Case No: 1601/7/7/23

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

DR SEAN ENNIS

Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(3) APPLE CANADA INC.
(4) APPLE PTY LIMITED
(5) APPLE SERVICES LATAM LLC
(6) ITUNES K.K.
(7) APPLE (UK) LIMITED
(8) APPLE EUROPE LIMITED

Defendants

REASONED ORDER

UPON the Defendants having given disclosure of and provided for inspection the documents referred to in paragraph 6(a) of the Tribunal's order of 5 June 2025 (the ***Kent*** **Disclosure**)

AND UPON the applications made by the Class Representative by a letter to the Tribunal dated 17 April 2026, seeking: (i) permission to amend the Amended Collective Proceedings Claim Form (the **Amendment Application**); (ii) permission to adduce expert evidence; (iii) an order for specific disclosure from the Defendants (the **CR's Disclosure Application**); and (iv) an order that the Defendants file a costs budget

AND UPON the application made by the Defendants by a letter to the Tribunal dated 17 April 2026: (i) seeking permission to adduce expert evidence; and requesting that the Tribunal consider (although not at this stage put forward in an application) the Defendants' proposals to

(ii) seek disclosure from members of the class (the **Defendants' Intended Disclosure Application**); and (iii) rely on survey evidence at trial

AND UPON the Tribunal having heard counsel for the Class Representative (Mr Carall-Green) and the Defendants (Mr Piccinin KC) at the Case Management Conference on 6 May 2026 (the **CMC**)

IT IS ORDERED THAT:

Disclosure

1. The following procedure shall be followed for undertaking searches against the US Production Set and the datasets of documents disclosed by the Defendants in the following proceedings:

   (1) Re Apple iPhone Antitrust Litigation (Case 4:11-cv-06714-YGR);

   (2) the CMA Strategic Market Investigation into Apple's Mobile Platform; and

   (3) the EU Commission investigations under the Digital Markets Act DMA 100109, DMA 100203, DMA 100204 and 100206.

   The procedure shall be as follows:

   (1) The CR may propose search terms to be applied to these datasets.

   (2) The Defendants will specify the number of documents in each of those datasets responding to each of the CR's proposed search terms.

   (3) The CR may, if so advised, propose modified search terms.

   (4) The CR and the Defendants will engage with one another with a view to identifying whether agreement can be reached on search terms to be applied to these datasets. The Defendants will, as required by the CR, disclose the number of documents responsive to any proposed search term.

(5) In the event that there is agreement, the Defendants will run the agreed search and disclose the documents responsive to that search.

(6) In the event that there is no agreement, the CR may apply to the Tribunal for a decision as to whether the Defendants should be directed to run the proposed search.

2. The Defendants shall, within one month of the date of this order, respond to the requests for information set out in paragraphs (iii), (iv) and (v) of Request 3.1 of the schedule of further disclosure requests prepared by the CR and responded to by the Defendants (last updated on 1 May 2026) (the **Further Disclosure Requests Schedule**).

3. The Defendants shall disclose, within two months of the date of this order or such longer period as the Tribunal may on application allow:

(1) any document held by the Defendants or under their control and not already disclosed to the CR to the extent that the document contains analysis of the effect on the behaviour of app developers of changes to the Defendants' pricing tiers; and

(2) any document held by the Defendants or under their control and not already disclosed to the CR to the extent that the document contains analysis of the effect on the behaviour of app developers of the Defendants' different rates of commission payable pursuant to particular programs (the **Program Exceptions**).

Expert Evidence

4. The parties each have permission in principle to adduce evidence, if so advised, from one expert in relation to each of the following disciplines: (i) competition economics; (ii) accounting, (iii) the app industry; and (iv) software and technical elements of app development. However:

(1) the CR will, within one month of the date of this order, intimate to the Defendants a list of the issues which the CR proposes should be addressed by each of these classes of experts;

(2) the Defendants will, within one month thereafter, intimate any proposed additions to or deletions from those lists of issues;

5. the parties shall, by the date two weeks before the September CMC, file a document which discloses the extent of their agreement on the issues to be addressed by each of these classes of experts, and the points on which there is disagreement; and

6. each of the parties shall also, by the date two weeks before the September CMC, file with the Tribunal a note disclosing the identity of the experts upon whose evidence they propose to rely in respect of these matters and a CV for each expert disclosing that expert's qualifications.

7. If the CR proposes to seek permission to lead expert evidence on either or both of: (i) app security and privacy; and (ii) payment systems and digital banking, the CR will by a date four weeks before the September CMC file an application identifying: (i) the expert whom the CR proposes to instruct in respect of each of these fields ; (ii) the expert's CV; and (iii) a list of the issues the CR proposes that the expert should address; along with (iv) a note setting out the CR's reasons for requiring expert evidence in the expert field or fields in question (to be no more than two pages per expert field). If the Defendants opposes that application, they will file a note of opposition by a date one week before the September CMC.

8. If the Defendants propose to seek permission to lead expert evidence on valuation, the Defendants will by a date four weeks before the September CMC file an application identifying: (i) the expert whom the Defendants propose to instruct; (ii) the expert's CV; and (iii) a list of issues the Defendants propose the expert should address; along with (iv) a note (to be not more than two pages long) setting out the Defendants' reasons for requiring expert evidence on valuation. If the CR opposes that application, he will file a note of opposition by a date one week before the September CMC.

