Neutral citation [2025] CAT 5

Case No: 1602/7/7/23

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 January 2025

Before:

MRS JUSTICE BACON
Chair of the Competition Appeal Tribunal
ANTHONY NEUBERGER
CHARLES BANKES

Sitting as a Tribunal in England and Wales

BETWEEN:

**CHRISTINE RIEFA CLASS REPRESENTATIVE LIMITED**

Proposed Class Representative

\- v -

**(1) APPLE INC.**

**(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED**

**(3) AMAZON.COM, INC.**

**(4) AMAZON EUROPE CORE S.À.R.L.**

**~~(5) AMAZON SERVICES EUROPE S.À.R.L.~~**

**(6) AMAZON EU S.À.R.L.**

**(7) AMAZON.COM SERVICES LLC**

Proposed Defendants

Heard at Salisbury Square House on 12 July 2024 and 24 September 2024

---

**JUDGMENT (CPO APPLICATION)**

---

## APPEARANCES

Tom de la Mare KC, Jamie Carpenter KC and David Went (instructed by Hausfeld & Co. LLP) appeared on behalf of the Proposed Class Representative.

Roger Mallalieu KC, Sarah Abram KC, Tom Pascoe, Lucinda Cunningham and Michael Quayle (instructed by Freshfields LLP) appeared on behalf of the First and Second Proposed Defendants.

Meredith Pickford KC and David Gregory (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Third, Fourth, Sixth and Seventh Proposed Defendants.

CONTENTS


A. **Introduction** ... **4**

B. **The claim** ... **5**

C. **Procedural history** ... **7**

D. **Legal framework** ... **8**

(1) Certification conditions ... 8

(2) The authorisation condition ... 10

E. **The funding arrangements** ... **14**

(1) Iterations of the LFA: overview ... 14

(2) Key terms of the LFA ... 14

(3) The success fee payable to the funder ... 17

(4) Confidentiality ... 19

(5) The ATE policy ... 20

F. **Witness statements** ... **21**

(1) Prof Riefa's first witness statement ... 21

(2) Wessen Jazrawi ... 22

(3) Prof Riefa's second witness statement ... 23

(4) Prof Riefa's third witness statement ... 26

(5) Other evidence ... 26

G. **The authorisation condition** ... **29**

(1) The Tribunal's concerns following the July hearing ... 30

(2) Evidence submitted in advance of the September hearing ... 32

(3) Prof Riefa's evidence at the hearing ... 33

(4) Overall assessment of the evidence ... 35

(5) Our approach to the LFA ... 37

(6) Conclusion on the authorisation condition ... 38

H. **The eligibility condition** ... **39**

I. **Amendments to the claim form** ... **40**

J. **Disclosure request** ... **41**

K. **Conclusion** ... **42**

## A. INTRODUCTION

1. In a Collective Proceedings claim form dated 25 July 2023, Christine Riefa Class Representative Limited (the **Proposed Class Representative** or **PCR**) applied to commence opt-out collective proceedings against the Proposed Defendants on behalf of all those who had purchased Apple (including Beats-branded) electronic products at retail level in the United Kingdom during the period of the claim (the **Proposed Class Members**) (the **Proposed Collective Proceedings"**). The first and second Proposed Defendants are both members of the Apple group of companies (**Apple**); and the third to seventh Proposed Defendants are members of the Amazon group of companies (**Amazon**).

2. The PCR is a private company limited by guarantee which was incorporated for the purpose of this litigation. Its sole member and director is Professor Christine Riefa. Prof Riefa is a Professor at the University of Reading where she teaches EU Law, Commercial Law, and Technology, Privacy and Internet Regulation modules. She is also a member of the consultative group advising the class representative in a current action before the Tribunal, 1408/7/7/21 *Coll v Alphabet.*

3. The PCR's application for certification was considered at two hearings: an initial hearing on 12 July 2024 (the **July hearing**), and a further hearing on 24 September 2024 (the **September hearing**). At the July hearing, submissions for the PCR were made by Mr Carpenter KC and Mr Went; Mr Mallalieu KC and Ms Abram KC made submissions for Apple; and Mr Pickford KC made submissions for Amazon. At the September hearing, the PCR's submissions were made by Mr de la Mare KC, Apple's submissions by Mr Mallalieu, and Amazon's submissions (again) by Mr Pickford.

4. At the July hearing, the Proposed Defendants did not oppose certification of the collective proceedings as a matter of principle, but raised concerns regarding the class definition and the funding arrangements (in particular the level of the funder's return). By the September hearing, the focus of the opposition had shifted to the submission that it was not just and reasonable to authorise the PCR

to act as the class representative, by reference in particular to Prof Riefa's understanding of the funding arrangements.

## B. THE CLAIM

5. It appears that the genesis of this case lies in an approach by Dr Chris Pike, an economist at Fideres Partners LLP, to Hausfeld & Co. LLP (**Hausfeld**). Hausfeld in turn appears to have instructed finance brokers and signed heads of terms with a litigation funder, Asertis Limited (**Asertis**), before it approached Prof Riefa to suggest that she, or a corporate vehicle under her control, should act as the PCR. Her agreement led to the incorporation of the PCR on 24 January 2023. The claim form was then filed on 25 July 2023.

6. The PCR contends in the Proposed Collective Proceedings that Amazon and Apple entered into agreements which have the object or effect of preventing, restricting or distorting competition in the United Kingdom. The PCR points, in particular, to agreements entered into by Apple and Amazon in October 2018. The PCR claims that its preliminary analysis shows that those agreements have led to a significant reduction in the number of resellers of Apple products active on, and an increase in the prices of Apple products sold on, the Amazon UK Marketplace. Against that background, the PCR claims that the October 2018 agreements caused, and continue to cause, loss to the Proposed Class Members through paying an overcharge on Apple products purchased through the Amazon UK Marketplace, Apple's UK website and physical stores, and other online and physical retail channels, and that many Proposed Class Members will also have suffered losses from increased financing costs.

7. The PCR seeks an aggregate award of damages on behalf of the proposed class in respect of such losses. The proposed class comprises all natural persons who purchased one or more Apple branded or Beats branded products at retail level in the United Kingdom during the relevant period. The PCR's expert, Dr Pike, estimates the class size at over 36 million people.

8. The PCR's preliminary estimate of the total loss suffered by the Proposed Class Members who purchased Apple products on the Amazon UK Marketplace alone

is £494 million before interest. This does not include: (a) the losses suffered by those who purchased Apple products at inflated prices from Apple directly or from other e-commerce or physical retail channels; or (b) the losses suffered as a result of increased financing costs (all of which are within the scope of this claim).

9. The claim is brought on a standalone basis. There is no decision by either the Competition and Markets Authority or the European Commission (in relation to the period before 31 December 2020) on which the PCR can rely. The PCR's claim form does however draw attention to decisions of the Italian and Spanish competition authorities which, the PCR says, help its case, although it should also be noted that the Italian competition authority's decision has been annulled on procedural grounds by an Italian administrative court.

10. The claim form was supported (initially) by a witness statement from Prof Riefa (**Riefa 1**). A number of documents were exhibited to that witness statement, including:

    (1) a litigation plan and budget,

    (2) a partially redacted after the event (**ATE**) insurance policy providing cover against an adverse costs award; and

    (3) a partially redacted litigation funding agreement (**LFA**), entered into between the PCR and Asertis which had been amended on several occasions prior to the July hearing, as described further in section E below.

11. The claim form was also accompanied by an expert report from Dr Pike. In December 2023 a witness statement was filed from Wessen Jazrawi, a partner at Hausfeld, explaining amendments that had been made to the LFA. Further evidence was then filed in the course of the proceedings, as set out further below.

12. In responses to the PCR's application for certification filed on 19 April 2024, the Proposed Defendants refute the substance of the claim in its entirety. The Proposed Defendants have not, however, contended that any of their substantive objections to the claim are grounds for refusal of the certification of the Proposed Collective Proceedings.

## C. PROCEDURAL HISTORY

13. As noted above, the application for certification was considered at hearings in July and September 2024. Prior to the July hearing, the PCR applied to amend its claim form. Many of the amendments were agreed by the Proposed Defendants. Other amendments were not agreed and were addressed at the July hearing, but (for the reasons explained in section I below) are no longer in dispute.

