



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1601/7/7/23

BETWEEN:

DR. SEAN ENNIS

Applicant /
Proposed Class Representative

- v -

- (1) Apple Inc**
- (2) Apple Distribution International Ltd**
- (3) Apple Canada, Inc**
- (4) Apple Pty Limited**
- (5) Apple Services LATAM LLC**
- (6) iTunes KK**
- (7) Apple (UK) Ltd**
- (8) Apple Europe Ltd**

Respondent/
Proposed Defendants

REASONED ORDER (SERVICE OUT OF THE JURISDICTION)

UPON the Proposed Class Representative’s application dated 25 July 2023 pursuant to Rule 31 of the Competition Appeal Tribunal Rules 2015 (the “**Rules**”) for permission to serve the collective proceedings claim form and supporting documents on the First to Sixth Proposed Defendants out of jurisdiction (the “**Service Out Application**”)

AND UPON the Proposed Class Representative’s application dated 25 July 2023 pursuant to Rule 111(2) for an order permitting and specifying an alternative method or place of service (the “**Alternative Service Application**”) (the Service Out Application and the Alternative Service Applications together being the “**Applications**”)

AND UPON the Tribunal’s Order made 22 August 2023 extending the deadline for the Seventh and Eighth Proposed Defendants to contest jurisdiction until the deadline for any of the First to Sixth Proposed Defendants to apply to contest jurisdiction (the “**Jurisdiction Challenge Deadline Order**”)

AND UPON reading the first witness statement of David Gallagher made on behalf of the Proposed Class Representative in support of the applications and the accompanying exhibit

IT IS ORDERED THAT:

1. The Proposed Class Representative (“**the PCR**”) has permission to serve the Collective Proceedings Claim Form and supporting documentation and the Applications and supporting documentation by the following methods and at the following places:

(a) by courier to the following addresses:

Doug Watson
Gibson Dunn & Crutcher LLP
Telephone House
2-4 Temple Avenue
Temple
London EC4Y 0HB
United Kingdom

Apple Inc
One Apple Park Way
Cupertino
California
USA

(b) and in addition, by email to the following addresses:

PDoris@gibsondunn.com
Dwatson@gibsondunn.com
Dwarner@gibsondunn.com

2. The PCR shall serve the Collective Proceedings Claim Form and supporting documentation and the Applications and supporting documentation by each of the methods in paragraph 1 above. Such documents shall be deemed served on each of the Proposed Defendants on the latest date on which service is effected by courier to either of the addresses in paragraph 1(a) above.

3. The Proposed Defendants shall each have 28 days after service of the Collective Proceedings Claim Form on them to file an acknowledgment of service in the form provided by the Registrar.
4. The PCR shall take steps to serve the Collective Proceedings Claim Form and supporting documentation, and the Applications and supporting documentation, as soon as practicably possible in accordance with paragraphs 1 and 2 above.
5. The Proposed Defendants may apply to have this order set aside or varied but must make any such application no later than the latest date by which any of the Proposed Defendants may dispute the Tribunal's jurisdiction (as set out under Rule 34 in the case of the First to Sixth Proposed Defendants, and as extended by the Jurisdiction Challenge Deadline Order in the case of the Seventh and Eighth Proposed Defendants). If any Proposed Defendant makes any application to have this order set aside or varied and also makes an application to dispute the Tribunal's jurisdiction, those two applications will be heard and determined together. Any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc.* [2021] CAT 4, at [3].
6. The Costs of the Applications are reserved.

REASONS

The Proposed Defendants

7. The Proposed Defendants are members of the Apple corporate group. The First Proposed Defendant, Apple Inc, is a Californian registered corporation whose registered address is One Apple Park Way, Cupertino, California 95014 and the ultimate holding company of all subsidiaries and businesses within the Apple corporate group including the Second to Eighth Proposed Defendants.
8. The Second Proposed Defendant, Apple Distribution International Ltd, is a company incorporated in Ireland. The Third Proposed Defendant is a company incorporated in Canada. The Fourth Proposed Defendant is a company incorporated in Australia. The Fifth Proposed Defendant is a corporation organised and existing in the United States of America. The Sixth Proposed Defendant is a corporation

organized and existing in Japan. The Seventh and Eighth Proposed Defendants are companies incorporated in the United Kingdom.

