Neutral citation [2026] CAT 29

Case No: 1689/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

2 April 2026

Before:

THE HONOURABLE MR JUSTICE WAKSMAN
(Chair)
PROFESSOR ALASDAIR SMITH
MICHAEL CUTTING

Sitting as a Tribunal in England and Wales

BETWEEN:

CONSUMERS' ASSOCIATION

Applicant/Proposed Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(3) APPLE EUROPE LIMITED
(4) APPLE RETAIL UK LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 19 and 20 November 2025

JUDGMENT (CPO APPLICATION)

APPEARANCES

Philip Woolfe KC and Jack Williams (instructed by Willkie Farr and Gallagher (UK) LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Marie Demetriou KC, Max Schaefer and Michael Quayle (instructed by Covington & Burling LLP) appeared on behalf of the Respondents/Proposed Defendants.

TABLE OF CONTENTS

A. INTRODUCTION

1. There are two applications before us. The first is the application by the Proposed Class Representative (**PCR**), the Consumers' Association (**Which?**) for a Collective Proceedings Order (**CPO**) in respect of its proposed claim against Apple Inc., Apple Distribution International Limited, Apple Europe Limited and Apple Retail UK Limited (**Apple**) (the **CPO Application**). The proposed claim and the CPO Application were set out in the Collective Proceedings Claim Form issued on 8 November 2024. On 25 July 2025, Which? served a draft Amended Claim Form. Should we grant the CPO, the amendments themselves are not objected to and so for present purposes, we shall refer to the claim as set out in the draft Amended Claim Form.

2. Also on 8 August 2025, Apple served its Response to the CPO Application (the **Response**) and on 3 October 2025, Which? served its Reply to the Response (the **Reply**).

3. For the most part, and subject to our consideration and approval, Apple does not resist the making of a CPO. However, it has raised a number of points in relation to the status and viability of the proposed funder for these proceedings being LCM Funding UK Limited (**LCM**), and certain terms of the Litigation Funding Agreement (**LFA**) to be made between LCM and Which?.

4. The second application is made on the footing that the CPO is otherwise granted. It is that certain parts of Which?'s claim relating to one particular head of loss should be struck out and/or should be summarily dismissed on the grounds that it has no real prospect of success as a matter of law (the **Strike-Out Application**). We shall deal with this second application in a further judgment.

5. We should add that following the initial hearing on 19-20 November 2025, we considered that there were various matters and questions arising out of the Strike-Out Application which needed to be explored further. For this reason, we sent a set of questions to the parties to be answered at a further hearing. This hearing, preceded by further written submissions, took place on 6 March 2026.

B. THE NATURE OF THE PROPOSED CLAIM

6. This can be taken relatively briefly, since there is no merits challenge at this stage save in respect of the head of loss which is the subject of the Strike-Out Application.

7. The proposed claims are made on a "stand-alone" basis under s. 47A of the Competition Act 1998 (the **Act**). They allege that Apple has abused its dominant position in respect of the operating system for Apple mobile devices - iOS and iPadOS - on iPhones, iPads, and iPod Touch devices (**iOS**) by unlawfully favouring its own cloud storage product, namely iCloud, to the exclusion of what is said to be the many actual and potential competitors for the provision of cloud storage services. In particular, it is said that Apple deployed a set of technical restrictions and practices which prevented Apple iOS users (such as those who have iPhones, iPads, or iPod Touch devices) from storing certain significant file types on any cloud storage service other than iCloud. This means that in those respects such users can only use iCloud if they wish to have what Which? describes as a comprehensive backup of their iOS devices. Further, it is alleged that Apple deploys unfair choice architecture options which individually and cumulatively steer iOS users towards using and purchasing iCloud rather than any other cloud storage services available from other providers and/or limits their effective choice and/or excludes or disadvantages competitors and potential competitors.

8. On the above basis, Which? contends that Apple has infringed the prohibition on such anti-competitive conduct in Chapter II of the Act and (for the period prior to 31 December 2020) Article 102 of the Treaty on the Functioning of the EU.

9. So far as damages are concerned, the major part of the claim (in terms of quantum) relates to Apple iOS users who paid for additional iCloud storage above and beyond that which is supplied to them by Apple free of charge. We refer to such users as **Purchasing Customers**. The core argument is that absent the alleged abuse and in a counterfactual market not affected by such abuse, the Purchasing Customers for the extra storage would have been charged, and paid, less. In other words, this is an "overcharge" claim. The present estimate of this part of the claim is £1.187 billion and £1.671 billion, exclusive of interest, or between £1.462 billion and £2.043 billion including simple interest at the Bank of England base rate + 5%.

10. However, about 13% of the total claim by quantum relates to a second group of Apple iOS users who did not in fact purchase extra storage at all. Which? contends that they have also

suffered a recoverable loss which can be described as "foregone consumer surplus". The total sum claimed here is £162m exclusive of interest, and £202m inclusive of simple interest interest at the Bank of England base rate + 5%. It is this head of loss which is the subject of the Strike-Out Application.

11. The overall amounts recoverable for each member of the proposed class, should the claims succeed, are put at between £43 and £58.

12. An injunction requiring Apple to cease the alleged abusive conduct is also sought.

13. Apple disputes these allegations and claims.

C. EVIDENCE

14. The CPO Application is supported by the witness statement of Ms Charmian Averty, Which?'s General Counsel and Company Secretary (and of Which? Limited, a wholly-owned subsidiary of Which?), dated 8 November 2024 (**Averty 1**). Averty 1 exhibits the proposed **Litigation Plan**, prepared in accordance with r. 78(3)(c) of The Competition Appeal Tribunal Rules 2015 (the **Rules**) and §6.30 of the Competition Appeal Tribunal Guide to Proceedings 2015 (the **Guide**). The Litigation Plan has two annexes, namely the **Notice and Administration Plan** and the **Costs Budget** (as required by r. 78(3)(c)(iii)).

15. In addition, there are expert reports from Mr Mat Hughes on competition economics, Dr Stefan Hunt on Apple's choice architecture for cloud storage on iOS, and Professor James Mickens on technical matters, dated 8, 7 and 6 November 2024, respectively.

16. In addition, there is the LFA and documents relating to it, as well as various documents relating to the operation and performance of LCM.

D. THE CPO APPLICATION

(1) Introduction

17. Section 47B of the Act provides for the bringing of collective proceedings before the Tribunal. It provides (so far as material) as follows:

"(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').

(2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.

[…]

(4) Collective proceedings may be continued only if the Tribunal makes a [CPO].

(5) The Tribunal may make a [CPO] 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
>
> (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.

(7) A [CPO] must include the following matters—

> (a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,
>
> (b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and
>
> (c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).

(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 [CPO] 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.

(9) The Tribunal may vary or revoke a [CPO] at any time.

(10) 'Opt-in collective proceedings' are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.

(11) 'Opt-out collective proceedings' are collective proceedings which are brought on behalf of each class member except—

> (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and
>
> (b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings…"

18. In addition, r. 78 of the Rules provides 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 [PCR] 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 [PCR] is a member of the class, and if so, its suitability to manage the proceedings;

(b) if the [PCR] 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 [PCR] 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 [PCR] shall provide."

19. Further, r. 79 of the Rules provides (so far as material) 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 [PCR] 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;
>
> […]
>
> (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;
>
> […]
>
> (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 [CPO], 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 [CPO]."

(2) The Eligibility Condition

20. Section 47B(5)(b) and (6) of the Act and r. 79 (1) and (2) set out the requirements for collective proceedings to be "eligible" for the purpose of making a CPO, to which we shall refer as the **Eligibility Condition**. We deal with each of its elements below.

