Neutral citation [2024] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

19 January 2024

Before:

BEN TIDSWELL
(Chair)
WILLIAM BISHOP
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LTD

Defendants

- and –

THE COMPEITITION AND MARKETS AUTHORITY

Intervener

RULING (FUNDING)

A. INTRODUCTION

1. The Defendants ("Apple") seek a ruling in these proceedings in respect of the enforceability of the Class Representative's funding arrangements. These are collective proceedings, pursuant to a collective proceedings order made by the Tribunal in June 2022. The nature and subject matter of the proceedings is described in detail in our judgment dated 29 June 2022 ([2022] CAT 28).

2. The funding issues arise because of the decision of the Supreme Court in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("*PACCAR SC*"), in which the majority determined that the litigation funding agreements ("LFAs") in those proceedings fell within the definition of "damages based agreements" ("DBAs") for the purposes of section 58AA of the Courts and Legal Services Act 1990 ("*section 58AA"*), and were (1) unenforceable in opt out proceedings pursuant to section 47C of the Competition Act 1998 (*"section 47C CA 98"*) and (2) unenforceable in any proceedings unless they complied with section 58AA and the Damages Based Agreement Regulations 2013 (the *"DBARs"*), which those LFAs did not.

3. The relevant part of section 58AA provides as follows:

> "(1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
>
> (2) But ... a damages-based agreement that does not satisfy those conditions is unenforceable.
>
> (3) For the purposes of this section—
>
> (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that -
>
> (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
>
> (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained. ..."

4. Section 58AA(4) then sets out the conditions referred to in subsection (1), which in turn require compliance with the relevant provisions of the DBARs.

5. However, any DBA which relates to opt out proceedings is deemed unenforceable, regardless of whether it complies with section 58AA and the DBARs. Section 47C(8) CA 98 provides that *"A damages-based agreement is unenforceable if it relates to opt-out collective proceedings"*.

6. It is common ground that the LFA entered into by the Class Representative to finance the costs of these collective proceedings was a DBA, by virtue of the application of *PACCAR SC*. The Class Representative therefore entered into an amended LFA of 7 November 2023 (the *"Revised LFA*"), which provides that the return to the funder will be determined by applying a multiple to the amount of costs expended by the funder (the sum of such costs being defined as the *"Funder's Outlay"*), instead of the percentage based recovery provided for in the original version.

7. Apple raise two arguments by way of challenge to the revised funding arrangements:

   (1) The funder's fee is payable from, and limited by, the amount of proceeds of any successful outcome, which provides a natural cap on the fee, both as a matter of potential outcome and also as a reference point for any decision by the Tribunal about the level of the funder's fee. The funder's fee is consequently, as described in section 58AA(3)(ii), determined by reference to the financial benefit received by the Class Representative. The LFA is therefore a DBA and is unenforceable, not having complied with the DBARs (this latter point is common ground).

   (2) The revised funding arrangements include a "ratchet" which has the effect of doubling the funder's return if the proceedings continue beyond a date which is more than two years away but less than three years away (the "Ratchet Date"). As a consequence, the "ratchet" provision has the potential to provide a return to the funder which is similar to that available under a prohibited DBA and potentially incentivises the funder

to act in a manner which may not be congruent with class members' interests, especially as the Ratchet Date deadline approaches. This warrants a review of the authorisation of the Class Representative under Rule 78(2) of the Competition Appeal Tribunal Rules 2015 (the *"Rules"*).

8. Subsequent to Apple advancing these arguments, a decision about a similar LFA in *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and ors* [2023] CAT 73 ("*Neill v Sony*") was handed down by a differently constituted Tribunal. In that judgment, the Tribunal rejected arguments which were substantially the same as those advanced by Apple in these proceedings.

9. Unsurprisingly, the Class Representative adopted the reasoning in *Neill v Sony* and submitted that, as a consequence, the Revised LFA was enforceable and no further intervention from the Tribunal was warranted at this stage.

10. Apple asked the Tribunal to provide a ruling on the challenges they have advanced. It was agreed that the issues would not be the subject of oral submissions at a CMC convened on 14 December 2023, but instead that we should determine the issues on the papers.

