean that the Tribunal has no jurisdiction to determine the copyright issues or that the copyright issues have not been (and could not have been) transferred to

¹ [Core/14/207-209]

² [Core/15/210-236]

³ The Respondent’s claim for a declaration could not be transferred because, as at the date of the Transfer Order, the CAT did not have the power to grant declarations.

the Tribunal pursuant to the Transfer Order. In any event, in light of section 16(4) of the EA2002, the question of what can and cannot be transferred pursuant to section 16(1) is moot.

4. Before turning to the procedural context and the legislative background, it is important to reiterate that the Appellants' arguments, if correct, would undermine (and create unworkable uncertainty for) the Section 47A regime. That is because the logic of the Appellants' position is that the Tribunal has no jurisdiction to deal with *any* issues of law other than competition issues, regardless of how and when they arise. That means that the Tribunal cannot deal with a competition law claim which requires (for example) a contractual framework to be construed, or that raises issues of legal causation, because both of those are issues of law that are not competition law issues; on the logic of the Appellants' case, those issues would need to be transferred out to the High Court. Moreover, the Tribunal might find its jurisdiction to decide a claim removed (or at least fettered in this way) by legal issues that arise late in the day: it is not unheard of for pleadings to be amended at a late stage (conceivably, as late as at trial), particularly to introduce new points of law. If the Appellants are right, that could cause chaos.
5. In the present case, if the Tribunal cannot determine the copyright issues because it has no jurisdiction, this would mean that the Tribunal would be unable to try the preliminary issues that the parties *agreed* should be heard and that are currently scheduled to be tried in September 2025; it would also mean that the Tribunal would be unable to try *any* parts of the case that engaged questions of copyright law (which extend beyond the preliminary issues). In practical terms, it would render the Tribunal incapable of conducting the Liability Trial in this claim.
6. None of these outcomes is consistent with the clear wording of section 47A. The appeal should be dismissed.
7. It should be emphasised at the outset that the appeal seeks a hard-edged ruling on a point of jurisdiction. This is *not* an appeal against the exercise of the Tribunal's discretion to allocate a part of the claim (or the copyright issues) to the Tribunal or against the Tribunal declining to exercise discretion to transfer issues to the High Court. No application for

transfer of any particular issues to the High Court has been made or is in issue.⁴ Thus, the question of whether the CAT is a suitable forum for determination of issues of copyright law does not arise on this appeal (although, as it happens, a number of the Tribunal Chairs, including Mr Turner KC, *do* have expertise in this area of law).

8. The remainder of this skeleton sets out the following:
 - (1) At paragraphs 9-14 below, the emergence and role of the copyright issues in the pleadings;
 - (2) At paragraphs 15-18 below, the procedural history of the jurisdiction issue;
 - (3) At paragraphs 19-22 below, the relevant legislative background;
 - (4) At paragraphs 23-37 below, the Respondent’s explanation of why the Tribunal has jurisdiction to determine the copyright issues having regard to the Grounds of Appeal and to the Respondent’s Notice.

The emergence and role of the copyright issues in the pleadings

9. The Respondent’s Sealed Amended Claim Form⁵ was issued in the Commercial Court on 22 April 2021. It states that “*this is a claim for damages and other relief caused by breaches by the Defendants (“Microsoft”) of sections 18 and/or 2 of the Competition Act 1998, Arts 102 and/or 101 of the Treaty on the Functioning of the European Union, and/or Arts 54 and/or 53 of the Agreement on the European Area*”.
10. As can be seen from the Re-Amended Particulars of Claim⁶ the Respondent’s claim is that it has suffered loss and damage by reason of the Appellants’ breach of competition

⁴ Note that this is the answer to the Appellants’ argument at paragraph 69 of the skeleton [Core/3/46] regarding the inefficiency that might arise if a finding were made in the Tribunal that could not be enforced there. The Tribunal of course has a discretion to transfer to the High Court in appropriate circumstances under Rule 71 of the Tribunal’s rules – but that is not the issue in these proceedings.

⁵ [Core/14/207-209]

⁶ [Core/15/210-236]

law⁷. In particular, the Respondent was a reseller of pre-owned perpetual licences⁸ for various software products, materially including Microsoft Windows and Microsoft Office. The Appellants, who at all material times have been dominant in those markets, have abused a dominant position by undertaking a Campaign to stifle sales of pre-owned software, including by paying customers that switched to subscriptions not to resell their old perpetual licences. That caused loss and damage to the Respondent, including lost profits on sales of second-hand software that would otherwise have been made.

