Neutral citation [2022] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

3 February 2022

Before:

BRIDGET LUCAS QC
(Chair)
TIM FRAZER
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN

ELIZABETH HELEN COLL

Applicant /
Proposed Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Respondents /
Proposed Defendants

Heard remotely on 17 January 2022

RULING
(DISCLOSURE OF FUNDING ARRANGEMENTS)

APPEARANCES

Ms Ronit Kreisberger QC; Mr Matthew Kennedy and Mr George McDonald (instructed by Hausfeld and Co. LLP) appeared on behalf of Ms Elizabeth Helen Coll.

Mr Josh Holmes QC, Mr Jamie Carpenter QC and Jack Williams (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Proposed Defendants.

A. INTRODUCTION

1. By a claim form dated 28 July 2021, Ms Elizabeth Coll, as a proposed class representative (**PCR**), applies for a collective proceedings order (**CPO**) pursuant to section 47B of the Competition Act 1998 (**the 1998 Act**) on behalf of a proposed class of approximately 19.5 million consumers who it is contended have suffered loss due to the allegedly abusive conduct of various Google entities (the P**roposed Defendants**) in relation to app distribution and payment processing services on certain Android devices which are provided via Google's 'Play Store' (the **CPO Application**).

2. A Case Management Conference (**CMC**) took place remotely on 17 January 2022 at which various directions were made as to the future conduct of the **CPO Application** and for the listing of an application hearing on 18 to 19 July 2022 (the **CPO Hearing**). Various issues arose in relation to redactions that the PCR proposed to make in documentation relating to her funding arrangements, and requests made by the Proposed Defendants for disclosure of information relating to those arrangements.

3. In support of her CPO Application, the PCR has served a number of documents including: (i) a litigation funding agreement (the **LFA**), (ii) her after-the-event insurance policy (the **ATE Policy**), (iii) a litigation plan, and (iv) "a litigation budget to trial" (the **Litigation Budget**). Pursuant to rule 101 of the Competition Appeal Tribunal Rules 2015 (the **CAT Rules**), prior to the CMC, the PCR requested confidential treatment for certain parts of the LFA and the ATE Policy on one or more of three grounds: (1) commercial confidentiality, (2) "strategic sensitivity", and (3) privilege. Those parts of the documents produced for the purposes of the CMC were therefore redacted.

4. The Proposed Defendants objected to these redactions. In addition, they sought information about the conditional fee arrangements (**CFAs**) made between the PCR and her solicitors and counsel.

5. In advance of the CMC, the parties reached agreement on a number of the proposed redactions to the LFA including the PCR's proposed redaction relating

to the "Certification Costs Cap" in clause 1.2 of the LFA (which relates to the amount the funder has agreed to pay up to and including the determination of the CPO Application).

6. In the course of the CMC, two further issues were resolved:

   (1) The PCR agreed to limit the redaction requested for Clause 7.6 of the LFA. This clause referred to the "Solicitors Excess Provision" which provides for an excess above budgeted sums to be borne by the PCR's solicitors before the Funder can be requested to provide additional funding. It was agreed that only the figure for the excess would be redacted (and not the associated wording).

   (2) Regarding the PCR's proposed redaction of Appendix 3 to the LFA (the **Priorities Deed**), the Proposed Defendants contended that this affected the ability to identify the pool of funds to which it applies. This dispute was resolved by the PCR agreeing to disclose into a confidentiality ring a version of Appendix 3 with the reference to "Stakeholder Proceeds" (a defined term in the LFA) unredacted. The PCR informed the Tribunal that this defined the funds to which the Priorities Deed applied.

7. This is the Tribunal's Ruling on two matters argued at the CMC which remain disputed, namely (1) the PCR's proposed redaction of information relating to the deposit premium (**Deposit Premium)** payable under the ATE Policy. This affects the PCR's Litigation Budget to Trial and the ATE Policy; and (2) whether or not the PCR should be obliged to disclose the percentage level of the "success fees" payable under the PCR's **CFAs** entered into with her solicitors and counsel.

B. THE RELEVANT LEGAL BACKGROUND

8. Section 47B(8) of the 1998 Act provides that the Tribunal may authorise a person to act as the representative in collective proceedings, whether or not that person is a member of the proposed class but: "… (b) only if the Tribunal

considers that it is just and reasonable for that person to act as a representative in those proceedings."