Survey Evidence

9. If the Defendants propose to rely on survey evidence, they will, by a date four weeks before the September CMC, file an application which discloses details of the proposed survey, including identification of the person or organisation whom it is intended should undertake the survey, the questions to be asked, the methodology and any supporting explanation from the Defendants' expert in competition economics. If the CR opposes that application, he will file a note of opposition by a date one week before the September CMC.

Cost Budgeting

10. The CR and the Defendants shall each, by the date two weeks before the September CMC, file an analysis setting out their incurred costs to date.

Case Management

11. A further CMC (the **September CMC**) shall be scheduled to be held on the first available date after 1 September 2026.

Costs

12. Costs in the case.

Liberty to apply

13. The parties have liberty to apply to vary any of these directions on cause shown.

REASONS:

The Amendment Application

1. The Defendants oppose certain of the CR's proposed amendments. The parties have agreed that the Amendment Application should be deferred until after the Tribunal has handed down its decision, currently pending, in respect of the Defendants' Decertification Application dated 23 February 2026. I accordingly make no order in the Amendment Application at this time.

Further CMC

2. There remain outstanding applications in relation to expert evidence, upon which the Tribunal requires further information, and an anticipated application in relation to survey evidence. At the CMC, I canvassed with parties the possibility of a further CMC in July 2026. On reflection, in light of the issues which will need to be addressed in advance of that hearing, I agree with Mr Piccinin that a further CMC in September 2026 would be more realistic. The parties should liaise with the Tribunal with a view to fixing a further CMC at the earliest available date after 1 September 2026.

The CR's Disclosure Application

3. To date, the Defendants have disclosed to the CR the entirety of the disclosure provided by the Defendants in *Kent v Apple Inc. & Ors.* , along with a list of the documents contained in the trial bundles in *Kent* and an explanation as to how the Kent Disclosure was created. In the CR's Disclosure Application, the CR makes seven requests for additional disclosure from the Defendants , several of which are broken down into sub-requests.

4. The CR's Further Disclosure Requests Schedule filed ahead of the CMC described these requests in broad terms as follows:

(i) Request 1: Transaction data;
(ii) Request 2: Documents available from regulatory and overseas proceedings;
(iii) Request 3: Documents relevant to applicable law / territorial scope;
(iv) Request 4: Financial and profitability information;
(v) Request 5: Documents relating to Apple's dealings with developers;
(vi) Request 6: Exceptions to Apple's usual rules on app distribution / payment processing; and

(vii) Request 7: Disclosure on other issues not addressed in the *Kent* Proceedings.

5. In advance of the CMC the parties reached agreement in relation to Requests 1 and 4, and certain sub-requests of Requests 3, 5 and 7. They agreed that the Tribunal is not required to give any directions at this time in respect of the agreed disclosures. The Tribunal accordingly heard submissions in relation to Requests 2 and 6, and the unagreed sub-requests of Requests 3, 5 and 7.

6. Requests 3, 5, 6 and 7 are conventional requests for categories of documents. Request 2 is a request to the Tribunal to approve a search process, to be applied to a particular 'universe' of documents. The CR's position was that if Request 2 were to be granted, he would not insist on certain of the other requests.

Request 2

7. The Kent Disclosure was largely derived from a set of approximately six million documents which had already been produced in three proceedings in the US (the **US Production Set**). It covered documents which had been disclosed in nine other proceedings, which are listed in Annex A to a letter from the CR's solicitors to the Defendants' solicitors dated 20 February 2026. Request 2 asks the Tribunal to approve a process for undertaking searches in a wider dataset comprising: (a) any further documents which were produced in those nine proceedings too late to be captured in the Kent Disclosure ; and (b) documents produced in four additional regulatory proceedings namely, the CMA's Strategic Market Status Investigation into Apple's Mobile Platform, and three Commission investigations into Apple's compliance with the Digital Markets Act (DMA 100109, DMA 100203, DMA 100204 and DMA 100206).

8. The process proposed by the CR would involve the following steps: (i) the Defendants disclose to the CR the number of documents post-dating the Kent Disclosure produced for each of nine proceedings on which the Kent Disclosure was based and the CMA and Commission investigations referred to above; (ii) the CR and the Defendants exchange search strings to be applied to each of these sets of documents; (iii) the Defendants disclose the number of documents which those search strings would generate; (iv) the parties engage with a view to agreeing a final set of search strings;

(v) any disputed issues are brought to the Tribunal for resolution; and (vi) only once the search strings have been agreed or determined by the Tribunal would documents from this dataset be disclosed.

9. On behalf of the CR, Mr Carall-Green made the following points in support of the proposed search process.

(i) The US Production Set (from which the Kent Disclosure was largely derived) was generally compiled in 2019 and 2020; and the Kent Disclosure made between May 2023 and October 2024. On the face of it, these datasets would not capture later documents. There had, he said, been more recent changes in the Defendants' practices which justified updating the disclosure already made.

(ii) The CR's expert economist, Mr Perkins, supports the view that there would likely be relevant documents in the disclosures made by the Defendants to the CMA and the Commission in the context of the investigations mentioned above.

(iii) The issues arising in the present proceedings are not on all fours with those in the previous proceedings. For example, the issues of applicable law and territorial scope which arise in the present case did not arise in Kent. Further, this case is brought on behalf of UK developers. Whilst Mr Carall-Green accepted that the US Production Set contained material relevant to UK developers, he submitted that at least some of the Requests for Production which gave rise to the US Production Set were focused on US developers.

