Neutral citation [2026] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 January 2026

BETWEEN:

DR. RACHAEL KENT

Class Representative

and

(1) APPLE INC.

(2) APPLE DISTRIBUTION INTERNATIONAL LTD

Defendants

Heard at Salisbury Square House on 13 November 2025

RULING (PLEADING AMENDMENT)

APPEARANCES

Mark Hoskins KC, Tim Ward KC, Alexander Hutton KC, Matthew Kennedy and Antonia Fitzpatrick (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Marie Demetriou KC, Daniel Piccinin KC and Hugo Leith (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. On 23 October 2025 the Tribunal handed down its judgment ([2025] CAT 67) (the "Judgment") in these collective proceedings, following an eight-week trial in January and February 2025. At a hearing on 13 November 2025, convened to discuss consequential matters (the "Consequentials Hearing"), the Class Representative applied to amend her pleadings so as to extend the "Relevant Period" for the claims up until the date of Judgment (the "Application"). The Application is opposed by Apple.

B. BACKGROUND

2. The term "Relevant Period" is used in the Claim Form[1] to define the class as follows:

> "All iOS Device users who, during the Relevant Period, used the UK version of the App Store and made one or more Relevant Purchases."

3. However, the term "Relevant Period" is also used in the Claim Form to describe the time period over which purchases by class members have taken place and therefore are included in the value of commerce in relation to which the Class Representative makes her claim.

4. The term "Relevant Period" therefore serves two separate purposes in the Claim Form:

   (1) It brings into the class iOS device users who made a purchase in the App Store during that period.

   (2) It determines which transactions in the App Store (whether or not they were the transactions which brought a particular iOS device user into the class) fall within the Class Representative's damages claim.

[1] By this stage, the application concerns a proposed Re-Re-Re-Re-Amended Claim Form, but we will refer to it as the "Claim Form" for simplicity's sake.

5. The Application arises directly from the Tribunal's judgment in respect of an application for a collective proceedings order ("CPO") in *Neill v Sony* [2023] CAT 73 ("*Neill*"). In those proceedings, the proposed class representative ("PCR") sought to define the class (using the same term, "Relevant Period") by reference to the date of the final judgment or earlier settlement. The Tribunal agreed with the proposed defendants that the purpose of the collective proceedings regime is to combine claims, which must be extant as at the date of the claim form. The reasoning of the Tribunal has a broader relevance to the current application, so we set it out in full here:

> "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".
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> 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) [of the Competition Act 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 crystalise 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: [Case No. 1304/7/7/19 *Gutmann*; Case No. 1381/7/7/21 *Le Patourel*; Case No. 1403/7/7/21 *Kent*; and Case No. 1381/7/7/21 *Qualcomm*]. 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.

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."

C. THE PARTIES' ARGUMENTS

6. Consistent with *Neill*, the Class Representative has previously applied on two occasions (without opposition from Apple) to extend the Relevant Period to 8 October 2024, and then 15 November 2024. She now submits that it would not (given the decision in *Neill*) have been possible to make an application to extend the Relevant Period up until judgment until the date of that judgment had been identified. In that way, she says she seeks to include all iOS device users who have suffered loss after 15 November 2024 as a consequence of Apple's abusive conduct, and to ensure that Apple does not evade liability for those losses.

7. Alongside the Application, the Class Representative also seeks amendment to the CPO and permission to issue a fresh CPO notice in order to ensure that the domicile date for the proceedings reflects the amended Relevant Period and to allow for the necessary opt-out and opt-in procedures to take place.

(1) Apple's arguments

8. Apple opposes the Class Representative's Application. It says:

   (1) The Tribunal has no jurisdiction to entertain the Application, as the Tribunal has made a final order.

   (2) Even if the Tribunal does have jurisdiction, it would be unfair to Apple to allow the amendment to be issued in circumstances where the Class Representative (and any prospective class member) knows the outcome of the trial.

