Neutral citation [2024] CAT 58

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 October 2024

Before:

ANDREW LENON K.C.
(Chair)
TIM FRAZER
ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

DR SEAN ENNIS

Applicant/Proposed Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LTD
(3) APPLE CANADA INC.
(4) APPLE PTY LIMITED
(5) APPLE SERVICES LATAM LLC
(6) ITUNES KK
(7) APPLE (UK) LIMITED
(8) APPLE EUROPE LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 16 September 2024

JUDGMENT

APPEARANCES

Paul Stanley KC, Daniel Carall-Green and Victoria Green (instructed by Geradin Partners Limited) appeared on behalf of the Proposed Class Representative.

Marie Demetriou KC, Daniel Piccinin KC and Hugo Leith (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Proposed Defendants.

Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002

A. INTRODUCTION

1. This is the Tribunal's judgment in respect of an application by Dr. Sean Ennis, as proposed class representative ("PCR"), for a collective proceedings order ("CPO"), pursuant to s. 47B of the Competition Act 1998 (the "CA") ("the CPO Application"). The Tribunal informed the parties by letter dated 18 September 2024 of its decision to certify the proceedings. This judgment sets out the reasons for that decision.

2. Apple is the creator of devices such as the iPhone and the iPad, along with its proprietary mobile operating system (the "iOS") and the App Store, each of which come pre-installed on those devices. Users of iOS devices can purchase apps through the App Store.

3. The PCR alleges that Apple has contravened the Chapter II prohibition contained in section 18 of the CA, and Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). In particular, the PCR alleges that Apple has a dominant position in the market for iOS app distribution and has abused its dominance by charging prices (in the form of the commission charged on purchases of apps or purchases of additional content or subscriptions within those apps) which are excessive and unfair in their own right and/or unfair and abusive as a system of pricing.

4. The PCR seeks to bring the proceedings on an opt-out basis on behalf of all UK-domiciled iOS app developers that have sold apps and paid the allegedly unfair commission during the claim period, starting six years before the date of the Claim Form and ending on the date of final judgment or earlier settlement of the proceedings. The PCR estimates that the proposed class contains at least 13,206 app developers. The damages claimed are said to reflect the overcharge that developers have paid on these worldwide transactions and/or the lost sales they have allegedly suffered in markets around the world (the "Proposed Claims").

5. The PCR alleges that Apple is dominant (indeed a 100% monopolist) on the iOS app distribution market, and that it has abused its dominance by charging prices in the form of the Commission, which is:

   (1) excessive and unfair in its own right as a result of the rate of commission charged (the rate of commission typically being 30%); and/or

   (2) unfair and abusive as a system of pricing (the commission being effectively inescapable, the system failing to reflect the true economic value contributed by app developers or of the services that Apple provides, and the burden of the commission falling on a mere 16% of app developers).

6. The Tribunal has previously made a CPO in *Dr. Rachael Kent v Apple Inc and Apple Distribution International Ltd* [2022] CAT 28 ("*Kent*"), in which the class is made up of device users who made purchases through the UK storefront of the App Store. The PCR in *Kent* contends, amongst other things, that Apple has abused its dominant position by charging excessive and unfair commission, significant parts of which have been passed onto device users.

7. Apple denies any abuse or any liability in respect of the claim. Apple opposes the Tribunal making the CPO on an opt-out basis or at all.

B. THE PROCEDURAL BACKGROUND

8. The PCR filed his Claim Form in this matter on 25 July 2023. The Tribunal made an order on 20 September 2023 permitting service out of the jurisdiction on the First to Sixth Proposed Defendants (the "Non-UK Proposed Defendants"), along with an order for alternative service by courier and email instead of the normal methods of service provided for in CPR Part 6.

9. Apple applied for an order striking out these proceedings, or for reverse summary judgment, in so far as they concern commission charged on transactions carried out via storefronts outside the UK or via storefronts outside

the EU prior to 1 January 2021. Apple also applied to set aside the order granting permission to serve proceedings out of the jurisdiction on the same basis. Apple also applied to set aside the order for an alternative method of service on the basis that there were no exceptional circumstances to justify it. Following a hearing on 23 and 24 January 2024, the Tribunal dismissed these applications in its ruling dated 12 April 2024 ([2024] CAT 23).

10. The CPO Application was heard on 16 September 2024.

C. LEGAL FRAMEWORK

11. Section 47B CA sets out the requirements to be fulfilled in order for the Tribunal to make a CPO.

12. First, the Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the proposed class representative (the "Authorisation Condition"): section 47B(5)(a) CA. The authorisation condition is met if the Tribunal considers that it is "just and reasonable" for the proposed class representative to act as a representative in the proceedings: section 47B(8)(b) CA.

13. Second, the claims must be eligible for inclusion in collective proceedings (the "Eligibility Condition"): section 47B(5)(b) CA. According to section 47B(6) CA and Rule 79(1) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules"), the Eligibility Condition comprises three cumulative requirements:

    (1) The proposed claims are brought on behalf of an identifiable class of persons: Rule 79(1)(a) of the Tribunal Rules.

    (2) The proposed claims raise common issues, or in other words the same, similar or related issues of fact or law (the "commonality requirement"): section 47B(6) CA and Rule 79(1)(b) of the Tribunal Rules.