10. The Defendants resist Request 2. Mr Piccinin pointed out that the Defendants: (i) have produced 1.7 million documents in the Kent Disclosure; (ii) have agreed to provide updated transaction data comprising individualised data on every transaction through App Store storefronts involving the UK developers for a period of over eight years; and (iii) are content to run further searches over the US Production Set. Insofar as the CR seeks further disclosure, the right course, he argues, would be to focus on the categories of documents sought and, in respect of each category, to consider the

dataset which should be searched. Mr Piccinin emphasised the costs involved in undertaking searches and making disclosure and noted that of the vast number of documents disclosed, only a small number were in fact included in the *Kent* trial bundle. He observed that the regulatory proceedings to which Mr Carall-Green had referred were not specifically concerned with the App Store or the issues which arise in the present case. Mr Piccinin confirmed that the relevant datasets were available in searchable form; and stated that, if the Tribunal did consider that it was appropriate generally to update the Kent Disclosure, that would most appropriately be undertaken by focusing on *In Re Apple iPhone Antitrust Litigation* (Case 4:11-cv-06714-YGR) (the **US Class Action)**, an ongoing class action in the US which covered issues similar to those arising in *Kent.*

11. I have concluded that I should approve this request, but modify the proposed procedure, in the terms set out in this Reasoned Order, and apply that procedure only to the US Production Set and the datasets for the US Class Action and the four additional regulatory proceedings identified by the CR involving the CMA and the Commission (Items 1 to 4 in Annex B to the letter of 20 February 2026 referred to above). I take that view for the following reasons.

(i) The Defendants are content, in principle, to run additional searches against the US Production Set. It is not disputed that the US Production Set is now some years out of date, and it seems to me that authorising a process which envisages updating searches in appropriate datasets against relevant search terms would be appropriate.

(ii) Mr Piccinin advised me that any general updating of the Kent Disclosure would best be undertaken by reference to the dataset for the US Class Action. He confirmed that there would be no material difference in the practicability of searching this dataset as against the US Production Set. There is, accordingly, it seems to me, good reason to authorise updating searches against both of these datasets. Further, the likelihood of relevant documents being contained in the disclosures made by the Defendants in the CMA and Commission regulatory proceedings is supported, even if only in general terms, by the CR's expert. It accordingly seems to me that searches should be

undertaken in these datasets in addition to the US Production Set and the dataset for the US Class Action.

(iii) I agree with the Defendants' point that, before undertaking a search against any dataset, it is necessary to define the categories of documents which are sought or at least to define the searches to be undertaken in a manner which can be expected to identify relevant categories of documents. However, what the CR proposes is a process which is designed to lead to agreement between the parties on search terms to be applied to the relevant dataset. If the search terms cannot be agreed, ultimately the Tribunal will be required to adjudicate on the relevance and proportionality of any particular proposed search in light of the disclosure which has already been made or agreed by the Defendants. In effect, what is proposed is a mechanism for identifying justified searches in the datasets which I have identified.

(iv) The proposal that the process should be informed by disclosure of the number of documents which would be disclosed by any particular search seems to me to be a sensible one. Mr Piccinin did not suggest that this number could not readily be generated if a search term were to be applied to the relevant dataset. Disclosing the number of documents which any particular proposed search string would generate may allow the parties and, if necessary, the Tribunal to assess the proportionality of undertaking any particular proposed search and to refine the search terms to that end.

(v) It did not seem to me to be appropriate to direct a process in which the Defendants are required to propose search terms. It is for the CR to define the searches which he contends are relevant and proportionate. Whilst it does not seem to me to be unduly onerous to require the Defendants to provide information about the number of documents which a search term generates, the question of whether any particular search is justified as relevant and proportionate will fall to be addressed, if the parties cannot agree, by the Tribunal.

Request 3

12. Request 3 seeks disclosure of documents which the CR contends would be relevant to the applicable law and territoriality issues. Ahead of the CMC, the parties had reached agreement in relation to sub-requests 3.2 and 3.3. Sub-requests 3.1 remained in dispute. At sub-request 3.1, the CR first requests:

> "Documents and/or data relating to how Apple provides/markets services to and manages customer relations with developers and the extent, if any, to which this depends on the 'storefront' which the device user accesses and/or the location of the app developers. This includes but is not limited to documents identifying: (i) the nature of services provided to developers (including whether these vary on a transaction-by-transaction basis depending on the 'storefront' by which the transaction is effected); [and] (ii) documents identifying how Apple markets its services to developers and its associated strategy (and whether this depends on the location of the developer)".

13. Second, the CR seeks three categories of documents, set out in paragraphs (iii), (iv) and (v) of sub-request 3.1, directed generally to showing the location of staff providing services to class members and the roles and functions of the Seventh and Eighth Defendants and their employees so far as concerned with the App Store and the provision of services to class members.

14. The Defendants accept that in principle the issues of territorial scope and applicable law are relevant to these proceedings and did not arise directly in *Kent.* As regards the documents in the former category ((i) and (ii)), the Defendants take issue with the generality of the calls and the extent to which disclosure is necessary given what is already known and the likely availability of relevant documents in the Kent Disclosure. Mr Piccinin pointed out that the core facts of what services the Defendants provide to app developers are well known. The respects in which storefronts in different countries are the same or are different are known. As regards the second category of documents ((iii), (iv) and (v)), the Defendants do not object to providing the information sought. Their objection is to this being dealt with as a request for disclosure rather than a request for information.