14. More importantly, during the course of the July hearing, the Tribunal raised concerns and questions in relation to the confidentiality of the funding terms, the substance of the funding terms agreed and the suitability of the PCR (we explain those concerns in more detail in section G below). The Tribunal therefore directed the PCR to file further evidence to address these points, together with a revised draft claim form, and directed that a further certification hearing would be listed to consider that evidence. The Tribunal also indicated that after the further evidence had been filed, the Proposed Defendants should consider whether they wanted to apply for permission to cross-examine Prof Riefa during the subsequent hearing, in order to ensure that the Tribunal had sufficient information to reach a decision following that hearing.

15. A further hearing was then listed for September. In accordance with the Tribunal's directions, the PCR submitted a second witness statement from Prof Riefa (**Riefa 2**) dated 26 July 2024, together with witness statements from John Astill, Sir Gerald Barling KC and Anthony Maton. It also submitted (on the same date) a revised draft of the claim form. On 2 August 2024 the PCR filed a further amended LFA and updated litigation plan. Finally, on 11 September 2024 the PCR submitted a third witness statement from Prof Riefa (**Riefa 3**).

16. On 30 August 2024 both of the Proposed Defendants applied for permission to cross-examine Prof Riefa during the September hearing. That was granted in an Order dated 2 September 2024, and Prof Riefa was then cross-examined by both Mr Pickford and Mr Mallalieu during the September hearing.

17. In addition, Amazon applied to the Tribunal for an order that the PCR give disclosure and inspection of all advice given by Hausfeld to the PCR in connection with the funding arrangements that had been put in place for the purposes of these proceedings, including advice as to the appropriateness of those funding arrangements in light of the certification criteria. That application was dismissed in an Order of the Tribunal dated 17 September 2024. The reasons for that Order are set out at the end of this judgment.

## D. LEGAL FRAMEWORK

### (1) Certification conditions

18. Section 47B of the Competition Act 1998 (the **1998 Act**) and Rule 77 of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**) set out the requirements that must be fulfilled in order for the Tribunal to make a collective proceedings order (**CPO**).

19. First, the Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the PCR (the **authorisation condition**): section 47B(5)(a) and Rule 77(1)(a). The authorisation condition is met if the Tribunal considers that it is "just and reasonable" for the PCR to act as a representative in the proceedings: section 47B(8)(b) and Rule 78(1)(b).

20. The factors relevant to the determination of whether it is just and reasonable for the PCR to act as a class representative are set out in Rule 78(2). These include, at (a), the question of whether the PCR "would fairly and adequately act in the interests of the class members", and at (d) whether the PCR will be able to pay the defendant's recoverable costs if ordered to do so. Under Rule 78(3), in determining whether the PCR would act fairly and adequately in the interest of

the class members, the Tribunal must take into account all the circumstances, including:

(1) Whether the PCR is a class member, and if so its suitability to manage the proceedings: Rule 78(3)(a).

(2) If the PCR is not a class member, whether it is a pre-existing body and the nature and functions of that body: Rule 78(3)(b).

(3) Whether the PCR has prepared a plan for the collective proceedings which satisfactorily includes a method for bringing the proceedings on behalf of the class; a procedure for governance and consultation taking into account the size and nature of the class; and any estimate of and details of arrangements as to costs, fees or disbursements which the PCR may be ordered to provide: Rule 78(3)(c).

21. Secondly, the claims must be eligible for inclusion in collective proceedings (the **eligibility condition**): section 47B(5)(b) and Rule 77(1)(b). That condition comprises three cumulative requirements, set out in Rule 79:

(1) The proposed claims must be brought on behalf of an identifiable class of persons: Rule 79(1)(a).

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

(3) The proposed claims must be suitable to be brought in collective proceedings: section 47B(6) and Rule 79(1)(c).

22. As the Tribunal emphasised at [2] of *Gormsen v Meta* [2024] CAT 11, in considering whether to make a collective proceedings order the Tribunal must consider whether the requirements of both the authorisation and eligibility conditions are satisfied, whether or not these are raised by the parties.

## (2) The authorisation condition

23. As we have noted above, the Proposed Defendants' objections to certification focused on the authorisation condition, and in particular the funding arrangements and (related to that) the suitability of the PCR.

24. Paragraph 6.29 of the Tribunal's Guide to Proceedings 2015 (the **Guide**) notes that "being a class representative involves significant and serious obligations, and is not a responsibility to be taken on lightly". Paragraph 6.30 indicates that in considering whether it would be just and reasonable for the PCR to act in that capacity, and whether the PCR would fairly and adequately act in the interests of the class members, the Tribunal will consider the PCR's ability to manage the proceedings and instruct its lawyers.

25. As to the PCR's funding arrangements, paragraph 6.33 of the Guide notes that Rule 78(2)(d) requires the Tribunal to consider whether the PCR would be able to pay the defendant's recoverable costs, and comments further that:

> "By extension, the proposed class representative's ability to fund its own costs of bringing the collective proceedings is also relevant. In considering this aspect, the Tribunal will have regard to the proposed class representative's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers."

26. In *UK Trucks Claim v Fiat Chrysler Automobiles* [2019] CAT 26 the Tribunal observed that:

> "52. It is important to bear in mind that the Tribunal's concern in this regard is for the potential class members. The Tribunal seeks to be satisfied that appropriate and adequate arrangements have been made by the proposed class representative to fund the claim it wishes to bring, so that the class members will have the benefit of effectively conducted proceedings. …"

27. In *Gutmann v First MTR South Western Trains* [2022] EWCA Civ 1077 Green LJ said that:

> "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 … 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 behind the legislation which include properly rewarding the class and creating ex ante incentives upon undertakings to comply with the law."

28. In *Alex Neill v Sony* [2023] CAT 73, the Tribunal, referring to these observations of Green LJ, said:

> "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."

29. The PCR also drew our attention to the following passage from the judgment of the Tribunal in *Gormsen v Meta* cited above:

> "34. … We accept entirely that funding gives rise to at least two issues in relation to which the Tribunal must exercise great care:
>
> (1) First, there is the question of whether – in terms of straightforward allocation – a funder is taking more from the class than they properly should.

> (2) Secondly, there is a danger of perverse incentives arising; or (to put it more accurately) in a conflict between funders' interests and class interests manifesting itself. The problem, as we see it, is that funders are (as the law presently stands) precluded from aligning themselves with the class: they cannot, without more, lawfully, seek a return that is based on the damages recovered by the class. To this extent, therefore, the 'perverse incentives' are imposed on funders.
>
> 35. Both of these points arise against a context of commercial – and largely confidential – negotiation between the PCR and the funder, into which the Tribunal should be slow to venture. The collective actions regime in this jurisdiction depends on funders being ready and willing to assume the very considerable financial risk in funding litigation that is, on any view, large, complex and enormously expensive. It is not for this Tribunal, on certification, to review the commercial arrangements that have been reached between the class representative and the funder. That was a point made by Mr Bacon, KC, for the PCR, and in substance we agree with it: the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or judgment, and the Tribunal will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders.
>
> 36. That being said, there do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out or *in extremis* a blanket refusal to certify.
>
> 37. We stress that, although the terms that we describe below were identified as confidential, we can see no justification in withholding those terms from public scrutiny and considerable benefit: a regime built around access to justice ought to be as open as possible, including in particular as to the price that is paid (admittedly indirectly) by the class on whose behalf these claims are ultimately brought."

30. More recently, in its judgment in *Gutmann v Apple* [2024] CAT 18, the Tribunal commented that:

> "7. The courts have observed that class actions necessarily require third party funding and that the placing of unnecessary hurdles in the way of parties obtaining funding may undermine the ability of meritorious claims to be brought and/or increase the cost of funding. But the interests of the litigation funder are not the same as those of the class…
>
> 9. An initial safeguard is that class members will have a suitable class representative, in receipt of legal advice, who will act in their best interests in negotiating an appropriate and competitive litigation funding agreement. Additionally, the Tribunal is required to certify a class action and as part of that exercise it will consider the proposed funding arrangements …"

31. We draw from the statutory framework and the above authorities and guidance the following propositions regarding the Tribunal's consideration of the

authorisation condition and, in that context, its scrutiny of the PCR's funding arrangements:

(1) The Tribunal may certify a claim only where it considers that it is just and reasonable for the PCR to act as the class representative.

(2) In making that determination, the Tribunal must consider whether the PCR would fairly and adequately act in the interests of the class members.