(a) Identifiable class

21. We agree that this element has been satisfied, subject only to two points raised by Apple, dealt with below. The class is an objectively identifiable one estimated by Which? to consist of around 38.5m persons being those who have or have used an iOS device and/or have or have used (and paid for where applicable) iCloud services. Class members themselves can readily understand whether they would form part of the class or not and further, their membership of the class or not can be checked by them through their own Apple account, device settings or App Store purchase history. Which? expects that Apple should also be able to verify this, based on its membership and billing records.

22. The two points raised by Apple are: first, that a part of the class should be removed, namely those who did not purchase iCloud storage from Apple (the **Non-Purchasing Customers**). They are to be distinguished from those members of the class who did, i.e. the Purchasing Customers. According to Apple, this element of the class should be removed because the claims made on behalf of Non-Purchasing Customers are not recoverable in law", and this is the subject of the Strike-Out Application. We say no more about this here because it is dealt with separately in a separate judgment.

23. Apple had originally raised a second point to the effect that the proposed class should exclude any users who only obtained iCloud services for the first time after the issue of the original Claim Form. However, the parties have now agreed an "end-date" which will be the date when the Amended Claim Form is filed, whenever that is, and such a date can be provided in the order we make if a CPO is granted. The practice in collective proceedings where a CPO has been granted tends to provide for successive agreed end-dates. We now of course bear in mind the guidance given by the Tribunal in *Kent v Apple* [2026] CAT 1 about the need for the class to be "closed" prior to the commencement of the trial. That does not affect the present agreement about the end-date which we are content to approve.

(b) Common issues

24. These are set out at §§154–156 of the draft Amended Claim Form. In short, all of the claims concern the same services, namely the provision of iCloud services to users of iOS devices, and the same alleged abusive conduct. They therefore raise "the same, similar or related issues of fact or law". The fact that the class is then split into Purchasing Customers and Non-Purchasing Customers for the purposes of the damages claimed does not affect this. Apple does not suggest that this requirement is not met, and we agree that it is met.

(c) Suitable for collective proceedings

25. The suitability of these proceedings to be conducted on a collective basis is set out at §§157–168 of the Amended Claim Form. They obviously are suitable, because the relevant proposed class consists of a very large number of individual consumers, each of whom is said to suffer a modest loss, but one which is far too small to justify the bringing of an individual action by each such consumer. On the other hand, the aggregate damages could be very substantial and the PCR is a well-known and experienced class representative, extremely familiar with consumer issues: see in particular §§6–9 and §§19–22 of Averty 1. Further, the existing expert reports filed advance at least a plausible claim. Apple does not take issue with any of this save in respect of its Strike-Out Application. There is no other general merits objection made by Apple at this stage.

26. Accordingly, and subject to the outcome of the Strike-Out Application, we agree that the claims made here are suitable for collective proceedings.

(d) Conclusion on the Eligibility Condition

27. Subject to the matters raised by the Strike-Out Application, we consider that the Eligibility Condition has been satisfied here.

(3) The Authorisation Condition

(a) Introduction

28. We next have to be satisfied that the PCR is a person which can be authorised to act as the class representative and we refer to this as the **Authorisation Condition**. As provided in s. 47B(8)(b) of the Act, set out above, the Authorisation Condition is fulfilled if it would be "just and reasonable" to appoint the PCR as the class representative. As provided for in r. 78(2), factors going to the determination of that question, as material here, include whether the PCR would "fairly and adequately act in the interests of the class members" and will "be able to pay the defendant's recoverable costs if ordered to do so".

29. We have already made reference at §26 above to Which?'s experience of and involvement in consumer affairs, and it has in fact already acted as a class representative in other collective proceedings and competition damages claims: see also §29 of Averty 1. Apple does not challenge the qualities or abilities of Which? itself to act as class representative. However, it has raised a number of matters relating to LCM as the funder of the proceedings and the proposed LFA, which are said to affect whether it is nonetheless just and reasonable for the PCR to be the class representative, with which we need to deal.

30. Those matters are as follows:

    (1) The **LCM Issues**: these refer to concerns about LCM itself and its appropriateness as the funder here.

    (2) The **Transparency Point**: this concerns certain respects in which Apple says that the PCR has not been transparent in connection with the funding of these proceedings.

    (3) The **LFA Issues**: these concern three aspects of the draft LFA as originally provided, and the Deed of Priorities, relating to priorities (the **Priority Point**), termination of funding (the **Termination Point**) and adverse costs protection for the PCR in respect of appeals (the **Appeals Cover Point**).

31. We deal with those matters in turn. We also deal with the Transparency Point at the same time as the LCM Issues as the former is really one element of the latter.

(b) The LCM Issues and the Transparency Point

32. LCM is a wholly-owned subsidiary of an Australian company, Litigation Capital Management Limited (**LCM Ltd**). By the proposed LFA, LCM has agreed to provide Which? with just over £30m of funding for the purposes of its costs and expenses of pursuing these proceedings, as shown in the Costs Budget. The amount of funding from LCM would cover this.

33. LCM has also procured an adverse costs indemnity insurance policy with an anti-avoidance endorsement (the **Insurance Policy**) which is administered by Litica Limited on behalf of various insurers. The indemnity given is in respect of the obligation of LCM and/or Which? to pay (if it arises) Apple's legal fees, charges, disbursements and expenses incurred as a direct result of and pursuant to these proceedings, with a limit of £15m.

34. So far as its own funding commitments are concerned, in respect of the first £14.5m of Which?'s funding, 25% will come from LCM itself, with the balance of 75% coming from a fund consisting of secure and ring-fenced third-party capital which LCM itself manages. As matters presently stand, LCM itself will fund the balance of the £30m of funding to be provided to Which?. The provider of LCM Ltd's working debt facility, with scope for lending up to US$150m, is Northleaf Capital Partners Limited (**Northleaf**), a Canadian company.

35. On 1 October 2025, LCM Ltd produced its 2025 annual report, for the year ending 30 June 2025 (the **2025 Report**). The Chairman's Statement read thus:

> "In reviewing the past financial year I acknowledge the significant challenges LCM has encountered. FY25 has been the most difficult year in the company's history marked by an unprecedented number of case losses that have adversely affected our financial performance and cash flows. Despite these setbacks, our team has demonstrated resilience, taking decisive actions to stabilise the business amid near-term pressures from elevated debt levels. We remain committed to our long-term vision while prioritising financial stability.
>
> To address these challenges we have right-sized operations, significantly reducing operating expenses through disciplined cost management. This included difficult decisions such as reducing headcount, carefully evaluating our overheads, and streamlining processes to enhance efficiency without compromising our core capabilities. New commitments were scaled back as we focused on high-quality opportunities and capital preservation, ensuring resources are allocated to deliver maximum value. Additionally, we conducted a thorough review of our fair value accounting, introduced two years ago, and adopted a more conservative approach in light of recent disappointing results.
>
> The financial strain from case losses and reduced cash realisations increased our reliance on our debt facility. As a result, the Board has made the prudent decision to not pay a dividend, redirecting our focus to strengthening the balance sheet. These measures, though challenging, are critical to securing LCM's financial position and laying the groundwork for future

stability. The binary nature of our investments means that in light of our increased indebtedness there is a risk that in certain circumstances, further case losses could lead to a breach of LCM's debt covenants. As a result, we are reporting a material uncertainty in relation to our going concern status (further detail on page 39). The management team have been proactively engaging with the lender over the last few months. The lender has indicated that its current intention, which is subject to ongoing review and may be reconsidered in light of future developments or change in LCM's circumstances, is to continue to support LCM for the next 12 months as we advance the strategic review announced on 15 September 2025.

Looking ahead we are now focused on completing the strategic review, evaluating all options to realise value for shareholders. These options will be benchmarked against a lean run-off model, which would involve further reductions in operating expenses and a shift to managing our existing portfolio of assets through to conclusion. Under this model, proceeds from successful case investments would be prioritised to reduce debt, with the long-term goal of delivering value for shareholders. We are committed to executing this review with rigour and transparency, keeping you informed as we shape the company's path forward.