15. There is a live dispute in these proceedings about applicable law and territoriality. In principle, the CR is entitled to request disclosure of documents relevant to these issues. However, in my view, the first part of this request (covering (i) and (ii), which I have quoted above) is framed too broadly and with insufficient clarity. It is introduced by a request for a very general class of documents "*and/or data*" defined by reference to

two characteristics. It is not clear whether the "*and*" which joins those two characteristics is intended to be conjunctive or disjunctive. That broad category is then said to include "*but is not limited to*" documents falling within two further classes. Each of those classes is also framed very generally but with further descriptive matter in brackets. It is unclear whether the wording in brackets is intended to be exhaustive of the category in question or simply illustrative. Whilst I accept that a request can be framed in general terms, this request leaves far too uncertain what it is that the Defendants would be required to search for. If the CR wishes to pursue this request, he will be required to refine the category or categories of documents sought so as to give sufficiently specific direction as regards the searches to be undertaken by the Defendants.

16. As regards the second category, I have concluded that I should direct the Defendants to respond to the requests for information in subparagraphs (iii), (iv) and (v) of Request 3.1. Mr Piccinin said that, if ordered, this could be done within a month. If any consequential issue arises as to the adequacy of the response or otherwise, that can be brought before the Tribunal.

Request 5

17. Request 5 is directed to various categories of documents (defined in sub-requests 5.1 to 5.7) concerned with the Defendants' dealings with developers. I was told that the Defendants were considering further what they could provide in response to sub-request 5.7, and that I need not address that sub-request at this time. I deal first with sub-requests 5.1 to 5.5, and then with sub-request 5.6.

Sub-requests 5.1 to 5.5

18. Mr Carall-Green advised me that if the Tribunal were with the CR on Request 2, the CR would not insist at this time on sub-requests 5.1 to 5.5. Rather, he would approach the matter through the search procedure envisaged in Request 2 and, in light of documents disclosed by that process, decide whether to seek directions for further disclosure. Mr Piccinin accepted that at least the first four of these sub-requests were directed to "*central and core issues*" in the case. His main point was that, in light of the disclosure already made it would not be proportionate to order further disclosure in the absence of any contention that circumstances had changed.

19. It seems to me that the CR is justified in seeking to recover documents post-dating the Kent Disclosure which are relevant to what are agreed to be "*central and core issues*". However, it seems to me that, in the first instance, this should be advanced through the process which I have approved in response to Request 2. I accordingly make no further order in respect of these sub-requests at this time.

Sub-request 5.6

20. Sub-request 5.6 seeks documents and/or date showing or concerning "*the impact of changes to Apple's pricing tiers*". Mr Carall-Green supported this sub-request by reference to a letter from the CR's expert, Mr Perkins which identified this as relevant to market definition. Mr Piccinin did not resist that proposition. He opposed the request on the basis that the Defendants will be disclosing to the CR data on every individual transaction made by any UK-based developer anywhere in the world. The CR will, he argues, be in a position to undertake his own analysis of the impact of any changes in price, inter alia by reference to that data. Mr Piccinin also pointed out that there was material on this in *Kent.*

21. In response, Mr Carall-Green did not suggest that the CR could not carry out an analysis of the data being provided to it. His point was that it would not be disproportionate to require the Defendants to disclose any analyses which they may themselves have undertaken. This may, he contends, disclose qualitative aspects of developer behaviour which would not be captured by the data being disclosed. He also pointed out that *Kent* was concerned only with UK storefronts.

22. The relevance of the category of documents sought is not disputed. Since this case is concerned with transactions through all the Defendants' storefronts and not only those in the UK/EU, the *Kent* Disclosure may well not cover all of the relevant information. If the Defendants have, themselves, generated analyses (which have not already been disclosed) of the effects on developer behaviour of price changes, it does not seem to me that it would be disproportionate to require them to disclose those analyses. I accordingly grant this sub-request, but I confine it to documents containing analysis

of the response of app developers to changes in the Defendants' pricing tiers which has not already been disclosed.

Request 6

23. Request 6 is directed to various categories of documents (defined in sub-requests 6.1 to 6. 5) concerned with exceptions to the Defendants' usual rules on app distribution and payment processing. The parties are in dialogue on sub-request 6.1 and are agreed that I need not determine that sub-request at this time. They also agreed that I need not determine sub-request 6.4. I am accordingly required to address sub-requests 6.2, 6.3 and 6.5. In relation to these, the CR's skeleton stated that the Defendants were considering the CR's requests so far as they relate to the Defendants' exceptions to the usual rules of app distribution and payment proceedings in the EU (including pursuant to the Digital Markets Act), the Netherlands, South Korea and the USA (the **Territorial Exceptions**), and that with the exception of sub-request 6.3, the CR was content to pursue requests in respect of the program exceptions if the Tribunal approved the structured process which he sought in Request 2.

24. Notwithstanding that statement in the skeleton, I heard a short debate on each of sub-requests 6.2 and 6.5. That confirmed my view that, although the process which I have approved is not precisely as requested by the CR, the right course at this stage is to make no order in respect of sub-requests 6.2 and 6.5, on the basis that these can be pursued through that process and, if not agreed, an appropriately focused request can be brought to the Tribunal.

25. Sub-request 6.3, upon which the CR insists, is for "*[a]ny surveys or other analyses conducted by Apple of the effects on app developers of the Territorial Exceptions and the Program Exceptions (including in relation to the case of take-up)*". Mr Carall-Green intimated that in light of the Defendants' offer in relation to the Territorial Exceptions, he pressed this sub-request only in respect of the Program Exceptions. Mr Piccinin's response was that this had been addressed in *Kent* and the Defendants' response to the Further Disclosure Requests Schedule pointed to a specific Request For Production in the US concerning the small business program.

