



Neutral citation [2023] CAT 73

Case No: 1527/7/7/22

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 November 2023

Before:

BEN TIDSWELL
(Chair)
THE HONOURABLE LORD RICHARDSON
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

ALEX NEILL CLASS REPRESENTATIVE LIMITED

Applicant/Proposed Class Representative

- v -

(1) SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED
(2) SONY INTERACTIVE ENTERTAINMENT NETWORK EUROPE LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 7 to 9 June and remotely on 9 October 2023

JUDGMENT (CPO APPLICATION & STRIKE OUT/SUMMARY JUDGMENT)

APPEARANCES

Mr Robert Palmer KC, Ms Nicola Greaney KC, Ms Fiona Banks and Ms Antonia Fitzpatrick (instructed by Milberg London LLP) appeared on behalf of the Proposed Class Representative.

Mr Daniel Beard KC, Ms Charlotte Thomas, Ms Gayatri Sarathy and Mr George McDonald (instructed by Linklaters LLP) appeared on behalf of the Proposed Defendants.

A. INTRODUCTION AND BACKGROUND

1. This judgment follows a hearing on 7, 8 and 9 June 2023, in which the Proposed Class Representative (the “PCR”) applied for a Collective Proceedings Order under the Competition Act 1998 (“CA 1998”) in relation to a proposed collective proceeding against the Proposed Defendants.
2. At the same hearing, the Proposed Defendants made an application to strike out and/or obtain reverse summary judgment (where a defendant seeks judgment against the claimant) against the PCR in respect of parts of the PCR’s claim.
3. On 26 July 2023, the Supreme Court handed down its judgment in *R (PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28, in which the Supreme Court held that litigation funding agreements (“LFAs”) pursuant to which the payment to the funder is calculated as a percentage of the damages award are unenforceable insofar as they relate to opt out collective proceedings. We invited submissions from the parties on the application of this decision to the present proposed proceedings and we heard oral argument on the subject on 9 October 2023.
4. The claim relates to the distribution of games which are played on the Sony PlayStation, a gaming console developed and sold by the Sony group of companies, and to the systems and structures that Sony has created around the PlayStation. This includes the online store (the “PlayStation Store”) through which Sony distributes digital versions of games which can be played on the PlayStation and also the PlayStation Network (or “PSN”), which is the online gaming platform that allows PlayStation users to interact with other players online. We will for convenience refer to this entire arrangement as the “Sony ecosystem”.
5. In a nutshell, the claim asserts that the Proposed Defendants operate the Sony ecosystem so as to prevent game developers and publishers from accessing consumers other than through the PlayStation Store and PSN, which has resulted in users paying a higher price for digital games and add on content than would otherwise be the case.

(1) The Parties

6. The PCR is a corporate entity which is controlled by a sole director, Alex Neill. The PCR seeks to represent a class of UK domiciled users of the Sony PlayStation. In particular, the PCR seeks to recover losses which are alleged to have been suffered by those users when purchasing digital games, or content which has been added to games, from the PlayStation Store. The proposed class is estimated to comprise some 8.9 million people.
7. The Proposed Defendants are undertakings within the Sony group, who are said to be responsible for the sales, marketing and distribution of PlayStation products and services and for the operation of the PSN and PlayStation Store in the UK. In the rest of this judgment, we will simply refer to the Proposed Defendants as “Sony”.

(2) The claims

8. By way of summary, the PCR alleges that, due to restrictive terms and conditions and/or technical restraints imposed by Sony:
 - (1) Sony does not permit other third-party operating systems to be used on PlayStations or other third-party applications to be used to enable consumers to play games.
 - (2) Digital games for use on the PlayStation can only be sold and purchased through the PlayStation Store.
 - (3) Associated add-on content can, with limited exceptions, likewise only be sold and purchased through the PlayStation Store.
 - (4) Sony charges developers a commission on all purchases of games and add-on content made through the PlayStation Store which has largely been set at 30% [of the price paid by the consumer].

- (5) As a result, game developers and publishers wishing to sell digital games to PlayStation users are compelled to sell via the PlayStation Store; and PlayStation users wishing to purchase digital games have no alternative but to purchase them on the PlayStation Store. Similarly, add-on content must, with limited exceptions, be sold and purchased via the PlayStation Store.
9. The PCR pleads that Sony is dominant in a variety of related markets, including:
- (1) The gaming console market, which is said to comprise PlayStation and Microsoft's Xbox.
 - (2) The market for PlayStation system software, in respect of which it is said that Sony holds a monopoly.
 - (3) The market for the distribution of digital PlayStation games, in respect of which it is said that Sony holds a monopoly.
 - (4) The market for the distribution of add-on content for PlayStation games, in respect of which it is said that Sony holds a near monopoly.
 - (5) The PCR alleges that Sony has abused its dominant position by:
 - (i) Imposing an exclusive dealing obligation in the form of digital distribution restrictions which deprive or restrict Sony's customers from accessing alternative sources of digital games and in-game content and which foreclose actual and/or potential competition from other distributors (the "exclusive dealing claim").
 - (ii) Tying Sony's own electronic store for digital games and in-game content to the sale of PlayStation consoles and/or the PlayStation system software, foreclosing competition (the "tying claim").

- (iii) Imposing excessive and unfair prices for the distribution of third party published digital games and in-game content and for the supply of digital games and in-game content which Sony has developed itself (the “excessive pricing claim”).
- 10. The PCR argues that Sony is the PlayStation digital game user’s single essential trading partner for all digital game purchases and the vast majority of add-on content purchases. The PCR alleges that Sony has exploited that market, by setting excessive and unfair commissions and selling prices which bear no relationship to the costs of providing the services in question.
- 11. The claims are brought under section 18 of the CA 1998 and Article 102 of the Treaty on the Functioning of the European Union (“TFEU”). The PCR says that PlayStation users have paid higher prices for purchases of digital PlayStation games and add-on content than they would have done under circumstances of normal and effective competition. The PCR’s preliminary estimate of the aggregate losses suffered by the proposed class members is between £0.6 billion and £5 billion (excluding interest).

(3) Sony’s Response

- 12. Sony was not required to file a defence prior to the hearing of the PCR’s CPO application, so it has not yet set out its detailed response to the claims. It has however said in its response to the CPO application that the PCR’s case is “flawed from start to finish”¹.
- 13. However, for the purposes of the CPO application Sony has focused on a number of points which it says are of sufficient seriousness that the claims should either be struck out/subject to reverse summary judgment. Sony also says that the Tribunal should refuse to grant a CPO because of an inadequate methodology put forward by the PCR.

¹ Sony’s Response at [9].

(4) Some more background on the PlayStation ecosystem

14. It may be helpful to provide a brief description of how games are produced and sold to users of Sony PlayStations.
15. The video game industry is apparently the biggest entertainment industry in the UK, ahead of TV, video and music, with 60% of adults regularly playing games across consoles or mobile phones; and 93% of 10 to 16 year olds playing games online regularly.
16. Sony has been Europe’s largest supplier of consoles since the PlayStation console was first launched in 1994, alongside PlayStation games which were at that time exclusively on optical discs. Since then, Sony has released several further models of the PlayStation. Its latest, the PlayStation 5, was launched in the UK in November 2020, superseding the PlayStation 4. The PlayStation 5 has a digital only edition which has no optical disc drive. The PlayStation 5 also has a larger hard drive than the PS4 to further facilitate the distribution of content digitally.
17. At one stage, it was possible for users to purchase digital versions of games from third party retailers and to load those onto their PlayStations. However, as of 1 April 2019, Sony no longer permits the selling of digital games by third party retailers. It is technically impossible² and a breach of their licence terms for PlayStation users to modify the system software (including the PlayStation Store) to download alternative gaming stores. As a result, PlayStation users wishing to purchase digital PlayStation games now have no choice but to purchase them through the PlayStation Store³.
18. Some games are created by Sony itself, but most of the games Sony sells come from third party developers (who design and implement the games) and publishers (who market and distribute the games and sometimes fund developers). We will refer to developers and publishers simply as “publishers”

² Subject to limited, technically complex and unauthorised “jailbreak” activities.

³ It remains possible to purchase physical versions of games, provided the PlayStation has an optical disc drive.

in the rest of this judgment. Publishers are given access by Sony to development tools which enable publishers to create games which are technically compatible with the PlayStation and associated ecosystem. Publishers have contractual arrangements with Sony, which we will describe further below.

19. We understood that Sony sets the price for games which are sold to consumers through the PlayStation Store. When a publisher supplies a game to Sony for distribution through the PlayStation Store, Sony deducts a fee or commission from the sale price which it retains, as its own margin. The way in which this financial arrangement works was not entirely clear from the evidence before us. We do not think the precise details matter for present purposes and we will simply assume that there is an amount retained as margin by Sony from each transaction with a publisher, which we will describe as a “commission” for present purposes. We intend to make no finding of fact in using that shorthand for the purposes of this judgment.

B. LEGAL FRAMEWORK

20. It is now well established that there are two broad questions arising from section 47B CA 1998 and rules 78 and 79 of the Competition Appeal Tribunal Rules 2015 (“the Rules”) which the Tribunal is required to consider for CPO applications. They are:
 - (1) Authorisation of the class representative under section 47B(5)(a) CA 1998 and rule 78.
 - (2) Eligibility of the claims for inclusion in collective proceedings under section 47B(5)(b) CA 1998 and rule 79.
21. There is a further requirement, which emerges from the reference in various recent cases to a decision of the Canadian Supreme Court in the case of *Pro-Sys Consultants Ltd v Microsoft Corporation* [2013] SCC 57 (“*Pro-Sys*”). This is the requirement for a proposed class representative to provide to the Tribunal, for the purposes of it considering an application for a CPO, a methodology for the proceedings.

(1) Authorisation

22. The requirement for authorisation of a class representative is set out in section 47B(5) and (8) CA 1998:

“(5) The Tribunal may make a collective proceedings order only—

- (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and

...

(8) The Tribunal may authorise a person to act as the representative in collective proceedings—

- (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a “class member”), but
- (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.”

23. Rule 78 provides further detail on the issue as follows:

“Authorisation of the class representative

78.—(1) The Tribunal may authorise an applicant to act as the class representative—

- (a) whether or not the applicant is a class member, but
- (b) only if the Tribunal considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings.

(2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—

- (a) would fairly and adequately act in the interests of the class members;
- (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
- (c) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
- (d) will be able to pay the defendant's recoverable costs if ordered to do so; and
- (e) where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.

(3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—

- (a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;
- (b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;
- (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—
 - (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and
 - (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and
 - (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.

(4) If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that sub-class.”

(2) Eligibility

24. The eligibility element of section 47B CA 1998 reads as follows:

“(5) The Tribunal may make a collective proceedings order only—

...

- (b) in respect of claims which are eligible for inclusion in collective proceedings.
- (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.”

25. Rule 79 provides:

“Certification of the claims as eligible for inclusion in collective proceedings

79.—(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the

proposed class representative that the claims sought to be included in the collective proceedings—

- (a) are brought on behalf of an identifiable class of persons;
- (b) raise common issues; and
- (c) are suitable to be brought in collective proceedings.

(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

- (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- (b) the costs and the benefits of continuing the collective proceedings;
- (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- (d) the size and the nature of the class;
- (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
- (f) whether the claims are suitable for an aggregate award of damages; and
- (g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—

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

(4) At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant—

- (a) under rule 41(1), to strike out in whole or part any or all of the claims sought to be included in the collective proceedings; or
- (b) under rule 43(1), for summary judgment.

(5) Any member of the proposed class may apply to make submissions either in writing or orally at the hearing of the application for a collective proceedings order.”

(3) **Methodology**

26. The methodology requirement is not expressly part of the statutory test, but it is nonetheless closely linked to the questions of common interest and suitability.

In *Pro-Sys*, Rothstein J stated (at [118]):

“In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.”