[…]"

36. The Financial Statements within the 2025 Report, audited by the accountants BDO Audit Pty Ltd, contain the following material information:

(1) LCM Ltd had net assets of AU$114m, equivalent to about £57m.

(2) On 2 December 2024, LCM Ltd refinanced its credit facility with Northleaf for an initial amount of US$75m with the potential to increase it to a total of US$150m. This facility has a term of four years and is secured against the assets of LCM Ltd. On 30 June 2025 the outstanding utilisation of the loan facility was just under US$24m.

(3) The facility contains various debt covenants including as to borrowings as a percentage of effective net worth, minimum liquidity, and a minimum consolidated EBIT. There had been no defaults of those covenants during the year ended 30 June 2025. A default could render the outstanding balance of the facility due and payable.

37. At page 10, the 2025 Report said as follows:

"**Going Concern - Material Uncertainty**

Given the number of adverse case outcomes in recent months, which have impacted cash inflows and increased indebtedness, the Directors have considered a range of scenarios, including plausible downside scenarios, and note that in certain circumstances, further case losses could lead to a breach of LCM's debt covenants.

LCM's lender has granted a debt covenant waiver through to 30 December 2025 and as part of this arrangement the interest rate on the loan increases by 2.00% per annum during the

> waiver period, and a one-time waiver fee equal to 1.50% of the principal amount outstanding will be payable.
>
> While LCM's lender has been responsive in providing near-term covenant waivers to date, any further amendments, should they be required, will be subject to negotiation. This assessment is linked to a robust evaluation of the principal risks facing LCM and the potential impact of these risks being realised.
>
> After considering LCM's forecasts, stress testing and available mitigating actions, and having regard to the inherent risks associated with the binary nature of LCM's investment model, the Directors have concluded that a material uncertainty exists which may cast significant doubt on LCM's ability to continue as a going concern.
>
> The material uncertainty relates to LCM's ability to comply with its debt covenants in the event of certain adverse case outcomes. The Directors have a reasonable expectation, based on current discussions, that LCM will continue to receive the necessary support from its lender to allow it to continue in operational existence for the foreseeable future. Accordingly, the financial statements have been prepared on a going concern basis, whilst noting the material uncertainty above."

38. Apple's key point here is that the financial position of LCM Ltd and other matters relating to its operations give rise to real doubt as to whether it would in fact be able to fund these proceedings through to trial. Allied to this is Apple's further point that Which? has not conducted itself as thoroughly and as robustly as a PCR should have done when dealing with LCM Ltd and related matters, which in that respect make it unsuitable to act as a PCR in this particular case.

39. Before turning to the evidence and submissions on these points we should refer to two cases.

40. The first is *Riefa v Apple* [2025] CAT 5, where reference is made to the general approach which should be taken by the Tribunal to the assessment of the suitability of a PCR and the question of funding. In its judgment on the PCR's application for a CPO, the Tribunal said this at §31:

> "We draw from the statutory framework and the above authorities and guidance the following propositions regarding the Tribunal's consideration of the authorisation condition and, in that context, its scrutiny of the PCR's funding arrangements:
>
> > (1) The Tribunal may certify a claim only where it considers that it is just and reasonable for the PCR to act as the class representative.
> >
> > (2) In making that determination, the Tribunal must consider whether the PCR would fairly and adequately act in the interests of the class members.
> >
> > (3) That includes consideration of the PCR's ability to pay the defendant's recoverable costs, as well as its ability to fund its own costs, such that the proceedings are conducted effectively.

> (4) Class actions almost inevitably require third party funding. The interests of the funders are not the same as the interests of potential class members. This gives rise to inherent risks for the fulfilment of the policy objectives of the collective actions regime.
>
> (5) An important protection for potential class members is that the PCR will properly act in the best interests of the class including when agreeing any funding arrangements, and in managing the proceedings going forward including ongoing interactions with funders. That requires the PCR to be sufficiently independent and robust.
>
> (6) In forming its view as to the ability of the PCR to act fairly and adequately in the interests of potential class members the Tribunal will consider all relevant circumstances, including the question of how the PCR has satisfied itself that the funding arrangements reasonably serve and protect those interests.
>
> (7) A further protection is that the terms of any funding agreement should be open to scrutiny, not only by the court but also by the members of the class on whose behalf the claims are brought.
>
> (8) The Tribunal should nevertheless exercise caution in intervening in relation to the funder's return under the funding arrangements, at the certification stage, bearing in mind the Tribunal's ability to control the return to the funder at the subsequent stage of judgment or settlement. In extreme cases, however, the Tribunal's concerns regarding the funding arrangements may lead to a refusal to certify."

41. All of those principles are important, and we bear all of them in mind, but for present purposes, the eighth principle is of particular relevance here.

42. In *Riefa* itself, the Tribunal refused to make a CPO. It found that there were serious shortcomings in the approach to the proceedings taken by the inexperienced sole director and representative of the PCR, Professor Christine Riefa. In particular, its impression was that she was extremely reliant on her legal advisers and did not properly understand the proposed funding arrangements, which was exacerbated by confidentiality provisions in the funding agreement which indicated that she was alive to the funder's interests but not to those of the class members. In particular, she did not understand how the provision dealing with when the funder could be paid in priority to the members of the class actually worked, or how it should be applied, and this was a matter of considerable concern: see §§89–107 of the judgment which demonstrate that the approach of the PCR there was very seriously wanting, with potentially adverse effects for class members.

43. The second case is the very recent decision of the CAT in *Gutmann v Vodafone* [2025] CAT 77, published on 14 November 2025, which dealt with the PCR's application for a CPO, which was granted. The proposed funder was also LCM. At the hearing, the proposed defendants referred to the fact that there was an absence of a guarantee from LCM Ltd, which was a factor

to be taken into account when considering whether the PCR would fairly and adequately act in the interests of the class members. As to that argument, the Tribunal said as follows at §§245–246:

> "245. In respect of the Proposed Defendants' first argument, it is notable that no general challenge is made in respect of the funding arrangements which the PCR has secured with the Funder. Further, at the hearing, the Proposed Defendants did not seek to impugn the reputation of either the Funder or the LCM Group of which it is part. In this regard, we note that this Tribunal has previously certified collective proceedings funded by the Funder without the additional guarantee sought by the Proposed Defendants…However, without making such a challenge, the Proposed Defendants sought to argue that the funding arrangements put in place by the PCR are materially deficient because the Funder has no legally binding means of obtaining funding from the LCM Group.
>
> 246. The principal difficulty we have with the argument advanced by the Proposed Defendants is that, while they had not identified any reasonable basis for inferring that the Funder will, at some point, no longer be able to access funding from the LCM Group, they sought to suggest that this represents a fundamental problem with the funding arrangements put in place by the PCR. Indeed, it was contended by the Proposed Defendants that, in some unexplained way, the absence of a guarantee is of such significance that it will impact on the PCR's ability to act fairly and adequately in the interests of the class members. In short, we are entirely unpersuaded by the Proposed Defendants' argument."

44. However, just before the Tribunal was going to issue its judgment, the proposed defendants brought to its attention the 2025 Report referred to above. In their further submissions, the proposed defendants argued that in the light of the disclosures made in the 2025 Report, the Tribunal could not have confidence in the PCR's ability either to fund his own costs or act fairly and adequately in the interests of the proposed class. They contended that LCM was in a serious financial predicament. They made further submissions which reflect the nature of the submissions made to us about LCM by Apple. In particular, the provision of the 25% of the £19m of funding being provided to the PCR by LCM in that case was based on LCM Ltd's own funds which made this part of the funding open to doubt. There was then a concern as to whether the remaining 75% of the funding from external investors would remain in place if LCM Ltd ceased to be a going concern. Second, the PCR had failed candidly to acknowledge the very serious issues evident from the 2025 Report which cast doubt on his ability to act fairly and adequately. Third, the ability of LCM through its after-the-event (**ATE**) insurance policy to pay the proposed defendants' recoverable costs, if this arose, was put in doubt because it was not clear whether the PCR would be in a position to pay the further premium required.