(3) The proposed claims are suitable to be brought in collective proceedings (the "suitability requirement"): section 47B(6) CA and Rule 79(1)(c) of the Tribunal Rules. Rule 79(2) provides that, in determining whether the claims are suitable to be brought in collective proceedings, the Tribunal shall take into account all matters it thinks fit, including:

> "(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
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> (b) the costs and the benefits of continuing the collective proceedings;
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> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
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> (d) the size and the nature of the class;
>
> (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
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> (f) whether the claims are suitable for an aggregate award of damages; and
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> (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C [CA] or otherwise."

14. Third, if the above conditions are met, the Tribunal is required by Rule 79(3) of the Tribunal Rules to determine whether the collective proceedings should be opt-in or opt-out. Whilst the Tribunal is permitted to take into all matters it thinks fit, Rule 79(3) draws attention to the following specific matters:

> "(a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

15. Finally, to enable the Tribunal to form a judgement on commonality and suitability, the PCR is required to put forward a methodology setting out how the issues that they have identified will be determined or answered at trial. The PCR's proposed expert methodology must satisfy the so-called "Pro-Sys test", developed by the Canadian Supreme Court in *Pro-Sys Consultants v Microsoft* 2013 SCC 57 at paragraph 118, i.e. it must offer a realistic prospect of establishing loss on a class-wide basis grounded in the facts of the particular

case in question, providing a "blueprint" of the way ahead to trial, *(MOL (Europe Africa) Ltd & Others v Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701 ("*McLaren*"), [45] – [47]).

D. APPLE'S OPPOSITION TO THE CPO

16. The four arguments advanced by Apple in opposition to the grant of the CPO were as follows:

    (1) The proposed claims are not eligible or suitable to be brought in collective proceedings because of the actual or potential conflicts of interest between the proposed class members ("PCMs").

    (2) The proceedings are not suitable for an award of aggregate damages because of the radical differences between the claims of individual class members.

    (3) The proceedings are not suitable to be brought on an opt-out basis.

    (4) The funding arrangements are unsatisfactory in that they give rise to an incentive to the funders to delay settlement until after the start of the trial.

17. We propose to address these arguments before turning to the non-contentious aspects of the application.

(1) Conflicts of interest

Legal principles

18. The following legal principles were common ground between Apple and the PCR.

    (1) A class representative is a fiduciary with respect to the class. A fiduciary is under a duty not to place himself in a position where there is a conflict between the interests of the principals for whom he acts.

This is because, by acting for both principals, the fiduciary puts himself in a position where his duty to one principal may conflict with the duty owed to the other. He may only act where informed consent has been given by both principals following full disclosure; *Bristol & West Building Society v Mothew* [1988] Ch 1 at page 18H per Millet LJ; *FHR European Ventures v Cedar Capital Partners* [2014] UKSC 45, [5] per Lord Neuberger giving the judgment of the court.

(2) A potential conflict is one where there is "a real sensible possibility of conflict as distinct from some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person" *Boardman v Phipps* [1967] 2 AC 46, at 124B and C. Where there is an actual conflict, even fully informed consent does not resolve the problem; the fiduciary is barred from acting for at least one and preferably both*: Bristol & West Building Society v Mothew* [1998] at page 19H:

> "Finally, the fiduciary must take care not to find himself in a position where there is an *actual* conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see *Moody v. Cox and Hatt [1917] 2 Ch. 71*; *Commonwealth Bank of Australia v. Smith (1991) 102 A.L.R. 453* . If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule.""

(3) The existence of differences between the claims of individual members of the class does not mean that there are conflicts of interest between them. Apple accepted that, as the Canadian Supreme Court held in *Vivendi Canada Inc v Dell'Aniello* [2014] SCC 1, [2014] 1 SCR 3, at [45] and [46] ("*Vivendi*").

> "[45] … A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> [46] … a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of

> individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members."

(4) In the context of prospective collective proceedings, it is important to avoid confusing differences between class members (which are to be expected) with conflicts of interest. A core purpose of collective proceedings is to avoid the need for individual assessment of damages claims as the Supreme Court made clear in *Mastercard Inc v Merricks* [2020] UKSC 51 ("*Merricks")*, per Lord Briggs (giving the judgment of the majority):

> "[57] The same analysis leads to the same conclusion about the meaning of 'suitable for an aggregate award of damages' under r 79(2)(f). The pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure, is both burdensome for the court and usually disproportionate for the parties. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically dissolves those disadvantages, both for the court and for all the parties. In general, although there may be exceptions, defendants are only interested in the quantification of their overall (ie aggregate) liability. For the claimants the choice between individual or aggregate assessment will usually be a question of proportionality.
>
> [58] Another basic feature of the law and procedure for the determination of civil claims for damages is of course the compensatory principle, as the CAT recognised. It is another important element of the background against which the statutory scheme for collective proceedings and aggregate awards of damages has to be understood. But in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, s 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provisions of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable."