(3) That includes consideration of the PCR's ability to pay the defendant's recoverable costs, as well as its ability to fund its own costs, such that the proceedings are conducted effectively.

(4) Class actions almost inevitably require third party funding. The interests of the funders are not the same as the interests of potential class members. This gives rise to inherent risks for the fulfilment of the policy objectives of the collective actions regime.

(5) An important protection for potential class members is that the PCR will properly act in the best interests of the class including when agreeing any funding arrangements, and in managing the proceedings going forward including ongoing interactions with funders. That requires the PCR to be sufficiently independent and robust.

(6) In forming its view as to the ability of the PCR to act fairly and adequately in the interests of potential class members the Tribunal will consider all relevant circumstances, including the question of how the PCR has satisfied itself that the funding arrangements reasonably serve and protect those interests.

(7) A further protection is that the terms of any funding agreement should be open to scrutiny, not only by the court but also by the members of the class on whose behalf the claims are brought.

(8) The Tribunal should nevertheless exercise caution in intervening in relation to the funder's return under the funding arrangements, at the certification stage, bearing in mind the Tribunal's ability to control the return to the funder at the subsequent stage of judgment or settlement. In extreme cases, however, the Tribunal's concerns regarding the funding arrangements may lead to a refusal to certify.

## E. THE FUNDING ARRANGEMENTS

### (1) Iterations of the LFA: overview

32. The LFA was first entered into on 27 February 2023. In March 2023, Asertis raised concerns that the agreement might become unenforceable if the Supreme Court were to determine in its (then pending) judgment in *R (PACCAR) v Competition Appeal Tribunal* that a litigation funding agreement providing for the funder's return to be calculated by reference to the amount of damages recovered was an unenforceable damages-based agreement.

33. An amendment deed was therefore entered into on 6 April 2023 (the **First Amendment Deed**) which created an option to amend the LFA within three months of the Supreme Court's judgment in *PACCAR*. After the *PACCAR* judgment was handed down on 26 July 2023, [2023] UKSC 28, reaching the conclusion anticipated by the option, the option was duly exercised (on 4 August 2023). That had the effect of amending the LFA in the manner set out in the First Amendment Deed.

34. The LFA was then restated by a deed dated 22 October 2023 (the **Restated LFA**), and further amended by a deed dated 25 June 2024 (the **Second Amendment Deed**). Finally, a further amendment agreement and restatement of the LFA was entered into on 2 August 2024 (the **Third Amendment Deed**), in light of the concerns expressed by the Tribunal at the July hearing.

### (2) Key terms of the LFA

35. The recitals to the LFA provide that:

> "[C] The Claimant will be in sole control of the Claim and will act justly and reasonably in the interests of the Class Members.
>
> [D] The Claimant has taken legal advice from the Law Firm as to the available options for funding the Claim. That advice has included advice on after the event insurance, conditional fee agreements, external funding and the cost, advantages and disadvantages of each. That advice has also included advice on the funding terms contained in this Agreement which represented, in the professional opinion of the Law Firm, the best terms that are understood to be available in the market as at the date of this Agreement.
>
> [E] The Claimant's solicitors engaged the Funding Advisors who advised the Claimant that the terms contained herein represent the best terms that the market would offer.
>
> [F] The Claimant is of the view, after having had the opportunity to take legal advice on this Agreement and carefully considering the advice of the Law Firm and other professional advisors, that it is in the best interests of the Class Members for the Claimant to enter into this Agreement and progress the Claim."

36. These recitals remain the same in all versions of the LFA.

37. By clause 4 of the original LFA, the PCR gave a number of general commitments to the funder, including undertakings to do the following:

> "4.1.1 devote the Claimant's time, attention and necessary resource to the Claim so as to enable the Law Firm to facilitate and advance the Claim efficiently and to minimise the costs and length of any Proceedings in so far as it is in the interests of the Class Members to do so;
>
> …
>
> 4.1.4 provide any necessary support and cooperation in the Claim, including but not limited to attending all court hearings in relation to the Claim, either in person or via electronic means (where requested to do so by the Law Firm);
>
> …
>
> 4.1.6 co-operate in any negotiations, mediation or other alternative dispute resolution process unless the Claimant reasonably determines that not to do so would be in the Class Members' best interests;
>
> 4.1.7 use all reasonable endeavours to reduce the risk and quantum of any Adverse Costs order being made against the Claimant, the Law Firm or the Funder whilst acting in the best interests of the Class Members and in accordance with advice from the Law Firm and Counsel;
>
> …
>
> 4.1.9 pursue the Claim at all times in good faith;

…

4.1.11 act fairly and justly in the interests of the Class Members at all times;

…

4.1.15 following any application to the Court for a Collective Settlement Approval Order, pursuant to CAT Rule 94 or 96, seek to satisfy the CAT that the terms of the Settlement insofar as they relate to costs and expenses are in accordance with the content of this Agreement, unless otherwise agreed by the Funder, and are just and reasonable;

4.1.16 subject to any order of the Court to the contrary, instruct the Law Firm to seek payment of and take all reasonable steps to procure payment of any Case Proceeds directly into the Claim Trust Account;

4.1.17 following a Final Judgment or a Settlement, instruct the Law Firm to request that the Court makes an order that all or part of the Award may be paid to the Claimant in respect of the costs, fees and disbursements (including the Success Fee);

4.1.18 take all reasonable steps to attain or realise the Success Fee in full."

38. Clause 4.1.17 therefore obliged the PCR, following a successful outcome and an award of damages to the members of the class, to apply to the Tribunal for an order permitting all or part of the award to be paid to the PCR in respect of the costs, fees and disbursements incurred. If such an order were made, these payments would rank in priority above any distribution to the class members.

39. As set out in the original LFA, that obligation was unqualified and gave the PCR no option but to make such an application. The Third Amendment Deed amended that position by deleting clause 4.1.18 and amending clause 4.1.17 to provide as follows:

"4.1.17 following a Final Judgment or a Settlement, and subject always to any direction or order of the Court to the contrary:

4.1.17.1 instruct the Law Firm to apply to the Court for an order that the Claimant may be paid their costs, fees and disbursements (including the Success Fee) from:

(a) the Undistributed Damages; and/or

(b) where it is appropriate in all the circumstances, having regard to the Funder's investment in the Claim and the level of the Success Fee, the Award. If there is any dispute about whether it is appropriate in all the circumstances to make such an application: (i) such dispute shall be resolved through the dispute resolution process in Schedule 3 (Dispute Resolution) (*mutatis mutandis*)

> and (ii) in any event, the Funder may, if it wishes, apply to the Court for such a payment to be made; and
>
> 4.1.17.2 take all reasonable steps to attain or realise the Success Fee in full."

40. As it now stands, therefore, the obligation to make an application in priority to the distribution of damages to the class is qualified so as to apply "where it is appropriate in all the circumstances", with a dispute resolution mechanism in the event of a dispute as to whether that qualification is satisfied.

41. It is relevant to add at this point that the PCR's solicitors (i.e. Hausfeld) and counsel have all agreed to act under conditional fee arrangements. The LFA contains (in all versions) a "waterfall" provision which sets out the priorities in which payments are to be made to the funder, the ATE insurer (in relation to the contingent premium), and to the PCR's solicitors and counsel in respect of deferred fees. If the PCR were to be successful in an application under clause 4.1.17.1, persuading the Tribunal to make an order for payment of costs, fees and disbursements directly from the award rather than from undistributed damages, then the payments to the PCR's solicitors and counsel would also take priority over any distribution of damages to the class members.

**(3) The success fee payable to the funder**

42. Under the definitions set out in clause 1.1 of the LFA, the success fee referred to in clauses 4.1.17 and 4.1.18 is payable to the funder (i.e. Asertis) upon a "successful outcome", defined in clause 1.1 as "a final judgment or settlement pursuant to which the Claimant or Class Members become entitled to an Award". Schedule 1 to the original LFA provided that the success fee was to be calculated, in certain circumstances, by reference to a percentage of the damages recovered.

43. As set out above, the First Amendment Deed gave Asertis an option to amend the original LFA, exercisable within three months of the publication of the *PACCAR* judgment. The optional amendment provided for the success fee to be redefined as comprising (a) the drawn funds, plus (b) a priority multiplier, i.e. a multiple of the drawn funds, plus *the greater of* (c) a balancing multiplier and

(d) an amount equal to the aggregate of: (i) the drawn funds and (ii) an amount which gives the funder an internal rate of return (**IRR**) of 45% on the drawn funds at the time of the successful outcome.