26. Mr Carall-Green pointed out that the request is concerned generally with the Defendants' Program Exceptions, not merely their small business program. This request seems to me to be similar in nature to sub-request 5.6 and I likewise consider that it would not be disproportionate to require the Defendants to disclose any analysis which the Defendants may have undertaken of the effects of the Program Exceptions on the behaviour of app developers, so far as that analysis has not already been disclosed.

Request 7

27. This Request comprises three sub-requests. The parties are agreed on sub-request 7.1 and I need not address it. Sub-requests 7.2 and 7.3 seek, respectively, documents relating to the reasons for Epic's exclusion from the App store and documents relating to the reasons for Facebook's threatened exclusion from the App Store. In his skeleton argument, the CR indicated that if the Request 2 were to be granted, he would not insist on sub-requests 7.2 and 7.3.

28. The Defendants' response to these requests, both in writing and as articulated by Mr Piccinin, is that they are historic and are included in the US Production Set, and that documents relating to these matters have already been disclosed in the *Kent* Disclosure. The Defendants nevertheless renew their offer to run additional search strings across the US Production Set. Mr Carall-Green said that there are "*real reasons*" to believe that there may be more documents than were captured in the *Kent* Disclosure and contended that if an assurance cannot be given that this is not the case, further searches should be undertaken against the expanded dataset which the CR proposed.

29. The issue between the parties is, essentially, the dataset against which further searches should be undertaken in respect of these matters. It seems to me that I should make no specific order in respect of these requests at this time, and that they should be addressed through the process which I have approved in response to Request 2, which will, in principle, encompass an enhanced dataset.

The Defendants' Intended Disclosure Application

30. In advance of the CMC the Defendants' solicitors wrote to the Registrar of the Tribunal on 17 April 2026 intimating that the Defendants anticipated seeking disclosure from certain Class Members (described in the letter as "*Proposed Represented Persons*") pursuant to rule 89(1)(c) of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**). The letter stated:

> "5. Apple is conscious of the role of the Tribunal in relation to any application to seek disclosure from the Proposed Represented Persons and that this remains a largely untested area of the collective action regime. Against this background, Apple considers that it is appropriate to raise the Proposal for the Tribunal's consideration in the first instance before making any formal application for disclosure from the Proposed Represented Persons. While Apple does not seek any particular directions from the Tribunal at this stage, if the Tribunal has views on how any applications should be managed or on any other aspect of the Proposal, it is likely to be efficient and to reduce the burden on the Proposed Represented Persons if Apple can take those views into account in formulating its applications.
>
> 6. Apple therefore considers that the Proposal should form part of the agenda for the forthcoming CMC. Following the CMC and subject to any directions from the Tribunal in relation to the Proposal, Apple intends to request disclosure from the Proposed Represented Persons in correspondence and then prepare and file formal applications against the Proposed Represented Persons to the extent appropriate in view of the responses."

An annex to the letter set out the proposed disclosure categories in respect of which the Defendants propose to request Represented Persons to undertake searches.

31. In his skeleton, the CR contends that the Defendants have made no attempt to explain how the proposed request for disclosure would address the pleaded issues, why class members are thought to hold relevant documents or which class members are to be approached. He further contends that "*assuming that Apple could answer these questions satisfactorily, there is a separate question whether disclosure ought to be ordered*". He advances four submissions. First, disclosure by class members would be non-party disclosure for which an application under r. 63 of the Tribunal Rules would be needed. The CR argues that the proposed requests would not meet the requirements for such an application, inter alia by reason of their breadth. Second, relying on observations of Bridget Lucas KC in *Mark McLaren Class Representative Ltd v. MOL (Europe, Africa) Ltd and Others* [2023] CAT 71 (***Mark McLaren CAT)***, the CR contends that disclosure by class members is intended to be the exception rather than the norm and should be subject to careful scrutiny by the Tribunal. He suggests that

in this case there is an "*acute risk*" that requests to class members may prompt them to opt out. The proposal to approach only larger class members risks that the disclosure will be unrepresentative and of little probative value. Third, the Defendants have not shown that the disclosure sought from class members would be reasonably necessary and proportionate. Fourth, the proposal risks disrupting the management of these proceedings. He contends that the Defendants have not shown the CR or the Tribunal drafts of proposed correspondence, explained how it will ensure that the CR has a fair chance to comment on, and if necessary the Tribunal to supervise, the approach, or given any timetable. The proposed approach is liable, says the CR, to disrupt the timetable which has been set for this litigation.

32. In response, the Defendants' skeleton contends that the decision of Bridget Lucas in *Mark McLaren CAT* has been superseded by the decision of the Court of Appeal in *Mark McLaren Class Representative Ltd v. Nippon Yusen Kabushiki Kaisha* [2023] EWCA Civ 1471 (***Mark McLaren CA***) albeit that her decision was not directly the subject of the appeal in the latter case. The Defendants contend that, in light of that decision, defendants may correspond directly with class members with a view to gathering evidence from them, without copying the class representative or seeking permission from the Tribunal. Such correspondence has the absolute protection of litigation privilege. At the same time, the Defendants observe that where a defendant is willing to engage in the evidence-gathering process collaboratively with the class representative, or with the prior input of the Tribunal, there may be benefits to doing so in terms of increasing the efficiency of the process and reducing the burden on represented persons. The Defendants' proposals go, they say, squarely to key issues in the case, namely the value received by developers and market definition. In light of the CR's response, the Defendants propose simply to pursue their requests for disclosure without further reference to him; and, if it is necessary to do so, to bring an application before the Tribunal in due course.