Service outside the jurisdiction

9. I consider it likely that the proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Rules. This is on the basis that

- (a) the PCR and two of the Proposed Defendants are based in England;
- (b) it is expected that most members of the proposed class will be domiciled in England;
- (c) the applicable law should be the law of England and Wales, by virtue of the application of Article 6(3)(a) of Regulation (EC) No 864/2007 of 11 July 2007 (Rome II) and, after 11pm on 31 January 2020, the retained elements of Rome II.

10. Accordingly, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18].

11. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, the Application must satisfy the following requirements:

- (a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.
- (b) There is a good arguable case that the claim falls within one of the paragraphs or “gateways” set out in CPR Practice Direction 6B (“CPR PD6B”) at paragraph 3.1. “Good arguable case” means that the claimant has the better of the argument on whether the claim comes within the gateway(s) relied upon. Insofar as this involves an issue of fact, the claimant must supply a plausible evidential basis for the application of the gateway.

- (c) In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the claim and the Tribunal ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

(1) Serious issue to be tried

12. By the collective proceedings claim form, the PCR seeks to commence opt-out collective proceedings under section 47B of the Competition Act 1998 (the “Act”). The claims which the PCR seeks to bring are for loss and damage caused by Apple’s breach of statutory duty by its infringements of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) and section 18 of the Act.
13. Apple is well known as the creator of devices such as the iPhone and the iPad, and of iOS, the proprietary mobile operating system which comes pre-installed on those devices. Apple is also the creator of the App Store, which again comes pre-installed on those devices, and which functions as the exclusive gateway through which iOS device users may purchase apps.
14. The case advanced by the PCR is that Apple is dominant on the iOS app distribution market and has abused its dominance by charging prices in the form of the commission charged on purchases of apps from the App Store, and on purchases of additional content or subscriptions within those apps which are excessive and unfair, the rate of commission typically being 30%. The PCR also alleges that Apple has applied an unfair system of pricing, the commission being effectively inescapable, and the burden of the commission falling on a mere 16% of app developers. The PCR seeks to bring these proceedings on an opt-out basis on behalf of all UK-domiciled iOS app developers that have sold apps through the App Store.
15. I am satisfied, on the basis of the matters set out in the first witness statement of David Gallagher, that there is a serious issue to be tried on the merits of this claim. The expert report of Joe Perkins of Compass Lexecon, which has been filed with the collective proceedings claim form, sets out a detailed analysis of market definition, dominance, and abuse, as well as a proposed approach to the quantification of aggregate damages and subsequent distribution of damages. This analysis supports the PCR’s case. I note that Apple’s conduct in charging commissions on purchases of apps from the App Store, and on purchases of

additional content or subscriptions within those apps which lies at the heart of this claim, have been the subject of proceedings in various jurisdictions, including the Netherlands and South Korea where Apple's commissions have been condemned on the basis *inter alia* that they are unfair.

16. I also note that proceedings in *Kent v Apple Inc* Case No 1403/7/7/21 ("*Kent*") are currently before the Tribunal, and concern alleged infringements of competition law by Apple undertakings which include the infringement alleged in this case, namely that Apple abused its dominant position in a market for the distribution of iOS apps to iOS device users by charging unfair purchase or selling prices, in the form of the 30% commission. In *Kent* the claim is being brought on behalf of UK consumers on the basis that app developers passed on to consumers the unfair and unlawful commission that they were charged by Apple. The Tribunal decided in *Kent* that the claims in that case had a reasonable prospect of success.