11. No doubt anticipating that we would adopt the reasoning of the Tribunal in *Neill v Sony*, Apple also asked us to grant permission to appeal in respect of any negative finding on their challenges.

B. THE DECISION IN *NEILL v SONY*

12. *Neill v Sony* was the first time that the Tribunal had been asked to consider the effect of *PACCAR SC* on funding arrangements in collective proceedings. The Tribunal had heard an application for a collective proceedings order in June 2023. While the judgment was being prepared, the decision in *PACCAR SC* became available, and the Tribunal convened a further hearing in October 2023 to consider revised funding arrangements which the proposed class

representative entered into in order to address the consequence of the Supreme Court's ruling.

13. In short, this involved replacing a percentage-based mechanism for determining the funder's return with a mechanism that applied a multiple to the amount which the funder had committed to fund the proceedings. The proposed defendants raised challenges to those revised funding arrangements, which are very similar to those advanced by Apple in these proceedings.

14. On the issue of whether the proceeds of litigation providing a natural limit on the funder's fee engaged section 58AA, the Tribunal in *Neill v Sony* held that:

> "158. We do not accept Sony's submission [that the Proceeds are a natural cap on the amount which can be paid to the funder, so that there is inevitably a reference to the amount of financial benefit obtained by the PCR in determining the Funder's Fee][1] for the following reasons:
>
> (1) Sony could not point to any provision in the Current LFA by which the amount of the Funder's Fee was limited by the amount of the Proceeds. The Current LFA is not therefore *"an agreement…which provides that…the amount of the [Funder's Fee] is determined by reference to the amount of the [Proceeds]"*, as section 58AA requires.
>
> (2) It is in fact the Tribunal, exercising its discretion under Rule 93, that will determine the Funder's Fee in the event of any judgment. In a settlement, the Funder's Fee will be determined by the terms of the settlement, if approved by the Tribunal, in accordance with Rule 94.
>
> (3) It may well be the case, in either scenario, that the size of the Proceeds will be a relevant consideration for the Tribunal (or indeed the parties, in a settlement), not least to ensure that the Funder's Fee (together with other Stakeholder payments) does not eliminate or unfairly reduce the benefit of the collective proceedings to class members. That is entirely beside the point, as far as section 58AA is concerned. Neither situation will give rise to an agreement between the funder and the PCR by which the amount payable to the funder is determined by reference to the amount of the financial benefit obtained by the PCR.
>
> (4) In this regard, we note that Lord Sales JSC dealt with an argument about the significance of the Tribunal's intervention in [96] to [99] of the majority judgment in *PACCAR*, in which he said that the Tribunal's discretion in settling the return to

[1] We have for convenience inserted into this paragraph the submission which is recorded in [154] of the judgment.

the funder did not prevent a percentage based funder's fee from being a DBA. That must, with respect, be correct, but it is quite a different position from this case, where there is no effective provision for a percentage based funder's return. In this case, Sony is arguing that the exercise of discretion by the Tribunal, in referring to the size of the Proceeds, itself gives rise to a DBA. We do not think that PACCAR assists on that point.

(5) Finally, we have already dealt with Sony's argument that *PACCAR* has materially changed the way that the Tribunal should approach the question of whether a funding agreement is a DBA (see [144] above). We do not, as Sony suggested, consider that the approach we have accepted above is a mechanistic one which ignores the reality of the funding arrangements. On the contrary, our conclusions reflect the reality of the situation, and we reject the artificial approach urged on us by Sony."

15. The Tribunal in *Neill v Sony* also dealt with an argument that a "ratchet" provision provided an inappropriate return and gave rise to perverse incentives. It said:

"163. The PCR also relied on the decisions of the Tribunal and the Court of Appeal in *Gutmann v First MTR South Western Trains Ltd* [[2021] CAT 31 and [2022] EWCA Civ 1077]. In the Court of Appeal's judgment, delivered by Green LJ, the Court dealt at [80] to [87] with an argument by the proposed defendant that the proceedings were likely to be *"hugely expensive and overwhelmingly for the benefit of funders and lawyers"*, with a likelihood that few class members would ever claim whatever was recovered.