33. At the CMC, Mr Piccinin told me that if the Defendants' pending application for decertification is refused, they intend to write to certain of the Class Members with a view to seeking voluntary disclosure from them. If this approach to the Class Members should be unsuccessful, the Defendants anticipate bringing an application before the Tribunal under r. 89(1)(c) of the Tribunal Rules, seeking an order for disclosure. Mr

Piccinin advised me that the Defendants had raised the issue at this time, in the hope that there would be a constructive response to the proposal from the CR, for example as regards the issues which should be investigated in this way. In light of the CR's response, the Defendants proposed, subject to any comments which the Tribunal might have, simply to write to the Class Members in question.

34. Mr Piccinin accepted that the Tribunal has wide case management powers and that these can include a jurisdiction to regulate some communications between defendants and class members. But he submitted that the Tribunal has no power to make any order which would interfere with, or invade, litigation privilege. Mr Piccinin relied on *Mark McLaren CA*, in particular, the following observations of Popplewell LJ at §103:

> "Tribunal scrutiny of such an approach is an invasion of litigation privilege because it forces the defendants to disclose to their opponents details of their pursuit of evidence for the purposes of defending the claim. […] [W]here litigation privilege exists, it is inviolate: there is no balancing exercise to be undertaken between the interest in maintaining privilege and competing public interests in disclosure of the communications; privilege is a right, which cannot be overridden as a matter of case management or discretion."

On that basis Mr Piccinin contended that the Tribunal has no power: (i) to order the Defendants not to write to class members asking them to provide documents; or (ii) to ask to see correspondence between the Defendants and class members where that correspondence is covered by litigation privilege.

35. Mr Carall-Green, for his part, submitted that the Tribunal's power to make case management directions includes the power to issue directions regulating any approach by the Defendants to Class Members. He took me to certain passages in Popplewell LJ's judgment in *Mark McLaren CA* which he said vouched for the point. He noted, in particular, that Popplewell LJ had commented with approval, at §115, on a "*postface*" commenting on how communications with class members might be handled contained in the judgment of the Ontario Superior Court of Justice in *Del Giudice v. Thomson* [2021] ONSC. Mr Carall-Green submitted that the observations of Bridget Lucas KC in *Mark McLaren CAT* were consistent with the judgment of Popplewell LJ in *Mark McLaren CA.* Mr Carall-Green's position was that the Tribunal should regulate the position with a view to ensuring "*that mere request doesn't endanger the integrity of the proceedings, impose undue burdens on class members,*

alarm them, prompt opt outs for the wrong reasons and so on". He drew my attention to an order made on 6 March 2026 which had been made by the President in *Spottiswoode v. Airwave Solutions Ltd* (**Spottiswoode**), in which she had directed that a structured process be followed, involving the parties exchanging proposals on the disclosure to be sought from a sample of class members. He invited me to make similar directions in the present case.

36. Mr Piccinin responded, to point out that the Tribunal has no properly formulated application for directions before it. He told me that the approach set out in the 6 March 2026 *Spottiswoode* order had been proposed by the defendants in that case. He observed that the communication at issue in *Del Giudice*, to which the "*postface*" was directed was not a communication which engaged litigation privilege but a multimedia campaign seeking to persuade class members to opt out. He emphasised that the matters which the Defendants wish to explore are key issues in the case; and that the Defendants had raised the issue now on the basis that they wished to have a productive discussion with the CR and the Tribunal as to how the issue should be approached.

37. As this issue has unfolded, it has disclosed a disagreement between the parties about the Tribunal's powers to regulate an approach to class members such as that foreshadowed in the Defendants' correspondence. I have concluded that the only issue which I should determine at this time is the legal question which was debated between the parties. On that, I have concluded, in agreement with Mr Piccinin, that, subject to any waiver of privilege (which was not debated before me and upon which I therefore express no view), it is not open to the Tribunal to make an order which would be incompatible with the Defendants' litigation privilege. That proposition is, in my view, vouched by *Mark McLaren CA* and is, in any event, dictated by principle. As Popplewell LJ observed in *Mark McLaren CA* at §103, "*privilege is a right, which cannot be overridden as a matter of case management or discretion*".

38. *Mark McLaren CA* was an appeal against an order made by the Tribunal in opt-out collective proceedings prohibiting the defendants from communicating with class members (other than in the ordinary course of business) on matters concerning the proceedings without the consent of the Tribunal. This order was made in response to a letter which the defendants had sent to class members shortly after the CPO, drawing

attention to the opt-out date and intimating the defendants' intention to seek disclosure from the class members. The Tribunal made the order on the basis that it was implicit in the Tribunal Rules that defendants in collective proceedings should not communicate with class members without permission of the Tribunal or consent of the class representative.

39. The Court concluded that no such restriction fell to be implied into the Tribunal Rules. Among the reasons for its conclusion was the effect which such a restriction would have on litigation privilege. Popplewell LJ (with whom Butcher LJ agreed) said this:

> "102. At the forefront of her argument that the Restriction brings unacceptable and unfair consequences was the submission that it interfered with litigation privilege. In this case, the Shipping Companies had to disclose the detail of their approach to class members in seeking disclosure of relevant evidence, notwithstanding that such an approach had been sanctioned as appropriate in principle by the CAT's April 2023 order.
>
> 103. There is considerable force in this argument. Tribunal scrutiny of such an approach is an invasion of litigation privilege because it forces the defendants to disclose to their opponents details of their pursuit of evidence for the purposes of defending the claim. That is a class of communications which attracts litigation privilege because the communications are for the dominant purpose of the litigation. The vice in litigation privilege being invaded in respect of the conduct of a party's case in preparation for trial is that it may involve a party having to reveal to its opponent aspects of its litigation strategy, or its unused material. But the right to maintain privilege does not depend on whether it does so in a particular case. The privilege attaches to a class of communications. Moreover, where legal professional privilege exists, it is inviolate: there is no balancing exercise to be undertaken between the interest in maintaining privilege and competing public interests I disclosure of the communications; privilege is a right, which cannot be overridden as a matter of case management or discretion […]. The Ruling has resulted in that principle being breached in this case, and would potentially do so in many other collective proceedings before the CAT. That poses an unfair dilemma for defendants between foregoing their litigation privilege or foregoing their legitimate pursuit of evidence."