27. In *London & South Eastern Railway Limited and others v Justin Gutmann* [2022] EWCA Civ 1077 the Court of Appeal described the test in the following passage:

“24. To enable the CAT to form a judgment on commonality and suitability the class representative is required to put forward a “methodology” setting out how the issues that they have identified will be determined or answered at trial. In practice the methodology is prepared by an expert economist instructed by the proposed class representative. The methodology advanced will be counterfactual and therefore hypothetical in nature. It posits how the market would operate absent the alleged unlawful conduct and provides a benchmark against which to measure a defendant’s actual conduct. It constitutes a critical document that the CAT will examine when determining commonality and suitability. The test to be applied to a proposed methodology to determine whether it is up to standard was articulated by the Supreme Court of Canada in *ProSys Consultants Ltd v Microsoft Corp* [2013] SCC 57 (“Microsoft”) and was endorsed by the Supreme Court in this jurisdiction in *Merricks*. We address the test in paragraphs [45], [46] and [52] – [63] below.”

28. At [44], the Court of Appeal noted that the methodology acts as “a broad blueprint identifying the issues for trial and how they are to be resolved and provides important material from which the CAT can determine whether the issues are “common” and “suitable” for certification”. As a result, the methodology will be relevant to a range of issues including breach of duty, causation, proof of loss and quantum.

29. Between [52] and [61], the Court of Appeal then made the following observations which have particular relevance to these applications:

- (1) The test is not a statutory one. Judges are expected to use intuition and common sense and have a broad discretion as to how it is applied.
- (2) The test is a counterfactual one, based on a model of how the market would have operated absent the abuse. It may be quite hypothetical, but it should also disclose some factual basis for the assumptions used.
- (3) The test is applied at a relatively early stage in the proceedings and is necessarily provisional, pending disclosure and other steps.
- (4) The Court will bear in mind its ability to fill gaps and plug lacunae at trial – both in relation to liability and damages issues (this is referred to as the “broad axe”, which is defined as a well-established judicial practice whereby judges eschew artificial demands for precision and the production of comprehensive evidence on all issues and instead use their forensic skills to do the best they can with limited material to achieve practical justice).
- (5) The test is about practicable justiciability, and whether the methodology will allow the Court to determine issues at trial.

(4) The test for Strike out/Summary Judgment

30. Rule 41(1)(b) of the Rules sets out the Tribunal’s power to “strike out in whole or in part a claim at any stage of the proceedings if ... it considers that there are no reasonable grounds for making the claim”.

31. Rule 43(1) of the Rules provides in respect of summary judgment that:

“The Tribunal may of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

(a) it considers that—

(i) the claimant has no real prospect of succeeding on the claim or issue; or

(ii) the defendant has no real prospect of successfully defending the claim or issue; and

- (b) there is no other compelling reason why the case or issue should be disposed of at a substantive hearing.”

32. It was common ground that the legal principles governing applications for strike out/summary judgment are those summarised by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) (“Easyair”) at [15]:

- “i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
- ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
- iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: *Swain v Hillman*;
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available 16 at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
- vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as

opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

C. THE CPO APPLICATION

(1) Matters raised by Sony at the June hearing

33. Sony identified four areas which it argued meant the claim was unsuitable under the Eligibility Condition for the grant of a CPO. Two of these were methodology points (in the *Pro-Sys* sense) and the third was a broader attack on the approach of the PCR’s economic expert, Mr Harman. The fourth involved the class definition. The points are as follows:

- (1) Sony argued that the PCR’s case ignored the well-established consensus that console gaming takes place in a two sided market, leading to direct and indirect network effects. This had not been taken account of in Mr Harman’s methodology.
- (2) Sony argued that the PCR had failed in its analysis of the excessive pricing abuse to take account of the likely counterfactual response of Sony and publishers to a reduction in Sony’s commission and the consequent impact on prices to consumers. Again, this had not been dealt with in Mr Harman’s methodology.
- (3) Sony criticised Mr Harman for what it said was a selective and partial approach to presenting his expert opinions.
- (4) Sony argued that the class definition put forward by the PCR was defective. This point was raised both as an issue going to the Eligibility Condition and as a strike out point. Sony attacked the inclusion in the PCR’s proposed class definition of PlayStation users who had not purchased digital games or add-on content from the PlayStation Store as at the date of the claim form, on the basis that the claims need to be extant at the time the collective proceedings are issued.

34. Sony also raised a point relevant to the Authorisation Condition, relating to the PCR's employment status.

(2) Funding issues and other matters relevant to the CPO application

35. There were a number of other matters which Sony raised prior to the June hearing but which we were told had been resolved to Sony's satisfaction by the time of the hearing. These included points relating to the funding arrangements for the proposed proceedings. There were also matters which the Tribunal considered as part of its responsibility to ensure that the Authorisation and Eligibility Conditions are satisfied. We will deal with all these points in our sections on satisfaction of the conditions.

36. Following the Supreme Court's decision in *PACCAR*, the PCR presented a revised LFA which it said resolved any issues relating to enforceability as a result of that decision. Sony argued that the revised funding arrangements did not cure the enforceability concerns in the original funding arrangements arising from *PACCAR* and also argued that the revisions themselves gave rise to issues relevant to the Eligibility Condition and the Authorisation Condition. As far as we are aware, this is the first occasion on which the implications of *PACCAR* for other collective actions have been considered. We will deal with the arguments about the revised funding arrangements separately in Section E below.

(3) The Eligibility Condition

37. First, we will address the points put forward by Sony in relation to the Eligibility Condition. We will then summarise our overall views on whether the PCR has satisfied that test.

(a) *Two sided markets*

38. Sony served expert evidence from Dr Cristina Caffarra, an economic expert, who explained the concept of a two sided market as follows⁴:

“In economics, a ‘two-sided platform’ provides products or services to two groups of participants, the two ‘sides’, who interact via the platform. Crucially, one group’s demand for the platform is influenced by the number of participants in the other group. This demand effect may operate in both directions or in one direction only. For instance, the value of an online marketplace for buyers would increase when the number of sellers on the platform increases, and the value of the online marketplace to sellers also increases with the number of buyers. This interrelation between the groups is known as ‘indirect network effects’ in the economic literature.”

39. According to Dr Caffarra, who referenced a number of academic articles on the subject, the console gaming market is well known and recognised as a two sided market, with important characteristics which are crucial to an analysis of competition and pricing.
40. For example, a user of a Sony PlayStation would be interested in the number of other users on that platform, as that is relevant to the opportunity to interact with other PlayStation users. That would be characterised as a direct effect, with a factor influencing demand occurring on one side of the platform. The same user would also be interested in the number of publishers which Sony was able to source games from, and the nature of those games, as that is relevant to the choice and quality of games the user can access. That would be characterised as an indirect effect, with a factor influencing demand occurring across both sides of the platform.
41. Similarly, publishers can be expected to have considerable interest in the number of users the Sony platform has, which is relevant to the decisions the publisher will make about whether to produce a version of its game for the platform in question and, having done so, the terms on which it would be willing to make the game available on that platform. This would be another indirect effect.

⁴ [14] of Dr Caffarra’s first report.

42. Sony also considered that another aspect of interdependency in pricing was relevant, namely the relationship between prices charged for different elements of the Sony system. Specifically, Sony argued that there is an important interdependence between the price of games consoles and the price of games. Sony might be prepared to earn a lower profit on the sale of consoles than it would if the console were a stand-alone product, because the more PlayStation consoles sold, the greater the prospects of revenue from those console owners buying games to play on them. This phenomenon did not appear to depend on the two sidedness of the market, as such, since it could apply solely with respect to consumer choices on the consumer side of the market. However, to the extent it was present, it could highlight the need to consider evidence of the prices and profits of games sales in the context of the broader systems market. It does also bear on the two sidedness of the market since it could be rational for Sony to “loss lead” on the sale of consoles in order to expand the customer base and therefore to encourage publishers to make games available to the Sony ecosystem.
43. The presence of these direct and indirect network effects gives rise to the possibility that Sony will make pricing decisions on one side of the platform with reference to effects arising on the other side of the platform. That might most obviously arise in relation to cross subsidisation (for example, selling the console at a lower price than otherwise might apply, in order to take advantage of a consequent increase in users when agreeing prices with publishers).
44. Sony’s complaint was that the PCR’s case, and in particular Mr Harman’s first expert report, was wholly silent on the existence and relevance of two sided markets as a relevant issue in this case. As a result, the PCR was unable to advance any credible or plausible market definition, as the two sidedness of the market is fundamental to any such analysis, and any competition assessment carried out would necessarily be flawed.
45. Mr Harman addressed this criticism in his second report⁵. He disputed Dr Caffarra’s assertions about the two sided nature of the market, arguing that the

⁵ At section 4.

focal market for his purposes was a distribution market for games, which differs from the console market which is the subject of the articles referred to by Dr Caffarra. Mr Harman noted that Sony was yet to advance a market definition and noted that a full exercise to define the relevant markets was yet to be undertaken by the PCR.

46. He did however accept in his second report⁶ that it might be necessary to investigate interdependence between console and game pricing, in particular to assess whether there was any evidence of cross subsidisation between the two sides of the market (i.e. the pricing for sales of consoles to users on one side of the platform and the price paid or commission charged by Sony to publishers on the other side of the platform). In his second report, Mr Harman sets out a list of activities he proposes to undertake in order to investigate and opine on the issue⁷.
47. In our view, this potential interdependence is a matter which Mr Harman ought to have raised as part of his methodology in his first report. Regardless of his views on market definition and the existence or otherwise of a two sided market, there is clearly the potential for interdependencies between console prices set by Sony and the pricing arrangements between Sony and publishers which are likely to need to be investigated (even if to discard them after analysis, as Mr Harman still argues). Mr Harman ought to have incorporated that issue into his methodology, even if he was confident that it would not affect his analysis.
48. However, Mr Harman has now accepted the potential relevance of the point, even if there remains a disagreement between him and Dr Caffarra on the relevant focal market and the implications of that for the two sided market arguments. He has also set out in some detail the work he anticipates carrying out to explore the issue and the information he will need for that.
49. We are therefore satisfied that the PCR has met the requirement for a sufficiently credible and plausible methodology in relation to this point, at least

⁶ Section 4.6

⁷ See [4.6.7] and following and the information listed after [4.6.26].

as far as necessary for the grant of a CPO. As noted by the Court of Appeal in *Gutmann*⁸, it is important to recognise that these proceedings are at an early stage and there is a degree of asymmetry between the knowledge of the PCR and its team and the knowledge of Sony, as owner of the PlayStation system. In that light, we are satisfied that Mr Harman has done enough in relation to this issue to adequately describe a credible and plausible methodology.

50. We do remain concerned about the potential for the experts for each party to approach their expert evidence for trial in divergent ways. We are yet to see the market definition pleaded by Sony, but it is already apparent from the exchanges of reports by Mr Harman and Dr Caffarra that they see things very differently. We are mindful of the observations of the Court of Appeal in *Mark McLaren Class Representative Limited v MOL Ltd* [2022] EWCA Civ 1701 about the need to actively manage cases at an early stage where there are divergent views from economic experts which can and should be narrowed before trial⁹. We will return to that subject in the Disposition section below.

(b) Excessive pricing

51. Sony argued that the PCR has advanced a flawed methodology in relation to the counterfactual which would apply if the alleged exclusive pricing abuse had not occurred. The PCR's position (as articulated by Mr Harman) was that a reduction in Sony's margin (which would occur if Sony was forced to accept a lower commission in its pricing with publishers) would result in a reduced retail price charged to users.
52. Sony said (relying on Dr Caffarra's expert evidence), that this misunderstood the incentives the publishers and Sony would have in setting prices, because (given no, or very low, marginal costs of sales) and the assertion that Sony is responsible for determining retail prices (and then has an agreement with the publisher on how to split the revenue from any game sale), Sony could be assumed already to be setting the price at a level that maximised the "total profit

⁸ See [52] and following and in particular [55].