164. Green LJ said this at [83]:

"83. By way of preface to our conclusions we acknowledge that it is important for the CAT to exercise close control over costs. There are conflicting considerations at play. On the one hand to enable mass consumer actions to be viable at all will invariably necessitate the assistance of third-party funders (see the discussion in Le Patourel (ibid) at paragraphs [75] – [80]) and the CAT must therefore recognise that litigation funding is a business and funders will, legitimately, seek a return upon their investment. On the other hand there is a risk that the system perversely incentivises the incurring or claiming of disproportionately high costs. And there is also the risk, highlighted in Canadian literature, that third-party funders have an incentive to sue and settle quickly, for sums materially less than the likely aggregate award. This, if true, risks undermining important policy objectives 32 [2021] CAT 31 and [2022] EWCA Civ 1077 behind the legislation which include properly rewarding the class and creating ex ante incentives upon undertakings to comply with the law."

165. At [86] he continued:

> "86. Secondly, in any event, the answer to concerns such as those expressed lies in the close supervision of costs by the CAT to ensure that they are proportionate: see Le Patourel (ibid) paragraph [78]. The proffering of an exorbitant costs budget does not mean that those costs will be ordered to be paid if the class prevails at trial; and the mere fact that at the certification stage costs seem high does not mean that the CAT will simply accept that figure as appropriate for the purposes of a cost/benefit analysis. We cannot see that the CAT would therefore necessarily have taken any materially different view of suitability had it known of the most up to date costs figures."
>
> 166. These passages recognise that there are inherent risks for the fulfilment of policy objectives in the funding model which itself enables collective actions to proceed. The Tribunal has a responsibility to manage those risks and has a variety of means of doing so. These include:
>
> (1) Satisfying itself that a class representative is sufficiently independent and robust, so as to act fairly and adequately in the interests of class members (See Rule 78(2)(a)).
>
> (2) Scrutinising the funding arrangements at the certification stage and seeking adjustments if there are concerns that cannot otherwise be managed (see for example the Tribunal's intervention in relation to the funding arrangements in *Merricks v Mastercard* (Further Judgment – CPO Application) [2021] CAT 28).
>
> (3) Managing the proceedings so that costs are incurred proportionately, as suggested by Green LJ.
>
> (4) Exercising oversight of the terms of any settlement, including any concern that the settlement may be unduly influenced by the interests of people other than the class members, as provided for in Rule 94 and as also noted by Green LJ in the passage above.
>
> 167. It is a matter of judgment for the Tribunal as to how it employs those and other levers to deal with the inherent risks arising from the funding model. In this case, we do not consider the change in the reference point for the multiple to warrant our intervention at this stage. As noted in [144] above, we do not accept Sony's argument that *PACCAR* requires more intense scrutiny of funding arrangements than the decisions in *Gutmann* contemplated. We consider that, in this case, any concerns about the proportionality of the funder's return by reference to the risk and level of funding commitment it has made is best dealt with in the context of any judgment or settlement."

16. We adopt the reasoning set out in *Neill v Sony*. While the Tribunal in *Neill v Sony* recognised that, in some circumstances, intervention at the CPO stage was

desirable[2], it generally adopted the approach of leaving consideration of the appropriateness of funding outcomes until a later stage, namely upon approval of a settlement or after a judgment in favour of the Class Representative. It seems to us that there are good reasons for this:

(1) There are a number of different variables which will contribute to any calculation of the funder's fee under the LFA. These include the nature of any outcome, the timing of that and the amount of costs outlaid by the funder at that stage.

(2) It would therefore be a difficult, if not impossible, task to predict the likely funder's return (as calculated by the contractual mechanism) at this stage in the proceedings. That would require considerable work and even then might not be sufficiently robust to lead to any firm conclusions.

(3) By way of contrast, the oversight of the Tribunal (in approving a settlement or the funder's fee payable following a judgment in favour of a class representative) will not require consideration of many, if any, variables. The factors influencing the contractual fee will largely be known. The Tribunal will also have knowledge of the wider contextual points which may influence the Tribunal's willingness to approve a particular level of the funder's return. For example, the conduct of the litigation and any suggestion that its course might have been inappropriately affected by the funder.

(4) In the meantime, the Tribunal has at its disposal the various tools to ensure that any features of the funding arrangements do not unduly interfere with the interests of class members. This includes the control of costs as part of the Tribunal's case management function and the continuing oversight of the Class Representative's robustly independent conduct of the proceedings.