9. Rule 78 of the CAT Rules sets out the factors the Tribunal will take into account when considering whether it would be just and reasonable for the PCR to act in that capacity. In so far as is relevant for present purposes, Rule 78 provides that:

> "(2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person –
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> (a) would fairly and adequately act in the interests of the class members;
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> (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
>
> ….
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so …
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstance, including –
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> …
>
> (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes-
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> …
>
> (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

10. Paragraphs 6.29 to 6.36 of the Tribunal's *Guide to Proceedings* (2015) (the **Guide**) address the factors identified in Rule 78(2), and the fairness and adequacy test as set out in Rule 78(3). In particular, paragraph 6.33 of the Guide sets out the requirement for the Tribunal to consider the PCR's financial resources and her ability to pay the proposed defendant's recoverable costs if ordered to do so. Also relevant, according to this paragraph is the PCR's "*ability to fund its own costs of bringing the collective proceedings*" . In that regard, the Tribunal will have regard to the PCR's "*financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan referred to above is likely to assist the Tribunal's assessment in this regard*".

11. As regards confidentiality, Rule 101 of the CAT Rules provides:

> "(1) A request for the confidential treatment of any document or part of a document in the course of proceedings before the Tribunal shall –
>
> (a) be made in writing indicating the relevant words, figures or passages for which confidentiality is claimed; and
>
> (b) be supported in each case by specific reasons …
>
> (2) In the event of a dispute as to whether confidential treatment should be accorded, the Tribunal shall decide the matter after hearing the parties and having regard to the need to exclude information of the kind referred to in paragraph 1(2) of Schedule 4 to the 2002 Act.
>
> (3) The Tribunal may direct that documents, or parts of a document, containing confidential information are disclosed within a confidentiality ring."

12. Read with paragraph 1(2) of Schedule 4 to the Enterprise Act 2002, Rule 101(2) of the CAT Rules envisages that the kind of information that may need to be excluded (in so far as practicable) is:

> "(a) Information the disclosure of which would in its opinion be contrary to the public interest;
>
> (b) Commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates;
>
> (c) Information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests."

13. We were referred to various authorities relating to disclosure of litigation funding arrangements (including CFAs and ATE insurance policies) in the context of civil litigation generally, and in the specific context of CPO applications. In particular, we were referred to the decision of this Tribunal in *Kent v Apple Inc* [2021] CAT 37: a ruling handed down on 21 December 2021. The PCR's position is, in summary, that the documentation relating to the funding arrangements in this case is to all intents and purposes identical to the documentation in *Kent v Apple*; that the majority of the proposed redactions in this case were also considered in that case and previously upheld by the Tribunal, and that the Proposed Defendants ought not to seek to relitigate the points in these proceedings.

14. The Proposed Defendants, on the other hand, maintain that they were not a party to those proceedings; that they are not seeking to relitigate anything, and that they are entitled to invite a differently constituted Tribunal to reach a different conclusion on some issues on the basis of different arguments. We consider that must be right as a matter of principle: the Proposed Defendants cannot be regarded as being bound by a decision in proceedings to which they were not a party.

15. As regards the approach we should take to *Kent v Apple,* we have been referred to the decision of Mr Justice Jacobs in *Tuke v Derek Hood* [2020] EWHC 2843 (Comm) at [167] to [168]. Faced with a similar position, he summarised the position as being that *"I should follow the decision of another judge of first instance, unless I am convinced that the judgment is wrong"*. He cited the decision of Lord Neuberger in *Willers v Joyce* [2016] UKSC at [9]: *"So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so"*. With that in mind, we turn to consider the decision in *Kent v Apple*, and the approach adopted by the Tribunal in that case.

Privilege and Confidentiality

16. The Tribunal in *Kent v Apple* summarised the position as regards privilege and confidentiality at [15] to [17] in the following terms:

> "15. Legal professional privilege comprises legal advice privilege and litigation privilege. Legal advice privilege applies to confidential communications between client and lawyer which are made for the purpose of giving or obtaining legal advice. Where a document is covered by legal professional privilege it cannot be disclosed to anyone absent the consent of the client. Such privilege is a bar to disclosure and any part of a document which is covered by that privilege may be properly redacted.
>
> 16. As regards documents or information which are not subject to legal professional privilege, but which are or may be confidential, rule 101 of the CAT Rules provides for a procedure for requests for the confidential treatment of any document or part of a document provided in the course of proceedings before the Tribunal. In the event of a dispute, the Tribunal must decide the matter, *having regard to* the need to exclude information of the kind referred to in paragraph 1(2) of

> Schedule 4 to the Enterprise Act 2002 Act. Such information includes commercially confidential information. Schedule 4 does not impose an absolute duty to exclude; but rather a duty to have regard to the need "*so far as practicable*".
>
> 17. Thus, outside privilege, we consider that whether the information should be redacted or disclosed, into confidentiality ring as a minimum, is a question for the discretion of the Tribunal, balancing the relevance of the information with the interests of confidentiality."

17. We agree that is the correct approach. We would add a few observations of our own:

(1) First, if a document contains information subject to legal advice or litigation privilege its disclosure would plainly be contrary to the public interest pursuant to paragraph 1(2)(a) of Schedule 4 to the Enterprise Act 2002.