44. The values of the priority and balancing multipliers, depending on the stage of the proceedings, were set as follows:

| Stage of claim | Pre-collective settlement approval order | Post-collective settlement approval order (settlement) | Post-collective settlement approval order (trial) |
|---|---|---|---|
| Priority multiplier | 0.75x | 1.25x | 1.75x |
| Balancing multiplier | 1.75x | 2.25x | 2.75x |

45. That option having been exercised following the Supreme Court's judgment in *PACCAR*, the amended success fee provisions set out above were then embodied in the Restated LFA.

46. The Restated LFA also addressed the problem that the inclusion of "drawn funds" in the aggregate amount referred to in paragraph 43(d) above would (erroneously) have resulted in Asertis receiving *twice* the value of the drawn funds in addition to other amounts, if that paragraph applied. The Restated LFA corrected that error by amending (d) to refer solely to the IRR of 45%, deleting the addition of the "drawn funds".

47. The method by which Asertis' return was to be calculated was further amended in the Second Amendment Deed, by adding wording to clarify that the IRR element was to be calculated net of any amounts already received by the funder as a priority multiplier. So far as the PCR was concerned, this clarification did not change the commercial terms already agreed.

48. The Third Amendment Deed (following the July hearing) inserted into Schedule 1 a new definition of the success fee, as being an amount equal to the aggregate of (a) the drawn funds, plus (b) a priority multiplier, plus (c) a balancing multiplier, with the priority and balancing multipliers calculated by reference to

the time elapsed from the date of the original LFA until the receipt by the funder of all funds due to it following a successful outcome, as follows:

| Months elapsed | 0–47 | 48–83 | 84+ |
|---|---|---|---|
| Priority multiplier | 1.25x | 1.75x | 1.75x |
| Balancing multiplier | 2.25x | 1.9375x at month 48 increasing by 0.1875x every 3 months thereafter up to and including month 83 | 4.00x |

49. This methodology makes two significant changes to the earlier methodologies. First, the IRR provision is removed, with instead a revised set of multipliers reaching a maximum of 5.75x after seven years. Secondly, all previous versions calculated the funder's return by reference to the stage of the proceedings at which a successful outcome (whether settlement or trial judgment) is obtained, whereas the revised version calculates the return by reference to the period until the funder has received all amounts due to it following a successful outcome.

50. At the September hearing, the Proposed Defendants argued that the latest version of the LFA, far from ameliorating any concerns about the funding arrangements (and the level of the success fee in particular), in fact amounts to an even worse deal for the class than the previous iterations. We consider that it is certainly clear that the latest changes to the LFA represent a significantly different agreement between the PCR and Asertis when compared with the previous version of the LFA. However, whether the outcome would be more or less favourable to the class will depend heavily on the circumstances, in particular the amount of the drawn funds at any given time and the period elapsed from the start of the proceedings.

**(4) Confidentiality**

51. All versions of the LFA contain confidentiality obligations which require the PCR to keep certain information confidential including "all information relating to (i) the provision of the Claim Funding to the Claimant by the Funder and (ii)

the Funder's identity". There are exceptions to these confidentiality obligations, but those exceptions do not permit the disclosure by the PCR of any of the terms of the LFA to potential class members.

52. The question of confidentiality was raised by the Tribunal during the July hearing. In particular, the Tribunal wanted to understand why the LFA prevented the class from receiving basic information regarding the funder's level of return and the obligations assumed by the PCR under the LFA.

53. In response to questions from the Tribunal Chair, Mr Carpenter KC replied: "having taken instructions, I am told that this is a point the funder feels quite strongly about …". When asked for the position of the PCR, he replied: "I have not taken instructions on that, but she is bound by an agreement with the funder"; and "I am sure that she instinctively would not want to take a position contrary to that of her funder".

54. It appears from Riefa 2 that Asertis has now waived claims to confidentiality in respect of the calculation of the funder's return in the Restated LFA and the Second Amendment Deed. In addition, at the stage of providing corrections to the draft judgment, the PCR's solicitors stated that the waiver extended to the provisions of clause 4.1.17. It is very unsatisfactory that this information was provided so late in the day, and in this manner. In any event, it does not fully address our concerns. So far as the Tribunal is aware, the confidentiality provisions in the LFA (as now amended by the Third Amendment Deed) remain unchanged. The PCR therefore remains under a confidentiality obligation until it is waived, at the unilateral discretion of Asertis.

### (5) The ATE policy

55. On 3 February 2023 the PCR entered into an ATE insurance policy to cover its potential exposure for adverse costs with five insurers, who hold specified subscription shares. The policy provides an aggregate amount of adverse costs cover up to £20 million from the policy commencement date. The policy provides for two (staged) deposit premia to be paid by the PCR, which are non-refundable irrespective of the outcome of the dispute. If the Proposed Collective

Proceedings are successful, the relevant insurers will also receive a share of a contingent premium, subject to approval by the Tribunal. The amounts of the deposit and contingent premia have, however, been redacted as confidential in the version of the policy provided to the Tribunal.

56. In their responses to the application for certification and subsequent correspondence, the Proposed Defendants made a number of significant criticisms of the PCR's insurance arrangements. In particular, they drew attention to the fact that the initial ATE insurance policy failed to cover all of the Proposed Defendants, and that it failed to cover all aspects of the proposed claim, since the definition of the dispute in the policy differed from the way in which the class was defined in the proposed claim. These shortcomings were remedied by the PCR prior to the July hearing without an increase in the ATE premium.

## F. WITNESS STATEMENTS

57. We now turn to consider the various witness statements provided to the Tribunal concerning the funding arrangements and the suitability of the PCR to act on behalf of the Proposed Class Members. We will consider further below the evidence given by Prof Riefa during her cross-examination at the September hearing.

### (1) Prof Riefa's first witness statement

58. Riefa 1 was filed together with the claim form. It explained that Prof Riefa is the sole director and member of the PCR. Prof Riefa noted that the PCR, together with its legal advisers, had produced a litigation plan. Amongst other things that plan sets out, provisionally, how the PCR considers that it will manage and distribute sums to the class following the Tribunal's grant of an aggregate damages award or following approval of a collective settlement; and the estimated costs, fees and disbursements that the PCR may incur throughout the Proposed Collective Proceedings by reference to a litigation costs budget.

59. Riefa 1 contained only very brief details about the proposed funding arrangements, explaining that:

(1) The PCR had entered into an LFA with Asertis.

(2) Asertis had committed to providing £16,952,006 in claim funding, with the potential for additional funding to be requested if required.

(3) Hausfeld's view was that this should be sufficient to fund the Proposed Collective Proceedings through to final judgment if necessary.

(4) Asertis had agreed to pay Prof Riefa an hourly rate of £180, not exceeding £800 per day, for her work as the director of the PCR and managing the Proposed Collective Proceedings.

60. Prof Riefa then commented:

> "49. In entering into the LFA, I have considered in my capacity as the sole director of the PCR the overriding and primary requirement that, as the PCR, it must act in the interests of the Proposed Class. The LFA reflects Asertis' commitment to fund these Proposed Collective Proceedings and acknowledges that the PCR has control of the litigation.
>
> 50. In return for Asertis' commitment under the LFA, if the Proposed Collective Proceedings are successful and there are any unclaimed damages, the PCR will make an application to the Tribunal under section 47C(6) of the Act for its costs and expenses incurred during the Proposed Collective Proceedings, including the sums due pursuant to the LFA, to be awarded from any unclaimed damages (and to the extent not recovered from Amazon and Apple)."

61. The statement in paragraph 50 that Asertis would be paid from unclaimed damages was incorrect in light of the provisions of clause 4.1.17 of the LFA.

**(2) Wessen Jazrawi**

62. Ms Jazrawi is a solicitor and partner at Hausfeld. She produced a brief witness statement in December 2023, explaining the amendments to the LFA. She explained, in particular, the context in which the First Amendment Deed was entered into and the option in that Deed then exercised (following the *PACCAR*

judgment). She also described the replacement of the LFA (as amended) by the Restated LFA, a redacted version of which was annexed to her statement.