45. The Tribunal rejected the proposed defendants' further arguments, based on the 2025 Report. Because we are facing materially the same arguments here in respect of the same funder and parent company, we make no apologies for citing in full the Tribunal's reasons at §§272–284:

> "272. On that basis, we consider that by far the most serious aspect of the challenges made in the Proposed Defendants' submissions is the suggestion that the PCR's response to the LCM 2025 Statement in some way casts doubt on his ability to act fairly and adequately in the interests of the class members (rule 78(2)(a)). As we understand it, this assertion is made on the basis that the PCR has failed to acknowledge candidly, in the submissions made on his behalf, the issues evident on the face of the LCM 2025 Statement. The Proposed Defendants contend that this failure is compounded by the failure by the PCR either to explore or put in place any alternative or contingency arrangements.
>
> 273. Having considered the submissions made on behalf of the PCR and, in particular, the statement made by Mr Burnett, we have no hesitation in rejecting this aspect of the Proposed Defendants' submissions.
>
> 274. It is apparent from Mr Burnett's statement that the PCR acted promptly and assiduously on becoming aware of the content of the LCM 2025 Statement. On his instruction, his solicitors sought further information and assurances from LCM Ltd prior to this issue being raised by the Proposed Defendants. Moreover, it is also apparent that the suggestion that the PCR has failed to consider and explore the possibility of LCM Ltd's failure is simply unfounded. Mr Burnett makes clear both the PCR's approach, the steps he has taken and the advice he has received. On this basis, we see no reasonable grounds for questioning the PCR's approach. Nor do we see any reason to doubt that the PCR will continue to keep his funding arrangements and the position of LCM Ltd under review.
>
> 275. Furthermore, the Tribunal is unable to identify any particular aspect in which the submissions made on behalf of the PCR to the Tribunal in respect of the LCM 2025 Statement either lack candour or demonstrate an unrealistic approach. In this regard, we note that, despite making this serious allegation in brief and general terms, the Proposed Defendants have been apparently unable to particularise it to any degree. Having regard to the lack of particularisation, we are compelled to observe that we are surprised that the Proposed Defendants considered it appropriate to articulate a challenge to the authorisation of the PCR on this basis.
>
> 276. In light of this, the question which remains is – does the content of the LCM 2025 Statement raise any basis for considering that it would not be just and reasonable for the PCR to act as class representative. In this regard, the two particular factors that are highlighted in the Proposed Defendants' submissions are, first, the PCR's ability to ability to fund his own costs; and, second, his ability to pay the Proposed Defendants' recoverable costs if ordered to do so.
>
> 277. We consider that the second factor can be easily disposed of as being simply unfounded. On the basis of Mr Burnett's statement, it is clear that there is no basis to conclude that there is any reason to doubt that the Second Deposit Premium would be paid as and when it falls due. In fact, on 3 November 2025, the PCR subsequently confirmed to the Tribunal that the necessary funds had been received by his agent, Charles Lyndon Limited.
>
> 278. In respect of the first factor, we accept that the content of the LCM 2025 Statement does highlight issues in respect of LCM Ltd's financial position which both merited careful consideration by the PCR and will require to be kept under review both by him and by the Tribunal. However, overall, we are not persuaded that, at this stage, there is any reason to consider that, in light of the LCM 2025 Statement, the PCR would be unable to act fairly and

adequately in the interests of the class members. We have reached this conclusion for a number of reasons.

279. First, we consider that it is important to bear in mind that the Tribunal does not require, at the stage of certification, to determine the PCR's likely costs to the end of trial and be satisfied that the PCR has secured sufficient funding to cover those costs (see Trucks CPO Funding at [75], referred to above). To impose such a requirement at the stage of certification would fall foul of Lord Briggs' approach to the collective proceedings regime in *Merricks SC*. Rather, the Tribunal requires to consider the estimates and arrangements which the PCR has made and then to consider whether those arrangements will enable the PCR to act fairly and adequately in the interests of the class members.

280. Second, although within the LCM 2025 Statement, the directors of LCM Ltd set out their concerns as to its ongoing financial position, they nonetheless explain that:

> 'The Directors have a reasonable expectation, based on current discussions, that LCM will continue to receive the necessary support from its lender to allow it to continue in operational existence for the foreseeable future.' (LCM 2025 Statement at page 39)

We see no reason to doubt this statement.

281. Third, we consider that, contrary to what was submitted by the Proposed Defendants, the way in which the PCR's funding is structured is a relevant factor. In our view, the fact that up to 75% of the funding has been committed by third party investors and would remain available irrespective of whether LCM's funding ceased is of significance in this regard.

282. Fourth, we agree with the submissions made on behalf of the PCR that, in the circumstances, the Proposed Defendants' invitation to the Tribunal either to scrutinise the LCM Ltd's funding arrangements with Northleaf or to interrogate the assumptions made in LCM Ltd's audited accounts as to its net asset position go beyond what is required for the purposes of rule 78. The fact remains, as was submitted during the hearing, that LCM Ltd is a long established global litigation funding business with an established track record of funding proceedings, including collective proceedings.

283. Finally, we note from Mr Burnett's statement that, even if some issue were to arise in the future which would prevent LCM Ltd from continuing to provide funding to the PCR, it is reasonable to anticipate that alternative funding arrangements could be put in place with a period of three to five months.

284. In light of the foregoing, viewing the matter as a whole, we are satisfied that, at this stage, the present arrangements which the PCR has made will enable him to act fairly and adequately in the interests of the class members. However, we stress that this is a matter which we will keep under review. Accordingly, as we set out below, we direct that (1) the PCR shall inform the Tribunal and the Proposed Defendants of any material development in respect of his funding arrangements as soon as reasonably practicable; and, (2) in any event, the PCR shall file a summary updating the Tribunal and the Proposed Defendants of his funding position in advance of the next case management conference."

46. Against that background, we consider Apple's objections.

47. An initial point made by Apple here was that there had been a criminal investigation launched in Dubai against LCM Ltd and its CEO in respect of alleged money-laundering. However, that investigation has been formally and publicly withdrawn, with LCM Ltd and the CEO

being fully exonerated. Apple contends that nonetheless, the point remains because, when it was first put to Which?, one of the answers given was that this was a matter affecting LCM Ltd and not LCM. Yet the latter was a wholly-owned subsidiary of the former, and LCM Ltd's CEO was also a director of LCM, the significance of such connections apparently not being appreciated by either Which? or its lawyers. We consider that this supposed criticism is overstated and the fact remains that there is nothing now in the criminal investigation point. Indeed, when the matter was first put to Which?'s solicitors, they pointed out that the then-allegations were strenuously resisted, which proved to be the correct position.

48. In relation to LCM Ltd's financial position more generally, Apple makes two related key points, as noted above. The first is that Which? did not approach this question and LCM Ltd's ability to fund these proceedings with sufficient care or due diligence, which therefore casts serious doubts on Which?'s ability to act fairly and adequately in the interests of the proposed class members. A further aspect of that point was the suggestion that Which? had not sufficiently acquainted itself with the nature and effect of some of the terms of the then-proposed LFA; this, equally, cast doubt on its ability to act as class representative. We deal separately below with this latter criticism when we deal specifically with the LFA. The second point made by Apple is that in any event, the present position of LCM Ltd, as disclosed by the 2025 Report, affects both its ability to fund these proceedings and also to discharge any adverse costs orders. This would also mean that it is not just and reasonable for Which? to act as class representative.