(2) Secondly, as regards commercial information (paragraph 1(2)(b) of that Schedule) the Tribunal will have regard to whether or not disclosure of the relevant information "would, or might" cause harm. In other words, it is not incumbent on the party making a request for confidential treatment of such information to establish that it "would" cause harm: it is sufficient that it "might" do so.

(3) Thirdly, for the purposes of paragraph 1(2)(b), the harm that will or may be caused must be "significant".

(4) Fourthly, when making an application under Rule 101 the party requesting confidential treatment must support its request with "specific reasons". In other words, it is necessary to explain with a sufficient degree of specificity why it is suggested that disclosure of information will or might cause significant harm to the legitimate business interests of the relevant person, identifying what that harm is likely to be.

18. This approach is consistent with the Tribunal's Ruling in *BGL (Holdings) Limited v Competition and Markets Authority* [2021] CAT 33. The issue of the correct approach to confidentiality arose in a different context, but the Tribunal's observations are apposite here. The question was whether or not the

Tribunal should go into private session for the cross-examination of a witness. The need to do so arose as a result of the broad-brush approach taken in particular by the Competition and Markets Authority to the designation of information obtained from third parties as confidential. In that context, the Tribunal noted at [8] that "*a wide confidentiality regime is entirely at odds with, by which we mean prejudicial to and inconsistent with, the principle of open justice*". The Tribunal further noted at [9] that the confidentiality regime should be "*confined to that which is materially damaging to third parties*", and that the confidentiality must be supported by a clearly and specifically articulated reason why the release of the relevant documentation or information will cause material harm.

19. We agree with the Tribunal in *Kent v Apple* at [17] that, other than instances where privilege applies, whether or not confidential treatment should be afforded to any document (or part) is a matter for the Tribunal's discretion, balancing issues of (1) relevance with (2) the interests of confidentiality as specifically identified by the party making the request.

Case law on Disclosure of Funding Arrangements and ATE Insurance Documents

20. We were referred to the same case law as the Tribunal in *Kent v Apple* (see [18]). In addition we were referred to *Merricks v Mastercard* [2021] CAT 28 at [20] and *Gutmann v First MTR South Western Trains Limited* [2021] CAT 31 (***Gutmann)*** at [49] which make clear the special nature of collective proceedings, compared with ordinary litigation and the obligation for the Tribunal (and not merely the proposed defendant) to be satisfied that the PCR fulfils the authorisation condition, having regard to the interests of the class members who they seek to represent.

21. In *Kent v Apple* the Tribunal summarised the case law on disclosure of funding arrangements and ATE insurance documents as follows:

> "19. Although the position is not entirely settled by the case law, from the general authorities we derive the following general propositions:
>
> (1) In considering disclosure generally, three issues are likely to arise (in the following order): (i) relevance of the documents; (ii) if

relevant, whether they are privileged; and (iii) if relevant and not privileged, whether, as a matter of discretion, they should be disclosed either wholly or subject to redaction: *Excalibur,* §5.

(2) In principle, disclosure may be refused as a matter of discretion where disclosure might give the opposing party a tactical advantage in relation to various aspects of the conduct of litigation. Such tactical advantage may be derived from matters wider than knowledge of legal advice and might include, but is not limited to, knowledge of the assessment of merits risk on the part of funders and insurers: *Excalibur,* §§24 to 26 and *Hollander*, supra. This basis for withholding might appropriately be described as "strategic sensitivity".

(3) As regards a party's funding arrangements, (including but not limited to an ATE policy as a whole):

(i) They are not subject to litigation privilege: *Excalibur* §§13 to 23 and *RBS* §111.

(ii) It is not clearly established that they are subject to legal advice privilege; compare *Excalibur* §23 (privileged if disclosure gives an indication of the legal advice sought or given); and *RBS* §§111 and 112 (ATE policy is not, of itself, likely to reflect legal advice given as to prospects and tactics and in general unlikely to attract such privilege).

(iii) Even if not privileged, the exercise of discretion may fairly take account of any unfair tactical advantage to the opposing party: *Excalibur* §§24 to 26.

(4) Turning specifically to *the premium* payable under an ATE policy:

(i) Whilst not subject to litigation privilege, it *may possibly* attract legal advice privilege and require redaction on the basis that it might allow the reader to work out what legal advice had been given the reader: *RBS* §112.

(ii) Even if not privileged, disclosure of the premium reflecting the insurer's assessment of the merits might give rise to an unfair tactical advantage and thus discretionary grounds to refuse disclosure: *Excalibur* §25(1).

20. Whilst the above analysis of the general position provides us with a useful framework, we recognise however that it cannot automatically be read across to the very specific context of collective proceedings where the Tribunal has a specific and express duty to examine the PCR's funding arrangements, and where, as a matter of course, substantial aspects of those arrangements and the ATE insurance are necessarily disclosed to the proposed defendant and the Tribunal.