19. The leading authority on the application of the principles of conflict of interest to collective actions is *UK Trucks Claim Limited v Stellantis NV and others* [2023] EWCA Civ 875 *("Trucks").* In that case, a conflict arose because the Road Haulage Association (the 'RHA') sought to bring claims on behalf of both new and used truck purchasers, despite the fact that new and used truck

purchasers had a direct conflict of interest over the issue of the passing-on of the overcharge when a new truck was sold. The Court of Appeal rejected the submission that this could be addressed by an "appropriately worded notice", with the RHA doing its best to weigh up the competing interests of class members. The Chancellor said at [97] that "where there is an identifiable conflict of interest on a major issue in the case, I do not consider that a class representative is entitled to prefer the interests of some members to the detriment of others". Accordingly, the issue in that case could only be dealt with by establishing separate teams within the RHA for the separate sub-classes, with strict information barriers, separate solicitors, counsel, experts, and funders. Claimants who had both used and new trucks were represented in both teams. The Court disagreed with the Tribunal's view that there was only a "potential conflict of interest" which could be "dealt with in the future by active case management": [94]. The conflict arose immediately from the pleadings and so needed to be dealt with comprehensively from the outset at certification.

Apple's contentions

20. Apple contended that a conflict of interest arises in the present case out of the allegation in the Claim Form (at paragraph 140.9.4) that one of the respects in which the commission charged by Apple is unfair is that it is charged in relation to approximately 16% of the Third-Party Apps distributed through the App Store while the other 84% are free, even though they enjoy access to the same App Store services. The Claim Form goes on to assert that there is no objective difference between the minority and the majority such as might justify the difference in treatment. Apple contended that this allegation gives to rise to a "cross-subsidy" issue. It submitted that developers with different business models would approach this issue with diametrically opposed interests. Developers who earn almost all of their revenues from activities that do not attract commission (i.e. from the sale of physical goods and services supplied outside of the app or through advertising) would have no interest in running the argument that the alleged cross-subsidy is unfair. This is because such an argument, if accepted, would mean that, in the lawful counterfactual, those developers would have to pay commission on activities that do not currently incur commission. Other

developers who earn almost all of their revenue from activities that attract commission (i.e. paid downloads or in-app purchases) would have a strong interest in pressing the cross-subsidy argument.

21. According to Apple, the conflict between the interests of the developers would matter when the PCR makes strategic decisions about what arguments to run in the proceedings, including decisions as to what would be a lawful rate of commission in the counterfactual. Apple currently charges different levels of commission for different types of transactions. The PCR has chosen to take a flat rate as a counterfactual non-abusive commission. An approach that charged lower rates to some PCMs would benefit some and harm others. In choosing not to take this approach, the PCR has acted against the interests of PCMs who would benefit from different rates.

22. Apple also submitted that a developer which considers that it is cross-subsidising others would have a clear incentive not to seek an aggregate award of damages rather than an award in respect of its own loss. It would also have an interest in persuading the Tribunal to make findings about a lawful counterfactual that would improve its position going forward by requiring commission to be more evenly spread or by seeking an order from the Tribunal preventing future discriminatory pricing. It submitted that, in restricting its claim to one for damages, the PCR must have taken a strategic decision not to seek an order requiring Apple not to adopt discriminatory pricing.

23. The conflict of interest argument was also raised in relation to two other issues: pass-on and jurisdiction. In relation to pass-on, Apple referred to the fact that Dr Kent's expert Dr Singer has previously expressed the opinion in other proceedings that the rate of pass-on is likely to vary significantly between developers, depending on their market share. Developers with a very large market share would have a very low pass on rate and vice versa. In the present case, the PCR is contending that pass-on should be modelled on an average or probabilistic basis. Apple contended that, in taking that approach, the PCR is trading off the claims of developers who could individually have argued that they have extremely low pass-on rates against those who have very high pass-on rates. He is thereby favouring one group of PCMs over another.

24. In relation to jurisdiction, Apple proposes to defend the PCR's claim insofar as it relates to commissions charged on transactions at non-UK storefronts on the basis that the applicable law is not UK law and that the claims are beyond the scope of UK competition law. If Apple is right about the applicable law and territorial scope issues, UK-based developers whose relevant transactions are made through non-UK storefronts would have no entitlement to damages. Apple submitted that, in the event of a settlement, with no judgment having been given by the Tribunal on whether Apple or the PCR is correct, the PCR would be faced with an impossible dilemma as to how to structure the settlement or its distribution as between different PCMs. Placing more weight on the applicable law / territoriality defence as distinct from Apple's other defences in explaining the settlement level would imply a smaller share of any settlement for PCMs with most of their commerce on non-UK storefronts and a correspondingly larger share for PCMs focused on the UK storefront and vice versa.

25. Apple's primary case was that the conflict of interest was an *actual* conflict which, unlike a *potential* conflict, could not be consented to by the PCMs, and that, following the principles in *Bristol and West v Mothew* set out above, the PCR was prevented from acting. It is, in any event, difficult to see how PCMs could consent to the alleged *potential* conflict of interest. In order to consent, the PCMs would need to know how their interests were affected by the "cross-subsidy" issue. This would entail potentially complex economic analysis of the impact of different commission rates on their business, which is not practicable at the certification stage. For the same reason, the PCMs could not be segregated into discrete sub-groups of "subsidisers" and "subsidisees" so as to enable the different claims to be brought behind Chinese Walls. Whether a PCM was to be categorised as a "subsidiser" or a "subsidisee" might well be unclear.

The Tribunal's conclusions

(i) Commissionable activities

26. In considering Apple's arguments, it is first necessary to place the PCR's allegation as to the unfairness of charging commission only on digital goods and services as opposed to physical goods or services ("the commissionable activities

allegation") in the context of the claim as a whole. The claim is for damages for Apple's alleged infringements of the Chapter II prohibition and Article 102 in abusing its dominant position by charging prices which are excessive and unfair. The PCR seeks to establish, by reference to the principles established in *United Brands Company v European Commission* EU:C:1978:22, [1978] 1 CMLR 429, at [248] to [253], that Apple's pricing is unlawful by reference to the "excessive limb" and the "unfairness limb" under those principles.