⁹ See [50] to [53] in particular.

pie” available to Sony and the publisher. In such a situation, and in the event that Sony was forced by (say) a regulatory ruling to reduce the share of a game sale that it was permitted to earn, Sony's best response would be to maintain the same retail price, while conceding a higher share of that price to the publisher. In that way, Sony’s overall revenue would be greater than if the retail price were lowered to a point that yielded a smaller “total pie” for Sony and the publisher to share.

53. In his second report, Mr Harman disputed this analysis, saying that Dr Caffarra had not set out robust reasons as to why, in the event of a reduction in commission rates, there would be an adjustment in the commercial terms between Sony and publishers, so that the benefit of the reduction did not flow to consumers. However, he also set out a proposed methodology to investigate the points made by Dr Caffarra, which includes reviewing academic literature, reviewing evidence on Sony’s pricing policies and practices, and researching the perspective of publishers. During the hearing it became clear that there are a number of unresolved factual issues that could affect the outcome of this analysis, notably the extent to which the relationship between Sony and the publisher is indeed properly characterised as a profit-sharing deal (as Sony claims) or as a more conventional wholesaler-retailer deal (as the PCR claims).
54. Once again, we are satisfied that the PCR has met the requirement for an adequate methodology in relation to this point, at least as far as necessary for the grant of a CPO. While Mr Harman did not identify the point in his first report, he has now addressed it in some detail in his second report. The approach set out there is plausible and credible and reflects appropriately the early stage at which these proceedings currently are.

(c) Mr Harman’s expert reports

55. Sony criticised Mr Harman for what it called the selective and partial approach he took to the preparation of his report. This was partly a complaint about the way in which Mr Harman presented factual material in his report without proper transparency about the provenance of that material and in circumstances where (Sony said) some of it was demonstrably partial. It was also about the failure by

Mr Harman to identify points which were unhelpful for the PCR's case, in particular in relation to his methodology, some of which we have dealt with above.

56. In relation to the presentation of factual material, Sony pointed to reliance by Mr Harman on evidence given by parties to litigation in the United States, in *Epic Games Inc v Apple*¹⁰, which concerned commissions charged by Apple to Epic. Mr Harman referred to evidence given by Apple and Epic in that case, which he said supported the PCR's position¹¹, but did not refer to the relevant judgment in the case, which Sony says does not support the PCR's case.
57. Sony also criticised Mr Harman for referring to public statements by the CEO of Epic, without referring to other, contrary statements made at other times by the same person.
58. We make the following observations about the criticisms put forward by Sony:
 - (1) We fully accept and endorse the proposition that an expert providing evidence in support of a CPO application in a collective action is subject to the same duties to the court which arise in other aspects of litigation. We do not need to repeat those duties here – they are well known. There is no question that Mr Harman (and the other experts who have submitted reports in advance of the June hearing) are subject to those duties and we expect them to be complied with.
 - (2) It is however necessary to recognise that an expert providing a report at this stage of a collective proceeding is in something of an unusual position. In most cases, the report will be prepared prior to disclosure. The expert will very likely be reliant on public sources on information for much of the factual material underpinning their report.
 - (3) The report is also on any view intended to be a provisional one, for the purposes of supporting the CPO application and most importantly to set

¹⁰ Case No. 4:20-cv-05640-YGR.

¹¹ [6.4.18] of his first report.

out a credible and plausible methodology for the economic issues in the case to be tried. It is not expected to contain concluded views and is likely to have to deal with a number of potential permutations of issues which can only be narrowed once a proposed defendant has pleaded its defence and provided disclosure.

(4) We see no reason why those factors should create any conflict with the duties of the expert to the Tribunal. In most respects, any risk of that will be dealt with by appropriate transparency of sources and approach, with uncertainties and speculation being clearly signalled.

59. In relation to Mr Harman's reports, we are not satisfied that, in the round, Sony's criticisms amount to a breach by Mr Harman of his duties. In relation to the references Mr Harman made to the US proceedings and statements by Epic's CEO, these were qualified by Mr Harman making clear that the evidence was subject to limitations and not a full picture, which would need to be investigated further. There was some argument before us about the nature of the outcome of the judgment given in the US proceedings, but it is not necessary to delve further into that. In our view, the treatment of this material by Mr Harman was appropriate, given the qualifications he put on it.

60. We have already indicated that there are matters which should have been included in Mr Harman's first report which were only dealt with in his second report. We are not however willing to conclude that these arise from any intention by Mr Harman to depart from his obligations to the Tribunal.

61. In summary, the criticisms which Sony have made of Mr Harman's approach are not sufficient to affect our decision about the Eligibility Condition.

(d) The class definition point

62. The PCR's proposed class definition is as follows:

"All PlayStation users domiciled in the United Kingdom... who during the Relevant Period made one or more Relevant Purchases".

63. Relevant Period is defined as:

“Relevant Period means the period between 19 August 2016 and the date of final judgment or earlier settlement of the collective proceedings”.

64. Sony’s argument is that the purpose of the collective proceedings regime is to combine claims, which must be extant as at the date of the claim form. Sony relied on the wording of section 47B(1) CA 1998, which provides:

“(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies (“collective proceedings”).”

65. Section 47A, deals with claims for damages which can be made before the Tribunal, and provides:

“(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition, or

(b) the Chapter II prohibition.

(3) The claims are—

(a) a claim for damages;

(b) any other claim for a sum of money;

(c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.”

66. Paragraph 6.3 of the Tribunal’s guide to proceedings says:

“However, collective proceedings are a form of procedure and do not establish a new cause of action. The claims of the class members brought together in collective proceedings, or subject to collective settlement, must each be claims to which section 47A of the 1998 Act applies. They may indeed include claims that have already been started on an individual basis under section 47A, provided that the individual claimant consents. Part 4 of the Rules (Claims pursuant to section 47A of the 1998 Act) also applies to collective proceedings and collective settlements, save as set out in Rule 74.”

67. Sony also relies on a passage from *Walter Hugh Merricks CBE v Mastercard Incorporated & Others* [2022] CAT 13 (“*Merricks 3*”), where the Tribunal considered the domicile date which should apply in those collective

proceedings. The Tribunal had this to say about the nature of claims to be included in the regime:

- “26. The bringing of collective proceedings by the proposed class representative combines actual claims by the proposed class members and a CPO is required for those collective proceedings to continue: s. 47B(1) and (4). Accordingly, the individual claims of potential class members are not contingent claims or potential future claims which can start or crystallise only if and when a CPO is granted. It is therefore fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made. This contrasts with the position where an applicant needs the permission of the court to start the proceedings, e.g. for judicial review: see s. 31(3) of the Senior Courts Act 1981; or for committal for certain kinds of contempt: see CPR r. 81.3(5).
 27. The CAT Rules require that the claim form includes an estimate of the class size: r. 75(3)(c). That would be problematic if the class size could only be ascertained in the future.
 28. There is a right for any member of the proposed class to object to the granting of a CPO: rule 79(5). (That indeed occurred on the present application: see *Merricks 2* at [16].) That right would similarly be problematic if at the time of the application it was unclear whether any objector was in fact a member of the proposed class.”
68. The PCR responded by listing a number of cases where a similarly forward looking class definition had been approved by a CPO: *Gutmann, Le Patourel, Kent* and *Qualcomm* were identified¹². However, it was conceded by Mr Palmer KC that the point had not been argued in any of these cases. The PCR also argued that to adopt Sony’s position would undermine the collective proceedings regime, as it would exclude future claimants from obtaining recourse, unless the PCR took elaborate steps to issue “sweep up” proceedings to ensure that the claims of future users would somehow be included in or alongside these collective proceedings.
69. However, at the CPO hearing, Mr Palmer put up little resistance to the argument, accepting (rightly in our view) that the wording of sections 47A and 47B are clear and that the approach set out by the Tribunal in *Merricks 3* was correct.

¹² Respectively: Case No. 1304/7/7/19; Case No. 1381/7/7/21; Case No. 1403/7/7/21; and Case No. 1381/7/7/21.

70. In our view, Sony's interpretation of sections 47A and 47B is the only sensible one and we adopt the Tribunal's reasoning in *Merricks 3*, which explains clearly why Sony are correct in their current argument. That does of course create the requirement for some procedural gymnastics by anyone who wishes to bring a claim as or on behalf of a future user and to combine that in some way with these proceedings. It may be that Sony will in due course see the effort of dealing with situations like that as disproportionate to any benefit, so that some procedural compromise might emerge. That is of course a matter for the parties to resolve.
71. In the meantime, we agree with Sony that the present class definition is not adequate for the purposes of the Eligibility Condition, and particularly the suitability requirement in Rule 79(1)(c), and is also liable to be struck out. We direct that the PCR should amend the class definition so that the Relevant Period terminates as at the date of filing of the Claim Form.

(e) Other Eligibility matters

72. We have considered the various elements relating to the Eligibility Condition which are set out in Rule 79 (1) and (2). We will not go through them in detail, but we confirm that we have satisfied ourselves that, save as identified elsewhere in this judgment (including the consideration of the revised funding arrangements in Section E), the Eligibility Condition is satisfied for the purposes of this CPO application. We will revisit that conclusion in the context of the revised funding arrangements, as discussed in Section E below.

(4) The Authorisation Condition

73. The PCR is a corporate entity, of which the sole director is Ms Alex Neill. Ms Neill has extensive experience of consumer welfare issues, including in a senior role at consumer organisation Which? and as the chief executive of Resolver, an online complaint resolution facilitator. Ms Neill has established an advisory panel to assist the PCR and the PCR has assembled the range of professional advisers we would expect to see supporting a collective proceeding of this nature, including legal, claims management and communications advisers.

74. We have reviewed the Litigation Plan and budgets prepared by the PCR. Sony raised a number of points with the PCR relating to the funding of the proposed collective proceedings, including the provision for adverse costs. By the time of the hearing, these had apparently been resolved to Sony's satisfaction and we say no more about them.
75. The Tribunal also had some questions about funding and adverse costs protection which it raised during the June 2023 hearing, as part of the exercise of inquiring into the satisfaction of the Authorisation Condition. These concerned two aspects in particular:
- (1) The circumstances in which the funder could terminate its funding obligations if it ceased to be satisfied about the merits of the action. We were concerned to ensure that the relevant provisions permitting this required the funder to seek independent legal and expert advice. This was in fact a point that Sony had also previously raised, and the PCR had agreed with the funder to adjust the relevant provisions in the funding arrangements to that effect.
 - (2) The ability of Sony to have recourse for adverse costs in the event they were awarded those. The ATE policy procured for the purposes of adverse costs insurance did not have an endorsement which allowed a direct claim by Sony in that event, but the funder in this case has accepted primary liability for adverse costs (with the ATE policy being insurance for the funder's exposure). We were therefore satisfied that Sony would have sufficient protection for adverse costs, if required.
76. Sony raised two other points about the Authorisation Condition. One was to note that, in a third witness statement made shortly before the hearing, Ms Neill had updated the Tribunal about her departure from her role at Resolver to co-found a new business called "Consumer Voice", which aims to provide consumers with free advice and information about group claims in the UK. Sony suggested (without actually resisting certification on this basis) that Ms Neill might find it difficult to reconcile her role as sole director of the PCR in these proposed collective proceedings and the requirements of her new role, in

particular in relation to relationships with law firms and funders and the challenges of providing unbiased information about claims when she is involved in prosecuting one of them.

77. We are satisfied that these points do not materially impact Ms Neill's ability properly to discharge her functions as the sole director of the PCR. In her witness statement, Ms Neill makes it clear that she needs to manage any potential conflicts in order to properly fulfil her role, and we accept that she understands the need for that and is able to do so effectively.
78. We are satisfied that it is just and reasonable for the PCR to act as class representative in these proposed proceedings, having considered the factors set out in Rule 78(2). We note that neither Ms Neill nor the PCR are members of the proposed class. We were therefore satisfied, following the June 2023 hearing, that the Authorisation Condition was satisfied. We will revisit that conclusion in the context of the revised funding arrangements, as discussed in Section E below.