(2) Good arguable case as to jurisdictional gateway

17. The PCR relies on the following gateways in Practice Direction 6B of the CPR:
- (a) The claim is in tort and damage and has been sustained by the proposed class members within the jurisdiction (gateway 9(a)).
 - (b) The claim is in tort and is governed by the law of England and Wales (gateway 9(c)).
 - (c) The proceedings have been properly served on the Seventh and Eighth Proposed Defendants (as "anchor defendants"), there is between the proposed class members and the anchor defendants a real issue to be tried, and the other Proposed Defendants are necessary or proper parties to that claim (gateway 3).

Gateway 9(a)

18. I am satisfied that there is a good arguable case that the proceedings fall within gateway 9(a) for the following reasons.

- (a) Gateway 9(a) applies where “A claim is made in tort [and] damage was sustained, or will be sustained, within the jurisdiction”.
- (b) The claims in these proceedings are for abuse of a dominant position contrary to section 18 of the Act and article 102 TFEU. They are therefore claims in tort within the meaning of gateway 9: *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat), [2018] FSR 27, at [92] (“*Qualcomm*”).
- (c) In accordance with the decision of Morgan J in *Qualcomm* at [97], a claimant in a competition case can say that it has suffered damage in this jurisdiction if either (i) it is incorporated in the jurisdiction and has paid an overcharge which it has not passed on or (ii) irrespective of its place of incorporation, it has passed on the overcharge and lost sales in the market in this jurisdiction as a result.
- (d) The class definition requires members of the proposed class to be UK-domiciled. The vast majority of persons in the class are likely to be either UK-domiciled natural persons or UK-incorporated legal persons. The PCR alleges that proposed class members have paid excessive and/or unfair commissions on sales made through the App Store, and that those commissions would have been lower absent Apple’s abuse. This analysis is supported by Mr Perkins’ report. The PCR does not allege that the overcharge has been passed on and nor does the economic analysis in Mr Perkins’ report. However, Mr Perkins does provide an illustrative example based on a pass-on rate of 20% which supports the allegation that sales may have been lost. In either case (pass on, or no pass on) Mr Gallagher’s witness statement supports the conclusion that the loss of revenue would have been felt in the form of a reduction in receipts into developers’ bank accounts in the jurisdiction.
- (e) I note that at [99] of *Qualcomm* Morgan J said that if the loss consists of paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought. In the present case, commission was charged at the point of sale rather than purchase, which could in principle be anywhere in the world, rather than in England and Wales. However, I accept

Mr Gallagher's argument that the proposed class members carry on business in the UK and that a substantial number of customers to whom sales were made would have been in the UK so that, taking the place of sale as the place where damage was sustained, a significant amount of damage was sustained here.

Gateway 9(c)

19. I am satisfied that there is a good arguable case that the proceedings fall within gateway 9(c) for the following reasons.

- (a) Gateway 9(c) applies where "A claim is made in tort [and] the claim is governed by the law of England and Wales".
- (b) According to Article 6 of Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), (i) the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected; and (ii) the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
- (c) The product market in question is the market for the distribution of third-party iOS apps, the geographical scope of which is the UK. That is supported by the economic analysis in Mr Perkins' report. Therefore, (i) the country where competitive relations are, or are likely to be, affected and (ii) the country where the market is, or is likely to be, affected are both the UK, and, in the case of most of the app developers in question, England and Wales.

Gateway 3

20. I am satisfied that there is a good arguable case that the proceedings fall within gateway 3.

- (a) Gateway 3 applies where "A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise

than in reliance on this paragraph) and – (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.”

- (b) There are therefore three requirements: (i) there must be at least one anchor defendant served otherwise than via gateway 3; (ii) there must be “a real issue which it is reasonable for the court to try” between the claimant and the anchor defendant(s); and (iii) the other defendants must be “necessary or proper” parties to the claim.