27. The PCR relies on a classic "cost-plus" approach which focuses on Apple's extraordinarily high profit margin. It has nothing to do with discrimination between app developers. At paragraphs 136 to 139, the Claim Form sets out the PCR's case that Apple enjoys an extraordinary and excessive profit margin in respect of its app distribution services. At paragraphs 140.1 to 140.8 the Claim Form sets out the reasons why the commission is said to be unfair in that, amongst other things, it is inescapable and not subject to any relevant competitive pressure and does not reflect the true economic value of the App Store. The allegation as to unfairness of charging commission only on digital goods and services is put forward as one factor in a (non-exhaustive) list of nine factors demonstrating that the Commission is unfair "in itself".

28. The damages claim advanced by the PCR is based on the counterfactual in the Claim Form. The commissionable activities allegation has no bearing on that counterfactual. The claim seeks to maximise the aggregate damages to be awarded to the PCMs by claiming that Apple should have charged all members of the class (ie those who have paid Commission in the relevant period) a flat rate that was not excessive or unfair. In pursuing a claim based on this counterfactual, the interests of all the class members are aligned. The claim is, in this respect, fundamentally different from the claim in *Trucks* in which the two groups of truck owners were advancing mutually inconsistent claims in relation to pass-on.

29. Apple's case on the "cross subsidy" issue amounts to an argument that, instead of pursuing the claim in the Claim Form, the PCR could have pursued a different claim on the basis of a different counterfactual involving the imposition of commission on activities which are currently free and a reduction in commission on activities that are currently charged. According to Apple, the "subsidisers"

would be better off with such a claim and the "subsidisees" would be worse off. Apple contends that the reason the PCR does not put forward this alternative claim is because it would be contrary to the interest of the members who benefit from the cross-subsidy, i.e. that Apple is hamstrung from making this claim by a conflict of interest.

30. In the Tribunal's view, this argument is misconceived. Whether or not the PCR is in a position of conflict of interest between the members of the proposed class should be determined by reference to the claims advanced by the PCR in the Claim Form, not by reference to an alternative claim postulated by Apple. Apple's alternative claim hinges on the proposition, which is not one advanced by the PCR, that, if it could not have made money by charging a high commission on sales of digital content, it would have made the same money from app developers by some other means. It is not part of the PCR's case that, if Apple was required to reduce its commission on currently commissionable activities, it would in fact impose material charges in respect of other activities or that it would be entitled to do so. As the PCR points out in response to Apple's case, the PCR does not seek an injunction, and so how Apple complies with the law is up to it.

31. Contrary to Apple's case, there is no duty on the part of the PCR to pursue a different claim on behalf of those class members who earn most of the revenue from commissionable transactions. The obligation of a class representative is to prosecute the collective proceedings in a way that furthers the interests of the group as a whole; the PCR's obligations should be seen in that context. If individual members of the class wished to take proceedings requiring Apple to conduct its business in a way that requires Apple to reduce commission on transactions which are currently commissionable and to increase commission on other transactions which are currently free from commission, or to make a claim for price discrimination, they would be at liberty to do so but those claims are not part of the collective proceedings and there is no legal obligation on the PCR to pursue them.

(ii) Variable commission rates

32. Apple's contention that the PCR's selection of a flat rate of commission in the counterfactual creates a conflict of interest vis a vis those app developers who pay no higher rate than the counterfactual rate or a lower rate on certain types of transaction, is also wrong in principle. Assuming, in Apple's favour, that there were some app developers who would recover no damages based on the PCR's counterfactual rate (an assumption which the PCR does not accept) or who might for whatever reason wish to allege that the counterfactual rate should be lower, this would not give rise to a conflict between the interests of PCMs. They all have a common interest in establishing that the commission rates charged by Apple are excessive and unfair and not justified by offsetting benefits.

33. It is possible that the PCR's case will lead to recoveries for some class members but nothing for others. That would not entail a conflict of interest. If some app developers have avoided paying an unfair price, the result would be that no losses would be suffered by them. As observed in *Vivendi,* success for one member of the class does not necessarily have to lead to success for all. In *McLaren* [2022] CAT 10, at [61] and [62], the Tribunal held that the fact some class members might not have suffered any quantified loss, and therefore potentially less likely than other members than others to participate in any award of damages, did not militate against the grant of a CPO.

(iii) Pass-on

34. The crux of Apple's argument in relation to pass-on is that, since different app developers may (as a matter of fact) have passed on any overcharge to device users at different rates, there is a conflict of interest within the proposed class; the PCR will have to choose between a pass-on rate that favours some PCMs and harms others. The PCR notes in response that Apple's case in *Kent* is that there was no pass-on at all and that Apple has not adduced any evidence that rates of pass-on are likely to have differed among PCMs or that such differences as there may have been cannot reasonably be addressed in arriving at an aggregate award.