D. THE SUMMARY JUDGMENT/STRIKE OUT APPLICATIONS

(1) The arguments advanced by the Proposed Defendants

79. There are four strands to Sony's applications:
- (1) Sony argues that the PCR's allegations of abuse in relation to exclusive dealing and tying are in substance allegations of a refusal to allow access to Sony's PSN, which is a proprietary system involving Sony's intellectual property rights. As a consequence, the PCR needs to plead, and to meet, the test established in a line of cases, commencing with *Case C-7/97 Oscar Bronner GmbH v Mediaprint*, which concern refusal to grant access to essential facilities. Given the PCR's failure to address this issue, the claims of exclusive dealing and tying should be struck out.
 - (2) As an alternative, Sony says that the inevitable consequence of the PCR's arguments, if successful, is to require Sony to grant access to the

PSN. In setting out its counterfactual, the PCR has failed to advance any admissible factual material which explains how this might be achieved. Sony has however advanced evidence which demonstrates that the proposed counterfactual would result in a high degree of intrusion into Sony's system, which would not be feasible. As a consequence, the PCR has failed to establish any entitlement to more than nominal damages and summary judgment should be granted to determine the exclusive dealing and tying claims in Sony's favour.

- (3) Sony also argues that the PCR cannot prove to the requisite standard for the purposes of its pleaded tying abuse that the alleged tied product (the PlayStation Store) and the alleged tying product (the PlayStation Console or system software) are distinct.
- (4) Sony also applied to strike out that part of the PCR's claim which seeks to define the class by reference to people who have not yet purchased PlayStation products. We have dealt with this issue already in the context of the CPO application (which is the context in which the parties argued the point).

80. The refusal to supply argument is based on a line of cases in which it is said that an undertaking, even if dominant in a market, should be able to choose whether to dispose freely of its property. This principle was explained by Advocate General Jacobs in *Bronner* as follows¹³:

“56. First, it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification.

57. Secondly, the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant

¹³ See paragraphs [56] and [57] of the Opinion of AG Jacobs in Case C-7/97.

undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.”

81. Recognising the importance of those property rights, the courts have developed a test involving three conditions (we refer to these as the “Bronner Conditions”¹⁴) which must be satisfied before a refusal by a dominant facilities owner to give access to a product or service (including intellectual property, or “IP” rights) indispensable for carrying on a business will be held to be abusive:

- (1) The refusal must prevent the emergence of a new product for which there is potential and unsatisfied consumer demand.
- (2) The refusal must be unjustified.
- (3) The refusal must exclude any effective competition on the secondary market.

See Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*.

82. This test goes beyond the usual requirements to establish an exclusive dealing or tying abuse in a conventional abuse case under section 18/Article 102, which is how the PCR has pleaded its case. It is therefore said by Sony that the PCR has put its case on an incorrect basis. It is also said that if that error were to be corrected, and a refusal to supply case were to be pleaded, it would be unsuccessful, as the PCR would be unable to satisfy the three conditions in *IMS Health*.

83. Sony makes the point that it is not seeking to avoid accountability for any dominance it may be deemed to have. It recognises (and indeed asserts) that it has designed a system which is “closed”, in the sense that there are restrictions on how others (including competitors of Sony) can access it. It says however

¹⁴ They might also be referred to as the “IMS Conditions”, but the General Court in *Google*, to which we will turn shortly, referred to them as the Bronner Conditions, so we adopt the same terminology to avoid confusion.

that the standard to which it should be held in assessing any abuse of its market power should take account of the investment it has made in intellectual and other property, which is why the Bronner Conditions represent the appropriate test, rather than the ordinary standard to establish an abuse.

84. Sony develops its argument by noting the reliance of the PCR on the contractual terms which apply between Sony and the developers who offer their games for sale by Sony through the PlayStation Store. These are contained in the Global Developer and Publisher Agreement (the “GDPA”). We were shown various versions of this agreement, but the relevant provisions are for present purposes consistent throughout. These are as follows:

“Publisher desires to be granted a non-exclusive license to develop, publish, have manufactured, market, advertise, distribute or sell PlayStation Compatible Products in accordance with the provisions of this GDPA, and SIE Group is willing, in accordance with the terms and subject to the conditions of this GDPA, to grant Publisher such a license.

...

3. **Conditional License Grant.** If Publisher completes and submits a publisher application in a form that SIE Group provides, and if an SIE Group Company gives written acceptance of Publisher’s application, Publisher is then a Licensed Publisher, and SIE Group grants to Publisher, for the Term, a non-exclusive, non-transferable license, without the right to sublicense (except as specifically provided in this GDPA), as follows:

- 3.1 to use the SIE Group Materials solely to develop PlayStation Compatible Products;
- 3.2 to publish, distribute, supply, sell, rent, market, advertise and promote Digitally Delivered Products to end-users, through each applicable SIE Group Company (or its nominated Affiliate) through PSN, and to provide PlayStation Compatible Products to other Licensed Publishers for exploitation under a Licensed Publisher Agreement;
- 3.3 where Publisher has exercised its rights under Section 3.2 (or where the requirement of such exercise is expressly waived by the applicable SIE Group Company), to have the equivalent Physical Media Products manufactured by Designated Manufacturing Facilities according to those facilities’ terms;
- 3.4 to publish, distribute, supply, sell, market, advertise and promote Physical Media Products directly to end-users or to third parties for distribution to end-users;

3.5 to use the Licensed Trademarks in connection with the manufacturing, packaging, marketing, advertising, promotion, sale and distribution of Licensed Products; and

3.6 to sublicense end-users the right to use Licensed Products for personal, noncommercial purposes in conjunction with the applicable Systems only.

...

5. **Other Limitations on Licensed Rights**

...

5.5 **Reservation of Rights.** This GDPA does not grant Publisher any right or license except as expressly authorized by and in strict compliance with this GDPA's terms and conditions. No right or license is to be implied by or inferred from any provision of this GDPA or from the parties' conduct. Subject only to the express rights of Publisher under this GDPA, all rights to the SIE Group Materials and the SIE Group Intellectual Property Rights are reserved to SIE Group.

...

6. **Development of PlayStation Compatible Products, Product Assessment and Quality Assurance**

6.1 **Right to Develop.** Pursuant to Section 3 and subject to payment of any applicable fees, SIE Group grants to Publisher the right to place orders for Hardware Tools pursuant to Section 7, and a non-exclusive, non-transferrable license to use Software Tools, for the sole purpose of developing and testing PlayStation Compatible Products. Each PlayStation Compatible Product developed using, incorporating or with reference to the Development Tools must be expressly authorized by SIE Group. SIE Group's authorization may require, at SIE Group's discretion, consent by Publisher to additional terms, or a requirement that the PlayStation Compatible Product be subject to compatibility, assessment and quality assurance testing by SIE Group.

...

6.3 **Right to Develop.** Pursuant to Section 3 and subject to payment of any applicable fees, SIE Group grants to Publisher the right to place orders for Hardware Tools pursuant to Section 7, and a non-exclusive, non-transferrable license to use Software Tools, for the sole purpose of developing and testing PlayStation Compatible Products. Each PlayStation Compatible Product developed using, incorporating or with reference to the Development Tools must be expressly authorized by SIE Group. SIE Group's authorization may require, at SIE Group's discretion, consent by Publisher to additional terms, or a requirement that the PlayStation Compatible Product be subject to compatibility, assessment and quality assurance testing by SIE Group.

...

6.6 Third Party Tools. If Publisher uses any third-party tools to develop PlayStation Compatible Products or any portion thereof, Publisher shall be responsible at Publisher's sole risk and expense for ensuring that it has obtained all necessary licenses for its use.

...

9. Distribution

(a) Distribution of any Licensed Product is subject to SIE Group's assessment, testing and approval pursuant to Section 6.3. Licensed Products must be distributed in accordance with Sections 9.1 or 9.2, as applicable. Unless expressly approved in writing by an SIE Group Company, Publisher may not publish a Licensed Product previously published by another Licensed Publisher in the same Territory for the same System.

(b) Distribution of any PlayStation Compatible Product other than a Licensed Product (including Peripherals) is subject to prior written approval by SIE Group in its sole discretion and, as a condition of granting such approval, SIE Group may require Publisher to submit any PlayStation Compatible Product to SIE Group for evaluation, assessment, testing, and approval pursuant to Section 6.3 and the Guidelines, and evaluation of the commercial aspects of the PlayStation Compatible Product. Publisher's distribution of such PlayStation Compatible Product may be subject to commercial or other conditions required by SIE Group (following such evaluation or otherwise), including a requirement that such PlayStation Compatible Product must be distributed through PSN.

...

9.2 Distribution of Digitally Delivered Products

9.2.1 Distribution Channel for Digitally Delivered Products. Unless expressly approved in writing by all SIE Group Companies in the relevant Territories, Digitally Delivered Products and any subscriptions or services associated with Licensed Products shall be distributed through PSN only, in accordance with this Section 9. Publisher may, however, electronically transmit PlayStation Compatible Products from Development Site to Development Site, or from machine to machine over a computer network, for the sole purpose of facilitating development or testing of PlayStation Compatible Products to be carried out under Section 6, provided that Publisher uses reasonable security measures customary within the high technology industry to reduce the risk of unauthorized interception or retransmission of those transmissions.

...

9.2.3 License to Product Information. Publisher shall provide SIE Group with Product Information for each Licensed Product

for use by SIE Group in accordance with this Section 9.2.3 and the Guidelines. Publisher grants to SIE Group, for the Term, a non- exclusive license to use Product Information to further SIE Group’s resale or other electronic distribution of Digitally Delivered Products. This license includes the following grant of rights to SIE Group to: (i) use, publish, reproduce, distribute, display, exhibit, transmit and communicate to the public, make available, and publicly perform on or through any media whatsoever Publisher’s and its licensors’ trademarks, service marks or logos, and Product Information in connection with the marketing or promotion of Digitally Delivered Products on PSN or in connection with any campaign which is primarily aimed at advertising, marketing or promoting PSN, the PlayStation Store, the Systems or the PlayStation brand generally, and; (ii) edit, crop or vignette all such materials as appropriate to comply with technical limitations. The licenses granted in this Section 9.2.3 include a license to use Publisher Intellectual Property Rights as reasonably necessary to exercise the foregoing rights and licenses.

...

9.2.7 Product Submission. Publisher shall provide Digitally Delivered Products to SIE Group for supply on or through PSN by submitting to an SIE Group Company a Digitally Delivered Product pursuant to the process described in the Guidelines or otherwise communicated to Publisher by SIE Group (each such submission a “**Product Submission**”). Each Product Submission must include a true and accurate description of the Digitally Delivered Product, along with complete metadata for the Digitally Delivered Product as specified in the Guidelines or otherwise communicated to Publisher by SIE Group. Publisher is liable to SIE Group and Users for inaccurate or misleading (including by omission) product descriptions. There will be no obligation on SIE Group to supply any Digitally Delivered Product until SIE Group has accepted the relevant Product Submission (without prejudice to Section 9.2.5(ii)). Each accepted Product Submission is hereby incorporated into and becomes a part of this GDPA. Any changes that Publisher wishes to make to a Product Submission must be notified to SIE Group by way of a separate Product Submission. SIE Group may amend or change the Product Submission process and requirements at any time and will provide reasonable notice to Publisher of those changes. If a change to the Product Submission process or requirements requires additional information from Publisher, Publisher shall promptly provide that information to SIE Group. Publisher shall follow the Product Submission process that is current at the time Publisher submits Digitally Delivered Products.”