11. Only paragraphs 20-21 of the Respondent's Re-Amended Particulars of Claim [Core/15/215-216] refer to matters of copyright law, and the relevant paragraphs are pleaded only by way of background. If those paragraphs were not pleaded, the claim would remain exactly the same and the underlying cause of action would be complete. The Respondent's pleaded case on the market in second-hand sales is a factual one: there was in fact such a market and the Respondent participated in it; but for the Appellant's breach of competition law, it would have had more sales opportunities.
12. Contrary to the Appellants' arguments, this claim is not akin to a claim for copyright infringement and cannot properly be regarded as analogous to such a claim. No cause of action is pleaded based on copyright infringement, and the Respondent is not seeking (for example) a declaration of non-infringement. The only cause of action pleaded or relied upon by the Respondent is for breach of competition law.
13. It is the Defence that raises the copyright issues in a material and substantive way. As can be seen from the Re-Amended Defence, [Core/16/237-285] the Appellant's contentions specifically include that (i) the principle articulated in the CJEU's judgment in *UsedSoft v Oracle* (case C-128/11) does not apply to works that include any graphical content (such as toolbar icons) or to what Microsoft characterises generally as "*non-program works*";

⁷ The pleadings were amended following a summary judgment hearing and ruling by the Tribunal in November 2024, although it should be noted that the copyright issues were raised by the Appellants in the Defence originally served on 30 September 2022 and were in issue from that time. The later pleadings particularise more fully the parties' respective cases.

⁸ The Respondent ceased trading at the end of 2023, with one final sale in January 2024 (response 16a in the Claimant's Response to RFI dated 24 April 2025 [Supp/4/18-19]).

and that (ii) it does not permit the subdivision of multi-product or multi-user licences.⁹ The *UsedSoft* issues go to the question of whether there is an available lawful market (and, if so, the size of that market); the issues are now also relied upon by the Appellants in their defence of objective justification.¹⁰

14. It is common ground that the question of whether resale of second-hand software would breach copyright law raises important questions which fall for determination on the facts of the present case.¹¹ However, as already noted, it can be seen that those questions arise only in the context of arguments regarding the counterfactual that would have prevailed had the Appellants not infringed competition law. There is no free-standing claim relating to copyright – none has been pleaded by either party.

The procedural history of the jurisdiction issue

15. As noted above, the proceedings were transferred from the Commercial Court pursuant to the Transfer Order, which is dated 16 November 2022. [Supp/8/82-83] At the time of the transfer, the Appellants did not take the point that any hard-edged point of jurisdiction arose¹². The Appellants in fact submitted at that time that “*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*”.
16. Since the transfer, a series of CMCs have taken place before the Tribunal dealing primarily with procedural matters and a summary judgment application by the Respondent in relation to the Appellants’ pleading of a defence based on objective justification. Following the ruling on that summary judgment application on 28 November 2024, and discussions among the parties leading to an application for an order for the trial of Preliminary Issues, the Appellants made the submission for the first time in their skeleton for the 5th CMC (held on 24 February 2025) that the Tribunal does not

⁹ MS’s 19 May 2023 RFI response, response 1, [Supp/1/6] §5(a) [Supp/1/8] and 6 [Supp/1/9].

¹⁰ Re-Amended Defence §58 [Core/16/278-279].

¹¹ See paragraph 8 of the ruling under appeal [Core/6/70].

¹² This was noted at paragraph 6 of the ruling under appeal [Core/6/69].

have jurisdiction to deal with the proposed Preliminary Issues because they concern matters of copyright law.

17. The application for a trial of Preliminary Issues and the argument relating to lack of jurisdiction were heard at a 6th CMC on 13-14 May 2025 and this led to the ruling under appeal.
18. In addition, on 29 May 2025, an Order was made for the trial of two preliminary issues (the “**Preliminary Issues**”) to address the two contentions identified above. [Supp/9/84-90] The trial of the Preliminary Issues is due to take place on 9-11 September 2025. If the present appeal succeeds, it will be (or will have been) a trial of issues that the Tribunal has no jurisdiction to try.

The relevant legislative background

19. The provisions relevant to the determination of this appeal are as follows.
20. Insofar as material to this appeal, Section 47A of the Competition Act 1998 reads:

“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.

“

21. As noted in paragraph 10 of the ruling under appeal:

“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.”

22. In addition, although not specifically referenced in the ruling under appeal, Section 16(4) of the Enterprise Act 2002 provides for the making of Regulations that would enable the court to transfer to the Tribunal, in accordance with rules of court, “*so much of any proceedings before it as relates to a claim to which section 47A of the [Competition Act 1998] applies*”.