At §108, Popplewell LJ made further remarks consistent with the final sentence in this passage.

40. I do not consider that the other parts of the judgment to which Mr Carall-Green took me warrant a different view. I recognise that the Court of Appeal addressed the question of whether the order at issue in *Mark McLaren CA* should be upheld on the

basis that it was made, or should have been made, in the exercise of the Tribunal's case management powers. In particular, at §134, Popplewell LJ stated:

> "It remains open to [the class representative] to invite the CAT to make an order on a case management basis in the light of our decision on the interpretation of the Rules. The CAT, with its detailed understanding of the claims and the evidential and procedural position, is far better placed to consider whether to make such an order than we are, with the benefit of tailored submissions and evidence directed to that issue. It should be left to determine any such application if pursued."

It is implicit in these remarks that Popplewell LJ considered that the order which the Tribunal had made might be capable of being justified, in particular circumstances, by reference to the Tribunal's case management powers. It seems to me to be significant context for those remarks that the defendants' letter, to which the order had been a response, does not appear to have been a communication seeking disclosure or evidence, but a communication advising class members of the opt-out date and warning them that in the future they would have the trouble and inconvenience of responding to requests for evidence. It was accordingly not a communication to which litigation privilege, on the face of it, applied at all. Any order which the Tribunal might make, with a view to regulating such communications, would have to be framed in such a way as to avoid interfering with litigation privilege which, as Popplewell LJ observes at §103, is "*a right which cannot be overridden as a matter of case management or discretion*".

41. Nor do the references in Popplewell LJ's judgment to the "postface" in *Del Giudice* justify a different conclusion. The communication at issue in that case was, likewise, not one seeking evidence from class members and therefore not one which engaged litigation privilege at all. The procedure described in the postface is expressed as a way of avoiding "*problems and objections*". The postface states in terms that if, following exchanges between the parties, the defendant decides not to schedule a case management conference, it should simply issue its communication (taking the risk that this may result in applications for a corrective communication or otherwise). Whilst Popplewell LJ indicated that it might be open to the Tribunal to issue practice guidance based on the postface, there is nothing in those remarks which would justify the conclusion that any such guidance (or any order of the Tribunal) could lawfully over-ride or interfere with litigation privilege.

42. Nor do I agree with Mr Carall-Green that I should take succour from the decision of Bridget Lucas KC in *Mark McLaren CAT.* I agree with Mr Piccinin that her decision (which predated the Court of Appeal hearing) has been superseded by *Mark McLaren CA.* At §20 to §21, Popplewell LJ noted that after the ruling had been made, the Tribunal had given the defendants permission to communicate with class members for the purposes of seeking to obtain evidence or information from them in relation to the factual or expert issues, without seeking permission of the Tribunal or intimation to the class representative, but this permission was subject to a proviso that if the communication were to advert to any possibility of seeking an order against the class member, prior permission would be required from the Tribunal. The defendants wished to communicate with class members in those terms and had presented an application to the Tribunal. It was this application which Bridget Lucas KC determined in *Mark McLaren CAT.*

43. Ms Lucas refused to allow the proposed approach seeking disclosure from class members, directing that the first step should simply seek information the class members might be in a position to give. At §21, Popplewell LJ referred to her decision and stated: "*I would characterise the approach of the Tribunal as being that because the Rules impose a ban on communications without permission […] any departure from that presumed norm requires justification by the least invasive approach, and subject to careful scrutiny of the approach by the tribunal*". At §102, Popplewell LJ noted that the defendants had had to disclose (in the application which was before Ms Lucas) the detail of their proposed approach to class members seeking disclosure of relevant evidence. At §108, Popplewell LJ deprecated "*the experience of the application of the Ruling in this case, which has treated the implication in the Rules of a prima facie restriction on all communications as requiring detailed scrutiny by the Tribunal itself (and therefore disclosure to the class representative of the scrutinised material) if any departure from the restriction is to be allowed*".

44. Mr Piccinin accepted that, provided the Tribunal does not make any order which would breach or be incompatible with the Defendants' privilege, it has wide-ranging case management powers. By contrast with the position in *Spottiswoode,* he did not invite the Tribunal to make any particular directions in relation to the approach which

the Defendants have intimated to the CR and to the Tribunal. The communications from the Defendants foreshadow that an application may be forthcoming in due course; they have not placed any application before me. During the oral argument, Mr Carall-Green invited me to make directions analogous to those which were made in *Spottiswoode* but Mr Piccinin, reasonably, took issue with this unintimated application made in the course of Mr Carall-Green's reply. The debate before me was focused on the legal question which I have discussed above. The appropriate course, it seems to me, is simply to determine that legal question. If the CR wishes me to consider making procedural directions in light of my decision, he should file a properly formulated application, taking that decision into account, to which the Defendants can respond.