85. Sony describes these and related provisions of the GDPA as a broad, non-exclusive licence, which in particular permits publishers to:

- (1) Use Sony's IP which is imbedded in development tools that Sony makes available to allow third parties to develop games which are compatible with Sony's systems.
 - (2) Use Sony's trademarks to market products.
 - (3) Sublicence the right to use such products (containing Sony's IP) to end users (i.e. consumers).
 - (4) Permit publishers to distribute the products through Sony's PSN.
86. We were also shown the agreements which apply between Sony and the consumers who purchase games from the PlayStation Store and the overarching arrangements between Sony and consumers who own gaming consoles and operate within the Sony ecosystem. It is not necessary to record the detail of those documents for present purposes.
87. It is then said by Sony that the consequence of removing the contractual restrictions which are said to be abusive amounts to a demand that Sony grants access to its IP on wider terms than it does at present. The complaint by the PCR is therefore, Sony contends, a refusal to supply that wider licence.
88. Sony notes that the PCR did not engage with this question in its Claim Form and supporting material, but did so in its Reply, supported by the evidence of Mr Steinberg. This responds to the evidence of Mr Svensson, served by Sony with its Response, which explains the reasoning behind the restrictions which are imposed by the GDPR and other agreements and the consequences which would apply if those restrictions were removed. These include concerns about the security and integrity of the PlayStation system, privacy concerns and the need for consistency in user experience.
89. Mr Steinberg's report takes an entirely different position from Mr Svensson. Mr Steinberg says, in essence, that there are no serious technical or practical difficulties in relation to the alternative methods of distribution which might arise in a counterfactual without the alleged abusive restrictions.

90. Sony attacks Mr Steinberg's report on a number of bases, seeking to exclude the entire report as inadmissible. This is partly on the basis of the timing of the evidence (whether it was proper reply evidence to Sony's Response). Other objections relate to the question of whether the subject matter is genuinely an area of proper expertise and Mr Steinberg's qualifications to provide expert testimony.

(2) The arguments advanced by the PCR

91. The PCR says that its case on exclusive dealing and tying is properly pleaded and is expressed in conventional terms. The critical restriction is in paragraph 9.2.1 of the GDPA. The removal of that restriction would not, in itself, give rise to a requirement to supply. Instead, it removes from the publisher/Sony contractual relationship the elements of exclusive dealing and tying which are the foundation of the pleaded abuses. The pleaded abuses are in a market which the PCR defines as a distribution market and the restrictions represent well established exclusion and tying abuses.

92. The PCR recognises that, in order for publishers to make sales on to consumers other than through the PlayStation Store, some IP rights may come into consideration, but that does not make it a refusal to supply case. The PCR points to the decision of the General Court in *Google LLC v Commission* Case T-612/17, which the PCR says establishes that:

(1) Not every issue of access means the conditions for refusal to supply must apply especially where, on the facts (as here) specific conduct elements of refusal of supply are lacking.

(2) Although most practices capable of restricting or eliminating competition are liable to constitute implicit refusals to supply, a refusal which warrants the application of the Bronner Conditions will be one in which there is an express request to be granted access, followed by a refusal.

93. The PCR also relies on Mr Steinberg's evidence to establish that the statements made by Mr Svensson are superficial and that the counterfactual proposed by the PCR does not necessitate any active supply once the relevant restrictions are removed. The PCR maintains that Mr Steinberg's report is properly tendered as a response to Sony's summary judgment/strike out applications, so it is not in fact reply evidence at all. The arguments about expertise and Mr Steinberg's experience are rejected.

(3) Analysis

94. As a preliminary point, this argument arises in the context of an application for summary judgment/strike out, which means that our sole objective is to determine whether this part of the case can be disposed of in Sony's favour without going to trial. That requires Sony to establish that the PCR has no reasonable grounds for making the claim/ no real prospect of succeeding at trial, taking into account the evidence that might reasonably be expected to be available at trial.

95. We understood from Mr Beard KC that he put his first argument (the failure to properly plead a refusal to supply) as a strike out application, as it largely involved pleadings and questions of law. By contrast, we understood Mr Beard to put the second argument (the defects in evidencing a proper counterfactual) as a summary judgment application, as it largely involved the establishment of an evidential position by Sony, in the form of Mr Svensson's evidence, which was not answered by the PCR (given the admissibility issues identified in relation to Mr Steinberg's report)¹⁵. In any event, nothing turns on these distinctions, for reasons that will be apparent from the remainder of this section.

(a) The failure to plead refusal to supply

96. The central question which arises in relation to this issue is:

¹⁵ See the exchange between Mr Beard and the Chair, transcript day 1, page 67, line 22 to page 70, line 10.

- (1) Whether one can and should distinguish a refusal to supply case from other abuse cases, where those other abuses may involve (either in their commission or in the counterfactual) elements of refusal to supply.
 - (2) If that is the correct approach, how does one distinguish between the two types of cases, and what therefore is the appropriate test for establishing the abuse to be identified.
97. In *Bronner*, the complainant, Oscar Bronner, sought an order against Mediaprint which was dominant in the market for newspaper home delivery. Oscar Bronner sought to use Mediaprint's delivery network in return for paying a reasonable charge, on the basis that there was no viable alternative, recognising the barriers to building its own home delivery service. On a reference from the Austrian national court, the CJEU held that there would not be an abuse under the then equivalent of Article 102, because Oscar Bronner was only able to show that an alternative distribution was not economically viable, as opposed to being indispensable (there being alternative distribution methods, albeit inferior ones)¹⁶.
98. Interestingly, there was a separate allegation of discrimination by Oscar Bronner, but the CJEU did not deal with the question relating to that, having answered the first question in the negative¹⁷. The main argument was however an allegation of a direct refusal to supply following an express request to that effect.
99. In *IMS*, which was another reference to the CJEU, this time from the German national court, the facts involved a method (called the "brick structure") which IMS had developed to collect and provide data relating to pharmaceutical sales. The brick structure had become the industry norm for distribution of this data to pharmacies and doctors' surgeries. A competitor, PII, started to use the same brick structure, but IMS asserted an IP right to prevent that use. PII's parent, NDC, complained that this amounted to an abuse of what is now Article 102

¹⁶ See *Oscar Bronner* at [45] to [47].

¹⁷ *Oscar Bronner* at [49].

and the European Commission adopted interim measures requiring IMS to provide a licence for the brick structure to PII.

100. In the reference, the national court asked whether the refusal to grant a licence for the brick structure, where IMS was dominant and when consumers (the pharmacies and doctors) would not accept anything else, amounted to an abuse¹⁸. The case was therefore about the requirement of an IP right owner to grant a licence to a competitor.
101. After discussing the relationship between the upstream and potential downstream product markets involved in the abuse analysis¹⁹, the Court went on to set out the three conditions which emerged from *Bronner* and earlier cases and which are set out in [81] above. The CJEU referred the matter back to the national court for determination on this basis. There is no suggestion in the case that it involves anything other than an express request for supply which was expressly refused.
102. We were also referred to *Microsoft v Commission*, Case T-201/04, which was a judgment of the Court of First Instance²⁰. This was an application by Microsoft for annulment of a European Commission decision which had found an infringement of Article 102 (as it is now). The case concerned (among other things) an express request by Sun, a competitor of Microsoft's, for access to interoperability information, which was information and technology necessary to allow Sun's computer server operating system to interoperate with aspects of Microsoft's PC operating system.
103. Microsoft refused to supply the information, claiming that it was IP that it was entitled to withhold. The Commission found that there was an abuse by Microsoft of its dominant position in the PC operating system market by

¹⁸ See *IMS* at [21].

¹⁹ Which concludes at [44] with a finding that even a potential or hypothetical downstream market can be sufficient.

²⁰ Now renamed the General Court.

refusing to supply the interoperability information to competitors in the server operating systems market²¹.

104. In relation to the first abuse, the Commission found (and the Court upheld²²) that the Bronner Conditions were satisfied, in the sense that each of them was able to be met on the facts. Given that feature, and the fact that the tying allegation related to a different situation altogether from the refusal to supply, we found *Microsoft* of limited assistance on the present issue.
105. We now turn to the General Court's decision in *Google*. The PCR argued that this decision deals precisely with the question before us and makes it plain that simply pointing to issues of access does not convert an abuse into a refusal to supply abuse. Sony argued that *Google* is dealing with a different situation altogether and does not assist.
106. The *Google* case involved a finding by the European Commission of an infringement of article 102 TFEU by Google in relation to the way in which search services were displayed on Google's search results pages. The main focus of the Commission's investigation was the way in which Google presented comparison shopping services, which show search users different product options and prices relating to internet searches they conduct. The Commission found that Google had a dominant position in the market for general search services and abused that by preferring its own comparison shopping services over other competing comparison shopping services.
107. Google operated an open platform, which allowed competing services access to users through the search results page. However, the Commission found that the placement of a comparison shopping service on a results page was closely linked to the number of visits, or "traffic", and that significant traffic was essential for comparison shopping services and could not be replicated elsewhere, given Google's dominant position.

²¹ The Commission also found that Microsoft committed an altogether separate abuse, by tying its PC operating system to another product (which was in a market which was distinct from the server operating market and involved different affected parties).

²² See *Microsoft* at [712].

108. The Commission imposed a fine of €2,424,495,000. Google appealed to the General Court. As well as asserting that there was no abuse, but only competition on the merits, Google argued that the Commission had in fact imposed on Google a duty to supply, or to give access to its services as though these were an “essential facility” that was indispensable to Google competitors, without satisfying the strict conditions laid down in *Bronner*.²³
109. After considering and rejecting Google’s arguments about the existence of an abuse, the General Court turned to the refusal to supply argument in [212] and following. The Commission had concluded in its decision that *Bronner* was not applicable to the case because:
- (1) Abusive leveraging was a well-established, independent form of abuse.
 - (2) The practices in issue did not concern passive refusal of access, but rather active favouring of Google’s own services.
 - (3) It was not necessary in this case to require asset transfers or the entry into agreements to bring the abuse to an end.
110. As a result, the Commission did not expressly refer to the *Bronner* line of authority. After referring to the prior case law on refusal to supply (including the rationale for the line of authority, as set out by Advocate General Jacobs and noted above²⁴), the General Court noted that the Commission had envisaged in its decision requiring equal access to Google’s own shopping service, rather than access to the general results pages (which competitor services already had by virtue of the open nature of the search results).
111. The General Court disagreed with the Commission’s view that *Bronner* was irrelevant, noting that the Commission had found that traffic arising from positioning and display on Google’s general results pages was indispensable for

²³ See [122].

²⁴ See [217].

competing comparison shopping services²⁵, making it analogous to other refusal to supply cases²⁶. The General Court then said this:

“229. ... it should be noted that while the practices at issue, as Google maintains, are not unrelated to the issue of access, they can nevertheless be distinguished in their constituent elements from the refusal to supply at issue in the case giving rise to the judgment [in Bronner], which vindicates the Commission's decision to consider them from the aspect of criteria other than those specific to that judgment.

230. Not every issue of, or partly of, access, like that in the present case, necessarily means that the conditions set out in [Bronner] relating to the refusal to supply must be applied.

231. That is so in particular, as the Commission indicates in recital 649 of the contested decision (see paragraph 212 above), where the practice at issue consists in independent conduct which can be distinguished, in its constituent elements, from a refusal to supply, even if it may have the same exclusionary effects.

232. A 'refusal' to supply that warrants the application of the conditions set out in [Bronner] implies (i) that it is express, that is to say, that there is a 'request' or in any event a wish to be granted access and a consequential 'refusal', and (ii) that the trigger of the exclusionary effect - the impugned conduct - lies principally in the refusal as such, and not in an extrinsic practice such as, in particular, another form of leveraging abuse...

233. Conversely, the lack of such an express refusal to supply precludes practices from being described as a refusal to supply and analysed with respect to the strict conditions laid down for such a refusal where, notwithstanding that those practices might ultimately result in an implicit refusal of access, they constitute, in view of their constituent elements which deviate, by their very nature, from competition on the merits, an independent infringement of Article 102 TFEU.”

112. The General Court went on²⁷ to say that all or, at the very least, most practices capable of restricting or eliminating competition are liable to constitute implicit refusals to supply, since they tend to make access to a market more difficult, but that the Bronner Conditions cannot be applied to all of those practices without disregarding the spirit and the letter of Article 102 TFEU. The Court referred²⁸ to previous cases involving margin squeezes and tying which raised issues of access to a service, but where the condition of indispensability was not required to be satisfied.

²⁵ see [[222] to [227] of *Google*.