63. She then noted that the Restated LFA also incorporated "one further amendment relating to the funder's fee". That was an oblique reference to the change made to resolve the error in the First Amendment Deed referred to in paragraph 46 above.

**(3) Prof Riefa's second witness statement**

64. Riefa 2 was submitted following the July hearing. The purpose of that statement was said to be to explain the basis on which Prof Riefa was satisfied as to the appropriateness of the PCR's funding arrangements, and her suitability to scrutinise independently those arrangements for the benefit of the proposed class.

65. Riefa 2 disclosed for the first time that Hausfeld had signed heads of terms for the funding of this claim with Asertis before Prof Riefa agreed to take on the role of PCR. At the time she was approached and first shown the heads of terms, she understood that Asertis was an established and reputable funder and that Hausfeld had worked with Exton Advisors Limited (**Exton**), a reputable broker of litigation funding and insurance, to identify potential funders and to secure a competitive offer.

66. Prof Riefa said that she reviewed the agreement with Hausfeld, and also reviewed the terms under which Hausfeld itself was being paid (which included conditional fee terms). That gave her comfort that Hausfeld would have an aligned interest in the claim succeeding, although she recognised that this did not remove the need to be alert to potential conflicts of interest.

67. She reported that, before signing the original LFA, she spent some hours reviewing it and discussing it with Hausfeld, including questioning whether other funders had been approached, whether the terms offered were the best terms available, and whether the success fee was reasonable and in line with

Hausfeld's experience in other cases. She understood that the multipliers sought by Asertis had already been reduced in negotiations prior to her joining the case.

68. Prof Riefa described her review of the new terms proposed in the First Amendment Deed, while the *PACCAR* judgment was awaited:

> "20. I subsequently attended a call with Hausfeld on 4 April 2023. At this time, I understood that the 45% IRR (or Internal Rate of Return) was in effect a calculation of Asertis' success fee based on how long and when it invested money in the Proposed Proceedings and the modelling indicated that it would be less than a 5x multiple assuming the duration of the claim was as anticipated (i.e., no more than five years from the Original LFA). I understood that it would only become relevant if the Proposed Proceedings went on for more than five years. My understanding at that time was that the litigation funding industry, so far as I was aware, was almost at a standstill while it awaited the Supreme Court's judgment in *PACCAR* (and the witness statements from Anthony Maton and John Astill confirm this at paragraphs 41 to 43 and 28 respectively). I felt at the time that, understandably, most funders would be very concerned about obtaining returns on their investments and I could see that this could lead to funders expecting higher rates of returns. In any event, the new terms that Asertis was proposing did not seem unreasonable, given that the IRR would only be triggered if the Proceedings went longer than their expected duration. It was not in any event immediately obvious that there would be alternative funding options on the table. A lack of funding would have led to the claim failing to be certified which would undoubtedly have been a worse outcome for the class. I weighed the above factors and entered into the First Amendment Deed on 6 April 2023."

69. The witness statement went on to describe the corrections and clarifications made to the definition of the success fee, in the Restated LFA and the Second Amendment Deed, which we have set out above.

70. Prof Riefa then set out her responses to what she understood to be the Tribunal's concerns at the July hearing, as follows:

> "(i) Payment to funder before the class
>
> 28. My understanding of how the LFA was intended to operate was that I would seek a payment to the funder out of undistributed damages, save in unlikely circumstances where the Tribunal might have permitted a different approach. Therefore my plan for the litigation reflected this. However, I understand that there is a concern that the LFA as presently drafted requires me to seek payment to the funder ahead of the class in all circumstances, which I also understand is now possible post-*Gutmann*. I have therefore asked Asertis to propose amended wording and I have asked Hausfeld to instruct additional cost counsel on my behalf to review this variation in the wording. It was not possible to complete this process in the time available since the CPO hearing but I hope to be in a position to do so by the deadline to provide updated funding documents, as per the Tribunal's Order.

(ii) The PCR's undertakings to Asertis

29. While I was aware of my undertakings to Asertis, I have also been very conscious of the undertakings set out at clause 4.1.11 and 4.1.13 of the Restated LFA, which require the PCR to "*act fairly and justly in the interests of the Class Members at all times*" and "*use all reasonable endeavours, in accordance with the terms of this Agreement, to achieve the recovery of an Award and Recovered Costs as soon as reasonably possible and in the best interests of the Class Members*". Indeed, the interests of the class were always my top priority. I also understood that clauses 4.1.17 and 4.1.18 were included under the funding agreement for the protection of the funder and to guard against the possibility of a class representative acting in such a way which meant that the funder would not be paid.

(iii) Ability of Hausfeld to provide independent advice/lack of consultative panel

30. I understand that the Tribunal is concerned as to: (i) whether Hausfeld is able to provide the PCR with independent advice, in particular with regards to settlement offers which may occur in the future; and (ii) the fact that I do not have a consultative panel from which to take advice. As to each of these points:

a. It has always been my understanding that Hausfeld is a well-respected and reputable law firm which has obligations towards the PCR as its client. Through my dealings with other PCRs (notably via the Class Representative Network, but also in the remit of my role as member of the advisory panel in *Coll*) I had formed the opinion that relying on their advice regarding the negotiation of the funding agreement and any potential settlement offers that may come, was a reasonable position to take. To my knowledge, all PCRs rely on the advice of their law firms, most, if not all, of which are acting on conditional fee agreements (as noted in Maton 1). I have been, however, aware of the issues surrounding potential conflicts of interests with lawyers and funders in settlement offers (through attendance at collective action conferences). The ability of Hausfeld to provide the PCR with independent advice is addressed in Maton 1, sections B and C, which I have read in full. I confirm that it also reflects my understanding of what the PCR can expect of their law firm, although I cannot claim to have had such a detailed understanding of their obligations as the statement puts across. However, in view of the Tribunal's concerns and as set out above, I have asked Hausfeld to instruct additional cost counsel who will advise me on the revised terms.

b. I do not understand it to be a mandatory requirement for a PCR to have a consultative panel. I knew of cases with panels and cases without at the time of agreeing to discuss the case with Hausfeld. Being a member of such a panel, I see the value of having one. However, I am not aware (the existence and/or membership of consultative panels is not always publicized) of any class representative (proposed or certified) who has included an expert on funding arrangements on their consultative panel even where such a panel has been used. As such, I am not sure that it would have led to any material difference in the funding terms agreed. However, in view of the Tribunal's concerns, in the event the claims certified, I am happy to appoint a consultative panel to provide an additional layer of advice going forward and I have begun to make a list of potential candidates.

(iv) The IRR method of calculating Asertis' success fee

31. I explain at paragraph 20 above that it was my understanding that the IRR would only become relevant if the Proposed Proceedings went on beyond their expected duration.

> 32. However, in view of the Tribunal's concern about the level of return payable to Asertis under the IRR if the Proposed Proceedings went on beyond their expected duration, I have asked Asertis to put forward alternative terms and I will be discussing these with the additional cost counsel referred to above."

71. Finally, Prof Riefa addressed the question of confidentiality of the LFA, as set out in paragraph 54 above.

**(4) Prof Riefa's third witness statement**

72. Riefa 3 was filed in response to the applications by the Proposed Defendants to cross-examine Prof Riefa, and the identification of points which the Proposed Defendants sought to explore in cross-examination, if permitted to do so. Riefa 3 described, in particular, the changes to clauses 4.1.17 and 4.1.18 of the LFA and the revised calculation of the success fee following the Third Amendment Deed. Prof Riefa explained that those amendments were negotiated in order to address the concerns raised by the Tribunal at the July hearing.

73. Prof Riefa said that she had taken detailed independent advice on those amendments from Robert Marven KC, a leading silk on costs and funding matters. She also discussed Asertis' proposals with Hausfeld and its funding broker, Exton, and understood that the new capped multiple proposed by Asertis was in line with the commercial litigation funding market for opt-out collective proceedings such as these proceedings. She concluded that the revised proposed success fee for Asertis would be appropriate in the circumstances, bearing in mind the interests of the class.

74. Finally, Prof Riefa reported that she would be content to appoint a consultative panel to provide an additional layer of advice going forward, and that she had decided to appoint David Greene of Edwin Coe LLP to that Panel. She said that she intended to appoint two further panel members in due course.