[2] Indeed, the Tribunal in *Neill v Sony* did intervene of its own initiative to query a particular provision – see [2023] CAT 73 at [188] to [170].

(5) As noted above it always remains open to the Tribunal, in its discretion, to seek changes to specific aspects of the funding arrangements if that seems warranted at the CPO stage. See *Merricks v Mastercard (Further Judgment – CPO Application)* [2021] CAT 28 and in *Neill v Sony* itself.

C. OUR DECISION

17. We can see no basis on which it can sensibly be suggested that the mere fact that the damages which the Class Representative might be awarded creates a limit or cap on the funder's fee is enough to bring the revised LFA within section 58AA(3)(ii). As in *Neill v Sony*, we have seen no contractual provision that would engage section 58AA in this way. On the contrary, the contractual provisions in the revised LFA provide for the funder's fee to be determined by reference to a multiple of the Funder's Outlay. This is the real and substantive reference point for determination of the funder's fee. Any natural cap or limit is ancillary to that and does not engage section 58AA. We see no reason to depart from the conclusion reached in *Neill v Sony* on essentially the same issue, for the additional reasons given by the Tribunal in that judgment.

18. The position in relation to the "ratchet" provision, which causes the multiple to be increased after the Ratchet Date, is more complex. Apple refers to a "doubling" of the funder's return, which is correct in a sense, as a particular element of the funder's return increases by x[3] times the Funder's Outlay prior to the Ratchet Date, while the same element increases by $2x$ times the Funder's Outlay after that date. However, this is but one of several elements in the multiple mechanism and in fact is not the most significant element. It is not therefore correct to say that the "ratchet" has the effect of doubling the whole funder's fee.

19. To summarise briefly (to the extent necessary to deal with this issue), the mechanism to apply the multiple in the revised funding arrangements provides:

[3] It is not necessary for present purposes to record the precise value of the multiplier and the Class Representative has indicated that the funder considers that confidential treatment under paragraph 1(2)(b) of Schedule 4 of the Enterprise act is warranted. We have not sought to determine that question.

(1) For an element (the "Funder's Initial Return") which is determined by reference to the greater of:

(i) A multiple of the Funder's Outlay, or

(ii) An internal rate of return on the Funder's Outlay.

(2) For a further element (the "Funder's Further Return") which is a multiple of the Funder's Outlay.

(3) For a further element (the "Funder's Additional Return") which is the multiple of the outlay which varies between *x* and *2x*, depending on whether the funder's fee is paid before or after the Ratchet Date.

20. Both the Funder's Initial Return and the Funder's Further Return involve the application of multiples which are larger than either multiple which might apply to determine the Funder's Additional Return. They are therefore likely to be more significant than the Funder's Additional Return in determining the size of the overall funder's fee.

21. In *Neill v Sony*[4], the Tribunal raised a concern because the funder's return in those proceedings appeared to increase very dramatically (with the whole fee apparently increasing by 100%) at a particular point in time, without any obvious logic for that. The Tribunal's concern was that the provisions in the LFA in *Neill v Sony* might result in an arbitrary and steep increase in the multiple at that time, which might create unhelpful incentives as that point in time approached.

22. In response, the proposed class representative provided clarification on the working of the clause (that it increased the multiple by 1.0, not by the whole amount of the funder's fee as calculated at that point in time) and proffered a revised arrangement in which the increase was spread over a year, rather than

[4] See the discussion in *Neill v Sony* at [168] to [171].

taking effect at one point in time. On that basis, the Tribunal was satisfied that a collective proceedings order should be made.

23. There are a number of important differences between the mechanism for the multiple in the LFA in *Neill v Sony* and the mechanism in the LFA in this case. For example:

    (1) In the LFA in *Neill v Sony*, the multiple is applied to the funder's funding commitment, whereas here it is applied to the costs actually paid by the funder.

    (2) In the LFA in *Neill v Sony*, the multiple works by applying a multiplier which varies over time and in different circumstances by reference to the funding commitment, whereas here the mechanism provides for distinct elements to be calculated by reference to the Funder's Outlay and then aggregated.

24. We should add that none of this was argued before us, as the parties agreed we should deal with the funding issues on the papers and the written submissions were brief on this point.