²⁶ With specific reference to *Microsoft v Commission*. See *Google* at [227].

²⁷ At [234].

²⁸ See [235], including a further reference to *Microsoft v Commission*.

113. The General Court then said:

“244. However, the obligation for an undertaking which is abusively exploiting a dominant position to transfer assets, enter into agreements or give access to its service under non-discriminatory conditions does not necessarily involve the application of the criteria laid down in [Bronner]. There can be no automatic link between the criteria for the legal classification of the abuse and the corrective measures enabling it to be remedied. Thus, if, in a situation such as that at issue in [Bronner], the undertaking that owned the newspaper home-delivery scheme had not only refused to allow access to its infrastructure, but had also implemented active exclusionary practices that hindered the development of a competing home-delivery scheme or prevented the use of alternative methods of distribution, the criteria for identifying the abuse would have been different. In that situation, it would potentially have been possible for the undertaking penalised to end the abuse by allowing access to its own home-delivery scheme on reasonable and non-discriminatory terms. That would not, however, have meant that the abuse identified would have been only a refusal of access to its home-delivery scheme.”

114. As a result, the General Court concluded that *Bronner* did not require the conditions required to be established for a refusal to supply abuse necessarily to be met where there is an independent form of abuse which is distinct from a refusal to supply. That was the case even where there were access issues which arose in relation to the identified abuse. The Commission was not therefore required to meet the Bronner Conditions in this case and the appeal was rejected on this point.

115. We do not accept Sony’s argument that *Google* is not concerned with refusal to supply. It is plain from the judgment at [227] that the General Court considered there to be an abuse which had the hallmarks of refusal to supply, as a result of the Commission’s findings of the indispensability of Google’s traffic to a competing comparison shopping service.

116. We therefore find *Google* helpful in its explanation that it is possible and appropriate to distinguish between refusal to supply cases and cases where there is an extrinsic or independent abuse, notwithstanding elements of access might arise from that extrinsic abuse.

117. That seems both logical and necessary to us, as a matter of principle. There is an obvious potential for the requirements relating to refusal to supply to be deployed by a dominant firm to make it more difficult to challenge abusive

behaviour, even where the issues of access are relatively tangential to the identified abuse. Were such an approach to be permissible on an unqualified basis, it would potentially extend the applicability of the Bronner Conditions test well beyond the class of cases to which it is intended to apply and thus undermine the effectiveness of the prohibition of abuse of dominance in Chapter II/Article 102. On the other hand, the *Bronner* line of authority recognises the entitlement of even a dominant firm to determine, at least to some extent, how its property rights (and particularly IP) are deployed in favour of competitors. That policy consideration should also be given effect to in appropriate cases.

118. We also reject Sony's position that the mere fact that the resolution of the abuse might involve a need to give the excluded firm access to an IP right means that the Bronner Conditions will apply. In our judgment:

- (1) The Bronner Conditions do not need to be met where there is an abuse which is principally extrinsic or independent from a refusal to supply access to an indispensable facility.
- (2) That extrinsic or independent abuse can in principle include an abuse based on exclusionary conduct (such as a contractual restriction on third party sales) or tying.
- (3) The fact that some form of access may either be mandated or may eventuate as part of the curtailment of the abuse or in the counterfactual does not require that the abuse should be treated as a refusal to supply.
- (4) It is therefore necessary to determine whether a pleaded abuse under Chapter II/Article 102 can be considered to be sufficiently differentiated from any refusal to supply so as to be properly characterised as a principally extrinsic and or independent abuse.

119. *Google* is perhaps less helpful in explaining exactly how that determination is to be made. It is clear that the outcome in *Google* turns on the facts of the case, which we note were the subject of a prior investigation by the Commission and were recorded in an extensive infringement decision.

120. In our view, the exercise of properly characterising the abuse in question will involve resolving the application of potentially competing policy considerations – the effective implementation of Article 102/Chapter II on the one hand, and the protection of property rights as espoused by Advocate General Jacobs in *Bronner* on the other.
121. In reaching that determination in any given case, an examination of the following factors is likely to be useful:
- (1) The nature of the alleged independent abuse and the factors that might be said to make it extrinsic or independent of any refusal to supply.
 - (2) The nature and extent of any access issues that may arise in relation to the case, including in particular in relation to the counterfactual.
 - (3) The nature and extent of any property rights, such as IP rights, which are likely to be infringed or interfered with by any access requirements which may arise in considering the abuse and the counterfactual.
 - (4) The broader factual context, including the way in which the parties have approached the alleged abusive conduct. For example, has there been an express request to obtain access, and what was the response to that?
122. In relation to point (4), the PCR urged us to read [232] and [233] of *Google* so as to require an express request and consequent refusal before a case could be categorised as a potential refusal to supply abuse rather than an extrinsic or independent one. It is not necessary to decide that point to resolve Sony’s application and we say no more about it at present.
123. Examples of areas where factual and potentially expert evidence may be useful and indeed necessary to determine the existence of an independent abuse in this case are as follows:
- (1) The parties have advanced competing constructions of the GDPA. Mr Beard KC sought to persuade us that the overall thrust of the agreement

was the licensing of intellectual property to publishers, therefore reinforcing the argument that any adjustment was an interference with Sony's property rights. Mr Palmer KC focused on the limited contractual restriction which he said underpinned the PCR's case and sought to minimise the extent to which the removal of that impacted on Sony's IP rights. It is of course possible for us to attempt to resolve those arguments as a matter of contractual construction, but we would be doing so largely in a vacuum as to the context in which the relevant clauses operate. It seems to us that the factual matrix which surrounds the GDPA may well prove useful, and potentially necessary, in order to properly construe the relevant provisions.

- (2) Similarly, there is a dispute between the parties about what access requirements might be necessary in a counterfactual world where the alleged abuse (manifested by the restriction in clause 9.2.1) did not occur. Sony relies on some relatively short and high level passages in Mr Svensson's statement, which have not been tested in cross examination. Sony seeks to exclude the evidence of Mr Steinberg as inadmissible. We are not at this stage willing to exclude that evidence. Apart from the question of whether it was properly responsive (which we consider to be the case), the challenges to Mr Steinberg's report largely turned on whether Mr Steinberg could give evidence in relation to a recognised body of expertise and whether his evidence was argumentative, partial and unbalanced. If the PCR continues to rely on expert testimony from Mr Steinberg in later stages of this case then some of those questions may need to be resolved²⁹. For present purposes, having seen what Mr Steinberg had to say and taking into account Sony's criticisms, we are not willing to assume that the PCR will be unable to provide further admissible evidence (if Mr Steinberg's evidence was excluded) to challenge Mr Svensson.

²⁹ To be clear, we express no view at this stage as to the admissibility or otherwise of Mr Steinberg's evidence should he be called by the PCR at trial.

- (3) Finally, there is clearly a great deal to be explored in relation to the nature of Sony's property rights arising from the investments it has made in the PlayStation network, and therefore how and to what extent any access requirements might interfere with those rights.

124. It follows that, in order properly to resolve the dispute between the PCR and Sony about the existence of an exclusive dealing or tying abuse which is principally independent of any refusal to supply, it is not necessarily appropriate simply to apply the Bronner Conditions and further detailed factual inquiries, potentially involving expert evidence on technical matters, are required to resolve that question. Further, and contrary to the arguments of Sony, there is no established legal principle to the effect that the mere existence of access issues³⁰ which might arise as a result of any remedy must be established under the Bronner Conditions, even if those access issues involve IP rights. Despite Mr Beard's efforts to persuade us that the PCR's complaint was in essence a request for the licensing of Sony's IP rights, we consider that there is a realistic prospect of the PCR establishing that its pleaded claim of exclusive dealing and/or tying are independent abuses, not requiring the satisfaction of the Bronner Conditions.

125. That indicates that the issue is not one which can be properly resolved as a matter of strike out based on pleadings and established law, or indeed one which would be suitable for summary judgment. It is plain that we are not in a position to answer the question at this stage, where those facts have only been partially explored, and that a trial of the matter is the appropriate mechanism to determine the question in dispute (whether the Bronner Conditions properly apply to the claim being advanced by the PCR). As a result Sony has failed to establish that the PCR has no reasonable grounds for making the claim/ no real prospect of succeeding at trial.

³⁰ By which we mean agreements for access or some form of mandated regulation of the terms on which a dominant firm engages with an excluded firm by means of which an abuse is resolved.

126. The case is therefore appropriately pleaded and not liable to be struck out. Whether or not the PCR is successful will depend on a close examination of the relevant facts, as described above.
127. For completeness, we emphasise that we have reached no conclusion on what the answer to that dispute might be once it is fully traversed at trial. We express no view at all on the merits of the competing arguments, save to determine whether Sony is able to establish an entitlement to a summary remedy at this stage.

(b) Failure to establish an arguable counterfactual

128. The corrective measure sought by the PCR in relation to the exclusive dealing and tying abuses is the removal of the restrictions in the GDPA. There is a considerable difference of view between the parties on what access to the PlayStation network would be needed in order for publishers to make digital games available to consumers outside the existing distribution mechanism. Mr Svensson's evidence on the subject is relatively short and high level, and in no sense could be said to explore this subject in any detail. Regardless of whether Mr Steinberg's evidence is admissible, there is clearly a considerable and potentially complex set of facts which ought to be properly presented and tested at trial.
129. In those circumstances, the suggestion by Sony that we could grant summary judgment against the PCR on this issue is artificial (by seeking to rely on rules of evidence to exclude evidence) and misconceived (when there is obviously a factual dispute which requires determination at trial). Whatever the status of Mr Steinberg's report (on which we continue to express no view), it is clear that further evidence from both the PCR and Sony is likely to be necessary and helpful in determining the issues.
130. As a result, Sony's alternative argument fails as a basis for claiming summary judgment. Again, we express no views on the merits of the competing arguments beyond reaching this conclusion.

(c) Failure to prove the tying allegation

131. Sony’s argument about tying was advanced only briefly at the hearing. In essence, it follows the form of the argument about the PCR’s counterfactual by asserting that the PCR has not put forward any sufficient evidence to show that the requirements for tying, as an abuse, have been met. In our view, this argument is entirely premature and the application is misconceived. The issue in question clearly involves detailed questions of fact and expert evidence which should properly be explored at trial. We can see no sensible basis on which the issue is suitable for summary judgment and Sony’s application to that effect also fails.

E. THE REVISED FUNDING ARRANGEMENTS

132. In *PACCAR*, the Supreme Court held that LFAs pursuant to which the payment to the funder is calculated as a percentage of the damages award constitute “*damages-based agreements*” (“DBAs”) under section 58AA of the Courts and Legal Services Act 1990 and section 47C(8) of CA 1998 and are therefore unenforceable insofar as they relate to opt-out collective proceedings.
133. The question before the Supreme Court was one of statutory interpretation, concerning the interpretation of an express definition of the term “claim management services”, which was first defined in one statutory context (section 4(1) of the Compensation Act 2006) and then adopted and used in another context (section 58AA).
134. The words “claim management services” appear in section 58AA(3), which provides:

“(3) For the purposes of this section —

- (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—
 - (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.”

135. The majority in the Supreme Court (disagreeing with the Competition Appeal Tribunal and the Court of Appeal) held that the funding parties to LFAs in two proposed collective proceedings were providing “case management services”. Given that the funders’ return under the LFAs was based on a percentage of proceeds recovered by the proposed class representative, the agreements were necessarily DBAs under section 58AA. As a consequence, the LFAs were unenforceable by reason of section 47C of CA 1998.
136. On the basis of *PACCAR*, there is no dispute between the parties that the LFA which we considered at the hearing in June 2023 (the “Superseded LFA”) was a DBA and was therefore itself unenforceable. That was because the operative provision for determining the basis of the funder’s return (the “Funder’s Fee”) expressly included a reference to the fee being determined as a percentage of the damages recovered by the PCR, as can be seen below:

“Payment of Funder’s Fee other than from Undistributed Damages

11.1 If a Collective Settlement Approval Order is made, under which the Court approves the payment to the Class Representative of costs, fees and disbursements within the meaning of and under CAT Rule 94 and other than from Undistributed Damages, the Funder’s Fee shall be the greater of:

11.1.1 a multiple of the Funder’s Outlay; or

11.1.2 a percentage of the Proceeds,

calculated in accordance with the following table, unless the Court orders an amount be paid to the Class Representative in respect of the Funder’s Fee which is different from the amount derived from the table below, in which case the Funder’s Fee shall be the amount so ordered by the Court:...”