Why the Tribunal has jurisdiction to determine the copyright issues

23. The Respondent supports the reasoning in the ruling under appeal and asks the Court of Appeal to find that the Tribunal reached the right conclusion for the reasons that it gave. Although not expressed in precisely these terms, the ruling in essence proceeded on the basis that:
 - (1) The Respondent’s claim is a claim to which section 47A applies and it is necessary for the copyright issues to be determined in order for the Tribunal to determine that claim; and
 - (2) Accordingly, the Tribunal has jurisdiction to try the copyright issues and the same were transferred to the Tribunal pursuant to section 16(4) EA2002 and the Transfer Order.
24. In the event that the Court of Appeal considers that the above reasoning is not the basis of the Tribunal’s ruling, the Respondent relies on that reasoning as an additional reason for upholding the Tribunal’s decision, and filed its Respondent’s Notice to that effect.¹³

¹³ See Section 8 of the Respondent’s Notice dated 21 July 2025. [Core/2/21]

25. The Appellants raise two grounds of appeal: first, that the Tribunal applied the wrong test in holding that the copyright issues fall within the Tribunal’s jurisdiction; second that the Tribunal applied its own (wrong) test incorrectly.

Ground 1

26. As regards the relevant test:

- (1) The Tribunal was right that the fundamental question determining jurisdiction is whether the copyright issues (or indeed any other issue in the proceedings) arises in the context of a claim falling within section 47A. An issue so arises where it is necessary to decide it in order to determine the claim falling within section 47A. That this is the correct test is apparent from the wording of section 47A itself: the corollary of the right under section 47A to “*make a claim ... in proceedings before the Tribunal*” is that the Tribunal has jurisdiction to determine that claim. That in turn requires the Tribunal to be empowered to decide all issues of fact and law necessary for such determination.
- (2) There is no difficulty applying this test that might to lead to the conclusion that the legislative intention must have been different. On the contrary, the test is clear and easy to apply, creating a clear bright line between that which falls within jurisdiction and that which does not. It avoids uncertainty. It is also consistent with principles of efficiency - any claim under section 47A might engage issues that are not strictly competition law issues – for example, issues relating to contractual construction, limitation periods and causation (including pass on). It makes no practical sense to take those matters out of the jurisdiction of the Tribunal simply because they do not engage specifically matters relating to competition law infringements.
- (3) The test as formulated in the ruling under appeal can be applied and assessed by straightforward substantive inquiry. For example, as can be seen from the Amended Claim Form, the cause of action is identified as “*a claim for damages and other relief caused by the breaches Of section 18 and/or 2 of the Competition Act 1998, Articles 102 and/or 101 of the [EU Treaty] and/or Articles 54 and/or 53 of the [EEA Treaty].*” On its face, it can be seen that the claim falls squarely within section

47A. So too, therefore, do all the issues that need to be decided in order to determine the claim.

27. The Appellants seek to argue that, in substance, this case involves causes of action that are not competition law causes of action, and those fall outside the jurisdiction of the Tribunal notwithstanding that no remedy is claimed in relation to them. However, the only supposed “cause of action” that the Appellant has identified is a cause of action that the *Appellant* may have against the *Respondent* in relation to historic sales of second-hand software if the Appellant is right on the copyright issues – a cause of action that is *not* advanced in these proceedings and is entirely distinct from the Respondent’s competition law claims (albeit the same issues of copyright law arise). The fact that certain issues arising on the Respondent’s competition law claim might also be relevant to some different claim that the Respondent may have (but that does not form part of these proceedings) has no bearing on whether the Tribunal has jurisdiction to determine the claim before it, which is based on a cause of action falling within Section 47A. That the Respondent could theoretically seek a declaration of non-infringement of copyright also does not affect the analysis.¹⁴
28. Accordingly, the arguments put forward in the Appellants’ skeleton regarding the distinction between a cause of action and a claim¹⁵ are neither here nor there. The test formulated by the Tribunal in the ruling under appeal relates to matters of law that arise in the context of a competition claim and are not dependent on whether a cause of action or particular remedy is sought.
29. The Appellants also argue that the Tribunal can only deal with “*competition issues*” and not issues of IP law.¹⁶ However, that ignores the clear wording of section 47A, which bestows upon the Tribunal the jurisdiction not to deal merely with “*competition issues*” but claims for damages arising out of allegations of an infringement of competition law.

¹⁴ A question may arise as to whether the Tribunal had jurisdiction to grant such a declaration, but that is a different issue to the one under scrutiny on this appeal.