9. Apple's first argument, as to jurisdiction, proceeds as follows. The Tribunal's function is to determine claims made under section 47A of the Competition Act 1998 (in these proceedings, being aggregated claims by virtue of section 47B). Once it has done so in relation to the claims (as defined by the period of the claims pleaded in the proceedings) and recorded its final findings and orders, the Tribunal has no jurisdiction to revisit its decision or to make orders on the basis of a different claim from that pleaded at the time of the trial. There is no statutory provision that would allow for this and it would affect Apple's rights in a way which was warned about in a decision of Vaisey J in *In Re 56 Denton Road, Twickenham* [1953] Ch 51, [1952] 2 All ER 799 at pages 56-57:

> "…where Parliament confers upon a body…the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affected be altered or withdrawn by that body."

10. Apple points out that [1079] of the Judgment states: "[w]e make the following findings and orders." Apple says that the fact of consequential matters, such as quantum, remaining outstanding, does not mean the Tribunal has jurisdiction to reopen what it has already decided.

11. Apple notes that the position in the High Court is different, as that court has the power to reconsider a decision provided the order reflecting that has not been

perfected.[2] However, there is no equivalent in the Tribunal of Civil Procedure Rule ("CPR") 40.2, which provides for the process of perfecting orders in the High Court, and in these proceedings the Tribunal's orders have been made and cannot be revisited.

12. Apple's second argument, if it is wrong about jurisdiction, is that the Tribunal should decline to exercise any discretion to allow the proposed amendment. This is because:

(1) The Application comes very late and could have been made at an earlier stage. Further, the Class Representative's difficulty in relation to the timing of the Application is caused by the way in which the term "Relevant Period" has been used to determine both the identity of class members and the period for which damages can be claimed. If the two had been separately defined, then the Application could have been made earlier, at least in relation to new losses suffered by existing class members.

(2) It would be unfair to allow the Class Representative to await the outcome of the trial before deciding whether to seek to apply the findings to a later period.

(3) Apple would not be entitled to take the same course if it had succeeded at trial, as the Tribunal would (rightly) not contemplate Apple seeking to extend the period of application of the judgment so as to increase the size of the class who were bound by the result.

(4) To apply the Judgment to a period after the period considered at trial would unfairly remove the rights of Apple to contest liability during that later period, noting that some of Apple's defences were rejected by the Tribunal on evidential grounds.

[2] See *In the matter of L & B (Children)* [2013] UKSC 8, [2013] 1 WLR 634 ("*L&B*") at [18].

(5) To permit the amendment would be contrary to considerations of finality. Apple cited the decision of Henderson J in *Shebelle Enterprises Limited v The Hampstead Garden Suburb Trust Limited* [2013] EWHC 3097 (Ch), [2013] 6 WLUK 44 at [19]:

> "…After the date of judgment it is only in exceptional circumstances that an application to amend will be allowed, because the principle of finality has at that stage come into play and it is that which distinguishes the position from the more flexible approach which the court may adopt before judgment…"

(2) The Class Representative's arguments

13. The Class Representative responds to these points as follows:

(1) The wording in [1079] of the Judgment has to be read alongside [1092], which says: "[t]he parties are to seek to agree a draft order reflecting the outcome of this judgment and this should be available either in an agreed form or for determination of any differences at the consequential matters hearing." This shows that the Judgment does not represent a final order and, by analogy with the High Court procedure, the order of the Tribunal has not been perfected.

(2) In any event, the Tribunal has wide jurisdiction under Rule 115 of the Competition Appeal Tribunal Rules 2015 (the "Rules") to reopen any order. Rule 115(2) provides: "[a] power of the Tribunal under these Rules to make an order or direction includes a power to vary or revoke the order or direction."