**(5) Other evidence**

75. Alongside Riefa 2, the PCR filed witness statements from John Astill, Anthony Maton and Sir Gerald Barling.

### *(a) John Astill*

76. John Astill is the Senior Managing Director and co-founder of Exton. His statement explained the general approach that his firm takes to seeking and securing litigation funding for opt out collective proceedings. He then went on to describe the process followed in this case.

77. He approached three funders, including Asertis. Asertis offered terms which he considered competitive in the light of market conditions at the time; the other two funders declined to enter into negotiations. He did not consider it necessary to delay the process of obtaining funding by widening the scope of the search for funders, and instead started negotiations with Asertis. During those negotiations, and prior to the signing of heads of terms, he persuaded Asertis to reduce the multiples set out in its initial offer.

78. He explained that prior to the Supreme Court's judgment in *PACCAR* a success fee was negotiated which was calculated by reference to a percentage of the damages awarded, which was standard practice at the time. In the light of the *PACCAR* appeal, Asertis proposed the IRR model which was inserted into the LFA by the First Amendment Deed. Mr Astill instructed one of his colleagues to model the impact of the IRR component, and concluded that the proceedings would have to last more than 5 years before that component would become relevant. Until that point the funder's return would be based on multiples of not more than 4.5x.

79. In his view, given the state of the market at that time, pending the *PACCAR* judgment, it would have been very difficult for the PCR to secure replacement funding at that stage at all, let alone on terms more favourable than those Asertis was offering.

80. He described a variety of approaches that he had seen in litigation funding arrangements following the handing down of the *PACCAR* judgment. These included provision for a return on either committed capital or deployed capital, and calculated by reference to an IRR, multiples of capital or an interest rate added to the multiples. Typically, he said, the multiples would rise in six-

monthly increments, with the lowest multiple applying to a recovery achieved in the first six months and the highest multiple applying to a recovery achieved after five and a half or six years. Mr Astill said that he had seen multiples rising from around 3x up to a maximum of between 5.75x and 6.75x the level of funds deployed, depending on the timing of the successful outcome.

***(b) Anthony Maton***

81. Mr Maton is a partner at Hausfeld and the global chair of the Hausfeld network. His statement set out Hausfeld's experience in group actions and funded cases.

82. He recognised the potential for a divergence of interests between solicitors, funders and a class representative. He listed the main safeguards which operate to protect the interests of a claimant class as being: (i) the overarching legal and professional duties owed by a solicitor to their client; (ii) the role of the Tribunal in overseeing the litigation process, in particular relating to certification, distribution and payment of the class representatives' fees and expenses; and (iii) safeguards at the funder level which provide protections for the class representative and claimants.

83. Mr Maton cited a report by Professor Mulheron KC, "A Review of Litigation Funding in England and Wales: A Legal Literature and Empirical Study" (28 March 2024), which noted at p. 125 that:

> "… a conflict of interest on the part of the instructed law firm or barrister – i.e., a conflict re the duty owed to their client, and to the funder – does not appear to arise in theory or practice, given that the law firm/barrister's duty is to their client, and not to the funder."

84. He pointed out that Asertis is a member of the Association of Litigation Funders (**ALF**), whose Code of Conduct contains a number of provisions which aim to ensure that a funder does not take too great a degree of control over a claim or interfere with the other safeguards in place to protect the claimant. These include taking reasonable steps to ensure that the funded party receives independent advice on the terms of the LFA prior to its execution; not taking any steps that cause or are likely to cause the funded party's solicitor or barrister to act in breach of their professional duties; and not seeking to influence the

funded party's solicitor or barrister to cede control or conduct of the dispute to the funder.

85. He explained that his firm was bound to provide advice that is in the best interests of its clients. In his view, it was an oversimplification to assume that the existence of a conditional fee arrangement meant that a conflict of interest arose over and above the position of conflict inherent in any commercial instruction.

#### *(c) Sir Gerald Barling*

86. Sir Gerald Barling is a retired High Court Judge and former President of this Tribunal. He is currently a member (together with Prof Riefa) of the consultative panel which advises the class representative in the *Coll v Alphabet* collective proceedings.

87. He described his experience of Prof Riefa as an extremely competent and engaged consultative panel member, noting that she takes seriously her duties and obligations in that role, reads and digests all relevant documents, and reaches her own independent view on the issues which arise. He concluded that Prof Riefa is more than ordinarily diligent, and that he had no doubt that she would be a suitable class representative.

## G. THE AUTHORISATION CONDITION

88. The first test which the Tribunal must consider under Section 47B(5)(a) of the 1998 Act and Rule 77(1)(a) of the Tribunal Rules is the authorisation condition. The Tribunal may make a collective proceedings order only if it considers that the PCR satisfies this condition. As set out above, in considering whether the test is satisfied the Tribunal must consider whether the PCR would fairly and adequately act in the interests of the class members.

**(1) The Tribunal's concerns following the July hearing**

89. The evidence available to us at the July hearing raised a number of closely-related concerns, which in turn raised questions about whether the PCR met the requirements of the authorisation condition. In particular:

(1) The terms of the LFA as it then was included a success fee that was to be calculated on the basis of an uncapped multiple of the funder's costs, and an unqualified obligation under clause 4.1.17 to seek an order following a successful outcome for the costs, fees and disbursements incurred, including the success fee to be paid out of the award, in effect ahead of any payment to the class. Our concern was not only with the LFA itself, but with the basis on which the PCR had agreed terms which, on the face of it, seemed inimical to the interests of the class. Indeed, clause 4.1.17 could potentially have required the PCR to ask for an order the effect of which would be that the class would not receive any part of the damages award at all.

(2) We were also concerned about the evidence before us on that point. As we have already noted, Riefa 1 stated that the obligation to make an application to the Tribunal for costs, fees and disbursements to be paid from the damages award was limited to *unclaimed* damages (that is to say funds remaining *after* distribution to the class). As Mr Pickford pointed out at the hearing, that suggested that Prof Riefa may have satisfied herself that the arrangements were reasonable on the basis of a misunderstanding of her obligations under the LFA.

(3) We were also concerned about the brevity of the description of the LFA (in its various iterations) in Riefa 1. There did not appear to be evidence of independent detailed consideration of the terms of the LFA, and there was no evidence from Prof Riefa as to her understanding of the multiple changes to the LFA during the course of 2023 and 2024, prior to the July hearing, which substantially changed the terms on which the claim was funded from those in the original LFA. The changes made between the version in the First Amendment Deed and the Restated LFA were

referred to only in very general terms in the witness statement of Ms Jazrawi (see paragraph 63 above). Neither Ms Jazrawi nor Prof Riefa explained what appears to have been the erroneous inclusion, in the First Amendment Deed, of an additional tranche of drawn funds in the success fee calculation, which would have operated significantly to the disadvantage of the class.

(4) There were other indications of a lack of attention to detail, such as the errors in the ATE policy which we have referred to above. Taken individually, they gave us less concern. However, cumulatively, they gave the impression of insufficient control being exercised over the litigation process.

(5) While it is not mandatory for a class representative to have a consultative or advisory panel, it was not clear to us that Prof Riefa alone had the experience or the support needed for the PCR, which was under her sole control, to fulfil the role of the class representative conducting this kind of complex litigation. She had experience of the operation of an advisory body in other litigation, but had no other experience of this sort of litigation, and had not sought the support of an advisory body in this case.

(6) We were also concerned at the confidentiality provisions in the LFA, which required the PCR to keep the terms of the LFA confidential (see paragraph 51 above). The class is likely to have a strong interest in understanding the nature of the rather extensive commitments that their representative is taking on towards the funders of the action. However when the Tribunal questioned the confidentiality of the terms of the LFA during the July hearing, Mr Carpenter KC's response (recorded at paragraph 53 above) was that the PCR was bound by the terms of the agreement with Asertis which felt strongly about the confidentiality provision, and that Prof Riefa would not want to take a position contrary to that of her funder. That raised concerns that the PCR might not always be acting with the interests of class members at the forefront of its mind.

90. Our overall impression was that Prof Riefa was extremely reliant on her legal advisers. We were not convinced that she had properly understood the arrangements into which the PCR had entered on behalf of the Proposed Class Members, and we were concerned about her ability to protect the interests of the class robustly and independently.

91. We reiterate at this stage that our concerns were cumulative. It is not necessarily the case that any one of them would have been fatal to the PCR's application; but taken together they caused us to have considerable doubts about whether we could be satisfied that the PCR would fairly and adequately act in the interests of the class members, for the purposes of the authorisation condition.