21. As regards disclosure of the ATE premium specifically, at the CMC in *Gutmann* Roth J, whilst indicating that there was no reason for the policy as a whole to be confidential, considered that the premiums were obviously confidential as they will "*betray an assessment of risk*"; and more generally suggested the provisions which "*disclose the*

> *risk assessment*" can properly be kept confidential. In the CMC in *O'Higgins*, Marcus Smith J observed that premiums should be kept confidential because they "*show a certain insight into the risk that is being attributed to the success or failure of the litigation*". Whilst it does not appear that in either case argument was addressed to any question of privilege, in our judgment, these observations support the existence of the distinct discretionary ground of "strategic sensitivity", wider than privilege. Further in no CPO case to date has the Tribunal specifically ordered disclosure of the premium. It is the case that subsequently in the *O'Higgins* case, the premiums were disclosed. However, disclosure was volunteered in the context of a "carriage dispute" between competing PCRs." [Footnotes omitted]

22. We agree with the general propositions identified by the Tribunal, but would add the following points:

(1) The collective proceedings regime is a statutory regime in which PCRs are required to disclose their funding arrangements to the Tribunal, which is under a duty to examine them. We agree that the situation is therefore very different to that arising in general civil litigation, and that case law decided in that context cannot necessarily be read directly across to collective proceedings. Different considerations apply. In this regard, we were directed by Counsel for the Proposed Defendants to observations the then President made at the CMC in the CPO Application in *Gutmann* when querying the extent of proposed redactions to funding documents, and in the context of a discussion about confidentiality: *"this is a very special form of proceedings for which your clients get various benefits … But there is, as it were, a price to pay to get those benefits"*.[1]

(2) In our view, the starting point in collective proceedings must be that the whole of a PCR's funding arrangements are relevant to the Tribunal's assessment of the CPO Application. This is made clear by Rule 78(2)(d); 78(3) and paragraph 6.33 of the Guide. Subject to issues of privilege or confidentiality, we consider that the presumption should be that if the litigation funding agreement or ATE policy is relevant then, *prima facie* all of its terms are relevant and any redaction to the documents must be

[1] *Gutmann* Transcript p23 lines 14 to 17.

properly justified. This presumption of transparency is consistent with it being incumbent on a party to make a request for confidential treatment of a specified document, or part of a document, pursuant to Rule 101 should circumstances require.

(3) As regards paragraph 19(1) of *Kent v Apple*, therefore we would be concerned if relevance were to be treated as some form of "threshold test" such that if a specific provision in an ATE Policy or other funding document could not be said to be "relevant", it could be redacted without going on to assess issues relating to confidentiality. Such an approach would be inconsistent with [17] of *Kent v Apple* which makes clear that (absent privilege) relevance is one factor which is to be put into the balance when considering a request for confidential treatment. In our view, the Tribunal should be slow to permit any redaction in documentation relating to funding arrangements that have been disclosed, solely on the grounds of irrelevance.

(4) As to paragraph 19(2) of *Kent v Apple*, we agree that the circumstances in which a Tribunal may refuse disclosure (or grant a request for confidential treatment) are not confined to situations in which another party might otherwise gain knowledge of legal advice that had been given. We agree that the Tribunal may make such an order where another party to the proceedings might gain an unfair tactical advantage in relation to the litigation in issue. For our part, we prefer to use that approach because it stresses the need to identify both the tactical advantage that is said to arise, and the element of unfairness that would result should disclosure be required. We would be concerned if the use of the phrase *"strategic sensitivity"* led to any dilution of those requirements.

(5) When assessing whether or not disclosure of information would or might give rise to any unfair tactical advantage, the Tribunal should have regard to the context. In this regard, we were referred to paragraph 26-07 of Hollander: *Documentary Evidence* (14th Edn): *"... there are real problems in giving disclosure of an ATE policy. It gives the other party*

a tactical advantage to know the terms of funding, exactly how the mechanics of a settlement would work, who has to be consulted and who has to approve and how the matter is to be sorted out in case of dispute. It may make clear the limitations on funding, the exclusions and indicate the pressures that can tactically be brought on the insured party." In this case, because of the special regime relating to collective proceedings orders the PCR has already made extensive disclosure in relation to these aspects of her funding arrangements. Following the logic of the passage in Hollander, that may give rise to some degree of tactical advantage but because it is required under the statutory regime, that advantage cannot be considered to be unfair. The issue then becomes what additional unfair tactical advantage arises if further disclosure, over and above that already made, is required.