137. Following consideration of the Supreme Court’s judgment, the PCR and the funder entered into an amended LFA on 4 September 2023 (the “Current LFA”). Clause 11.1 was amended in the manner seen from the comparison below:

Payment of Funder's Fee other than from Undistributed Damages

11.1 ~~If a Collective Settlement Approval Order is made, under which the Court approves the payment to the Class Representative of~~ makes any application (including under clause 10.2) for an Order for payment of the Class Representative's costs, fees and disbursements (within the meaning of and including under CAT Rule 93(4) or CAT Rule 94 and) other than from Undistributed Damages, the Funder's Fee shall be the greater of:

11.1.1 ~~a multiple of the Funder's Outlay Costs Limit;~~ or

11.1.2 only to the extent enforceable and permitted by applicable law, a percentage of the Proceeds,

~~calculated in accordance with the following table, unless the Court orders an amount be paid to the Class Representative in respect of the Funder's Fee which is different from the amount derived from the table below, in which case the Funder's Fee shall be the amount so ordered by the Court; this clause 11.1, clause 11.4 and clause 11.6.~~

138. It can be seen that the Funder's Fee (as defined in the Current LFA) is now to be determined by calculating a multiple of the Costs Limit – being the amount of funding which the funder is contractually obliged to provide – as opposed to the previous position where the multiple was applied to the Funder's Outlay, being the amount actually drawn down. The use of a percentage of the Proceeds (defined as the amounts recovered by the PCR through an order for damages or a settlement, including costs) to calculate the Funder's Fee is made conditional upon that mechanism being enforceable and permitted by applicable law.

139. A similar change was made to a parallel provision (clause 11.2), which applies where the Funder's Fee is paid from Undistributed Damages (and in which case a slightly higher multiple applies). We will return to the relationship between clauses 11.1 and 11.2 in due course.

140. Other changes made in the Current LFA included:

- (1) The insertion of a clause (clause 11.4) which provided that the multiple applied under 11.1 or 11.2 would increase “by one times (1x)” on the date four years after the date of the first application for a CPO in the proceedings, and by the same amount again each year thereafter.
- (2) The addition of wording to the severance provisions at clause 37.4 to provide that:

“...the Parties acknowledge and agree that, if necessary to ensure the enforceability, legality or validity of this agreement, any provision of this agreement which begins with the words "only to the extent enforceable and permitted by applicable law" shall be severable: (a) without modifying or adding to other terms of this agreement; (b) with the consequence that the remaining terms continue to be supported by adequate consideration; and (c) without changing the nature of the contract, such that it is not the sort of contract that the Parties entered into at all.”

141. Sony raised a number of issues about these amendments. Before setting those out, we should also record a broader point made by Sony about the application of *PACCAR* to the exercise before us. Mr Beard pointed out (rightly in our view, and without dispute from the PCR) that we were not just concerned at the 9 October hearing with the potential application of section 58AA to the Current LFA, but that we also needed to reconsider whether the Eligibility and Authorisation Conditions were met for the purposes of the CPO application, as part of our gatekeeper role under Rule 79.

142. Mr Beard further submitted that the majority judgment in the Supreme Court’s decision (given by Lord Sales JSC) materially changed the legal context for assessing DBAs and therefore the lens through which we should undertake the exercise under Rule 79. Mr Beard took us to a number of passages in Lord Sales JSC’s judgment which, he submitted, suggested a broad approach to assessing whether funding agreements were DBAs and effectively imposed a requirement to assess the proportionality of returns to funders which might, in reality, be DBAs in disguise.

143. We think that Mr Beard reads too much into the Supreme Court’s judgment in *PACCAR*. There is a certain amount of discussion, in the judgment of Lord Sales JSC and in the minority judgment delivered by Lady Rose JSC, of the historical approach of the courts to litigation funding. However, Lord Sales JSC said this at [90] of his judgment:

“...Even if it might be said that it is desirable in public policy terms that third party funding arrangements of the kind in issue in this case should be available to support claimants to have access to justice (as to which I express no view), this is not a reason why there should be any departure from the conventional approach to statutory interpretation.”

144. In our view, the exercise carried out by the Supreme Court was just as Lord Sales JSC described – an exercise in statutory interpretation, in which the majority expressed no view on the public policy considerations. While the outcome in *PACCAR* is of course significant in terms of the application of section 58AA, it does not in our view have materially wider ramifications for the approach we should take to the questions of fulfilment of the Eligibility and Authorisation Conditions.
145. Turning to the arguments advanced by Sony, these can be conveniently summarised under four headings:
- (1) The potential application of section 58AA to the amended funding clauses and potential severance: Sony argued that clauses 11.1.2 and 11.2.2, as amended in the Current LFA, were still contrary to Section 58AA and therefore amounted to DBAs. In addition, they could not be severed because the effect of that would be to materially change the agreement between the parties.
 - (2) The potential application of section 58AA to other provisions in the Current LFA: Sony argued that the way in which the Funder’s Fee was set, including the mechanisms in the Current LFA for determining the payment of that fee, involved a reference to the amount of financial benefit received by the PCR and therefore engaged section 58AA(3)(a)(ii), so as to make the agreements DBAs.
 - (3) The effect of the funding arrangements on the incentives of the PCR and the funder: Sony argued that the funding arrangements, taken as a whole, create perverse incentives which are contrary to public policy, so that the Tribunal should not be satisfied that the benefits of the proposed proceedings exceeded the costs, as required by Rule 79(2)(b).
 - (4) The risk of conflict of interest: Sony submitted that the Current LFA created a risk of conflict of interest, so that the Tribunal should not be satisfied that the PCR could act free of conflict pursuant to Rule 78(2)(b).

(1) The potential application of section 58AA to the amended funding clauses and potential severance

146. Sony submitted that the words “only to the extent enforceable and permitted by applicable law”, as inserted into clauses 11.1.2 and 11.2.2, do not convert the Current LFA from a DBA into a lawful funding arrangement. Instead (Sony argued), the Current LFA still provides for payment of a percentage of the Proceeds, with section 58AA applying regardless of any contingency. Sony said that the Tribunal is required to assess the clause in light of the law as it currently stands, rather than in anticipation of any future change in the law. To allow the wording to have the intended effect would be to circumvent the public policy reasons which have led to the regulation of DBAs.
147. The PCR submitted that the plain meaning of the clauses was that there will be no payment that is determined by reference to a percentage of the Proceeds unless and until there is a change in the law permitting such agreements. Until that time, clauses 11.1.2 and 11.2.2 have no effect and do not engage section 58AA(3)(a)(ii), as there is no amount of payment to the funder which is determined by reference to the Proceeds.
148. We agree with the PCR. The clauses operate with a contingency, such that they have no legal effect until the contingency (legislation by Parliament to reverse the effect of *PACCAR*) eventuates. There is therefore no logical possibility that section 58AA could be engaged to make the provisions unenforceable. As a matter of freedom of contract, it is open to the PCR and the funder to agree on such a provision, and we see no reason of public policy or otherwise to make that objectionable. The drafting expressly recognises that the use of a percentage to calculate the Funder’s Fee will not be employed unless it is made legally enforceable by a change in the law, which appears to us to be an entirely proper position to take.
149. The parties told us that, if we reached the above conclusion, it would not be necessary to go on to consider the question of severance. However, for completeness, we will make some brief observations on the arguments as advanced by the parties.

150. The key dispute between the parties was the application of the third stage of the common law test for severance, as summarised in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2020] AC 154, namely that: “*the removal of the unenforceable provision does not so change the character of the contract that it becomes ‘not the sort of contract that the parties entered into at all’*”. In *Tillman*³¹, Lord Wilson suggested that this third limb might be better expressed as whether removal of the provision “*would not generate any major change in the overall effect*” of the contract.
151. Sony argued that the severance of clauses 11.1.2 and 11.2.2 would change the character of the LFA, so that it would cease to be a DBA, both in name and in substance, given the significance of the relevant provisions to the overall nature of the contract. We were referred to a number of cases involving conditional fee agreements where there was discussion about severance, which both Sony and the PCR sought to pray in aid of their position. We did not find these of much assistance, given the different nature of the agreements and the different factual circumstances which they concerned.
152. We do not accept Sony’s argument. Applying Lord Wilson’s formulation from *Tillman*, we do not consider it can be said that there is a major change in the overall effect of the LFA if the relevant clauses are severed. That is plain from the severance clause itself, where clause 37.4 expressly contemplates the offending provisions being removed “*without changing the nature of the contract, such that it is not the sort of contract that the Parties entered into at all*”. We see no reason to go behind this express agreement between the parties themselves.
153. We would therefore have been prepared to sever the clause if we had agreed with Sony’s primary argument to the effect that the current drafting in clause 11 still engaged section 58AA.

³¹ See *Tillman* at [87].

(2) The potential application of Section 58AA to other provisions in the Current LFA

154. Sony also argued that other provisions in the Current LFA engaged section 58AA and caused the Current LFA to be a DBA and therefore unenforceable. In Sony's written submissions, this argument was put quite broadly, so as to encompass:

- (1) The fact that the Proceeds are a natural cap on the amount which can be paid to the funder, so that there is inevitably a reference to the amount of financial benefit obtained by the PCR in determining the Funder's Fee.
- (2) The mechanism by which payments are directed by the LFA to be paid into an account held on trust for stakeholders (defined in the LFA as the "Stakeholders") such as the funder, the ATE insurer and the lawyers working pursuant to conditional fee arrangements, which again is said to create a cap and also defines the amount of financial benefit obtained by the PCR in determining the Funder's Fee.
- (3) A priority agreement entered into between the Stakeholders, which sets out a waterfall for distributions, which is said to recognise that the Proceeds might not be sufficient to pay all Stakeholders and therefore creates a further cap by reference to the amount of financial benefit.
- (4) The different levels of the Funder's Fee which is payable depending on whether the PCR applies for payment of that from the Proceeds (clause 11.1) or from Undistributed Damages (clause 11.2), which is said to make the determination of the Funder's Fee referable to those Proceeds or Undistributed Damages.
- (5) The determination by the Tribunal of the amount payable to the funder in the event of a judgment in favour of the PCR, which Sony said would involve a determination by the Tribunal by reference to the financial benefit obtained by the PCR.

155. At the 9 October hearing, we understood Mr Beard to concentrate on the first of these (item 1). He did not expressly abandon the others, but in our view he was right not to prioritise them as they were clearly misconceived. The argument about the payment mechanism to Stakeholders (item 2) seems to be based on a misunderstanding of the mechanism, and in any event none of: the mechanism (item (2)); the priorities agreement (item (3)); or the timing of application by the PCR (item (4)) could sensibly be said to provide that “*the amount of that payment is to be determined by reference to the amount of the financial benefit obtained*”, as required by section 58AA(3)(a)(ii).

156. Instead:

- (1) The mechanism (item (2)) is set out in clause 10 of the Current LFA. It requires the PCR to make certain applications for orders as to payments to Stakeholders and records that the Funder’s Fee (once determined) is to be transferred from the bank account of the PCR to a bank account on trust for the Stakeholders. It does not define the Funder’s Fee or create a cap. To the extent that the total amount of Proceeds can be said to act as a cap on the Funder’s Fee, that issue is covered by Sony’s point (1) and the consequent mechanism for distribution adds nothing material to the point.
- (2) The priorities agreement (item (2)) is an arrangement between the Stakeholders as to the order in which they are going to distribute the amounts which the mechanism delivers to the account held on trust for them. The PCR is not a party to that agreement and no reference is made to the Proceeds in this exercise. We see no basis on which section 58AA could apply.
- (3) The timing of the application (item (4)) concerns the point in the process at which an application is made to the Tribunal. Any adjustment to the amount of the Funder’s Fee is determined by that timing, not by reference to the amount of the Proceeds.