(3) The Class Representative has reasonably relied on the decision in *Neill* as meaning that she could not have made her application any earlier (because *Neill* says that the application can only be made in relation to claims which exist at the time the claim form is amended). It would be unfair in those circumstances for the Class Representative at least to be unable to bring up to the date of Judgment the claims of class members who have been brought into the class as at 15 November 2024, by virtue of the last permitted amendment.

(3) Further submissions

14. We invited the parties to provide further submissions, following the Consequentials Hearing, on two points:

    (1) The proper interpretation of Rule 115(2), with particular reference to case law about a similar provision in the High Court, which is CPR 3.1(7).

    (2) The approach taken in one Australian and two Canadian cases about when the class in a collective proceeding or class action should be considered closed.

15. In relation to Rule 115, Apple submits that the disposition and orders in the Judgment at [1079] to [1090] are not made pursuant to any power under the Rules, so that Rule 115 cannot apply. In any event, the equivalent provision in CPR 3.1(7) (which is almost in identical terms) establishes that such a power should not be used to vary or revoke final orders: see *Vodafone Group v IPCom* [2023] EWCA Civ 113, [2023] RPC 10 ("*Vodafone*") at [54].

16. The Class Representative submits that the power of the Tribunal under Rule 115 is a general one, as indicated by the power of the Tribunal to regulate its own procedure as expressed in Rule 115(1). To limit that power to exclude the revocation of orders unless they are otherwise referred to in the Rules would lack any coherent justification. In relation to CPR 3.1(7), the Class Representative notes that there are cases in which the court has varied its own final order in exceptional circumstances, as recognised in *Vodafone* at [35]. This is such an exceptional case.

17. We will deal with the Australian and Canadian authorities and the parties' submissions on them in the analysis section of this ruling.

D. ANALYSIS

(1) The general approach

18. Before turning to the detail of the Application, it seems important to consider as a matter of principle the question of when the class in collective proceedings should properly be considered as finally determined, or "closed". We recognise that this is a question for the Tribunal in each case, but it also seems to us that parties to collective proceedings would generally benefit from some guidance about the approach to be followed, given the decision in *Neill* which itself reflects complexities arising from the way in which sections 47A and 47B operate.

19. The issue in *Neill*, and the Tribunal's solution in that case, was limited to the question of the addition of new class members, as opposed to existing class members incurring further losses outside the pleaded claim period. The argument was expressed as being about the need for claims to be extant at the date of the claim form (see [64] of that judgment, for example) and there is no reference in the judgment to the question of continuing losses of existing class members being included up to the date of judgment.

20. It is correct that the use of the term "Relevant Period" in that case (in the same way as it is used in the present case) meant that the two aspects identified in paragraph 4 above were tied together by that definition. However, that is incidental to the point that was being addressed in *Neill*, which was only about the inclusion of new class members. That was also plainly the subject matter of the extract from *Merricks 3*, and is also clear from the reference to the claims of "future users" in [70]. We can see that there is some room for confusion which arises from the use of the term Relevant Period in these two respects, but we do not consider that, properly analysed, there is any doubt about what the Tribunal in *Neill* was actually addressing.

21. As we understand it, it is common ground that a pleading that claimed losses arising from a continuing breach suffered by existing class members up until the date of judgment would be unobjectionable if, for example, the original

pleading of the case had distinguished that aspect of the claims from the question of new class members coming into consideration as the case progressed.[3] We will return later in this ruling to the question of whether we should exercise our discretion to permit any amendment in relation to this aspect of the Class Representative's case. However, in the present discussion about "closing" the class, we are only concerned with the new claims of new class members.

22. The critical question then, for present purposes, is: what is the proper way in which to define a class which has the potential to increase over the course of the proceedings, by reason of new potential class members becoming subject to the alleged infringement and therefore having claims which arise after the date of the claim form (or the most recent amendment to that). In particular, is there a point in time at which it should not be permissible for a class representative to seek to include such new class members, or is it appropriate to allow the class to continue to expand up until the date of judgment?