(i) Service on anchor defendants

- (c) As to the first requirement, the anchor defendants for the purposes of this gateway are the Seventh and Eighth Proposed Defendants. The PCR intends to serve the collective proceedings claim form on them as of right in the UK at their registered office addresses.

(ii) Real issue to be tried

- (d) As to the second requirement (real issue to be tried), the cases of *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11, [2016] *Provimi Limited v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm), [2003] 2 All ER (Comm) 683, at [31] and *JJH Enterprises Ltd v Microsoft Corp* [2022] EWHC 929 (Comm), at [37] support the PCR’s case that abusive conduct could be attributed to the Seventh and Eighth Proposed Defendants on the following alternative bases: (i) they knowingly and intentionally participated in and/or implemented the infringements; (ii) they themselves lacked some requisite knowledge or intention, but that knowledge or intention was present in another Apple entity and is therefore treated as theirs, as part of the same, single undertaking; (iii) even in the absence of knowledge or intention, they could be liable on the basis that they were part of the infringing undertaking. In *JJH Enterprises Ltd v Microsoft Corp* [2022] EWHC 929 (Comm), at [37], Picken J said as follows (with particular reference to *Provimi* and *case C-882/19 Sumal SL v Mercedes Benz Trucks España SL* [2021] Bus LR 1755):

“[counsel for the claimant] was right (or at least, in my view, was sufficiently arguably right for present purposes bearing in mind the summary nature of the application(s) made by [the second defendant]) when she submitted that being part of an undertaking which has infringed competition law is sufficient in and of itself to fix a legal entity with liability; it is not necessary, therefore, to allege that [the second defendant] itself (as opposed to the ‘undertaking’ of which it forms part) did anything to infringe.”

- (e) As to the first of the three bases referred to above, Mr Gallagher’s witness statement includes evidence of job advertisements indicating that Apple employs staff in the UK who support the management, content production, and technical engineering behind the App Store. It is reasonable to expect that the staff hired and working in the UK are employed by, or otherwise linked to the Seventh and Eighth Proposed Defendants. The witness statement also refers to the Seventh and Eighth Defendants’ strategic reports which refer to their services being provided to group affiliates. This evidence supports the PCR’s case that the Seventh and Eighth Defendants participated in the abuse.
- (f) As to the second basis for attributing liability to the Proposed Seventh and Eighth Defendants (requisite knowledge/intention present in other Apple entities and therefore to be treated as theirs, as part of the same single undertaking), Mr Gallagher’s witness statement sets out evidence of the active involvement of the First to Sixth Proposed Defendants in the abuse. In particular, the First Proposed Defendant set out the terms of the DPLA and the First to Sixth Defendants are appointed as app developers’ agents, entitled to collect fees and deduct commission.
- (g) As to the third basis for attributing liability to the Proposed Seventh and Eighth Defendants (part of the infringing undertaking), the Seventh and Eighth Proposed Defendants are part of the Apple Undertaking and are ultimately wholly owned by the First Proposed Defendant.

(iii) Necessary or proper parties

- (h) I am satisfied that the PCR has a good arguable case that the First to Sixth Proposed Defendants are necessary or proper parties to the claim on the grounds that they implemented the abuse and, in any event, as part of the Apple undertaking, they are independently liable for the abuse.