35. These points aside, differences between rates of pass-on would not give rise to any relevant conflict of interest or make the claim unsuitable for collective proceedings. Apple's case is contrary to the principle that the purpose of award

of aggregate damages is to avoid the need for individual assessment of loss. In *Trucks* [2022] CAT 25, the Tribunal was explicit about this, saying at [182], "The calculation of estimated resale pass-on will similarly be on an average basis, so some PCMs who purchased new trucks may suffer a greater deduction for resale pass-on than they in fact experienced." As the PCR submitted, if Apple's argument in relation to pass-on were correct, the implications would be far-reaching since in many classes the actual level of pass-on will frequently vary from member to member because members will have taken their own individual pricing decisions. Such cases would be ineligible to be certified. In reality, however, pass-on is routinely modelled on an average (or probabilistic) basis – meaning that individual variations do not matter or can (to the extent appropriate) be reflected at the distribution stage.

(iv) Jurisdiction/Applicable law

36. Apple's argument is that some PCMs are more exposed than others to its case that transactions carried out via foreign storefronts are not governed by UK competition law and are outside the Tribunal's subject-matter jurisdiction, and that this would lead to a potential conflict of interest in the context of settlement, with the PCR having to assess the strength of it.

37. The Tribunal disagrees with this analysis. The fact that, in the context of a settlement, it might be necessary for the PCR to make a judgment as to how much should be allocated to individual claimants or groups of claimants with different claims does not give rise to a relevant conflict of interest. At the distribution stage, with or without a settlement, there may well be competing claims by members. That does not put the PCR in a position of a conflict of interest any more than a trustee distributing assets of a discretionary trust to rival beneficiaries is in a position of conflict. Any settlement would be subject to the collective settlement process provided for by Tribunal Rule 94(1). The Tribunal may only approve a settlement if it is satisfied that the terms of the collective settlement are just and reasonable (Rule 94(8)).

38. In *Gutmann v First MTR South Western Trains Limited* ("*Gutmann*") [2024] CAT 32, a settlement was structured into three "pots", each with a different evidential

threshold required for eligible persons to be able to make a valid claim for payment. Class members would have had different interests in relation to the allocation of funds to each "pot", depending on the amount of evidence at their disposal. For example, a class member who had retained the maximum amount of evidence would have wanted a high allocation to the "pot" that had a high evidential threshold—or indeed might have wanted to do away with the "pots" structure altogether in favour of distribution only to those with all the evidence at their disposal. However, this was not thought to give rise to any conflict of interest between members of the class.

39. For the reasons set out above, the Tribunal rejects Apple's objection to the grant of CPO based on alleged conflicts of interest between members of the proposed class.

(2) Aggregate damages

40. Section 47B CA 1998 empowers the Tribunal to adjudicate claims on an aggregate basis but, as Apple submitted, it does not follow that an aggregate award is appropriate in every case, which is why the Tribunal is specifically required under Rule 79(2)(f) to consider "whether the claims are suitable for an aggregate award of damages".

41. The PCR submitted that the claim is suitable for an aggregate award of damages because it is possible to model the effect of Apple's abuse, including the amount of the overcharge imposed by Apple and the amount of the overcharge passed on to consumers or borne by Third Party App Developers, on the class as a whole. He also submitted that the fact that modelling can produce sufficiently accurate estimates of those amounts is the premise on which *Kent* is based. The distribution of any aggregate award of damages will be a matter for detailed consideration after any aggregate award of damages is obtained. At this stage, the PCR provisionally intends to distribute damages by reference to estimates of relevant sales actually made by each PCM.

42. Apple submitted that the proposed claim goes too far in equalising the diverging claims of PCMs, that the substantive merits of the PCM's claims differ greatly by

reference to factors such as commission payable in the counterfactual and pass-on rates and that the PCR is effectively asking the Tribunal to equalise claims that have radically different values. Additionally, Apple submitted that the impracticality of assessing individually the long tail of developers with small claims did not make the claim suitable for aggregate damages because those small claims account for only a tiny percentage of the overall claim. The aggregate value of the smallest 11,800 PCMs accounts for at most [0-5]%[✂] of the claim so that it could never meaningfully affect the overall sum that the Tribunal actually awards at trial.

43. Apple's objection to aggregation of damages does not, in the Tribunal's view, take sufficient account of the Supreme Court's judgment in *Merricks,* according to which section 47C of the Act has done away with the need to assess loss on an individual basis. *Merricks* explains at [3] that the point of an award of aggregate damages is to provide "just compensation for the loss suffered by the claimant class as a whole". Therefore, the individual claim values do not matter. As section 47C(2) of the CA puts it "The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person".

44. Apple's approach is also at variance with decisions of the Tribunal in other collective proceedings. In *McLaren*, a small number of large business purchasers were identified as having claims in the region of £1.2 million to £2.4 million, while the great majority of the class members were likely to have small claims. That gave rise to a question about the expert methodology, but no doubt as to the suitability of an aggregate damages award. In *Michael O'Higgins FX Class Representative v Barclays* [2023] EWCA Civ 876 ("*O'Higgins FX*") there was a wide variation in the average loss to class members: institutions with a turnover of under $500,000 were thought to have suffered average losses of £9,795, whereas Non-Reporting Banks with a turnover of over £50 million suffered were thought to have suffered average losses of £5.86 million. The Court of Appeal did not consider that those differences rendered aggregate damages inappropriate, but emphasised the flexibility that aggregate damages are intended to offer.