49. In broad terms, these criticisms reflect the points made the by defendant in the Vodafone case referred to in §45 above.

50. As to the first point, it is necessary to refer to the correspondence about funding, which goes back to the first part of early 2025, recalling that the original Claim Form was dated 8 November 2024.

51. The first letter came from Apple's solicitors, Covington & Burling LLP (**Covington**) on 23 April 2025. This principally concerned certain terms of the LFA. However, more generally, it asked Which? to explain the basis on which it had satisfied itself that the proposed funding arrangements were appropriate and in the best interests of class members. Which?'s solicitors, Willkie Farr and Gallagher (UK) LLP (**WFG**) responded on 14 May 2025, giving a detailed

account of the LFA terms. It added that Which? had been actively involved in the negotiation of those terms and had obtained independent legal advice.

52. Covington replied to that letter some six weeks later, on 24 June 2025. In its seven-page letter it first raised the question of the criminal investigation which we have dealt with in §47 above. It then posed six questions for Which? to answer including what due diligence into LCM it had carried out, prior to the execution of the LFA, as a result of the criminal investigation or otherwise. It asked Which? whether it considered that there was a risk that LCM could not meet its financial obligations and if it did not so consider, why not. It then made reference to the terms of the LFA which it had previously highlighted.

53. WFG responded to this letter on 18 July 2025. It made the initial point that Which? was a very experienced class representative and that existing case law had discouraged the raising of funding issues in order to resist the making of a CPO. It went on to explain how the criminal investigation had no impact on LCM's ability to fund the claim and it said it had also made enquiries of LCM about the investigation and was satisfied that LCM continued to be able to meet its financial obligations under the LFA. It also said that a recent announcement about LCM Ltd's financial performance and in particular the pausing of its Fund III was immaterial, because it was not involved with the funds being provided here.

54. On 1 August 2025, Covington wrote with further questions about funding, including seeking the basis for the assurances provided by Which? in its letter of 18 July 2025. On 7 August 2025, WFG did not provide further details but pointed out that Apple had delayed in raising any questions about funding to start with and that the concerns now being expressed by Apple were "scattergun" and that Apple was engaged in a fishing expedition. Reference was again made to recent case law on the relevance of funding issues to certification. WFG said that it did not propose to engage further on these matters. Instead, Apple could now make such submissions as it wished in its forthcoming Response which was due on 8 August 2025, and Which? would then reply to that in its Reply. WFG also pointed out that there was no requirement for funders to sign up to the Association of Litigation Funders' Code of Conduct which had been another point raised by Apple.

55. Thus far, we do not see anything unreasonable or inadequate in Which?'s approach to dealing with the funding issues raised.

56. The Response was duly filed on 8 August 2025 and the Reply was filed on 3 October 2025. The latter contained a detailed reply to the points made by Apple, including at §§66–78, over some five pages, on the question of LCM itself.

57. Then, by Covington's letter dated 15 October 2025, Apple raised the now-published 2025 Report. It again asked Which? for the details it had sought in its letter of 1 August 2025 and whether LCM had notified Which? of a material change to its ability to fund the claim pursuant to §12.4 of the LFA. An answer to this letter was chased in the light of the fact that skeleton arguments for this hearing were due on 12 November 2025.

58. In the event, WFG responded with a five-page letter on 11 November 2025. Among other things, it pointed out that the 2025 Report was a recent development which it had had to consider and address with LCM over the "last few weeks":

> "Insofar as the Proposed Defendants have a point, it can only concern the LCM group's contribution of balance sheet capital to the £30.89 million. As to this, the PCR makes the following points:
>
> > i. We can confirm, as requested in Your Letter, that there has been no notice of any material adverse change in the funds available to meet LCM UK's obligations under the LFA. This in itself is a complete response to the Proposed Defendants' 'concerns' as there is no basis to consider that LCM UK is adopting anything other than a strict compliance to its contractual obligations. Nonetheless, adopting a careful and cautious approach, the PCR has considered and obtained further information which it sets out below.
> >
> > ii. LCM UK has to date met and continues to meet all costs and disbursements that have been incurred by the PCR and invoiced, and the Proposed Defendants have not raised any concerns specifically in respect of LCM UK.
> >
> > iii. The LCM group's balance sheet shows substantial net assets of A$114.4 million as at 30 June 2025 (as contained in the 'Highlights' section of the 2025 Annual Report).
> >
> > iv. The concerns you refer to in respect of 'going concern status' arise in relation to the possibility that adverse case outcomes – in respect of which there is nothing to suggest that there will be, nor is the fact that there has been, a number of negative case outcomes recently an indicator of the future outcome of other cases (as to which see below) – might in the future lead it to be in breach of covenants in respect of its debt facility with [Northleaf]. The nature of those covenants is set out at Note 15 ('Borrowings') to the LCM Ltd's consolidated financial statements for the period ended 30 June 2025, in the 2025 Annual Report. A breach of those covenants could, but will not necessarily, lead to the debt facility being withdrawn, which would cause cash flow issues. This was properly noted in the accounts as a material uncertainty. As to this however, the PCR notes the following:
> >
> > > a. As set out in the Chairman's Statement to the 2025 Annual Results, LCM Ltd's audited accounts are in fact prepared on a going concern basis,

notwithstanding the responsible and proper disclosure of this material uncertainty.

b. It is common for companies to renegotiate debt facilities where it is necessary to do so. The credit facility provided by Northleaf is very substantial. In the 2025 Annual Report, on 2 December 2024, under Note 15 ('Borrowings'), LCM Ltd refinanced its credit facility with Northleaf for an initial amount of US$75 million (the 'Facility'), with a further US$75 million being available to be called upon (should that be required). In response to questions from the PCR, LCM UK has informed the PCR that approximately US$56 million has been drawn from the initial US$75 million. Therefore, there is still a significant sum in the amount of US$19 million that is available, and that is before consideration is had to the availability of the further $75 million. The PCR understands that LCM Ltd has in fact taken steps to secure a waiver of the relevant debt covenants from Northleaf until the end of 2025, as stated in the 2025 Annual Results. Thereafter, and as also recorded in the 2025 Annual Results, the PCR understands that Northleaf is positioned to provide further support for LCM Ltd's balance sheet share of cases such as the Proposed Collective Proceedings through to conclusion in accordance with its current lending commitments, subject to the sorts of continued assessments and ongoing review that is usually undertaken by lending providers.

c. Even in the event that LCM Ltd were forced to cease trading on an ongoing basis by reason of a cash flow issue, that would not imply that LCM UK would permanently cease to meet all of its obligations under the LFA, in circumstances where the LCM group continued to be balance sheet solvent. Funding notices submitted by the PCR requiring payment of action costs pursuant to clause 4 of the LFA would still trigger an obligation on LCM UK to pay the relevant sums. Further, we note that the LCM Ltd Board's benchmark case for its Strategic Review, as expressed in the Chairman's Statement to its 2025 Annual Report, is a 'lean run-off model, which would involve…managing our existing portfolio of assets through to conclusion'.

v. For the first approximately just over £14.5 million of the £30.89 million budget for the Proposed Collective Proceedings, this is being covered 75% by Fund II (around £10.5 million), a ring-fenced fund comprising capital sourced from institutional investors, and LCM UK has to cover approximately £4 million (which as noted above, it has been doing in paying the invoices incurred by the PCR to date). Therefore, the material exposure to LCM group's balance sheet is an issue (if at all) only once the first £14 million has been incurred, which will be a long way in to the litigation. At that stage, LCM Ltd's financial position may have materially improved and strengthened, as things can move around quickly in financial investment businesses. We also note that the Proposed Defendants' position is covered by the ATE policy, for which the premiums are current.

vi. The PCR understands that the contractual terms of Fund II are such that there is no scope for the institutional investors to withdraw their investment commitment in the event that there were to be any issue as to the ability of LCM UK to continue to operate. If that eventuality were to occur (and there is nothing right now to indicate that such a scenario is likely), then the investors in Fund II would be likely to seek to appoint a new fund manager to take over the conduct of Fund II, and insofar as there was a need to cover any shortfall in funding that was previously coming from the LCM group's balance sheet, the PCR believes the institutional investors between them would have a strong incentive to do so in circumstances where these investors remain

liable for the debts of Fund II (including the capital committed for the investments in that Fund).