(6) We agree with the approach taken to ATE premia summarised at paragraph 19(4) of *Kent v Apple*: that the premia payable may possibly attract legal advice privilege, and that – if not privileged - disclosure of the premia reflecting the insurer's assessment of the merits might give rise to an unfair tactical advantage and thus discretionary grounds to refuse disclosure. As regards paragraph 21, and the transcripts in the CMCs for *Gutmann*[2] and in *O'Higgins*[3], we also note that in neither case was there any discussion as to what exactly could be gleaned as regards legal advice, or by way of unfair tactical advantage from the disclosure of the ATE deposit premium, *per se*. We accept that it was assumed that ATE premia were confidential in *Gutmann*. We do not read Marcus Smith J's comments in *O'Higgins* as leading to the conclusion that ATE premia should in all cases be kept confidential. When considering the issue of redactions, he stated: *"For instance, one might say that in the ATE insurance documents, the premiums ought, whatever the status of the other party document, [to] be kept confidential because that shows a certain insight into the risk that is being attributed to the success or failure of the litigation; and I can see good reason for keeping that under*

[2] *Gutmann,* Transcript at page 5, lines 30 to 31; page 8 lines 6 to 7
[3] *O'Higgins*, Transcript at page 17 lines 14 to 17

wraps". We agree with the Tribunal in *Kent v Apple* that these observations support the existence of a discretionary ground for ordering confidentiality if disclosure would give rise to an unfair tactical advantage.

C. THE ATE PREMIA

23. The ATE premia are referred to at paragraph 8 of Schedule 1 of the ATE Policy. This is broken down into two parts: the Deposit Premium (payable in two stages), and the Contingent Premium (also payable in two stages). The Deposit Premium is payable in any event, and is funded by the Funder. The Contingent Premium is only payable upon success, and only out of undistributed damages. Reference to the ATE premia is also included in the Litigation Budget. In all instances the amount of premia, Deposit Premium and Contingent Premium, are redacted.

24. The PCR maintains that the amount of the Deposit Premium should remain redacted. In summary, this is said to be because:

    (1) The Deposit Premium is irrelevant. It is not necessary for the Tribunal (or the Proposed Defendants) to know the amount of the Deposit Premium payable under the ATE Policy in order to determine whether or not the PCR has sufficient funding in place to pursue the litigation.

    (2) In any event, disclosure of the Deposit Premium might confer an unfair tactical advantage on the Proposed Defendants.

25. The Proposed Defendants do not seek disclosure of the Contingent Premium but maintain that the PCR ought to disclose the Deposit Premium. In summary, this is said to be because:

    (1) If the PCR does not do so, she has not provided a proper budget for the litigation as required by Rule 78(3)(c)(iii) and paragraph 6.30 of the Guide, and without it the remainder of the budget makes no sense;

(2) The Deposit Premium is relevant because all substantive terms of the funding arrangements should in principle be disclosed, and it is needed in order to establish what "real" costs the PCR has for the litigation; and

(3) The Proposed Defendants can derive no unfair tactical advantage from knowledge of the Deposit Premium and in any event any advantage is outweighed by the need for the PCR to disclose the material relevant to an assessment of her suitability.

Relevance

26. Turning first to consider the issue of relevance, we do not consider that the ATE premia are or might be relevant to the issues that the Tribunal will need to determine at the CPO Hearing. We say this because:

(1) The Litigation Budget reflects:

(i) A "Total" figure of £16,422,258.10. This figure reflects a detailed breakdown by phase (Pre-action; Claim Form & other documents; First CMC and so on) of the estimated costs of each lawyer, calculated by reference to estimates of time to be spent, and their "Base Rate" (i.e. their normal rate not reflecting any deferred element provided for in any CFA). The Total excludes any ATE premia.

(ii) A figure for "Total Through to Trial" of £15,422,258.10. This again excludes any ATE premia. It discounts a disbursement of £1m for "Phase 13" in the detailed breakdown (Notice and Administration) on the basis that this will be incurred only if and after the PCR is successful at trial.

(iii) A figure for "Total Funded Amount" of £11,290,031. Although this appears in the Litigation Budget under items (i) and (ii) above, which suggests that it is derived from the figures appearing in the table above it, it is not. It appears from the

footnotes and has been explained to us that this figure is (a) calculated by applying the discounted CFA rates agreed for each member of the legal team to the hours reflected in the Litigation Budget for each phase, and (b) includes the ATE Deposit Premium (but not the Contingent Premium).

(2) The issues for the Tribunal to determine at the CPO Hearing regarding funding will be:

(i) Whether or not, for the purposes of Rule 78(2)(d) of the CAT Rules, the PCR will be able to pay the Proposed Defendants' recoverable costs if ordered to do so. That is a question that will be determined by whether or not the level of cover provided by the ATE Policy is adequate. The level of cover is £10m. It is not necessary to know the amount of the ATE Deposit Premium for the purposes of this exercise.