23. Sections 47A and 47B provide no guidance on this question and, as far as we are aware, it has not been considered in any decision in this jurisdiction. However, there are some provisions of the Rules which are relevant to the question, because they specify steps that must be taken, and rights that need to be addressed, as a consequence of the certification of opt-out collective proceedings. These are as follows:

> "**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

[3] This is not in fact a completely straightforward issue, as can be seen from previous discussions in cases before the Tribunal. See the discussion in the transcript of the first certification hearing in Case No. 1602/7/7/23 *Riefa v Apple* and Day 2 of the certification hearing in Case No. 1304/7/7/19 *Gutmann v MTR*. However, we have not been asked to decide it and proceed on the basis that it is agreed between the parties.

(c) are suitable to be brought in collective proceedings.

[…]

(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.

[…]

The collective proceedings order

80.—(1) A collective proceedings order shall authorise the class representative to act as such in continuing the collective proceedings and shall—

(a) state the name and address for service of the class representative or, where there are sub-classes, representatives;

(b) state the name of each defendant;

(c) describe or otherwise identify the class and any sub-classes;

(d) describe or otherwise identify the claims certified for inclusion in the collective proceedings;

(e) state the remedy sought;

(f) state whether the collective proceedings are opt-in or opt-out collective proceedings;

(g) specify the domicile date;

(h) specify the time and the manner by which—

(i) in the case of opt-in collective proceedings, a class member may opt in;

(ii) in the case of opt-out collective proceedings, a class member who is domiciled in the United Kingdom on the domicile date may opt out; and

(iii) in the case of opt-out collective proceedings, a class member who is not domiciled in the United Kingdom on the domicile date may opt in;

(i) order the publication of a notice to class members in accordance with rule 81; and

(j) specify the part of the United Kingdom in which the collective proceedings are to be treated as taking place.

(2) In describing or otherwise identifying the class for the purposes of paragraph (1)(c), it is not necessary for the order to name or specify the number of the class members.

Notice of the collective proceedings order

81.—(1) The class representative shall give notice of the collective proceedings order to class members in a form and manner approved by the Tribunal.

(2) The notice referred to in paragraph (1) shall—

(a) incorporate or have annexed to it the collective proceedings order;

(b) identify each defendant;

(c) contain a summary in easily understood language of the collective proceedings claim form and the common issues;

(d) include a statement explaining that any judgment on the common issues for the class members or any sub-class will bind represented persons in the class, or those within the sub-class;

(e) draw attention to the provisions of the order setting out what a class member is required to do and by what date so as to opt into or opt out of the collective proceedings and

(f) give such other information as the Tribunal directs.

Opting in and opting out of collective proceedings

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

(a) in the case of opt-in collective proceedings, opt into the collective proceedings; or

(b) in the case of opt-out collective proceedings, either—

(i) opt out of the collective proceedings; or

(ii) if not domiciled in the United Kingdom at the domicile date, opt into the collective proceedings.

(2) A class member who does not opt in or opt out in accordance with paragraph (1) may not do so without the permission of the Tribunal.

(3) In considering whether to grant permission under paragraph (2), the Tribunal shall consider all of the circumstances, including in particular—

(a) whether the delay was caused by the fault of that class member; and

(b) whether the defendant would suffer substantial prejudice if permission were granted.

(4) A class member who has already brought a claim that raises one or more of the common issues set out in the collective proceedings order may not be a represented person unless the class member:

(a) discontinues the claim, or;

(b) for claims brought in England, Wales or Northern Ireland, applies to stay that claim, or;

(c) for claims brought in Scotland, applies to sist that claim before the time specified in the collective proceedings order under rule 80(1)(h) to opt into or out of the collective proceedings.

Class records

83.—(1) After a collective proceedings order has been made, the class representative shall establish a register on which it shall record the names of those class members who, in accordance with rule 82, opt in to or opt out of the collective proceedings.