25. However, our understanding of the way the funder's fee changes after the Ratchet Date is that there is an increment which is material, but not so steep (relative to the other elements of the funder's fee, being the Funder's Initial Return and the Funder's Further Return) that it causes us sufficient concern to justify intervening further at this stage. It is important in this regard to distinguish between two distinct issues:

    (1) Any concern that the funder's fee might, in certain circumstances, be inappropriate (because, for example, its size relative to the investment and risk taken by the funder).

    (2) The risk that the way the multiple mechanism is constructed might cause the proceedings to be conducted in a way that is contrary to the interests of the class or the interests of justice generally.

26. Dealing with issue (2) first, we do not consider that the terms of the revised LFA and the "ratchet" provisions in relation to the Ratchet Date are sufficiently extreme to give rise to any particular, immediate concern about the ability of the Class Representative to conduct the proceedings in the best interests of class members and with robust independence from any interference by the funder. In addition, the Tribunal has the tools at its disposal to manage the proceedings, and the funding outcome, to ensure proportionality and appropriateness. We therefore see no reason to revisit the application of Rule 78(2) of the Rules at this stage.

27. As for issue (1), this is, we understand, Apple's alternative argument: that the LFA is in effect a prohibited DBA because of the size of the likely returns. We reject this argument for two reasons.

28. First, if and when the Tribunal comes to assess the appropriateness of the funder's return, the outcome may or may not be acceptable to the Tribunal. We think that question is best deal with at the time when the full context is known, in accordance with the approach set out in [13] above. Indeed, our consideration of the mechanism for determining the funder's fee, including the "ratchet", has itself made it apparent that assessing the effect of such provisions at this stage of the proceedings, with all their potential permutations, is not at all straightforward.

29. Secondly, Apple's argument suffers from a logical flaw. Either section 58AA applies to the LFA or it does not. We have (in determining the issue of the limit or cap on the proceeds) already decided that it does not, having considered the substance of the way in which the funder's fee is determined under the LFA. We fail to see how, in those circumstances, it can be said that the LFA is in effect a "prohibited" LFA. That is precisely the opposite of what we have already decided. In those circumstances, Apple's alternative argument must logically fail.

30. For these reasons, we reject Apple's challenges to the Revised LFA. We are unanimous in reaching this conclusion.

D. PERMISSION TO APPEAL

31. As a consequence of the way in which Apple's challenges to the funding arrangements have been raised and decided, we have no formal application for permission to appeal which sets out the proposed grounds of appeal. However, we are able to anticipate with some confidence that Apple will argue that:

    (1) We have erred in law in determining that section 58AA does not engage simply because the funder's fee is payable from, and therefore limited or capped by, the proceeds of a successful outcome for the Class Representative (Ground 1).

    (2) We have erred in law by finding that the "ratchet" arrangement by which the funder's fee increases after the Ratchet Date does not in substance amount to a DBA and/or warrant a reconsideration of the ability of the Class representative to satisfy the requirements of Rule 78(2) of the Rules (Ground 2).

E. JURISDICTION

32. Under section 49(1A) of the Competition Act 1998:

> "An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—
>
> (a) as to the award of damages or other sum (other than a decision on costs or expenses), or
>
> (b) as to the grant of an injunction."

33. The meaning of the phrase "*as to an award of damages*" has been the subject of consideration by the Court of Appeal in recent decisions. See *Evans v Barclays Bank Plc & Others* [2023] EWCA Civ 876 and *Nippon Yusen Kabushiki Kaisha & Ors v Mark McLaren Class Representative Ltd* [2023] EWCA Civ 1471.