**(2) Evidence submitted in advance of the September hearing**

92. The witness statements submitted following the July hearing are summarised above. Although that evidence provided significantly more detail about the negotiation of the LFA, it did little to mitigate the overall impression that the PCR was and remains over-reliant on her advisers, and contained (in our judgment) insufficient evidence of robust and independent scrutiny of the arrangements by Prof Riefa.

93. For example, Prof Riefa appears to have accepted the amendments which incorporated the IRR return into the LFA without inquiry as to whether further efforts might identify better terms or alternative sources of funding. All she says, in that regard, is that the IRR proposal "did not seem unreasonable" and that it was not "immediately obvious that there would be alternative sources of funding".

94. While the terms now agreed in the Third Amendment Deed, following the July hearing, do appear to have been considered by independent costs counsel (Mr Marven KC), Riefa 3 was vague as to Prof Riefa's understanding of how the revised success fee terms compared to the previous terms. Her description of the operation of the new clause 4.1.17 was somewhat ambiguous, and it was not clear from her witness statement what circumstances she envisaged would or

might trigger an application to pay the funder in priority to the class, under clause 4.1.17.1.

**(3) Prof Riefa's evidence at the hearing**

95. Our concerns as to the suitability of Prof Riefa as the PCR were not dispelled at the September hearing. Throughout her cross-examination, we found Prof Riefa to be hesitant and uncertain in her answers. Overall, she did not demonstrate that she had a strong understanding of the arrangements she had entered into on behalf of the PCR.

96. Prof Riefa was, for example, asked by Mr Pickford to explain the discrepancy between the original LFA and her first witness statement, regarding the effect of clause 4.1.17. In responding to the question put to her, Prof Riefa recognised the discrepancy and initially said that her understanding of how the clause worked had been different at the time of her first witness statement. That suggested that her understanding of the clause at the time of her first witness statement had indeed been as she had set out in paragraph 50 of that statement (i.e. that Asertis would be paid out of *unclaimed* damages). She then, however, went on to say that she did understand that "the clause might become operative" (which we take to mean that she did understand that there might be an obligation to apply for payment from the damages award in priority to the class members), but that "it would be an exception, it would be in unlikely circumstances and linked to the way the case law had operated to that point", referring to the judgment of the Court of Appeal in *BT Group v Le Patourel* [2022] EWCA Civ 593. When asked about this, it was not clear what she meant by that reference:

> "Q: You refer to the case of *Le Patourel*. It is right, isn't it, that in that case the Court of Appeal didn't see an inherent problem with the funder being paid from damages, did they?
>
> A: I am not sure I can answer that question. I cannot claim that I know the case well enough."

97. It is therefore unclear, from Prof Riefa's answers on this point, what her understanding of the clause was at the time of her first witness statement. Indeed she subsequently admitted that "I am not sure that I remember clearly what I was thinking".

98. Prof Riefa was also asked by Mr Pickford to explain why she had (under the Third Amendment Deed) agreed a new version of the LFA which no longer included an IRR calculation. She told us that she had not necessarily thought that the returns to the funder under the IRR model would be excessive, but that the Tribunal's concerns needed to be taken into account. When it was put to her that, under certain circumstances, the IRR under that model would go over 1200% she replied:

> "That's not the way I understood the IRR to work, but also I am not a specialist in the way those things are calculated. … But my team seemed to have had a very different view of how the IRR would operate compared to yours."

99. Prof Riefa was then asked about whether the changes to the LFA between the July hearing and the September hearing were more or less favourable to Asertis. Her attention was drawn to the fact that the multipliers on which the success fee was to be calculated had increased between the two agreements. In the exchange that followed she did not appear to have a solid understanding of the terms of the two agreements, the differences in the effects of those terms, and whether the amendments that she had agreed were to the benefit of the class.

100. Mr Mallalieu KC, for his part, asked Prof Riefa about the changes made to clause 4.1.17 under the Third Amendment Agreement. She was asked to identify the circumstances in which she would consider it appropriate for the class representative to apply for the funder to be paid in priority to the members of the class. After some discussion, she suggested that it would be appropriate if the PCR was not as successful as hoped, or not successful at all. She did not appear to understand that if the claim was unsuccessful the clause would not apply at all. Ultimately, she could not explain why it might be in the best interests of the class for the funder to be paid in priority to the class.

101. Our overall impression was that Prof Riefa did not really understand how the new clause 4.1.17.1, with the reference to "appropriate in all the circumstances", would operate in practice. That is a matter of considerable concern. While the inclusion of the "appropriateness" qualification may operate in the interests of the class, it does so by placing an increased burden on the PCR to balance competing interests. Such an exercise will require a robust and independent

PCR able to form its own views. However, under cross-examination, Prof Riefa failed to persuade us that she had properly understood this provision and was able to carry out such an exercise.

102. Moreover, in the event that Prof Riefa were to decide that it was "appropriate in all the circumstances" to make an application under that clause, she could not answer the question of who would then act in the interests of the class in opposing the application (or at least considering whether to do so). She initially responded that the consultative panel would provide representation for the class, but could not explain how that would work:

> "Q: So you would expect, on an application of that kind that the class' interest would be protected by the other – the members of the consultative panel to the PCR that is making the application, standing up and saying that it disagreed?
>
> A: I think for me to be able to figure the clause out we need to rely on the advice of the legal team."

103. Finally, and as a related point, although Prof Riefa claimed to have understood the arrangements under which Hausfeld would get paid, she did not appear to have given thought to the point that making an application for the funder to be paid in priority would also benefit Hausfeld, for the reasons explained at paragraph 41 above, such that a conflict of interest might then arise (and indeed *already* arose) in taking advice from Hausfeld on this clause.

### (4) Overall assessment of the evidence

104. In conclusion, the written and oral evidence of Prof Riefa has not convinced us that she has a strong understanding of the nature and extent of her responsibilities to protect the interests of the class she seeks to represent. These are complex and high-value proceedings in which the PCR plays a central and crucial role. The PCR has already made important commitments on behalf of the Proposed Class Members, and if the case proceeds the PCR will need to continue to take important and complex decisions in managing the litigation. Prof Riefa appears to have considered that the steps taken following the July hearing addressed and ameliorated the concerns raised at that hearing. But her evidence at the September hearing demonstrated that she did not have a

sufficient understanding of the consequences of the amendments to the arrangements which she had agreed, such that she would be able to form a considered and informed view as to whether they were in the interests of the class or not.

105. We accept that a PCR will inevitably need to rely to a considerable extent on the advice given by its solicitors, who may be acting on a conditional fee arrangement. Furthermore, the costs of collective proceedings are such that they invariably now require third party litigation funding, as noted by Green LJ in *Gutmann v First MTR*, cited at paragraph 27 above. The PCR is entitled to take its solicitors' advice on the terms of the funding arrangements on offer.

106. However, in order to meet the authorisation condition, the PCR – whose representative is in this case its sole director, Prof Riefa – must demonstrate that it has a clear view of the interests of the class and can engage robustly and independently with advice received. In order to do so it must at the very least have a good understanding of (a) the effect of the terms being offered, and (b) the overall context in which it is being advised, including the position of its legal advisers, and the risks of any conflicts of interest arising from that position. In our view, the evidence of Prof Riefa falls well short of demonstrating a good understanding of either of those things.

107. We note that Prof Riefa has indicated in Riefa 3 that she is "content to appoint a consultative panel to provide an additional layer of advice going forward if these Proposed Proceedings are certified", and has identified one member who she intends to appoint to that panel. This is, in our judgment, much too late. If the Tribunal is to take account of the existence of a consultative or advisory panel, for the purposes of assessing whether to make a collective proceedings order, full details of that panel need to be put before the Tribunal prior to the certification hearing. It is not sufficient for the PCR to identify a single potential panel member at such a late stage of the certification proceedings.

## (5) Our approach to the LFA

108. At the July hearing Apple challenged the level of Asertis' return under the LFA and, in particular, the IRR of 45% as "manifestly excessive and disproportionate". Amazon raised similar points and attacked the proposed return to Asertis as "unfairly large and uncompetitive". In particular, it said that the effect of compound interest at such large rates gives rise to the potential for extraordinary rewards to the funder, vastly out of kilter with the risks that it is taking.