(ii) Whether or not the PCR will be able to fund her own legal costs (paragraph 6.33 of the Guide) will be determined by whether or not she can fund the ongoing legal costs charged by her legal team at the discounted level (and not the Base Rate) provided for in the relevant CFAs, and disbursements including the Deposit Premium. The Litigation Budget records that the total of those two items is £11.29m. We do not understand there to be any dispute that this figure is funded by the LFA. If the PCR loses at trial then on the basis of the Litigation Budget there will be nothing further for her to pay. If the PCR wins at trial, the legal team will become entitled to the deferred element of their fee (up to the Base Rate), and also a success fee. However, the deferred element of the fee is payable either by the Proposed Defendants, or (if there is any shortfall) from undistributed damages, and the success fee is payable from undistributed damages. The Proposed Defendants have suggested that it is important to be able to strip out the Deposit Premium so that it is possible to see what funding is actually available to the PCR for each phase. We

do not accept that this is right. As we have said, the fees payable by the PCR will be less than the Base Rates shown in the table, and we do not understand it to be in dispute that the LFA provides funding to the PCR to meet her obligation to pay the discounted rate payable for the hours shown in the Litigation Budget.

(3) We do not therefore accept that, on the facts of this case, the Deposit Premium figure is relevant to the issues that the Tribunal will determine at the CPO Hearing. Nor do we accept the Proposed Defendants' criticism that the Litigation Budget is not a budget, properly so-called. It is a document which is required to be produced under paragraph 6.30 of the Guide which will assist the Tribunal in deciding whether to make a CPO. The Tribunal will, for example, use it as a basis for assessing whether or not the PCR's approach and expectations as regards the progress of the litigation and the resources required for each phase are realistic**.**

Unfair Tactical Advantage

27. Relevance is only one element of the balancing exercise we are required to undertake. As we have made clear, if relevance was the only basis for redaction, we would not be minded to grant confidential treatment. We must also consider whether disclosure of the Deposit Premium would give the Proposed Defendants an unfair tactical advantage.

28. The PCR asserts that it would. This is said to arise in two ways: first, disclosure of the Deposit Premium could disclose the insurer's assessment of risk, and thereby confer a tactical advantage on the Proposed Defendants; secondly, with knowledge of the Deposit Premium, it is said that the Proposed Defendants could reverse engineer the figures in the Litigation Budget, and deduce the average discount rate under the CFAs, which would then provide an insight into the PCR's lawyers' assessment of risk.

29. In the course of argument we attempted to explore whether or not the risk that the Proposed Defendants would gain an insight into the perceptions of risk on the part of either the insurer or the PCR's lawyers is a real one. We were told by the PCR that it is the Deposit Premium that is capable of giving an insight into the insurer's view of the merits, because if the merits are weak, the insurer is more likely to demand a higher deposit premium. The contingent premium is only payable in the event of success, and so when fixing this element, the insurer will take into account the fact that it is unlikely to collect it if the merits are weak.

30. In this case, the Proposed Defendants are not asking for details of the Contingent Premium and so they would not know whether the Deposit Premium is large relative to the Contingent Premium or not. However, the PCR maintains that those with market knowledge would gain an insight as to the insurer's merits and risk assessment from the absolute figure for the Deposit Premium relative to the overall amount of cover (in this case, £10m). We were also told by Ms Kreisberger QC, Counsel for the PCR, that there will be other commercial factors relating to matters such as a percentage attributable to costs, but these are likely to be fairly standard in the market. It was suggested that those in the market could therefore control for such factors. Ms Kreisberger QC submitted that the fact that the Deposit Premium is the product of a commercial negotiation does not mean that it is not of interest to the Proposed Defendants in relation to the merits and risk assessment.

31. Further, if the Deposit Premium was known, then it would be possible to calculate the deferred element of the lawyers' fees. It is only the average deferred element that would be disclosed. However, the PCR maintains that is more revealing than any individual discount because it reveals the legal team's overall view of palatable risk and is reflective of how the team view the merits of the case. Again, the fee arrangements will be the product of a commercial negotiation, however the PCR maintains that if the Proposed Defendants know how much the legal team as a whole are prepared to defer then there is a risk of giving the Proposed Defendants an unfair tactical advantage.

32. In the course of argument, Ms Kreisberger QC submitted that this information could be used by the Proposed Defendants to the disadvantage of the class by enabling them to pitch a "low ball" settlement offer. She suggested that the Proposed Defendants could be advantaged both in terms of pitching the quantum of its offer and as regards timing as to when to make it.

33. The Proposed Defendants say there is no risk that they will obtain an unfair advantage. They say that given that there has already been extensive disclosure relating to the ATE Policy (as there must be in collective proceedings), the focus must be on the incremental tactical advantage that knowledge of the Deposit Premium will provide. The Proposed Defendants say that it is for the PCR to show that disclosure *will* cause harm, and that it is not enough to show that it *might*. They point to the fact that in other cases insurers have been willing to disclose ATE premia in, for example, the *Trucks* and *O'Higgins* cases.