(2) The class representative shall, on request, make such register available for inspection by the Tribunal and any defendant and by such other person as the Tribunal may direct."

24. There is therefore a scheme by which the class is defined by reference to the common issues arising between them, class members are notified, class members have the opportunity to opt out, non-domiciled class members can opt in to the proceedings, and class members are required to discontinue existing claims in order to remain part of the represented class, all by reference to the provisions of the CPO and the notices which the CPO requires to be published. Consistent with those provisions, the Class Representative in these proceedings has applied (alongside the application to amend the Claim Form) to amend the CPO and to publish fresh notices, among other things containing invitations to class members to opt in or out as the case might be.

25. It is clear from the overall scheme of the regime that its purpose is to provide access to justice for consumers such as iOS device users. It would, as the Class Representative submits, be consistent with that objective to maximise the size of the class so as to make the most effective and efficient use of the collective proceedings and to remove the need for other proceedings which might unnecessarily occupy judicial resources.

26. Against that background, we have found it instructive to look at how the issue of "closing" the class is dealt with in other jurisdictions with similar regimes. In doing so, we are conscious (and made it clear to the parties when we invited their submissions) that the decisions on which we have asked the parties to make submissions concern different legislative frameworks. They cannot therefore provide any direct guidance about the statutory provisions in the Competition Act 1998 or in the Rules.

27. However, we do think they are relevant and helpful, because of the broad principles which emerge from those decisions, which we think can at least to some extent be read across to our collective proceedings regime.

28. The Australian decisions arise from the *Gill v Ethicon SÁRL* proceedings, the first of which is [2018] FCA 470 ("*Gill 1*"). This is a Federal Court decision of Katzmann J concerning a class of women who were surgically implanted with a defective medical device. A question arose about whether women implanted with the devices after the commencement of the proceedings should be added to the class. There was an express provision in the Federal Court of Australia Act 1976 allowing for amendment to the description of the class in the relevant legislation, and the Judge reached the conclusion that it was just and convenient (the relevant test) to do so. The judge then had to decide when the cut-off date should be for inclusion in the class. The applicants (on behalf of the class) submitted that should be the date of the judgment.

29. The judge rejected that argument, saying that "[i]n order for the opt-out procedure to work, a precise date must be fixed before the opt-out notice is sent and included in the notice. If not, a further notice would have to be sent when the date of judgment is known or the settlement is due to be approved and yet another if the settlement is not approved"[4] and "[i]t is both inappropriate and impractical to fix a cut-off date by reference to an uncertain date."[5]

30. On appeal,[6] the first instance decision was upheld, with the appellate court saying[7]:

> "38. This notion of certainty is fundamental. Certainty of composition allows the Court to deal with the class when necessary for the purposes of the Part. For example, s 33J (affording the right to opt out); s 33L (identifying where there are less than seven group members); s 33Q (making orders as to the determination of issues where not all issues are common); s 33R (making orders as to individual issues); s 33S (making directions relating to the commencement of further proceedings by group members); s 33T (considering applications by group members as to adequacy of representation); s 33X (giving notice

[4] See *Gill 1* at [63].
[5] Ibid at [65].
[6] *Ethicon SÁRL v Gill* [2018] FCAFC 137 ("*Gill 2*").
[7] At [38].

> to group members of certain matters); and s 33ZB (making orders binding group members).
>
> …
>
> 40. The primary judge fixed a cut-off date of 3 July 2017, being the day before the initial trial started. A factor that influenced her Honour in doing so was the general prohibition on the hearing of a representative proceeding beginning before the date by which a group member may opt out of the proceeding (see s 33J(4)).”

31. Apple submits that these decisions (and the legislative framework in Australia) broadly support its position that the composition of the class should logically be settled by the time the trial starts, so that the matters to be decided and the persons to be bound are known.