This is a complete and comprehensive response to the latest set of 'concerns' that the Proposed Defendants have identified in respect of funding. Nonetheless, the PCR makes a few further broader remarks.

Unlike most litigation funders that operate in the UK and that are funding collective proceedings, LCM Ltd is a listed public company (appearing on the Alternative Investment Market ('AIM'), and prior to that on the Australian Stock Exchange). This imposes transparency requirements, regulation as a publicly traded company, and accountability to shareholders. Whereas there is little (if any) visibility about the swings and roundabouts of most litigation funders' investments and their balance sheet, LCM Ltd's transparency should not be used to speculate and draw unevidenced inferences – namely, that the PCR no longer has adequate financial resources under its LFA to meet the authorisation condition.

Like most financial investment businesses, looked at any single point in time, the financial position of the business is reflective of the performance of its investments at that time and not necessarily indicative of the overall longer term strength and health of the business. Furthermore, litigation funding, like any investment business, is inherently risky and the value of investments can increase and decrease. Whilst the PCR recognises that LCM Ltd has clearly faced a difficult 12 months resulting in a number of the cases in which it is invested to have been unsuccessful, and about which LCM Ltd has transparently and responsibly made announcements to the market, as stated above, it has continued to meet its funding obligation and no material adverse change notice has been given.

As to the reference in Your Letter to the drop in share price, it is not explained what relevance that has. The PCR understands that there is no debt covenant of LCM Ltd which is linked to its share price. The First Proposed Defendant is itself a publicly listed company, and so it should be all too familiar that share prices move for all manner of different reasons. Their pointing to LCM Ltd's share price decline does not evidence an inability of LCM UK to meet its share of the LFA obligations.

Likewise, the failure of any single case or investment within the LCM group is not evidence that the PCR lacks suitable funding to certify the Proposed Collective Proceedings."

59. On 14 November 2025, Covington responded to that letter. It made the point that it had been received only one day before skeleton arguments were filed for this hearing, although WFG had originally said that it would respond in good time for the skeleton arguments. We see that, but on the other hand, the timing of the underlying events (the 2025 Report and Covington's letter of 15 October) were not within Which?'s control, and of course at this stage, both parties were preparing for the hearing of the CPO Application, much of which was not about funding at all. We do not consider that any real criticism can be made of the timing of WPG's letter in this regard.

60. Otherwise, Covington's letter of 14 November 2025 raised a number of questions about LCM and replied to the points made by WFG in its letter of 11 November 2025.

61. WFG then responded on 15 November 2025. It referred to the decision of the Tribunal in *Vodafone*, and said that this constituted a complete answer to WFG's points on funding. Many of the paragraphs from the judgment which we have cited above were cited. This letter also enclosed a letter from LCM Funding PTY Ltd to WFG, and a letter from LCM to Which?, dated 23 October 2025 and 11 November 2025, respectively, the content of which was referred to in WFG's previous letter of 11 November 2025. It said that, having already said that Which? would keep the financial position of LCM under review, it would be content to inform the Tribunal and Apple of any material developments in respect of its funding arrangements and file a summary updating the Tribunal and Apple of its funding position as the proceedings move forwards, consistent with what the Tribunal had required in *Vodafone*. This letter ended by seeking the withdrawal by Apple of its submissions on funding issues as set out in its skeleton argument, by 17 November 2025, or Which? would seek an order that Apple pay its costs of dealing with these issues on an indemnity basis.

62. The last shot in this particular exchange came on 18 November 2025 from Covington. It took issue with what WFG's last letter had said, including claims to privilege which had been made over certain documents, arguing that there was no privilege at all, and reserve the right to seek all of its costs incurred in relation to the funding issues on an indemnity basis.

63. At various points in its oral submissions, Apple suggested that the tone of WFG's correspondence was inappropriate or aggressive. Having read the entirety of the correspondence with care, we do not accept that. On occasion, there were elements of the letters from both sides which could be described as intemperate or overheated, and it is certainly true that this correspondence was much prolonged. However, we do not consider that this is of any real significance when considering the approach generally taken by Which? to the funding questions.

64. Recognising the significance of the decision of the Tribunal in *Vodafone*, Apple sought to point out that the decision there was quite nuanced and that the Tribunal had noted in particular that the PCR there had acted promptly and assiduously, whereas that could not be said of Which?'s conduct here, comparing it unfavourably with that of the PCR in *Vodafone*. We disagree. As with the PCR there, Which? clearly did spend time with LCM going through the funding issues and in particular dealing with the 2025 Report. We see some evidence of that in the two letters from LCM which were produced to Apple. Which?, as a reputable organisation and experienced class representative, plainly considered the matter very

carefully. It is true that this was not set out in a new witness statement (as it had been in *Vodafone*). That might have been a sensible further step to take although one bears in mind, again, that the hearing of the CPO Application was looming and the parties were already preparing for it. However, a detailed reading of all the letters sent by Which? shows the extent of its engagement with the issues, while fairly pointing out that there were limits to the extent of any investigation of funding matters by the Tribunal when dealing with the question of certification. The fact that Apple did not agree with Which?'s position on all of this does not alter that fact. In addition, we do consider that there was an extent to which Apple's persistent questioning of every aspect of Which?'s position on the funding issues, requiring Which? to continue to provide further details and information, went beyond what was appropriate in the context of certification.

65. Looking at the position overall, including what was said about funding in Averty 1, and mindful of what the Tribunal said in both *Riefa* and *Vodafone*, we find it quite impossible to say that the way in which Which? had approached the question of funding, at whatever stage, suggests that it had not acted with due diligence so as to render it incapable of acting fairly and adequately in the interests of the proposed class members.

66. That being the case, we then turn to the second question posed by Apple as to whether, in any event, on an objective analysis as it were, the fact and content of the 2025 Report means that it would not be just and reasonable for Which? to act as class representative in the light of LCM's financial position.

67. So far as LCM's ability to discharge any adverse costs orders, the ATE insurance of up to £15m has already been procured. There is nothing to suggest that the relevant premiums have not been or will not be paid. It needs to be recalled here that the figure of £15m was referred to in the Claim Form, but Apple had not previously suggested that this would not be sufficient. If there was any question, much further down the line, that Apple's estimated costs to trial were likely to exceed this sum, the matter can be addressed then. At the moment, it is simply not an issue.

68. The next matter concerns Which?'s ability to have its own costs going forward funded by LCM. As with the Tribunal in *Vodafone*, we agree that, at this early stage of certification, it is not necessary for us to be satisfied that Which? has sufficient funding to cover the entirety of its costs all the way to the end of the trial. In that regard, it remains the case that 75% of

the initial tranche of £14.5m comes from the funds managed by LCM, which it is contractually obliged to provide. Questions were raised about, for example, what might happen if it was necessary to find a new fund manager (as opposed to a new fund); these were answered in WFG's letter of 11 November 2025, but we regard these sorts of questions as speculative at this stage.

69. Further, we are entitled to take at face value the statements of the directors of LCM Ltd that there is indeed sufficient support from Northleaf to allow LCM Ltd to continue its operations for the foreseeable future, quoted at §37 above.