45. In the Tribunal's judgment, the claim is suitable for an award of aggregate damages. It is not realistic to suggest that the claims of the long tail of App Developers should be subject to individual assessment. Far from making the case unsuitable for aggregate damages as Apple submitted, the fact that the aggregate value of the smallest 11,800 claims accounts for less than [0-5]%[✂] of the total claim means that individual assessment would be burdensome and disproportionate. The fact that the losses suffered by the long tail are only a small proportion of the overall claim does not make the claim unsuitable for an award of aggregate damages. For many of the claimants, the losses are not *de minimis.* Finally, the differences between the claims of individual members of the proposed class do not make the claim unsuitable for an award of aggregate damages, any more than they did in *McLaren* or *O'Higgins FX.*

(3) Opt-in or Opt-out

Legal principles

46. The following principles were common ground:

(1) Section 47B CA 1998 recognises that collective proceedings can be opt-in or opt-out but neither s 47B CA 1998 nor the Tribunal Rules indicate any sort of a policy or legal preference or predisposition either towards or against opt-in or opt-out.

(2) The Tribunal has an unfettered discretion to choose between opt-in and opt-out proceedings. The Tribunal is not bound to accept the choice made by the class representative. In exercising its discretion, the Tribunal may take into account all matters it thinks fit, including the non-exhaustive list of considerations in Tribunal Rule 79 paragraphs (2) and (3).

(3) In considering "practicability", the Tribunal must consider not only "do-ability" but also whether it would also be "reasonable, proportionate, expedient, sensible, cost effective, efficient etc," for proceedings to be brought on an opt-in basis: *Le Patourel v BT Group* [2022] EWCA Civ 593 ("*Le Patourel*") at [83].

47. The fact that the proposed class comprises a group of several thousand members of which the large majority suffered small losses is, in this case as in others, a strong indicator that opt-in proceedings would not be practicable and that the proceedings should therefore be on an opt-out basis. As noted by Green LJ in *Le Patourel* after referring to the judgments of the Supreme Court in *Lloyd v Google LLC* [2021] UKSC 50 and *Merricks*:

> "[73] ... Both judgments demonstrate that the practicalities of collectively organised litigation might favour an opt-out solution where there are large numbers of potentially affected parties and relatively small sums at stake which might otherwise deter the take up of opt-in proceedings."

48. In *Le Patourel,* the Court of Appeal agreed with the Tribunal that class members, even if they could be identified and contacted at the outset, would be more likely to opt-in after a favourable damages award than at the outset and that this was a relevant factor in favour of opt-out proceedings. By maximising take-up by potentially affected parties, opt-out proceedings are conducive to the underlying purpose of the collective action regime:

> "[29] Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase *ex ante* incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims."

49. In *O'Higgins FX* the represented class was estimated to include 42,015 members of which 18,154 were financial institutions and 23,861 non-financial institutions with more than 49 employees. The class was described by the Tribunal as made up of only fairly large and inferentially sophisticated institutions ([2022] CAT 16,[381(2)]). A book-building exercise had started and some 321 firms had been contacted but it had not proved possible to assemble a large enough group to make a group action economically feasible. The Tribunal inferred that the class members were large and sophisticated entities that could afford to bring proceedings and that if they did not do so this was due to a deliberate decision on their part that they did not "want" to litigate. As such, the majority concluded, there was no access to justice deficit; it was practicable for them join an opt-in

class. The Court of Appeal disagreed. Relative to costs, the scale of typical claims was modest and the size of the typical claimant was not large. Furthermore, the principle that the collective action regime was intended to facilitate the vindication of rights and the principle that unlawful anticompetitive conduct should be restrained also pointed in favour of opt-out proceedings.

The parties' contentions

50. Both Apple and the PCR drew support from the dissenting judgment of Mr Lomas in *O'Higgins FX* on the issue of practicability, which Green LJ described as largely chiming with the reasoning of his judgment. Mr Lomas had stated as follows:

> "[436] In creating an opt-in class, it would be necessary to establish a critical mass of core claimants to make such a claim viable as an action. The (formidable) costs of bringing this action are not materially dependent on the size of the class. However, the total size of the damages claim is critical because it supports the funding to pursue the claim. That is a function of the number of class members and the size of their claims. In essence, that total likely damages claim has to be large enough for the economics of bringing the claim, with its costs and risks, to be rational. Once sufficient (presumably larger) claimants opt in so that point is reached, and a claim is viable and proceeds, there is then a separate issue of the extent to which it is possible to contact other PCMs to give them a fair opportunity to join the class. In this sense, practicability has two elements (i) would a claim happen at all; and (ii) if it did, would it be practicable to bring the claim to the attention of the remaining PCMs to give them a fair opportunity to consider whether they should opt-in.
>
> …
>
> [447] The extent to which an opt-in CPO is practicable is not a binary issue but a matter of degree and to be assessed in particularly uncertain circumstances (not least since there is limited current experience in the creation of an opt-in CPO and none, that we are aware of, in analogous circumstances). This is, not least, because (a) a degree of impracticability can be overcome by the application of greater effort and resources and (b) the concept of an opt-in CPO that is practicable must include some assessment of how widely it meets the interests of the PCMs as a whole (rather than, say, just a core element)."

51. It was submitted on behalf of Apple that, consistently with this judgment, practicability may be broken down into parts: viability and contactability/giving a fair opportunity to be heard. Applying that principle to the facts of this case, the transaction data shows that a few hundred of the largest PCMs would comprise the great majority of the commission charged over the claim period.