32. Apple also notes that there was one further decision[8] in the course of the same proceedings in which an amendment was allowed to further expand the class but that order was revoked when it because apparent that judgment was imminent, on the basis that to allow potential class members to opt out after seeing the judgment would cause unfairness to the defendants.[9]

33. The Class Representative submits that these cases can only be relevant to the exercise of our discretion, rather than the question of our jurisdiction which is a matter of construction of UK law. On that basis, the Class Representative points to the policy objectives of including everyone with related claims in collective proceedings rather than requiring them to issue separate proceedings. The Class Representative also accepts that the notion of certainty in relation to class definition is fundamental and says that certainty is provided by reference to the date of a delivered judgment.

34. The two Canadian cases are *Wright v United Parcel Service Canada Ltd* 2011 ONSC 5044 (“*Wright*”) and *Berg v Canadian Hockey League* 2017 ONSC 2608 (“*Berg*”).

[8] *Gill v Ethicon Sàrl (No. 3)* [2019] FCA 587.
[9] See *Gill v Ethicon Sàrl (No. 4)* [2019] FCA 1814 (“*Gill 4*”), at [10]-[11].

35. The Canadian class action regime contemplates the class typically being identified by reference to the date of certification: see *Wright* at [177]. The judge in that case rejected an argument that the class should be closed as at the date of issue of proceedings, saying that would encourage multiple class actions, cause confusion and lead to unnecessary expense.[10]

36. It appears from *Berg* that it is also possible for a class definition to be amended by way of a "certification motion" taking place after the original certification decision. In that case, the judge noted the undesirability of an open-ended and uncertain class. However, he also noted that there was the possibility (by reason of the provisions of the Canadian Class Proceedings Act 1992) to amend the certification order, which therefore allowed for new motions to certify, even by way of consent certification for the purposes of settlement. The judge therefore set the date for closing the class as the date of the certification motion.

37. The Class Representative and Apple agree that open-ended class definition is undesirable because it lacks certainty.

38. We agree with the Class Representative and Apple that, as a matter of logic and as explained in the Australian and Canadian cases, there needs to be a defined point at which a class is "closed". That is necessary in order to understand what is being decided and in relation to whom. Without a defined date, there would be uncertainty about who might be in the class, and it would be difficult to make any assessment about whether common issue arose between them (a requirement of certification under Rule (79(1)(b)).

39. That suggests that using the date on which the judgment is handed down after trial would be an unsatisfactory reference point. That date is dependent on progress in drafting the judgment and the other activities which must be undertaken before it is handed down. It might vary by months from case to case. The parties are generally unaware of this date until shortly before the judgment is handed down. It is therefore an inherently uncertain date and we agree with

[10] See *Wright* at [195] and [196].

the Australian view that this makes it unsuitable as a reference point for the date for "closing" the class.

40. It also seems to us that there is considerable force in the proposition that the class needs to be finally determined at a point at which the processes for opt-out and opt-in can be meaningfully carried out. As Apple has argued, it is unlikely that can fairly and sensibly happen once the world knows the outcome of the proceedings.

41. We agree with Apple that it is potentially unfair for a defendant in collective proceedings to be faced with class members who have the luxury of knowing the outcome of the case before deciding whether or not to opt out. That might most obviously arise where the defendant has won, and, as the Class Representative points out and Apple accepts, those circumstances are unlikely to lead to an application to extend the class. However, the position may be more nuanced, with the defendant winning and losing on some points, leading to different assessments by class members as to their prospects in the collective proceedings or outside them. That is the hypothetical situation with which the judge in *Gill 4* was concerned.

42. There is also the possibility that non-domiciled claimants could take advantage of knowledge about the outcome to opt in to the class, with obvious unfairness to a defendant who has lost the case.

43. If it is accepted that it would be inappropriate for the opt-out and opt-in processes to be available once the outcome of the case is known, it becomes difficult to see how the date of judgment can be a useful reference point. Further, and given that any application to amend to expand the class can only be made once their claims arise (as explained in *Neill*), there is no obvious point after the trial has finished and before judgment is delivered at which the application could sensibly be made.

