IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1601/7/7/23

BETWEEN:

DR. SEAN ENNIS

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

Defendants

REASONED ORDER (PERMISSION TO APPEAL)

UPON the Tribunal's Judgment dated 18 October 2024 ([2024] CAT 58) granting the application by Dr Sean Ennis (the Class Representative) for a collective proceedings order pursuant to section 47B of the Competition Act 1998 (the "CA") and Rule 75 of the Competition Appeal Tribunal Rules 2015 (the "2015 Rules") (the "CPO Judgment")

AND UPON the Defendants ("Apple") having filed an application on 8 November 2024 seeking permission to appeal the CPO Judgment

AND UPON the Class Representative having filed a response to the PTA Application on 15 November 2024 ("Response")

IT IS ORDERED THAT:

1. Apple's application for permission to appeal is dismissed.

REASONS

2. In considering whether to grant permission to appeal to the Court of Appeal in England and Wales, the Tribunal applies the test in Civil Procedure Rules Rule 52.6(1). The Tribunal will not grant an application for permission to appeal unless: (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard.

3. Apple seeks permission to appeal on the following grounds:

   (a) Ground One: the proposed claims were not eligible or suitable to be brought in collective proceedings because of the conflict of interest between class members whose apps attracted the commission and those where no commission was payable. The manner in which the Class Representative framed his claims were demonstrative of that conflict. On a correct application of the law, the conflicts of interest identified by Apple should have prevented the Tribunal from certifying the proceedings.

   (b) Ground Two: opt-in proceedings would have been practicable because virtually the entire claim resides in an extremely small number of class members. The Tribunal erred in law in finding that opt-in proceedings would have been impractical: the existence of a long tail of proposed class members whose claims individually and collectively account for a negligible proportion of the overall claim value does not, as a matter of law, render opt-in proceedings impracticable; the finding that it would be costly and time-consuming for the Class Representative to contact proposed class members was unsustainable on the evidence; and the Tribunal's finding that the opt in

rate would probably be very low was unsupported by evidence and speculative.

4. The Tribunal is unanimously of the view that the application for permission to appeal should be dismissed. The grounds of appeal raised do not, in the Tribunal's view, have a real prospect of success and there is no other compelling reason why the appeal should be heard.

5. In relation to Ground One, the Tribunal found in the CPO Judgment (at [30]) that there was no conflict of interest between the members of the proposed class, because "whether or not the [proposed class representative – ("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". The purported conflict of interest identified by Apple has been contrived by reference to a claim and a counterfactual not advanced by the Class Representative.

6. A collective proceedings order is made, under section 47B(5) and (6) of the CA and Rule 79 of the 2015 Rules, in relation to the specific claims which have been: (i) advanced and (ii) determined by the Tribunal as being suitable to be brought in collective proceedings. It is only in respect of these claims that a class representative can hold the position of fiduciary relative to class members. A class representative cannot owe fiduciary duties to class members in respect of claims in which the class representative does not represent (and does not seek to represent) those class members. Apple's case is that the PCR had a conflict of interest which was inconsistent with his position of fiduciary because he could have brought a different claim to the one advanced in the Claim Form which would have benefited some members of the represented class and disfavoured others, The alleged conflict does not, however, arise in relation to the claim which is actually being pursued. The alleged conflict of interest can be contrasted with the position in *UK Trucks Claim Ltd v Stellantis NV* [2023] EWCA Civ 875, [2024] 1 All ER (Comm) 54, where an actual conflict of interest between the members of the class had materialised upon the face of the pleadings (see paragraph [94]). We do not consider Apple has a real prospect of persuading the appellate court that the alleged conflict identified here should have precluded certification.

7. Similarly, there is no real prospect of Apple persuading the appellate court that the proceedings should have been certified on an opt-in basis. On the question of opt-in versus opt-out proceedings, the Court of Appeal has held that "when it comes to weighing up of the various factors relevant to the choice of opt-out or opt-in this is essentially an exercise of judgment over facts and evidence by an expert, specialist body" (*Le Patourel v BT Group Plc* [2022] EWCA Civ 593, [2023] 1 All ER (Comm) 667, at [57] per Green LJ). An appellate court will not interfere with such an assessment unless it is persuaded that "the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge" (*Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, at [35] per Sir James Munby P).

8. Each of the issues identified by Apple as errors of law under Ground Two are questions of assessment, rather than appealable errors. It was appropriate for the Tribunal to have regard to the long tail of low value claims when assessing whether opt-in proceedings were practicable; such an assessment is not binary, but a matter of degree. The Tribunal's finding that the process of identifying and contacting thousands of App Developers would be costly and time consuming was open to the Tribunal on the evidence before it and is an evaluative assessment of the kind the Tribunal is well-placed to make. Finally, the difficulty of converting individuals with low-value claims into litigants has been the subject of judicial observation (see *Lloyd v Google Inc* [2021] UKSC 50, [2022] AC 1217, at [26] per Lord Leggatt, and *Le Patourel v BT Group Plc* [2022] EWCA Civ 593, [2023] 1 All ER (Comm) 667, at [73] per Green LJ). The Tribunal was entitled to weigh all these factors in reaching its conclusion that opt-out proceedings were to be preferred in this instance.

Andrew Lenon KC
Chair

Anthony Neuberger

Tim Frazer

Made: 26 November 2024

Drawn: 27 November 2024