70. It is of course true that for any funds beyond the £14.5m already committed to Which?'s own costs, in the absence of new investment funds, LCM will have to look to LCM Ltd's own resources. However, there remains about US$19m from the first tranche of the agreed working capital facility and then there is the prospect of the further tranche of US$75m from Northleaf, which is presently intending to continue its support. Moreover, LCM Ltd is well-solvent on a balance sheet basis.

71. Overall, and notwithstanding the particular points made by Apple as to what uncertainties may lie ahead, we are quite satisfied that there is nothing about the present financial position of LCM Ltd which entails the conclusion that it is not just or reasonable for Which? to act as class representative or that in particular it will not or cannot act fairly and adequately in the interests of the class.

72. To the extent not covered above, we do not see that there has been any real lack of transparency on the part of Which? when dealing with the question of funding and we note that it agreed that a non-confidential version of the LFA should be posted on the claim website. Nor do we consider that its claim that certain documents were privileged was simply an attempt to avoid otherwise material disclosure.

73. We now consider the questions arising in connection with the terms of the LFA itself.

(c) Concerns about the terms of the LFA

74. We can take this matter fairly shortly because, following the hearing of the CPO Application, we indicated to the parties what amendments we would require to be made to the LFA, looking

at the interests of the proposed class members as distinct from the funder or PCR, and those amendments will be made.

75. Prior to and at the initial hearing, Apple raised the following concerns about the then-LFA:

(1) the LFA does not provide automatic cover for Apple's costs in the event of an appeal by either party (the Appeals Point);

(2) the provisions of the LFA dealing with LCM's right to terminate its funding of the claim were unsatisfactory from Which?'s point of view as PCR (the Termination Point); and

(3) Which? had misconstrued clause 10.3 of the LFA (dealing with the payment of the Which?'s costs when not recovered from Apple, where Which? succeeded in the claim (the Priorities Point).

76. We consider each of these points in turn.

(i) *The Appeals Point*

77. Clause 4.2 of the LFA provides as follows:

> "4.2 Subject to and in accordance with the terms of this Agreement, including for the avoidance of doubt satisfaction of the provisions of clause 3 above, the Funder agrees to pay the Action Costs after the Effective Date up to the amount of the Funding Limit and any Adverse Costs after the Effective Date up to the amount of the Adverse Costs Indemnity Limit in accordance with this clause 4."

78. "Adverse Costs" are defined in clause 1.3 to include any of Apple's costs in "the Action" which the Tribunal orders Which? to pay. The "Action" is defined in clause 1.1.4 to include any appeal if LCM has issued an "Appeal Funding Confirmation Notice" (**Appeal Notice**) pursuant to clause 11.

79. Clause 11 deals with appeals. In particular:

> "11.1 Any request by the PCR to the Funder to fund the PCR's Appeal or the defence of the Defendants' Appeal must be supported by an opinion from the Solicitors and details of any budget for such appeal.

> 11.2 Subject to satisfactory Due Diligence having been completed by the Funder, the Funder agrees to fund the PCR's Appeal and / or the defence of the Defendants' Appeal, in either case the level of funding to be agreed and upon such agreement, the Funding Limit and the Adverse Costs Indemnity Limit to be increased by the agreed amount."

80. Those provisions make clear that it is a matter for LCM to decide whether or not to issue an Appeal Notice, and the level of any funding has to be agreed. Clause 11.5 contemplates that the situation could arise where LCM refuses to provide an Appeal Notice.

81. So far as an appeal made by Which? is concerned, where there is no Appeal Notice in place, if Which? sought to appeal, it would be proceeding entirely unfunded and with the prospect of having itself to pay Apple's costs if ordered to do so. In those circumstances, and in our view, it is inconceivable that Which? would take such a course. That being so, there is no real costs exposure on the part of Apple in this respect.

82. The real question concerns any putative appeal on the part of Apple but where there is no Appeal Notice to protect Which?. In such a case, it is very hard to see why this would arise. That is because LCM would surely issue an Appeal Notice where there was at least some prospect of successfully resisting the appeal. Otherwise, if the appeal was not defended and went by default, as it were, there would be the obvious prospect that Apple would recover as against Which? not only the costs of the successful appeal but also most or all of the costs below, because the costs orders previously in favour of Which? would now be reversed.

83. The only circumstances in which an Appeal Notice might be refused would be if (as no doubt expressed in the required solicitors' opinion) the grounds of appeal were so strong that it would be pointless to oppose it. We would respectfully suggest that this scenario is unlikely, but if it occurred, Apple's costs would be minimal, since there would be no opposition to the appeal, the PCR, again, having no incentive to "go it alone" on a hopeless defence to it.

84. In reality, therefore, however one looks at it, the prospect of Apple having to incur any real costs in relation to an appeal by either party that would be uncovered is extremely remote and implausible. This means that it cannot be said that Which? is unable to demonstrate that it will be able to pay Apple's recoverable costs if ordered to do so as required by r. 78(2)(d).

85. This disposes of the Appeals Point.

(ii) *The Termination Point*

86. Clause 17.1 of the LFA provides as follows

> "**17. BREACH, TERMINATION AND ABANDONMENT**
>
> 17.1 If the Funder reasonably considers that the merits of any Claim are no longer satisfactory or that any Claim is no longer economically viable the Funder may give the PCR not less than forty (40) Business Days written notice of its intention to terminate this Agreement, subject to the right of the PCR to seek Expert Determination, of the Funder's Determination, under clause 15."

87. Clauses 15.1 and 15.2 provide as follows:

> "**15. EXPERT DETERMINATION**
>
> 15.1 Subject to clauses 16 or 17 below, if a dispute arises in respect of the reasonableness of any Action Costs to be paid in accordance with clause 4, or the Funder reasonably considers that the merits of any Claim are no longer satisfactory or are no longer economically viable under clause 17.1, either Party (the 'Disputing Party') may serve a dispute notice ('Dispute Notice') on the other Party.
>
> 15.2 The Dispute Notice must set out the nature and grounds of the dispute, the outcome sought and must require the appointment of an independent solicitor of the level of partner in a reputable commercial law firm or an independent King's Counsel specialist in competition law or costs as appropriate ('Expert') to undertake an independent assessment and determination."

88. Apple contends that these provisions give LCM a broad discretion to terminate the funding without requiring it first to take advice or obtain an independent assessment of the circumstances which it could say justifies termination.

89. That much is true, but in response, Which? argues that, in practice, LCM would of course take appropriate advice, and in any event, any decision to terminate funding can then be challenged by Which? invoking the expert determination process provided for by clause 15 referred to above. Apple then counters that this would be insufficient because any expert determination would be limited to considering whether LCM had acted "reasonably" in reaching its decision to terminate because the merits were no longer satisfactory or the claim was not economically viable, as opposed to deciding, objectively, as it were, whether that state of affairs existed. In addition, the phrase "economically viable" was itself uncertain.

90. In this regard, we invited the parties at the end of the CPO Application hearing to make any further submissions, if so advised, on the drafting of this clause and how it might be amended. They took the opportunity to do so by means of a letter from WFG dated 20 November 2025 and a letter from Covington dated 21 November 2025. In the light of that correspondence, we

indicated the approach we were minded to take subject to any further points made, and there then followed further letters from WFG and Covington, both dated 15 December 2025.

91. Having considered all of the submissions made and with regard to the relevant case law, we decided that there should be the following amendments to clause 17.1:

> "**17. BREACH, TERMINATION AND ABANDONMENT**
>
> 17.1 If the Funder reasonably considers (such view to be reached based on independent legal and expert advice which has been provided to the Funder) that:
>
> (a) the merits of any Claim are materially worse than the Funder's assessment at the signing date ~~no longer satisfactory;~~ or ~~that~~
>
> (b) any Claim is no longer economically viable, when compared with the Funder's assessment at the signing date, then
>
> the Funder may give the PCR not less than forty (40) Business Days written notice of its intention to terminate this Agreement, subject to the right of the PCR to seek Expert Determination, of the Funder's Determination, under clause 15."