109. At the September hearing, Apple and Amazon maintained their concerns, pointing out that the IRR component had been replaced by multipliers which are now a total of up to 5.75x the drawn funds. Both Apple and Amazon contended that this could, under certain scenarios, result in an even higher return than under the previous versions of the LFA. Both Proposed Defendants also expressed concern that there was no evidence before the Tribunal that these terms had been robustly market tested, to ensure that they were the best terms available to the PCR for these Proposed Collective Proceedings.

110. We agree that the Tribunal should be reluctant to venture into an assessment of the commercial terms of the LFA unless they are sufficiently extreme to warrant calling out. We have received evidence about the uncertainty of the litigation funding market in the aftermath of the Supreme Court's judgment in *PACCAR*. Having regard to those points, and despite the submissions of both Proposed Defendants, we have not concluded in this case that the funding terms are, in themselves, sufficiently extreme to warrant calling out. We also note that in at least one previous case (*Gutmann v Apple*) the Tribunal certified an LFA which contained payment priority provisions similar to those of clause 4.1.17.

111. Nevertheless it may, in an appropriate case, be relevant for the Tribunal to consider the circumstances in which the LFA was agreed. We have done so in this case for the reasons set out above, in particular our concerns with the accuracy and completeness of the evidence put before us at the July hearing. We have set out above the points on which our understanding of the process

followed in this case contributes to our assessment of whether the authorisation conditions are satisfied.

112. Our concerns are exacerbated by the confidential nature of the LFA. Although Asertis has since waived the confidentiality requirement in relation to the calculation of the funders return and (it now appears) the provisions of clause 4.1.17, a PCR enters into an LFA so as to enable it to act in the interests of the members of the class. As with the comments of the Tribunal at [37] of *Gormsen v Meta*, we can see no justification in withholding any of the terms of the LFA from the scrutiny of the public and in particular the potential class members. In an opt-out class action it is crucial that sufficient information is made available to the class members, so as to enable each of them to make an informed decision about whether to opt out. The Tribunal was struck by the fact that Prof Riefa has only engaged with the confidentiality issue in terms of the need to respond to the Tribunal's concerns. She is clearly alive to the interests of the funder. She does not, however, appear to have considered sufficiently where the interests of the class members lie.

**(6) Conclusion on the authorisation condition**

113. Our conclusion is that we do not consider that the PCR has satisfied the authorisation condition. On that basis we are not able to make a collective proceedings order in this case.

114. Our key concern in this case is that Prof Riefa has not demonstrated sufficient independence or robustness so as to act fairly and adequately in the interests of the class. We reach that decision on the basis of a cumulative assessment of the matters that we have set out above.

115. We do not wish to be harsh to Prof Riefa, who is no doubt an accomplished scholar in her field. But these are very complex proceedings, for a huge class, involving vast amounts of money. A class representative is not, and cannot be, merely a figurehead for a set of proceedings being conducted by their legal representatives, but must act as the independent advocate for the class. Someone who chooses to act as a class representative therefore carries a heavy

responsibility to ensure that the proceedings are conducted, in all respects, in the best interests of the class. The Tribunal will accordingly hold them to a high standard.

116. As we have noted at paragraph 5 above, this is a case where the PCR became involved at a relatively late stage, after the solicitors had identified a funder for the proceedings that were contemplated. The Tribunal understands that this is a quite common feature of the way in which collective proceedings are conducted. The Tribunal does not criticise this, but the case does underline the importance of the process by which those promoting the proceedings identify and recruit the PCR.

117. We emphasise that we are not seeking to impose any specific conditions on the types of PCRs that are put forward in collective proceedings. Nor are we seeking to impose specific obligations on future PCRs as to the manner in which funding arrangements are negotiated, and we are certainly not suggesting the straitjacket of a "continual procurement exercise" (contrary to the suggestion of Mr de la Mare at the September hearing). The circumstances of individual cases are likely to be different, and it is for each PCR to demonstrate, to the satisfaction of the Tribunal, that it is suitably qualified to act for the class, and that the manner in which it has approached the funding arrangements reflects sufficient regard to the interests of the class members. In the present case, for the reasons given above, we do not consider that the PCR has done so.

118. As the PCR has failed to satisfy the authorisation condition, the collective proceedings order will not be granted.

## H. THE ELIGIBILITY CONDITION

119. The second condition which the PCR must meet in order for the Tribunal to make a collective proceedings order is the eligibility condition set out in section 47B(5)(b) of the 1998 Act and Rule 77(1)(b) of the Tribunal Rules. It is by now well established that this requires the PCR to put forward a methodology setting out how the issues that it has identified will be determined or answered at trial,

which must satisfy the so-called *Microsoft* test, referring to the judgment of the Canadian Supreme Court in *Pro-Sys Consultants v Microsoft* [2013] SCC 57.

120. In their submissions, the Proposed Defendants advanced substantial criticisms of both the PCR's case and the methodology advanced by Dr Pike. However, neither set of Proposed Defendants resist certification on the basis of the eligibility condition; rather, they merely note that they will pursue those criticisms if and when the claim is certified.

121. Our view is that this is the correct approach in this case, having considered Dr Pike's evidence and the submissions of the Proposed Defendants on the substance of the claim. However, in the light of our decision on the authorisation condition, it is not necessary for us reach a conclusion on the eligibility condition.

## I. AMENDMENTS TO THE CLAIM FORM

122. At the first certification hearing, an entire morning was taken up with argument concerning a proposed amendment to the Proposed Collective Proceedings claim form put forward by the PCR. The original class definition proposed by the PCR was:

> "All Purchasers (other than Excluded Persons) who Purchased one or more Apple Products at Retail Level in the United Kingdom during the Relevant Period".

123. The Relevant Period for the purpose of the claim was defined as the period from 31 October 2018 to the date of the final judgment or earlier settlement of the proceedings.

124. In light of the Tribunal's judgment in *Alex Neill Class Representative v Sony Interactive Entertainment Europe* [2023] CAT 73, the PCR proposed to amend the Collective Proceedings claim form, so that the proposed class consisted only of those who had purchased Apple products from online and physical retail stores in the United Kingdom between 31 October 2018 and the date on which the claim form was amended.

125. The PCR's claim is, however, that the alleged breach of competition law is a continuing one. On that basis, in amending the Collective Proceedings claim form, the PCR sought to include loss suffered by the class up to the point of judgment (or settlement), even though membership of the class was determined by reference to an earlier date.

126. Following the discussion of this point at the July hearing, and the objections of the Proposed Defendants, the PCR put forward a further revised claim form which limited both membership of the class and the losses subject to the claim to the period ending on the date on which the claim form was amended. That resolved the dispute between the parties. It is unfortunate that considerable Tribunal time was taken up on a point which the PCR ultimately conceded.

## J. DISCLOSURE REQUEST

127. On 9 August 2024, Amazon applied to the Tribunal for an order under Rule 89 of the Tribunal Rules that the PCR give disclosure and inspection of all advice given by Hausfeld to the PCR in connection with the funding arrangements put in place for the purposes of these proceedings, including advice as to the appropriateness of those arrangements in light of the certification criteria. Amazon asserted that the PCR had waived privilege over that advice which therefore fell to be disclosed.

128. That application was dismissed by Order of the Chair dated 17 September 2024. Paragraph 6.28 of the Guide provides that:

> "The Tribunal does not encourage requests for disclosure as part of the application for a CPO. However, where it appears that specific and limited disclosure or the supply of information (cf Rule 53(2)(d)) is necessary in order to determine whether the claims are suitable to be brought in collective proceedings (see Rule 79(1)), the Tribunal may direct that such disclosure or information be supplied prior to the approval hearing."

129. In our view the application was neither necessary in order to determine whether the claim was suitable, as is clear from this decision; nor was it specific and limited. The Tribunal is not concerned with the intricacies of the PCR's commercial arrangements, but with the question of whether the PCR has the

appropriate expertise and is supported by appropriate advice. No issue arises in relation to the substance of the advice given to the PCR.

## K. CONCLUSION

130. For the reasons set out above, we refuse the application for certification of the Proposed Collective Proceedings. We invite the parties to provide submissions on the form of the order.

131. This judgment is unanimous.

| Mrs Justice Bacon<br>Chair | Anthony Neuberger | Charles Bankes |
|---|---|---|

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

Date: 14 January 2025