¹⁵ See, in particular, paragraphs 61-67 of the Appellants’ skeleton. [Core/3/44-45]

¹⁶ See paragraphs 53-54 of the Appellants’ skeleton. [Core/3/43]

30. The jurisdiction question that arises on this appeal does not appear to have been directly addressed by any previous authorities. However, there are three authorities of relevance: *Unwired Planet v Huawei and Samsung* [2016] EWHC 958 (Pat) (“**Unwired Planet**”), *Sportradar AG and Another v Football DataCo Limited and Others* [2020] CAT 25 (“**Sportradar**”), and *Rest & Play Footwear Ltd v George Rye & Sons Ltd* [2021] CAT 18 (“**Rest & Play**”). Each of these was cited by the Appellant below and Unwired Planet is also cited in the Appellants’ Appeal Skeleton.
31. The three cases are all consistent with the Tribunal’s ruling and the Respondent’s case on this appeal:
- (a) *Unwired Planet* is authority for the proposition that the Tribunal has no jurisdiction to deal with claims that do not arise from alleged infringement of competition law merely because the Tribunal’s expertise may be helpful and/or because the subject matter of the non-competition claim interrelates to that of a competition claim for which the Tribunal does have jurisdiction. So the Tribunal had jurisdiction to deal with Unwired Planet’s competition law claim, but not its FRAND claim which, as a matter of legal taxonomy, was a claim for breach of contract¹⁷.
- (b) *Sportradar* is a CAT decision where the Tribunal declined to transfer a claim out of the Tribunal notwithstanding that it raised issues (but not free-standing claims) outside of competition law. As observed in the Judgment at [43]: “*stand-alone competition proceedings under c.47 CA 1998 will often raise legal issues outside pure competition law. I consider it most unlikely that this would serve as a good ground for transfer out of the CAT*”. That observation is entirely consistent with the Tribunal’s decision in the present case and the common sense view that a jurisdiction to deal with competition law claims must encompass a jurisdiction to deal with non-competition issues that arise in the context of those claims.
- (c) *Rest & Play* is a case where the Tribunal (unsurprisingly) concluded that a claim for a contractual debt did not fall within its jurisdiction. The case illustrates precisely the distinction that the Tribunal’s ruling makes in this case: the debt claim in *Rest & Play* did not arise in the context of the competition claim under section 47A and did not require

¹⁷ See the judgment in *Unwired Planet*, in particular at paras 44- 47.

determination in order to rule on the competition damages claim. That is quite different from – indeed the opposite of – the situation in the present proceedings, where the copyright issues *must* be determined in order to rule on the competition damages claim and do, therefore, arise in the context of that claim.

32. The Respondent accordingly submits that the correct test is whether the issues in any claim have to be determined in order to rule on a competition claim and that is the test that was in fact formulated by Justin Turner KC in the ruling under appeal (and, if not sufficiently implicit in the ruling under appeal, the Respondent contends for that test).

Ground 2

33. As regards the application of the test formulated in the ruling under appeal, the Appellants' argument is premised on a mischaracterisation of the claim and the proceedings.
34. The true nature of the claim can be seen from the Amended Claim Form and the pleadings referred to at paragraphs 10-13 above. When the nature of the copyright issues is properly understood in the context of the Appellant's defence, it is clear that they are not "anterior" to the competition law cause of action (whatever that might mean). The copyright issues arise *in the context of the claim under Section 47A* because they have to be decided in order to determine whether the Appellants are liable for damages – but that is just the same as any issue of contractual construction, limitation or causation that might have arisen or arise.
35. The notion that the copyright issues are themselves a cause of action is wrong. The Appellants have not alleged copyright infringement in these proceedings. As explained at paragraph 14 above, the defence in these proceedings relates to what the Respondent might have been able to do lawfully (or not) in the counterfactual. There is no pleaded defence based on what the Respondent did in the actual and no claim by the Appellants based on what was done in the actual. To put the point another way, the copyright issues concern the question of whether, in selling software in the counterfactual, the Respondent could have complied with the *UsedSoft* requirements – not whether the Respondent in fact complied with those requirements in the actual.

36. Accordingly, the Tribunal correctly applied the legal test it formulated in the ruling under appeal.
37. If and to the extent the test is different from that formulated because it is not implicit in the ruling that the test is one of assessing whether the copyright issues fall for determination in ruling on the claim in these proceedings, the Respondent respectfully submits that the application of such a test would have the same result – namely, that the Tribunal has jurisdiction to try the copyright issues.

Conclusion

38. The Court of Appeal is respectfully invited to dismiss the appeal.

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