



**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1601/7/7/23

BETWEEN:

DR. SEAN ENNIS

Proposed Class Representative

- v -

(1) APPLE INC.

(2) APPLE DISTRIBUTION INTERNATIONAL LTD

(3) APPLE CANADA INC.

(4) APPLE PTY LIMITED

(5) APPLE SERVICES LATAM LLC

(6) ITUNES KK

(7) APPLE (UK) LIMITED

(8) APPLE EUROPE LIMITED

Proposed Defendants

REASONED ORDER (INTERIM CONTACT ORDER)

UPON the application of the Proposed Class Representative (“**Dr Ennis**”) for a collective proceedings order pursuant to section 47B of the Competition Act 1998 and Rule 75 of the Competition Appeal Tribunal Rules 2015 (the “**2015 Rules**”) (the “**Ennis CPO Application**”)

AND UPON Dr Ennis’ proposed class being defined in the terms set out in paragraph 5 of the draft collective proceedings order filed with the Ennis CPO Application (individuals

falling within that proposed class being the “**Proposed Class Members**”)

AND UPON the Proposed Defendants explicitly not submitting to the jurisdiction pending the outcome of any application to contest jurisdiction

AND UPON the Tribunal having made a collective proceedings order in Case No. 1403/7/7/21 *Dr Rachael Kent v (1) Apple Inc. (2) Apple Distribution International Ltd* (the “**Kent Proceedings**”)

AND UPON the Proposed Defendants’ application by letter dated 23 October 2023 (that application being made expressly without prejudice to the Proposed Defendants’ right to contest jurisdiction and/or certification in due course) (the “**Application**”)

AND UPON reading the Proposed Class Representative’s letter dated 10 November 2023 in response to the Application

AND UPON reading the Proposed Defendants’ letter dated 17 November 2023, in which the Proposed Defendants requested that the Application should be held over until after judgment has been handed down in the judicial review proceedings in relation to the order of the Tribunal dated 28 November 2022 in Case 1339/7/7/20 *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others*, (“**the McLaren proceedings**”) and requesting that the Tribunal grant an interim order in the terms below

AND HAVING REGARD TO the Tribunal’s powers under the 2015 Rules

IT IS ORDERED THAT:

1. The Proposed Defendants shall have permission to communicate with potential app industry experts who are Proposed Class Members for the purpose of seeking to obtain evidence or information in relation to the factual and/or expert issues in the Kent Proceedings, without being required to obtain permission from the Tribunal or notify Dr Ennis.
2. Costs in the case.
3. There be liberty to apply.

REASONS

4. In the Kent Proceedings, Apple Inc. and Apple Distribution International Ltd (the “**Kent Defendants**”) have permission to adduce expert evidence from an app industry expert. The deadline for the exchange of expert reports is 26 April 2024. The Kent Defendants therefore need to identify and appoint an app industry expert as a matter of some urgency.
5. By its Order dated 14 November 2023 the Tribunal has granted permission to the proposed Defendants in the Kent Proceedings to contact potential app industry expert candidates who are members of the Class Representative’s Class in those proceedings (the “**Kent Class Members**”).
6. There is potentially an overlap between the Kent Class Members and the Proposed Class Members. The Kent Class Members comprises all users of Apple who used the UK storefront of Apple’s app store and made one or more relevant purchases in the relevant period (as more particularly defined in the Collective Proceedings Order in the Kent Proceedings). The Proposed Class Members comprise UK-domiciled third-party app developers who sold apps via the App Store and made sales to iOS device users within third-party apps. A UK-domiciled developer may well have made purchases on the UK storefront of Apple’s app store as a consumer. In order for the Kent Defendants to contact a potential expert who is a UK-domiciled developer and who has made transactions on the App Store UK storefront as a consumer, permission is therefore required in both proceedings. This Order ensures the efficacy of the permission already granted in the Kent proceedings.
7. The Tribunal does not consider that communications with potential experts made pursuant to this Order will have the effect of putting undue pressure on the Proposed Class to opt out of, and thereby risk the integrity of, the Proposed Class. The Kent Defendants have made clear that they intend to communicate with a very limited number of potential experts who may also happen to be Proposed Class Members and that they are fully aware of their obligation to act transparently and in accordance with the principles set out in the Tribunal’s Ruling (Communications with Class) dated 28 November 2022 in the *McLaren* proceedings.

8. The Tribunal does not accept the argument advanced on behalf of Dr Ennis that permission to contact potential experts within the Proposed Class is unnecessary because the Kent Defendants could instruct a non-UK based expert. Requiring the Kent Defendants to instruct a non-UK based expert would be an unfair limitation of their rights of defence and contrary to CAT Rule 4(2)(a).

9. The Tribunal does not consider that the Order is premature given the need for the Kent Defendants to identify and appoint an app industry expert without delay.

Andrew Lenon KC
Chair of the Competition Appeal Tribunal

Made: 27 November 2023
Drawn: 29 November 2023