44. Overall, it seems both impractical and inconsistent with the whole scheme of the collective proceedings regime for trials to take place and final judgments to be delivered in circumstances where the significance of those actions (who is

claiming and for what) is not finally determined before those events take place and where an opt-out/opt-in process is delayed until some indeterminate date by which they have become artificial, if not meaningless.

45. For that reason, in our view it is as a matter of general practice desirable for the class to be determined, or "closed", before the trial of the collective proceedings commences. We do not intend by this to fetter any future Tribunal in approaching the matter in a different way, but we suggest that, absent circumstances which require a different approach, parties to collective proceedings should approach the matter on that basis. That would require notices to be served and opt-in/out processes to be complete before the first day of the trial, which means that the date by which the amendment to the claim form takes place will need to be some sufficient time in advance of the trial.

46. Bearing in mind again the requirement, as explained in *Neill*, that claims be extant at the time any application to amend is made, it might be suitable for the question to be dealt with at the pre-trial review ("PTR") if that is reasonably proximate to the start of the trial. Alternatively, if the PTR does not take place at a suitable juncture, it might be an application which can be dealt with by the Tribunal on the papers at the appropriate time.

47. This approach ought also to avoid the need for class representatives to continually update the claim form to add new class members. That exercise need only be done once, at the PTR, or by application a suitable time in advance of the trial, to bring the class composition up to date immediately prior to the commencement of the trial.

(2) The Application

(a) Jurisdiction

48. We do not accept Apple's argument that the Tribunal has no jurisdiction to reopen the Judgment by way of permitting an amendment to the class definition.

49. Apple's argument starts with the premise that the Tribunal's function is to decide section 47A claims (obviously, in this case, as aggregated under section 47B) and, once that has been done, it has discharged its statutory function and has no further jurisdiction. We can see nothing in section 47A which suggests such a narrow approach to the question of jurisdiction and indeed it seems inconsistent with Apple's suggestion that we do retain jurisdiction for consequential matters (which, in a collective action, are considerably broader than in a simple section 47A case, involving for example the distribution of damages to class members under Rule 92).

50. It also seems to us that such a limitation is inconsistent with the wide powers under Rule 115(1) for the Tribunal to regulate its own procedures and under Rule 115(2) allowing the Tribunal to vary or revoke any order or direction.

51. Apple submits that Rule 115(2) should be read narrowly, as it corresponds in its wording with CPR 3.1(7), which has been interpreted restrictively. We do not accept that cases about the application of CPR 3.1(7) can be used to support Apple's point about jurisdiction under Rule 115(2). CPR 3.1(7) is located in the section of the CPR concerning the court's general power of management (the corresponding provision in the Rules is Rule 53). Rule 115, on the other hand, is a more general provision about the Tribunal's powers and we consider that Rule 115(2) needs to be read in that light.

52. It seems to us that this general provision is both appropriate and necessary in the context of a statutory tribunal to avoid the very conclusion Apple seeks us to draw. It would create an unhelpful inflexibility if the Tribunal was constrained by the sort of argument Apple is making, so that revisiting a judgment in any circumstances, however exceptional, would be impossible. The situations which have arisen in High Court practice (some of which are described by the Supreme Court in *L&B*[11]) are examples of when a degree of flexibility is desirable. It is of course possible that similar situations requiring

[11] See *L&B* at [16]-[27], and in particular the cases as to the exercise of the discretion including: *Re Harrison's Settlement* [1955] Ch 260, [1955] 2 WLR 256; *Stewart v Engel* [2000] EWCA Civ 362, [2000] 1WLR 2268.

some flexibility might arise in the Tribunal's cases, as the present Application evidences.

53. We therefore conclude that we do have jurisdiction to revisit the terms of the Judgment, insofar as they constitute an order or direction, under Rule 115(2).