92. The first amendment reflected the need, in our view, for there to be an express obligation upon LCM to take legal and expert advice. This amendment was ultimately offered by WFG on behalf of Which? and LCM. A suggestion was made subsequently by WFG that the relevant phrase should be "legal and/or expert advice". We disagreed with that suggestion. First, the wording we proposed was that which was adopted by the Tribunal in *Merricks v Mastercard* [2021] CAT 28 at §27, having been volunteered by the PCR. Second, we saw no practical difficulty with the obligation to obtain both legal and expert advice. While there may be a case where, on the question of merits, it appeared to require only the opinion of the legal adviser, there may be an element which the expert economist considers is relevant as well. At the very worst, all that will happen (and at little cost) is that the expert adviser will advise that there is no aspect of the putative change which requires any expert input. If the wording were as suggested by WFG, there would in theory be nothing to stop the funder making its own decision as to which advice was relevant, and which was not.

93. As for the remaining amendments, and as we explained in our letter to the parties dated 10 December 2025, they were necessary in order to ensure that the threshold for termination (as reasonably considered by the funder, etc.) is not too low, focussing on the difference between the position as to the merits of the claim or economic viability when originally assessed by the funder and when the funder now wishes to terminate. The "reasonable consideration" aspect of clause 17.1 was retained as we did not think it necessary for the expert to determine

the underlying matters for themselves, objectively, as it were. In this case, we consider that sufficient protection is given to the proposed class by the amendments made. In those circumstances, there was therefore no need to amend clause 15.2 as well.

94. We made clear that these amendments were required before we would be prepared to grant a CPO, if we were otherwise satisfied that we should do so. Which? duly confirmed that those amendments are acceptable and that it would make those amendments if the application for a CPO is granted.

(iii) *The Priorities Point*

95. As part of clause 10, which deals with the receipt and distribution of any recovery, clauses 10.1–10.3 provide as follows:

> "10.1 Subject to any Order of the Tribunal to the contrary, the PCR shall procure payment of any and all Recovery directly into a bank account, which shall be a client account held by the Solicitors or the account of a Claims Administrator approved by the Solicitors and to the extent necessary, approved by the Tribunal.
>
> 10.2 Subject to any order of the Tribunal, the PCR shall hold the Recovery on trust for the Class Members, the Funder and, to the extent their charges have not been paid, Solicitors, Counsel, and the ATE Insurance providers.
>
> 10.3 To the extent not recovered from the Defendants, and to the extent required, the PCR shall seek approval from the Tribunal for the payment of the PCR's costs, fees, and disbursements (including for the avoidance of doubt the Funder's Fee, any ATE Insurance premiums, the uplifts payable under any conditional fee agreements, and VAT in accordance with 20.2, if any) in accordance with this clause 10."

96. "Recovery" is defined in clause 1.39 of the LFA as "all and any amounts received by or on behalf of the PCR and/or Class Members, or to which the PCR and/or Class Members is/are/or become(s) entitled" which expressly includes "[a]ny Award, settlement or compromise". "Award" is defined in clause 1.10 as "any judgment or ruling of the Tribunal made in respect of the Action". Apple has submitted that accordingly, recovery includes any damages to which the proposed class members may be entitled as well as any costs recovery, and we agree. We also agree that the sums out of which the costs and disbursements may be paid with the approval of the Tribunal are all the sums "recovered", as referred to in clauses 10.1 and 10.2.

97. Apple further submits that clause 10.3 imposes an obligation upon Which? to seek approval from the Tribunal for payment of its costs, fees and disbursements, wherever those costs, fees and disbursements ait re not recovered directly from Apple. Moreover, because of the

definition of "recovery" in this regard, Apple made clear that it was not here contending that payment of such costs and disbursements, including any monies to be paid to LCM, in priority, as it were, to some subsequently paid out to the proposed class members, was itself unlawful or necessarily contrary to the interests of the class members. Having regard to the decision of the Court of Appeal in *Gutmann v Apple* [2025] EWCA Civ 459, [2025] Bus LR 1292, it could not make that submission.

98. What Apple did say, however, is that it appeared as if Which? was taking the view that whether or not it should approach the Tribunal to obtain its approval for the payment of those costs was itself a matter for the exercise of Which?'s own discretion, as indicated by the use of the words "and to the extent required". Apple contends that not only is this interpretation wrong but it indicates that Which? does not even understand an important part of the LFA which goes to its suitability as the PCR.

99. It did appear to us at the hearing of the CPO Application that Which? considered that it had a discretion as to whether or not to seek the approval of the Tribunal for the payment of costs and disbursements where there was a shortfall. In the correspondence concerned with the LFA post-the CPO Application hearing, as referred to above, further points were made by the parties about this.

100. It seemed important that we express our overview as to what this clause meant. We agree with Apple that clause 10.3 imposes a positive obligation on Which? to apply to the Tribunal for payment of any of the relevant sums (as set out in the middle of clause 10.3) whenever any of such sums (or part thereof) cannot be recovered directly from the Apple, pursuant to an order of the Tribunal (typically an order for costs). The words "to the extent not recovered" and "to the extent required" refer to the shortfall after any sums recovered directly from Apple. In particular, the latter phrase does not refer to whatever is required by Which?. It is what is necessary in order to make up the shortfall. Accordingly, there is no discretion on the part of Which? as to whether or not to apply for approval in such circumstances – it must apply. Once it has done so, then it is a matter for the Tribunal to decide what should be done. Further, clause 10.3 is concerned with the position once the initial recovery has been obtained; in other words, it is dealing with the position before any damages are distributed. We set out this view to the parties in our letter to them dated 10 December 2025. Having done so, nothing further arises in relation to the Priorities Point.

(4) Opt-in or opt-out

101. We have to determine whether these putative collective proceedings should be certified on an opt-in or opt-out basis. Rule 79(3), cited at §20 above, permits us to take into account all such matters as we think fit, including the strength of the claims and whether it is practicable for the proceedings to be brought as opt-in, having regard to the circumstances including the estimated amount of damages individual proposed class members may recover.

102. It was not suggested by Apple that these proceedings, if they go forward, should not be on an opt-out basis, and Which? positively contended that they should be. Exercising our own independent view of the matter we are in no doubt that this is a clear case for opt-out proceedings because: a very substantial claim is made on behalf of a very large class of natural persons where the individual amounts which can be recovered are very modest indeed, and therefore there is no real prospect of individual claims being made; the class members can be easily identified; and it would be unnecessarily cumbersome and unattractive to proposed class members if the only basis was opt-in.

(5) Conclusions on the making of a CPO

103. So far as the parties were in dispute in relation to matters arising in connection with the Authorisation Condition, we have determined those matters in favour of Which? as set out above. Exercising our own judgment overall, and with regard to the interests of the proposed class members, we are quite satisfied that it is just and reasonable for Which? to act as class representative. It would fairly and adequately act in the interests of the class members and would be able to pay Apple's recoverable costs if ordered to do so. Having considered the Litigation Plan (including the Notice and Administration Plan and the Costs Budget), we are also of the view that Which? has prepared a plan which satisfactorily includes a method for bringing the proceedings and notifying represented persons of progress in them, and that there is a procedure for governance and consultation. We also consider that there is plainly sufficient merit in the proposed claims to go forward, subject only to the discrete points made in relation to one sub-class of the proposed class members which we will determine separately in the context of the Strike-Out Application.

104. Accordingly, we are satisfied that a CPO should be made here, and this is the unanimous decision of the Tribunal.

The Honourable Mr Justice Waksman
Chair

Professor Alasdair Smith

Michael Cutting

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 2 April 2026