34. As regards the possibility of disclosing the insurer's assessment of risk, Mr Carpenter QC, Counsel for the Proposed Defendants, submitted that "there is a lot more art than science" that goes into the underwriting of ATE policies and that each of the five underwriters will have undertaken their own underwriting decision. Merits is only one factor, and other factors will be for example the amount an insurer is paying in respect of brokerage, what its other costs are, what profit it is looking to make. He did not accept that these other costs are standard across the market. He stressed that another important factor is how the premium is split between deposit and contingent elements, and other "less scientific factors" such as capacity and market positioning: whether it is a line of business that the insurer is looking to get into, or looking to get out of. The Proposed Defendants suggest that even if the entire ATE premia were disclosed, it would be hard to infer anything about the insurer's view of the merits, given that it is just one of a number of factors that go into an underwriting decision.

35. The Proposed Defendants maintain it is impossible to discern anything meaningful regarding a risk or merits assessment from the knowledge of the Deposit Premium alone. Mr Carpenter QC suggested that what matters is the split between contingent and deposit premiums, and even then the split may simply reflect that an insurer would prefer to have the greater certainty of, for

example, a smaller premium rather than wait to receive a larger premium. There may be a cashflow element.

36. As regards the possibility of discerning the deferred element of the lawyers' fees and gaining an insight into the perception of the lawyers' assessment of success, Mr Carpenter QC maintained that it would only be possible to calculate the average level of deferred fee across the legal team as a whole, and that the proportion of deferred fee is "*very unlikely to be directly or even indirectly reflective of views on the merits*": it is much more likely to be the product of a commercial negotiation. Mr Carpenter QC suggested that it might reflect a different attitude to the value of work in progress, or the benefit of certainty of payment rather than having to wait contingently for payment. The deferred element may be the product of commercial negotiations with the funder. Mr Carpenter QC indicated that whilst it would be possible to calculate the deferred element if the Deposit Premium was disclosed, it was not something the proposed Defendants were particularly looking to find out.

37. In the course of submissions at the hearing, both Counsel rightly stressed that they were not giving evidence in relation to the basis upon which ATE policies are underwritten, and premia calculated. We had no evidence before us on this issue. We are not suggesting that evidence is strictly necessary, and a "trial within a trial" as to the basis upon which any particular policy has been underwritten would generally be undesirable. However, the provisions of Rule 101 of the CAT Rules, and the observations of the President in *BGL v CMA* appear to us to be pertinent. We stress that it is incumbent upon the PCR, if it wishes to seek confidential treatment to make its request clearly in writing, and to provide clearly and specifically articulated reasons why the release of the relevant documentation or information will, or might, cause material harm. Likewise, it is for the Proposed Defendants to do the same should they resist that request. We are conscious that we were being asked to draw conclusions as to what disclosure of the Deposit Premium may or may not reveal principally on the basis of factual assertions (only really articulated and developed in the course of oral argument). We consider that the Tribunal will be greatly assisted in future if, once it appears that an application for confidential treatment is likely to be controversial and will need to be resolved at a CMC, a specific request is

prepared by the PCR pursuant to Rule 101 of the CAT Rules, articulating clearly the specific reasons why confidential treatment is required, identifying the material harm that it is alleged will or might be caused should disclosure be required, and summarising the facts and matters relied upon in support of that proposition. Similarly, we suggest that the Proposed Defendant provide a response specifically addressing each point raised.

38. We see some force in the submissions made by the Proposed Defendants as to whether what can be gleaned from disclosure of Deposit Premium and the deferred part of the legal fees would confer an unfair tactical advantage on them. However, we have come to the conclusion that we cannot discount the possibility that it might. In particular, we have in mind the submissions made on behalf of the PCR as to what might be deduced as regards the insurer's risk assessment from the level of Deposit Premium relative to cover provided, and as regards the legal team's assessment of the merits as a result of it being possible to calculate the deferred element of the fees. On the basis of what we have heard, we consider that it might be possible for the Proposed Defendants to gain insight into these matters were we to require the Deposit Premium to be disclosed and that this might inform the Proposed Defendants' own strategy, for example in terms of settlement.

39. We note that ATE premia have been disclosed in other cases, and to the public (and not within a confidentiality ring). However, (1) those cases were "carriage disputes", in which disclosure was made in the context of each party's claim to be the party best suited to take the case forward; (2) it does not follow from the fact that disclosure was made in that context that no tactical advantage is thereby conferred: it may be that the risk of unfairness in doing so was considered by the parties on balance to be worth taking; and (3) we do not see that the decision of parties taken in other litigation to disclose information voluntarily binds our assessment of the potential risk of doing so in these proceedings.