54. However, we do accept that such a jurisdiction must be used carefully and indeed sparingly. We also note that there has been some debate in decisions of the Supreme Court and in the Court of Appeal[12] about the circumstances in which the discretion to reopen a judgment should be exercised. Some of this depends on the question of whether or not a sealed order has been made, but the general approach is that the interests of finality in judgments is a powerful factor which would need to be displaced before it would be just to reopen a judgment.

55. For reasons which we explain below, we do not intend to exercise our discretion in this case regardless of the test, and it is not necessary to consider in detail how those authorities might apply to the practice in the Tribunal (which is different in various respects), beyond acceptance of the general principle that the interests of finality require there to be very good reasons why it would be just to reopen a judgment.

(b) Discretion

56. As indicated above, we do not consider it appropriate to exercise our discretion to permit the amendment sought by the Class Representative. The simple reason for that is that the proposed amendment is not consistent with our preferred approach to "closing" the class, as described in earlier parts of this Ruling. In fact, the approach taken by the Class Representative prior to the present amendment application is in our view the appropriate one for her to have taken and, more or less, achieves the same outcome as our preferred approach.

[12] See *L&B*; *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, [2022] 1 WLR 3223 at [18]-[28]; *Vodafone* at [35]-[56].

57. The Class Representative previously made an application to extend the class by reference to a "closing" date of 15 November 2024. That application was made on the papers, by way of written application dated 30 October 2024. It was consented to by Apple, and therefore required no substantive consideration at the PTR, which took place on 15 November 2024.

58. The order made by the Tribunal on 21 November 2024 provided that the Relevant Period would be extended from 8 August 2024 to 15 November 2024. The fresh CPO notice issued in accordance with the 21 November 2024 order provided that opt-in and opt-out decisions needed to be notified by 27 December 2024 (effectively two weeks before the trial started on 13 January 2025).

59. In this way, the Class Representative has more or less achieved the outcome that our preferred approach involves. She has sought and obtained a determination of the class at a date shortly before the start of the trial. While it may have been the case that the adjustment of the Relevant Period could have extended a further two weeks, with the opt-in/opt-out date in the notice corresponding more closely with the start of the trial, the timing difference is minor in the scheme of things and probably represents a sensible level of redundancy in that process.

60. In those circumstances, any order we would be willing to make would achieve only a marginal benefit in terms of maximising the size of the class by extending the Relevant Period by a further two weeks. Given the importance of finality in judgments and the potential for prejudice to Apple, we do not consider that allowing for that level of fine tuning in the class composition is warranted, and we therefore decline to use our discretion to allow an amendment to that effect.

61. It follows that we are not willing to exercise our discretion to permit the amendment proposed by the Class Representative, which uses the date of judgment as the reference point for "closing" the class. For the reasons given earlier in this Ruling, we consider that is not the correct approach to this issue of class determination, given the structure of the regime, questions of fairness to Apple and the importance of there being a meaningful opportunity for opt-in and opt-out processes to work meaningfully and effectively.

(3) Other amendments

62. That leaves the question of any amendment which the Class Representative might wish to make to include the claims of existing class members up until the date of judgment. The application before us involves an amendment which involves the claims of both new and existing class members, and is not one which we are prepared to grant for the reasons set out above. There is no application before us relating to existing class members only. Such an application would involve more than just a change in the date for determination of the class, as it would need to deal with the omnibus nature of the term "Relevant Period". It is not therefore something which we can properly address in this Ruling.

63. If the Class Representative wishes to pursue an amendment relating to the claims of existing class members up to the date of judgment, then she will need to make a fresh application for that purpose.

E. DISPOSITION

64. The Application is refused.

65. This Ruling is unanimous.

Ben Tidswell
Chair

William Bishop

Tim Frazer

Charles Dhanowa, CBE, KC (Hon)
Registrar

Made: 13 January 2026
Drawn: 13 January 2026