Those PCMs are all businesses of some substantial size and could reasonably be expected to take an informed decision as to whether to opt in to proposed opt-in proceedings. If opt-in proceedings were practicable with the support of a relatively small number of larger PCMs and were certified, then the long tail could participate if they wished to, once the claim was further publicised and full details of the claim provided to them. Apple submitted that, despite this being an unusually easy case for book-building, the PCR did not appear to have attempted to contact any potential class members (or to seek information from Apple to assist in that exercise) to assess the practicability of opt-in proceedings. By way of contrast, in *Trucks,* at the time of the certification hearing the PCR had already signed up more than 15,000 class members which was only a fraction of the total number of members in the class.

52. Apple further submitted that opt-in proceedings would be particularly appropriate in this case for the following additional reasons. First, because they would force the PCR to confront the conflicts of interest between members of the proposed class and require the PCR to build a class in which there were no actual conflicts or for which class members have given their consent to any potential conflict. Second, because it would be desirable for proceedings to have the "buy-in" of the class in whose name they are being pursued since the claim is about the experiences of class members who have allegedly received something that is not worth what they are paying and suffered loss by paying excessive commission. If developers do not positively want to run those arguments, the PCR should not be authorised to do so on their behalf.

53. The PCR, for his part, drew to the Tribunal's attention Mr Lomas's observation that practicability must include some assessment of how widely opt-in proceedings would meet the interests of the PCMs as a whole (rather than, say, just a core element). Whilst it might well be possible to contact a sufficient number of the PCMs with large claims and persuade them to opt-in and thereby attract the funding needed to pursue the claim, this would not resolve the practical difficulties of identifying, contacting and persuading the large tail of claimants with their modest claims to opt in. The evidence of the PCR was that he would face significant informational challenges in identifying and contacting PCMs. He would have to rely on incomplete publicly available data. There is

also no immediate resource available to the PCR where he can readily obtain all (or at least a significant proportion) of PCMs' contact information. For instance, Companies House provides postal addresses only. Sending letters to PCMs by post to determine whether they wished to opt in would incur significant time and expense. It was noted in *O'Higgins FX* that the PCR's solicitors, in an attempt to contact c.321 PCMs in relation to losses arising from FX trading, invested more than 6,000 hours over 4 years. The present collective proceedings appear to involve over 13,000 PCMs. Moreover, even if the PCR could make contact with a PCM, there would be no guarantee that the PCM would be proactive and respond. The PCR's solicitor's evidence, albeit not corroborated directly by any PCM, was that there was a risk of app developers, whose business depended on their continued ability to have access to the App Store, being too intimidated to take the active step to opt in to an action against Apple.

54. The PCR submitted that *Trucks* was an unusual case in that the RHA had demonstrated that opt-in proceedings were practicable by signing up 15,761 class members. No similar trade association exists in this case.

55. The PCR rejected the two additional arguments run by Apple. First, there was no conflict of interest which needed to be addressed by opt-in proceedings. Second, there was no particular reason why these proceedings should only be certified if class members were positively willing to opt-in, any more than was the case in *Le Patourel* or *Higgins FX.* Most class members would have no understanding of the legal concept of excessive pricing and would not know whether it was in their interests to participate in the proceedings or not.

The Tribunal's conclusions

56. In the Tribunal's judgment, the fact that the proceedings might be financially viable on an opt-in basis, because of the number of large PCMs with substantial claims, as Apple contends, would not overcome the impracticability of opt-in proceedings *vis a vis* the majority of the PCMs with relatively modest claims. The process of identifying and contacting many thousands of App Developers would be costly and time consuming. Even if they could be contacted and identified, the opt-in rate would probably be very low because of the small sums

involved in the majority of claims. An opt-in basis would not be in the interests of the PCMs as a whole. Consistently with the principles set out in *Le Patourel* and *O'Higgins FX*, the opt-out basis is therefore to be preferred.

(4) Funding

57. The PCR's costs are proposed to be funded through a litigation funding agreement between the PCR and the third-party funder, Harbour Fund V LP (the "Funder").

58. The funding matters in issue between the PCR and Apple have narrowed over time and, by the date of the CPO Hearing, Apple pursued only one objection which was that the PCR's litigation funding agreement provides for an increase in the funder's return from a multiple of three to a multiple of four upon the start of trial. Apple submitted that this creates an unacceptable incentive on the funder not to settle until after the trial has started.

59. Apple referred to the Tribunal's judgment in in *Alex Neill Class Representative Limited v Sony* [2023] CAT 73 ("*Sony*") which noted at [166] that there are inherent risks that arise in a system in which collective proceedings are supported by third party funding. These risks include those arising from the incentives of funders. As the Court of Appeal noted in *Gutmann* [2022] EWCA Civ 1077, at [83] (referred to by the Tribunal in *Sony* at [164]): "the CAT must therefore recognise that litigation funding is a business and funders will, legitimately, seek a return upon their investment". The Tribunal "has a responsibility to manage those risks", including by, "Scrutinising the funding arrangements at the certification stage and seeking adjustments if there are concerns that cannot otherwise be managed".

60. The Tribunal in *Sony* initially understood that the funding arrangement would increase the funder's return by 100% upon the proceedings entering their fourth year. The Tribunal held that this was an "arbitrary and steep increase" that "might create unhelpful incentives" for the funder. The Tribunal was, however, ultimately satisfied with the arrangement upon the Class Representative clarifying that the proposed arrangement was for the level

of the return increasing by a multiple of one times the amount of the funding commitment, in each year; and revising that arrangement so as to provide for a gradual increase, each month. Apple submitted that a graduated response, like that adopted in *Sony*, would be appropriate in this case.