34. In the *McLaren* case at [38], Popplewell LJ summarised the current position as follows:

> "(1) The expression "as to" damages should be given as wide a construction as possible because of the desirability of challenges coming directly to the Court of Appeal by way of appeal from the experienced specialist CAT, rather than by an application to the Administrative Court, involving first an application for leave to bring a claim for judicial review ([57]-[58]).
>
> (2) The appeal route is not confined to end of the road and potential end of the road decisions ([143]).
>
> (3) It encompasses decisions on any issue capable of having "some causal effect" on the award of damages. The casual effect need not be very direct or close ([55]).
>
> (4) The decision need not be one which determines whether or not damages are awarded: s. 49(1A)(a) is engaged if the decision might (sufficiently) have causative effect on the quantum of damages ([55]). The test is whether it "could ultimately affect quantum" ([56)], in the sense that there is a real and material risk of it having such an effect.
>
> (5) Interlocutory case management decisions will often fulfil the "as to" damages requirement because they involve a sufficient risk of affecting how the case can be conducted, so as potentially to affect the amount of damages. Accordingly, as the CAT observed at [18] of *Merchant Interchange Fee Umbrella Proceedings* [2022] CAT 50, approved by Green LJ at [54], in pragmatic terms, interlocutory case management decisions can be presumed to meet the requirement that they may affect the final substantive outcome in terms of the level of damages awarded and so are subject to the appeal route ([54]). This will not be true of all interlocutory decisions. Those concerned merely with timing are unlikely to do so. But those which concern the extent of disclosure of documents, or of admissible evidence, for example, are likely to do so.
>
> (6) There are outer limits where the causative link will be too remote or non-existent. *Paccar* is an example of the latter. It is to be explained as a case on its own particular facts because the CAT's finding about alternative sources of funding meant that the substantive decision would have no causative effect at all on the recovery of damages ([53])."

35. The reference to *PACCAR* in the last subparagraph is to the judgment of Henderson LJ in *PACCAR Inc & others v Road Haulage Association Ltd* [2021] EWCA Civ 299, [2021] 1 WLR 3648, in which the Court of Appeal decided that an issue about the enforceability of funding arrangements was not a decision "as to damages", and therefore was not subject to the appeal jurisdiction conferred by section 49(1A)(a). Crucially, however, in that case the Tribunal had found that there were alternatives to the funding arrangements under challenge and the proceedings would probably continue with some modified funding arrangements. Henderson LJ accepted that logic and based his decision about jurisdiction on that fact.

36. There is no such finding in this case and we have not been invited to make such a finding. Further, the funding issues are intertwined with the Tribunal's decision to grant the CPO applications (including making an assessment of whether it is just and reasonable for a proposed class representative to act in that capacity, pursuant to Rule 78(2) of the Rules). Separating any aspect of the funding issues from the others would be inefficient and a waste of judicial resource.

37. We are therefore satisfied that we should treat the funding issues generally as arising from a decision "as to the award of damages".

F. OUR DECISION ON PERMISSION TO APPEAL

38. We consider that there is no real prospect of the Defendants succeeding on appeal in respect of the anticipated Grounds 1 and 2:

    (1) There is no provision in the Revised LFA applying a cap, which is a pre-requisite to the application of section 58AA, as construed by *PACCAR (SC),* to these proceedings. It is also plain that, in substance, the funder's fee is determined by the mechanism for applying a multiple, and not by reason of any limit or cap on the proceeds.

    (2) The potential application of the "ratchet" does not warrant intervention by the Tribunal at this stage, still less any reconsideration of the requirements of Rule 78(2) of the Rules. The Tribunal has the means to control both costs and the direction of the case through case management and will have ample opportunity to ensure that any fee payable to the funder is proportionate and appropriate.

39. In respect of the further question as to whether there is a compelling other reason to grant permission, we recognise that the decision in *PACCAR (SC)* has resulted in funders and class representatives in a number of collective proceedings amending their funding arrangements so as to avoid the consequences of that decision, which in turn has led to those amended funding arrangements being challenged by defendants in those cases. This is creating

uncertainty and consuming the resources of the Tribunal and the parties, and that is unlikely to cease until there has been a conclusive decision on these points by the Court of Appeal. The Tribunal in *Neill v Sony* has already granted permission[5] to appeal on the funding issues in relation to similar grounds and it would be expedient for cases with similar features to be dealt with together in any hearing in the Court of Appeal. We do therefore consider there to be a compelling reason why we should grant permission to appeal.

40. We therefore grant permission to appeal on Grounds 1 and 2 on the basis that there is no real prospect of success, but there is a compelling other reason to grant permission.

41. This decision is also unanimous.

Ben Tidswell
Chair

William Bishop

Tim Frazer

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

Date: 19 January 2024

[5] See *Neill v Sony* [2024] CAT 1.