40. We are required to conduct a balancing exercise. As Ms Kreisberger QC fairly accepted in argument, in a hypothetical world, if the material in issue was highly relevant, disclosure might be required notwithstanding the risk of conferring an advantage on the Proposed Defendants. However, we agree with Ms

Kreisberger QC that we are not in that territory. We are not satisfied that the Deposit Premium is relevant to the issues the Tribunal will be considering at the CPO Hearing. We are satisfied that there is a risk of giving an unfair tactical advantage to the Proposed Defendants if we were to require disclosure of it. In the exercise of our discretion, balancing relevance with that risk, we consider the figure for Deposit Premium should be redacted. We note that the Tribunal in *Kent v Apple* reached the same conclusion, albeit without the benefit of the specific arguments put forward to us by the Proposed Defendants, or the submissions made to us by both parties on issues not ventilated in that case.

41. Finally, we have already made clear our view as to the importance of transparency in relation to the PCR's funding arrangements in collective proceedings. Should it at some future point in these proceedings be appropriate to revisit the issue of where the balance between relevance and the likely risk of unfair tactical advantage then lies, we do not consider that the Proposed Defendants are prevented from making a further application in this regard. It is, of course, open to this Tribunal to raise the point of its own motion.

D. SUCCESS FEES

42. The Proposed Defendants do not seek disclosure of the CFAs themselves, but seek an order that the PCR inform it, and the Tribunal, of the percentage level of success fees payable under the CFAs entered into with her legal team. This is on the basis that paragraph 6.33 of the Guide provides that, in considering the PCR's ability to fund her own costs of bringing the proceedings the Tribunal will have regard to *"any relevant fee arrangements with its lawyers"*. It is said that the success fees are therefore something that the Tribunal "must" have regard to. The Proposed Defendants do not put their argument on the basis that the success fees are relevant to any consideration of whether or not the PCR has the resources to fund her own legal costs, or meet any order that may be made in the Proposed Defendants' favour. Rather their case is placed squarely on the suggestion that a potential conflict of interest arises.

43. The Proposed Defendants argue that success fees are particularly significant because they are payable only out of undistributed damages. They maintain that

there is therefore a potential conflict of interest between the PCR and class members, on the one hand, and the PCR's lawyers on the other on the basis that there is an incentive for the PCR's lawyers to ensure that there is a sufficient pot of undistributed damages so that the success fees are paid in full. By way of example, Mr Carpenter QC suggested that under a CFA it may be in the lawyers' interests to accept a particular offer which may not be as much as a client might be able to achieve if they fought the case for longer. He did not seek to make any adverse implications against the PCR's solicitors, or their professional obligations. He suggested that the potential conflict is a feature of this regime, and one that the Proposed Defendants were therefore entitled to know about.

44. The PCR points out that any success fees are payable only if and after she is successful at trial, and only from undistributed damages. The basis upon which damages will be distributed will be subject to supervision from this Tribunal, and the interests of the class members will therefore be protected. The level of success fee is in any event subject to a 100% cap pursuant to section 58(4)(c) of the Courts and Legal Services Act 1990 and article 3 of the Conditional Fee Agreements Order 2013/689.

45. The PCR also argues that the success fees are confidential for similar reasons to those that apply to the deferred element of the legal fees. It is said that it will enable the Proposed Defendants to deduce information about the CFAs which gives them an unfair advantage. The PCR also relies upon the fact that, even when success fees were recoverable from the other party in litigation, disclosure of them was not required under the Civil Procedure Rules (**CPR**). We do not consider that the approach taken historically in the CPR is particularly instructive in light of the special regime applying to collective proceedings.

46. The Proposed Defendants accept that the Tribunal has the ability to scrutinise payments to the insurer, funder and lawyers out of the undistributed damages, but says that is only after the distributions have happened, by which time it is too late to deal with how the distribution has been affected, and whether it has been maximised. The Proposed Defendants also suggest that the success fee element is not indicative of very much in terms of the legal team's view of the merits.

47. The thrust of the Proposed Defendants' submission is that there is a risk that the PCR's legal team will not comply with their professional obligations. We do not accept that that assumption is an appropriate one to make in this case, in the absence of any real evidential basis for it. In any event, the Tribunal has the power under Rules 93 and 94 of the CAT Rules to make appropriate directions relating to the distribution of any award or collective settlement. In the circumstances, we do not think that the Proposed Defendants have made out a case for being provided with the information they seek relating to the success fees.

E. CONCLUSION

48. In the light of our conclusions the amounts of premia in the ATE Policy shall remain redacted, and the PCR is not required to inform the Proposed Defendants of the level of the success fees payable under the CFAs entered into with her legal team. This is our unanimous decision.

Bridget Lucas QC
Chair

Tim Frazer

Professor Michael Waterson

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

Date: 3 February 2022