Forum

21. The following factors support the PCR's contention that England and Wales is the proper forum in which to bring the claims:
- (a) To the extent that the claims pass through gateway 9(c), the governing law is the law of England and Wales.
 - (b) The proposed opt-out class is made up of approximately 1,500 to 1,600 members, all of which are by definition UK-domiciled.
 - (c) The case is concerned with abuse of a dominant position in a relevant geographic market defined as the UK and the consequences of that abuse on UK-domiciled businesses.
 - (d) Witnesses that may be called on behalf of the class are likely to be (or to be related to) proposed class members, and so are highly likely to be present in this jurisdiction.
 - (e) Documentary evidence presented on behalf of the class is likely to be in the possession of proposed class members, and so is likely to be present in this jurisdiction.
 - (f) The PCR's legal representatives and experts are all based in the UK.
 - (g) Many of the proposed class members, around 600 of the c1,566, are small- or medium-sized businesses that are estimated to have suffered damages of less than £10,000. These class members are unlikely to have the resources to litigate abroad. By contrast, Apple is a very large multinational with UK subsidiaries, and is well able to litigate in this jurisdiction. If a multinational company trades on a global scale, it can expect to have to bring evidence to defend its conduct in courts around the world: see e.g. *Unlockd Ltd v Google Ireland Ltd* [2018] EWHC 1363 (Ch) and *Streetmap.EU Ltd v Google Inc* [2016] EWHC 253 (Ch).
 - (h) Mr Gallagher's evidence is that the proposed class members would likely be barred from recovering their losses in a US action as it is difficult for

claimants in US claims to seek damages for losses not sufficiently connected to the US or for infringements of non-US law (see further at paragraph 23 and following below).

- (i) The unfair pricing abuse pursued in *Kent* concerns a similar abuse to the abuse in the present case and is proceeding in this jurisdiction (before this Tribunal). It would not be efficient, and would give rise to a greater risk of inconsistent outcomes, for this case to be decided in a different forum, particularly since a CPO has been certified in Kent, and the claims in that case will now proceed to trial.

- 22. Pursuant to the PCR's duty of full and frank disclosure, Mr Gallagher has, however, drawn attention to the jurisdiction provision at Clause 14.19 of the DPLA:

“Any litigation or other dispute resolution between You and Apple arising out of or relating to this Agreement, the Apple Software, or Your relationship with Apple will take place in the Northern District of California, and You and Apple hereby consent to the personal jurisdiction of and exclusive venue in the state and federal courts within that District with respect any such litigation or dispute resolution. This Agreement will be governed by and construed in accordance with the laws of the United States and the State of California, except that body of California law concerning conflicts of law.”

- 23. Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, very strong reasons are required to allow one of the parties to go back on this agreement; *Mackender v Feldia* AG [1967] 2 Q.B. 590; *The Eleftheria* [1970] P 94; *Jurisdiction and Arbitration Agreements and their Enforcement* 3rd Ed para 10.05 and following.

- 24. Mr Gallagher argues that the jurisdiction clause, which was not freely negotiated, should not preclude the grant of permission to serve out in this case for the following reasons. First, based on advice from US Counsel, he contends that unfair pricing is not an offence under US or Californian antitrust law and that consequently the PCR would not be able to prosecute a challenge to Apple's commissions as an unfair or exploitative pricing abuse under those laws. Although Courts may find a violation of California's Unfair Competition Act if there is other misconduct on the part of the defendant, such as misleading consumers or if the price is substantively and procedurally unconscionable. However, the claims in this case do not depend on or include additional allegations of that nature.

25. Second, in addition to the non-availability of a cause of action under US antitrust law concerning unfair/exploitative pricing, Mr Gallagher's evidence is that the US Foreign Trade Antitrust Improvements Act (which affects claims under California law as well) significantly restricts the extraterritorial scope of US antitrust law. The result is that a claim based on US antitrust law would not generally cover sales made on non-US versions of the App Store (although it would probably cover sales made on the US version).
26. Third, according to Mr Gallagher's witness statement, a US court would be very unlikely to hear a claim based on non-US competition law. A Californian court would probably decline to exercise jurisdiction over a foreign-law competition claim.
27. Fourth, it is desirable, to avoid inconsistent outcomes and unfairness, that the Tribunal should deal with both *Kent* and the present claims together rather than having parallel proceedings concerning the claims in overseas jurisdictions.
28. I note that in *Epic Games Inc v Apple Inc* [2021] FCAFC 122, a case referred to in the Collective Proceedings Claim Form, the Federal Court of Australia refused to grant a stay of proceedings alleging breaches of Australian competition law which had been brought in Australia contrary to an exclusive jurisdiction clause in the same terms as the clause in this case. This was on the basis of public policy considerations in favour of the Federal Court determining issues of Australian competition law.
29. I am satisfied that, on the basis of Mr Gallagher's evidence, that if the proposed members were compelled to sue in California, they would suffer serious prejudice and that in these circumstances England is clearly the appropriate forum for the trial of the claims in these proceedings, notwithstanding the existence of the jurisdiction clause. It will be up to Apple to decide whether it wishes to apply to set aside such service, including by relying on the jurisdiction clause in the DPLA: *Epic Games Inc v Apple Inc* [2021] CAT 4, at [148] citing *AstraZeneca UK Ltd v Albemarle International Corp* [2010] EWHC 1028 (Comm) and *Konkola Copper Mines plc v Coromin Ltd* [2006] EWCA Civ 5).

