IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

BETWEEN:

DR RACHAEL KENT

Class Representative

\- v -

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

Defendants

\- and -

THE COMPETITION AND MARKETS AUTHORITY

Intervener

REASONED ORDER

UPON the Tribunal having granted the CPO Application on 5 May 2022

AND UPON receipt of an application by Max Schaefer (the "Applicant") for permission to opt out of these collective proceedings by the letter annexed to this Order on 30 November 2022

AND UPON the Tribunal having considered the application on the papers filed with the Tribunal

IT IS ORDERED THAT:

1. Permission is granted under Rule 82(2) of the Competition Appeal Tribunal Rules for the Applicant to opt out of these collective proceedings.

REASONS

1. These collective proceedings concern a Class defined in a Collective Proceedings Order date 29 June 2022 (the "Order") as comprising "All iOS Device users who, during the Relevant Period, used the UK storefront of the App Store and made one or more Relevant Purchases". The Applicant is a member of the Class.

2. The Applicant is a commercial barrister who practises in, among other fields, competition law. He did not opt out of these collective proceedings by the date specified in the Order, which was 9 September 2022.

3. On 28 November 2022, the Tribunal handed down a judgment in the case of *McLaren v MOL and Ors* [2022] CAT 53, in which the Tribunal made observations concerning a number of defendants in a collective action who had written directly to class members (as opposed to the class representative). The Tribunal held:

   > *14. We consider that the Rules preclude any communication between a defendant or that defendant's legal representative and a member (actual or contingent) of a class identified or identifiable under a collective proceedings order made by the Tribunal where that communication concerns those collective proceedings, unless the Tribunal otherwise orders or (subject always to the Tribunal's supervisory jurisdiction) the parties agree.*

4. The Applicant says he considers himself materially prejudiced by membership of the Class, by reason that his friends and colleagues who are acting in these proceedings will need to "engage in policing their interactions" in order to comply with the judgment in *McLaren*.

5. Having become aware of this circumstance, the Applicant seeks permission to opt out of these collective proceedings under rule 82(3). Rule 82 provides:

   > *82(1) A class member may on or before the time and in the manner specified in the collective proceedings order:*

> *(a) in the case of opt-in collective proceedings, opt into the collective proceedings; or*
>
> *(b) in the case of opt-out collective proceedings, either*
>
> > *(i) opt out of the collective proceedings; or*
> >
> > *(ii) if not domiciled in the United Kingdom at the domicile date, opt into the collective proceedings.*
>
> *(2) A class member who does not opt in or opt out in accordance with paragraph (1) may not do so without the permission of the Tribunal.*
>
> *(3) In considering whether to grant permission under paragraph (2), the Tribunal shall consider all of the circumstances, including in particular*
>
> > *(a) whether the delay was caused by the fault of that class member; and*
> >
> > *(b) whether the defendant would suffer substantial prejudice if permission were granted.*

6. The Applicant submits that any delay is excused by him not being aware of the prohibition in *McLaren* until the judgment was handed down and that there can be no conceivable prejudice to the Defendants (or any other person), given the size of the class and the nature of his interest.

7. In *McLaren*, the solicitors for many of the defendants to a collective action wrote to a number of large businesses concerning their participation as class members in the proceedings. The letters warned the recipients that if they did not opt out of the proceedings then there would likely be applications by the defendants against them for disclosure, which would be expensive and time consuming.

8. The prohibition expressed in [14] of *McLaren* is therefore designed to prevent the undermining of the collective proceedings regime by communications which should be with class representatives, not class members, or which should not take place at all.

9. It is obvious that the prohibition in *McLaren* relates only to the interest the class member has in the collective proceedings. Otherwise, the communication would not concern the collective proceedings. It is therefore difficult to see how the prohibition in *McLaren* will affect the Applicant in the way he suggests, given that it extends only to communication with a class member concerning his interest in the collective proceedings. It seems highly unlikely that the Applicant's friends or colleagues would inadvertently find themselves making such a communication and nor is there any obvious reason why they should wish deliberately to do so.

10. Nonetheless, it is a matter for the Applicant to assess the materiality of the risk he is willing to take in that regard. I accept at face value the submission that the Applicant would have opted out of the collective proceedings had he been aware of the prohibition in *McLaren* prior to 22 September 2022. I also accept that there is no risk of prejudice to any party. Accordingly, I grant the permission requested.

Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 11 January 2023
Drawn: 11 January 2023