157. In relation to the last point, item (5), this seems to us to be no more than a re-characterisation of item (1), which is essentially that any decision made by the Tribunal or arising through a settlement must inevitably have some degree of reference to the amount the PCR is getting by way of damages, as a cap or otherwise, thereby engaging section 58AA on the plain wording of that provision.
158. We do not accept Sony's submission on item (1) for the following reasons:
- (1) Sony could not point to any provision in the Current LFA by which the amount of the Funder's Fee was limited by the amount of the Proceeds. The Current LFA is not therefore "*an agreement...which provides that...the amount of the [Funder's Fee] is determined by reference to the amount of the [Proceeds]*", as section 58AA requires.
 - (2) It is in fact the Tribunal, exercising its discretion under Rule 93, that will determine the Funder's Fee in the event of any judgment. In a settlement, the Funder's Fee will be determined by the terms of the settlement, if approved by the Tribunal, in accordance with Rule 94.
 - (3) It may well be the case, in either scenario, that the size of the Proceeds will be a relevant consideration for the Tribunal (or indeed the parties, in a settlement), not least to ensure that the Funder's Fee (together with other Stakeholder payments) does not eliminate or unfairly reduce the benefit of the collective proceedings to class members. That is entirely beside the point, as far as section 58AA is concerned. Neither situation will give rise to an agreement between the funder and the PCR by which the amount payable to the funder is determined by reference to the amount of the financial benefit obtained by the PCR.
 - (4) In this regard, we note that Lord Sales JSC dealt with an argument about the significance of the Tribunal's intervention in [96] to [99] of the majority judgment in *PACCAR*, in which he said that the Tribunal's discretion in settling the return to the funder did not prevent a percentage based funder's fee from being a DBA. That must, with respect, be

correct, but it is quite a different position from this case, where there is no effective provision for a percentage based funder's return. In this case, Sony is arguing that the exercise of discretion by the Tribunal, in referring to the size of the Proceeds, itself gives rise to a DBA. We do not think that *PACCAR* assists on that point.

- (5) Finally, we have already dealt with Sony's argument that *PACCAR* has materially changed the way that the Tribunal should approach the question of whether a funding agreement is a DBA (see [144] above). We do not, as Sony suggested, consider that the approach we have accepted above is a mechanistic one which ignores the reality of the funding arrangements. On the contrary, our conclusions reflect the reality of the situation, and we reject the artificial approach urged on us by Sony.

159. For these reasons, we find that section 58AA has no application to the wider provisions of the LFA.

(3) The effect of the funding arrangements on incentives of the PCR and the funder

160. Sony submitted that the Current LFA, if enforceable, gives rise to perverse incentives which are contrary to public policy and in any event similar to those arising under a DBA. As a result, we were invited to find that the cost/benefit analysis that we are required to consider as part of our assessment under Rule 79(2) was not adequately met.

161. Sony focused on two aspects of the Current LFA, one of which was new and one of which was present in similar form in the Superseded LFA:

- (1) Sony said the revisions to the calculations of the Funder's Fee, and in particular the application of a multiple to the total funding commitment, rather than amounts actually spent, dramatically increased the amount payable to the funder. This effect was amplified by the provisions relating to the funder agreeing further funding commitments, and the

consequences of the proceedings lasting beyond four years, both of which served to increase the multiple.

- (2) The requirement for the PCR to ask the Tribunal to order that the funder is paid before class members significantly benefits the funder at the expense of class members.

162. The PCR and Sony did not agree on the likely financial impact of the revisions to the calculation of the Funder’s Fee. Broadly speaking, it seemed to us that the stage at which any settlement takes place will determine whether the change from Funding Outlay to Total Costs has a significant effect – the earlier the settlement, the greater the likely effect. However, the PCR pointed out that under the Superseded LFA the funder would recover on a percentage basis, which could well exceed the multiple of costs approach on either basis.

163. The PCR also relied on the decisions of the Tribunal and the Court of Appeal in *Gutmann v First MTR South Western Trains Ltd*³². In the Court of Appeal’s judgment, delivered by Green LJ, the Court dealt at [80] to [87] with an argument by the proposed defendant that the proceedings were likely to be “*hugely expensive and overwhelmingly for the benefit of funders and lawyers*”, with a likelihood that few class members would ever claim whatever was recovered.

164. Green LJ said this at [83]

“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 (see the discussion in *Le Patourel* (ibid) at paragraphs [75] – [80]) 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

³² [2021] CAT 31 and [2022] EWCA Civ 1077.

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

165. At [86] he continued:

“86. Secondly, in any event, the answer to concerns such as those expressed lies in the close supervision of costs by the CAT to ensure that they are proportionate: see *Le Patourel* (ibid) paragraph [78]. The proffering of an exorbitant costs budget does not mean that those costs will be ordered to be paid if the class prevails at trial; and the mere fact that at the certification stage costs seem high does not mean that the CAT will simply accept that figure as appropriate for the purposes of a cost/benefit analysis. We cannot see that the CAT would therefore necessarily have taken any materially different view of suitability had it known of the most up to date costs figures.”

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.
168. That view was potentially subject to one exception, being the provision that imposes an increase in the multiple four years after the application for a CPO, with further increases each year thereafter (see clause 11.4, referred to in [140(1)] above). Our reading of the clause was that it increased the relevant multiple by a factor of 100%, being the natural meaning of "increase by one times (1x)". We were concerned that this provided for an arbitrary and steep increase in the multiple after four years, which might create unhelpful incentives as that point in time approaches.
169. We invited the PCR to discuss that matter further with the funder and we were subsequently advised in correspondence that the intention of the drafting was to increase the multiple by one every year after the fourth year, not by 100%. So, for example, a multiple of 3.75 in year three would become 4.75 in year four. The PCR also suggested that the effect of this could be smoothed by applying the increase in monthly increments. The PCR provided an amended LFA on 31 October, which provided for the relevant multiple to increase, after four years, by 0.833 (recurring) each month.
170. At our invitation, Sony filed a short response addressing this amended provision and the PCR filed a short reply submission. In short:
- (1) Sony continued to maintain that clause 11.4, as amended (as well as other provisions which provided for an increased multiple in certain circumstances), provided a return that was disproportionate to the amount invested and not justified by any reasonable rationale. Sony

argued that the sharp increase in the funder's return from year three to year four would provide perverse incentives in the litigation for the funder and the PCR.

- (2) The PCR submitted that the increased return over time was a proper reflection of the increased risk and cost to the funder of delay and reflected a reasonable rate of return on an annualised basis. The PCR referred to the observations of Green LJ in *Gutmann* and submitted that the PCR had done enough to establish a proper basis for the CPO application to be granted.

171. Taking these developments into account, we do not consider the funding arrangements to create unacceptable risks of perverse and unmanageable incentives at this time. We note the arguments advanced by Sony about the potential size of the funder's return in certain circumstances, but we agree with the PCR that this is not the time to determine the reasonableness of those outcomes. The proper time for that will be if and when the PCR obtains any recovery from the proceedings and the Tribunal is required to make a determination of the costs, fees or disbursements properly payable to the class representative under Rule 93(4) of the Rules. We therefore find that the cost/benefit analysis, as referred to in Rule 79(2)(b), continues to favour the bringing of collective proceedings after the amendments to the LFA.

172. For these reasons, our previous conclusion that the Eligibility Condition is met is not altered by Sony's arguments about the Current LFA.

(4) The risk of conflict of interest

173. Sony's arguments under this heading were essentially a reflection of those in relation to perverse incentives, as discussed above, into the Authorisation Condition. Sony submitted that the features of the Current LFA which might incentivise the funder to seek outcomes which are contrary to the interests of the class members, together with the obligations which the PCR has assumed in that regard, create a conflict of interest for the PCR.

174. There was a dispute between the parties as to whether the Tribunal should be focused on conflicts of interest between the PCR and the class, as opposed to the funder and the class. We did not find that distinction very helpful. To the extent that there are potential conflicts of interest that might affect the outcome of collective proceedings, the Tribunal's role is to assess and manage those, regardless of how they arise.
175. Prior to the 9 October hearing, we had satisfied ourselves that the PCR (and Ms Neill as its sole director) were aware of and able to discharge their responsibilities adequately for the purposes of the Authorisation Condition. We do not consider that any of the issues that arise from the relevant features of the Current LFA justify us reaching a different conclusion. Those issues, to the extent they arise, should be able to be managed adequately by the PCR, its sole director and its advisers, recognising their duties to the class, and with the oversight of the Tribunal, in the manner discussed in [166] above.
176. For these reasons, our previous conclusion that the Authorisation Condition is met is not altered by Sony's arguments about the Current LFA.

F. DISPOSITION

(1) CPO application

177. Save in one respect, we are satisfied that the Authorisation Condition and the Eligibility Condition have been met and, subject to the process described in [180] below, we grant the PCR's application for a CPO.
178. This one respect is the class definition, which we have determined to be defective by reason of the inclusion of class members who did not have a claim as at the date of issue of the Claim Form. We direct that the PCR amend the class definition and submit that to the Tribunal for approval. Sony will be entitled to make written submissions on the revised definition.

(2) Summary judgment application

179. We have concluded that, aside from the question of class definition, which we have dealt with as an eligibility point above, the applications by Sony for strike out/reverse summary judgment should be dismissed, given our conclusion that Sony has failed to establish that the PCR has no reasonable grounds for making the claims/no real prospect of succeeding at trial.

(3) Further Procedure

180. As noted in [50] above, we are concerned that there is potential for the economic experts in the case to approach their expert evidence for trial in divergent ways. We intend to direct the parties to follow a process to ensure that there is a clear understanding of the experts for both parties, and the Tribunal, about the key issues for the experts to address and the approach they are taking to those issues in their expert reports. This does not mean that we intend to resolve expert issues in advance of the trial, although if that opportunity arises and the parties wish us to do so then we will consider that possibility. Rather we wish to ensure that we are presented at trial with expert evidence which meets the case of the other party and their expert, so that the Tribunal can make a properly informed determination of the issues.

181. Our proposed process (which we will finalise after hearing any representations from the parties) is that the experts should address a number of topics identified by the Tribunal in short reports which set out the proposed approach at a relatively high level. The Tribunal will then, if it deems it useful, hold a hearing at which the experts will be asked to speak to their reports and approaches and answer questions from the Tribunal. The hearing is likely to take the form of a “hot tub”, led by the Tribunal. Counsel will not be permitted to question either their own party’s expert or the other party’s expert. Counsel will however be permitted to file written observations on the reports prior to the hearing and to make oral or written observations after the hearing.

182. A preliminary list of the issues which the Tribunal is likely to explore is as follows:

- (1) Market definition
- (2) Systems competition/primary v aftermarket sales
- (3) Two-sidedness
- (4) Exclusive dealing/Tying/Bundling abuse
- (5) Excessive pricing abuse
- (6) Profit share v wholesale supply issues

183. The Tribunal invites observations on this proposed process from the parties, to be provided within 30 days of the date of publication of this judgment. If we decide to proceed with a process of this nature after receiving those observations, we will provide further detailed questions for the other issues identified above.

184. In the meantime, we also wish to make provision for a timetable for filing the Defence and Reply. The parties are invited to propose suitable dates for those, bearing in mind that:

- (1) There has now been a considerable delay in determining the outcome of the CPO applications (for reasons outside the parties' control) and it is desirable for these proceedings to progress with some expedition.
- (2) It would be of assistance for the Tribunal to see Sony's Defence in advance of any expert related exercise such as is described above.
- (3) It would be convenient to combine any such expert related exercise with a further CMC to determine further steps to be taken in the proceedings.

185. This Judgment is unanimous.

Ben Tidswell
Chair

Lord Richardson

Derek Ridyard

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

Date: 21 November 2023