61. The Tribunal does not consider that there is a valid basis of objection to the uplift in the Funder's return at the start of the trial in the present case. A similar funding arrangement was approved in *Le Patourel.* Whilst a gradual increase in return during the trial would have been a possible alternative arrangement, the Tribunal considers that Apple overstates the risk of the increase in return at the start of a trial being an obstacle to a pre-trial settlement. The decision to settle is the PCR's alone and is subject to the approval of the Tribunal. The Funder's incentives are of secondary importance. Moreover, the funding arrangements also create an incentive to settle before trial. Apple will know that settlement is likely to be cheaper if the funder's return is lower, meaning that Apple will have an incentive to settle earlier. When considered in the round, therefore, the increase in the Funder's return does not warrant adjustment by the Tribunal.

E. CONSIDERATION OF THE CPO APPLICATION

62. We now address the uncontentious aspects of the application.

(1) The Authorisation Condition

63. We are satisfied that Dr Ennis is a suitable person to act as the PCR. Since 2019, Dr Ennis has been the Director of the Centre for Competition Policy and Professor of Competition Policy at Norwich Business School at the University of East Anglia. Dr Ennis also works as an economic consultant on legal cases and for government.

64. Prior to his current role, Dr Ennis has held various roles involving competition economics at organisations including the OECD's Competition Division, the European Commission's Directorate General of Competition and the US Department of Justice's Antitrust Division. In addition to his professional roles, Dr Ennis has consistently researched and published in competition economics.

Dr Ennis's experience demonstrates a commitment to preventing and reducing anti-competitive harms and he is well equipped to manage the litigation on behalf of the proposed class.

65. Dr Ennis is not a member of the proposed class and considers that he does not have any interests that are in conflict with the proposed class.

66. The CPO Application includes a detailed litigation plan, which deals with matters including communicating with class members, disclosure, experts and distribution. The plan also includes a detailed litigation budget and a proposed timetable. Dr Ennis will be involved in the management of the litigation through regular project meetings and has project management and economic consulting experience that will allow him to actively manage the litigation on behalf of the proposed class. Dr Ennis has retained third parties to assist with administration of the proceedings and communicate with class members. Dr Ennis also intends to assemble a consultative group of advisors if the claim is certified.

67. The litigation funding agreement with the Funder would enable the PCR to pay the costs of the proceedings. The Funder has committed to providing the PCR with c £15 million in claim funding. A comprehensive budget has been agreed in connection with the funding. The Funder has agreed to indemnify the PCR for any adverse costs that the PCR is ordered or agrees to pay to Apple. The Funder has bought insurance which will provide it with insurance cover of £15 million (against the risk of having to pay out under the indemnity). The Tribunal is satisfied that this level of cover is adequate.

68. Taking into account the matters set out above, we consider that the Authorisation Condition is met.

(2) The Eligibility Condition

(a) Identifiability requirement

69. We are satisfied that the PCMs can be identified using Apple's records of third-party app developers that were charged the relevant commission during the

claim period. Apple has not disputed that this is a realistic mechanism for identifying class members. During the CPO Hearing, we were shown analysis of the commission paid to Apple by more than 13,000 identified App Developers, which was prepared on the basis of App Store transaction data. This analysis demonstrated to us the practicability of using Apple's transaction data to identify PCMs.

(b) Commonality requirement

70. It is clear that the claim raises issues which are the same or substantially the same for all of the PCMs, namely:

(1) the definition of the relevant market;

(2) whether Apple was and is dominant on that market;

(3) whether Apple has abused and is abusing its dominant position on that market by unfair pricing;

(4) whether any abuse of dominance has caused the PCMs to pay a higher commission than the commission they would have paid in the absence of the infringements set out in the Claim Form and/or made fewer sales that they would have made;

(5) the quantum of damages and interest to which the PCMs are entitled.

71. In its Response to the PCR's Claim Form, Apple has proceeded on the basis that the issues raised by the Proposed Claims raise common issues, and did not raise any objections in this regard at the CPO Hearing.

Conclusions on suitability

72. For the reasons set out above, we consider that the claims are suitable to be brought in collective proceeding. While the above is focussed on the objections raised by Apple at the CPO Hearing, we have assessed suitability more holistically.

73. We have a broad discretion under Rule 79(2) of the Tribunal Rules to take into account all matters that we see fit when determining suitability. We consider that the size and nature of the class and in particular the interests of the long tail of smaller developers, weigh in favour of a finding of suitability. We are satisfied that many of these PCMs may not otherwise bring claims and that collective proceedings are an appropriate means for the fair and efficient resolution of those claims. The methodology proposed by the PCR provides a "blueprint" of the way ahead to trial in accordance with the Pro-Sys test.

(3) Conclusion on the CPO Application

74. For the reasons set out above, we are satisfied that the requirements for a CPO are satisfied in this case and that the PCR's application for a CPO should be granted on an opt-out basis.

F. CONCLUSION

75. We grant the PCR's application for a CPO.

76. This judgment is unanimous.

77. Unless either party intends to ask the Tribunal to make a different costs order, the costs of the CPO Application will be costs in the case.

Andrew Lenon K.C. Tim Frazer Anthony Neuberger
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*) Date: 18 October 2024
Registrar