The parties' applications for permission to rely on expert evidence

45. Both parties have applied to the Tribunal for permission to adduce expert evidence in relation to experts in several disciplines. Ahead of the CMC, the parties had reached an agreement that expert evidence would be required in relation to each of (i) competition economics, (ii) accounting, (iii) the app industry, and (iv) software and technical elements of app development.

46. Although Schedule 1 to the draft order prepared by the Class Representative ahead of the CMC suggested that permission to adduce expert evidence in relation to (iii) and (iv) should be granted only to the CR, Mr Carall-Green confirmed at the CMC that the CR had no objections to this grant of permission being extended to the Defendants (although it may be that they will address those topics through factual evidence).

47. On the basis of the material before me, I was satisfied that I should grant permission in principle for expert evidence to be adduced by both parties, if so advised, on these four topics. However, the Tribunal requires to maintain control over the scope of the expert evidence to be led under these heads and I accordingly issue directions with a view to the articulation of the issues to be addressed by these experts, and disclosure of the identities of the parties' proposed experts, in advance of the September CMC, so that the Tribunal can regulate those issues. At the September CMC the Tribunal

will wish to consider whether to direct an early meeting of the parties' respective experts.

48. The CR also sought permission to adduce expert evidence in relation to the fields of: (i) app security and privacy; and (ii) payment systems and digital banking. The Defendants resisted these applications. For their part, the Defendants sought permission to adduce evidence in relation to valuation and the CR resisted this application. Whilst I understand the reasons why the Defendants wish to lead expert evidence on valuation, the nature of the valuation exercise which the Defendants propose to undertake is undefined, as is the precise focus of the expertise upon which they propose to rely. These matters will require to be clarified before the Tribunal can determine the application, not least so that the CR can, if so advised, consider instructing his own expert in the relevant field. Whilst the CR has identified a list of the issues which he proposes would be addressed by the two experts whom he wishes to instruct, I have concluded that the Tribunal should have further information on each of these heads before determining the competing applications. I have accordingly issued directions with a view to intimation of the identity of the proposed experts and a short report (no more than two pages) from each proposed expert identifying the issues which that expert proposes to address, so that the Tribunal can at the September CMC determine whether to approve the instruction of these experts.

The Defendants' intention to apply to rely on survey evidence

49. Although no application was put forward for determination at the CMC, the Defendants have intimated their intention to rely on survey evidence at trial in relation to consumer behaviour. The Defendants explain that they are still in the process of identifying their economic expert, whose input will be required to define the proposed survey evidence. No issue accordingly arises for decision at this time. The nature of the proposed survey, and its methodology, will need to be disclosed before the Tribunal can consider it. I have issued directions with a view to the Tribunal considering the matter at the September CMC.

Costs budgeting

50. The CR has applied to the Tribunal to order the Defendants to produce a cost budget. Although the application does not propose that the CR himself should be required to produce an updated cost budget, at the CMC Mr Carall-Green did not resist the proposition that any order should apply to both parties. He made clear that he is not, at least at this stage, inviting the Tribunal to take a more proactive approach to cost budgeting; his purpose is simply to secure transparency about the costs being incurred by the Defendants.

51. The Defendants do not resist directions requiring transparency as to the costs which have already been incurred. They resist the application for production of a cost budget. They make the point that estimating future costs in this litigation is inherently uncertain. The preparation of a budget will itself involve a cost; without, say the Defendants, any evident benefit at this time. If the Defendants benefit from an award of costs, the recoverability of the costs which they have incurred will be subject to scrutiny in any event.

52. Rule 53(2)(m) of the Tribunal Rules provides that the Tribunal may give directions for "*the costs management of proceedings, including for the provision of such schedules of incurred and estimated costs as the Tribunal sees fit*". The Tribunal is obliged to "*seek to ensure that each case is dealt with justly and at proportionate cost*": Tribunal Rules, r. 4(1). That includes, "*so far as is practicable, [inter alia,] ensuring that the parties are on an equal footing, saving expense and dealing with the case in ways which are proportionate [inter alia] to the financial position of each party*": r. 4(2).

53. In *Spottiswoode,* the President, when ordering the production of costs budgets, made the following observations at a hearing on 4 March 2026:

> "… there is a general concern within the Tribunal about the management of the costs of collective actions, and it is important that the Tribunal has oversight of the costs of collective actions along the way if the Tribunal is going to meaningfully exercise control over the costs that are being incurred, and in order to do that properly that needs to be on the basis of information provided on both sides as to the expectations of costs and the costs actually incurred."

54. I am satisfied that I should give directions designed to secure transparency as to the costs which have already actually been incurred by both parties, now and during the progress of the case. I accordingly direct that each party prepare, disclose and file with the Tribunal, two weeks before the date of September CMC, an analysis of the costs incurred to that date in the conduct of these proceedings. Parties should seek to agree the milestones at which future similar disclosure of incurred costs should take place; and this should be put on the agenda for the September CMC.

55. Notwithstanding the President's observations in *Spottiswoode*, I have decided not to require the filing of a future-facing costs budget at this time. I accept the Defendants' submission that the significant uncertainties as regards future costs at this stage of proceedings cast doubt on the value of a future-facing costs budget prepared at this stage. However, those uncertainties will diminish as the proceedings progress, and the Tribunal will wish to hear parties at the September CMC as to whether the production of cost budgets should be ordered at an appropriate stage in the proceedings.

James Wolffe KC
Chair of the Competition Appeal Tribunal

Made: 15 June 2026
Drawn: 15 June 2026