Alternative Service

30. Rule 111(16) provides as follows:

“With regard to a claim form or collective proceedings claim form to be served on a defendant outside the jurisdiction (and subject to rules 31, 33(2) and 76(2)), the claimant or person applying for a collective proceedings order shall serve the claim form or collective proceedings claim form by any method permissible under Part 6 of the CPR in relation to proceedings in England and Wales [...]”.

31. Mr Gallagher contends that the methods of service provided for under Part 6 (namely (i) service through foreign governments, judicial authorities and British Consular authorities, (ii) service in accordance with civil procedure conventions or treaties, and (iii) service by methods permitted by local law) are not appropriate in this case on the grounds that method (i) is only used for claims against states and/or when done agent- to-agent; method (ii) would result in long delay and method (iii) would be costly and time-consuming.

32. Rule 111(2) provides as follows:

“Where it appears to the Tribunal that there is a good reason to authorise service by a method or at a place not otherwise permitted by these Rules, the Tribunal may of its own initiative or on the request of a party make an order permitting and specifying an alternative method of service or place, and specifying when the document is to be deemed to be served”.

33. The PCR submits that the test for ordering alternative service is that there is a “good reason” to do so. I accept that, for the reasons given by Mr Gallagher, this is not a case where “exceptional circumstances” need to be shown justifying a departure from service as provided for in the Hague Service Convention. I am further satisfied that there are good reasons for granting the order for alternative service. In particular:

(a) Service in accordance with Part 6 of the CPR on all of the Proposed Defendants would be relatively cumbersome and would take almost a year (based in particular on the length of time needed to serve an Australian entity).

(b) The First Proposed Defendant and the Second Proposed Defendant are already involved in the *Kent* proceedings before the Tribunal concerning the

commission charged by Apple and are represented in those proceedings by Apple's London solicitors, Gibson Dunn & Crutcher LLP ("Gibson Dunn"). Gibson Dunn have confirmed that they act for each of the Proposed Defendants in these proceedings. The Proposed Defendants will therefore need less time to respond to respond to the Claims in these proceedings than would be otherwise be the case. They would not be placed at any disadvantage by service on the First Proposed Defendant's home jurisdiction and on Gibson Dunn who are already familiar with the subject-matter of the present claim.

- (c) The PCR has proposed an accelerated timetable which would allow the present claim to catch up with *Kent* in July 2024 and allow both claims to be tried at the same time in order to avoid inconsistent outcomes. The issue of whether and to what extent (or in what ways) Apple's commission was excessive or unfair is an issue in both cases. The extent of the pass-on will also be an issue in both cases The delay associated with service under CPR Part 6 would put that timetable at risk.
- (d) All the Proposed Defendants are subsidiaries of the First Proposed Defendant, Apple Inc, and can be expected to be represented by one legal team. There is therefore no practical reason to require notice to each of them separately. Separate notice to each entity would be duplicative and unnecessary. Service of documents in California and London and in hard copy and electronic form, ought to be sufficient.

Andrew Lenon KC

Made: 20 September 2023

Chair of the Competition Appeal Tribunal

Drawn: 20 September 2023