Neutral citation [2026] CAT 72

Case No: 1601/7/7/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 September 2026

Before:

JAMES WOLFFE KC
(Chair)
TIM FRAZER
ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

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

Heard at Salisbury Square House on 27 July 2026

JUDGMENT (CLASS COMMUNICATION)

APPEARANCES

Daniel Hubbard (instructed by Scott + Scott UK LLP) appeared on behalf of the Class Representative

Daniel Piccinin KC and Natasha Simonsen (instructed by Gibson Dunn & Crutcher UK LLP) appeared on behalf of the Defendants

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A. INTRODUCTION

1. This is an application (**the Application**) by the Class Representative (the **CR**) for directions pursuant to r. 53(1) of the Competition Appeal Tribunal Rules 2015 (the **Rules**) concerning a proposal by the Defendants (**Apple**) to communicate with certain members of the represented class with a view to seeking voluntary disclosure of documents. The Application arises out of a dispute between the parties about Apple's proposal and the Tribunal's role in regulating such communications.

B. PROCEDURAL BACKGROUND

2. The CR brings these collective proceedings under s. 47B of the Competition Act 1998 seeking damages on behalf of UK-domiciled iOS app developers that have sold apps and made in-app sales on which commission has been charged by Apple. On 29 November 2024 the Tribunal made a collective proceedings order, authorising the CR to continue the proceedings on an opt-out basis, and allowing class members to opt out by 1 March 2025. Class members who did not opt out by that date, and whose claims are accordingly combined in these proceedings are referred to in the Rules as "represented persons": see r. 73(2). In February 2026, Apple applied to the Tribunal to decertify the class. That application was heard on 22 April 2026.

3. On 17 April 2026, Apple's solicitors, Gibson Dunn & Crutcher UK LLP (**Gibson Dunn**), wrote to the Tribunal indicating that Apple proposed to seek disclosure, initially on a voluntary basis, from certain represented persons and requesting that the issue be included on the agenda for a case management conference which was listed for 6 May 2026 (the **May CMC**). That case management conference was a deferred CMC, in place of one which had been envisaged in §9 of the Tribunal's order dated 5 June 2025 to deal, among other things, with any disclosure issues which had not already been dealt with or agreed.

4. In its letter, Apple explained its rationale for seeking disclosure in the following terms:

> "Many members of the class are very substantial enterprises and stand to benefit significantly if the Proceedings are successful. Indeed, as explained in Apple's application for decertification of the Proceedings dated 23 February 2026, the vast majority of the commerce at issue in these Proceedings resides in a very small number of businesses with very substantial revenues.
>
> Several core issues in the Proceedings concern matters that are within the knowledge and documentary records of the Proposed Represented Persons. As such, Apple considers that they will have documents that will provide evidence on those issues and that those documents will be important to its defence. Furthermore, those documents would have been disclosable and therefore available to Apple to advance its defence had the Proposed Represented Persons brought proceedings on an individual basis."

5. Apple recognised that disclosure from represented persons raises issues which are relatively novel in the context of the collective proceedings regime. It explained that its purpose was not to seek any specific directions from the Tribunal at the May CMC, but rather to raise the matter in advance of any formal application under the Rules. Apple further observed that, if the Tribunal had any views as to how the exercise should be managed "or on any other aspect of the Proposal", it would be efficient and potentially reduce the burden on represented persons if those views could be taken into account when formulating any subsequent application.

6. Annexed to Apple's letter was a draft list of 19 proposed disclosure categories. These categories were directed to five broad topics:

   A. Apple's services, tools and technologies;

   B. the pricing of apps and in-app content across different app marketplaces;

   C. multi-homing and substitution across different app marketplaces;

   D. financial information relating to the download or purchase of apps, in-app digital content and/or web apps on any app marketplace or website; and

   E. domicile.

7. Apple stated that it proposed to ask class members to make searches covering the period from 25 July 2017 to the present. It did not identify the number or identity of the represented persons from whom disclosure might be sought and stated that,

depending on the answers received, it might be necessary to alter the list of represented persons from whom disclosure would be sought.

8. On 24 April 2026, Scott+Scott UK LLP (**SSUK**), on behalf of the CR, wrote to the Tribunal setting out the CR's objections to Apple's proposed course of action. The CR contended, among other things, that Apple had failed to explain adequately how the proposed disclosure requests related to the issues in dispute or why it was thought that class members possessed relevant material. The CR also criticised Apple's failure to identify how many represented persons it proposed to approach, arguing that this made it impossible properly to assess the necessity or proportionality of the exercise. Further objections were raised to the breadth of the proposed disclosure categories and to the fact that neither the Tribunal nor the CR had been provided with draft copies of the communications which Apple proposed to send. More generally, the CR expressed concern that asking represented persons to undertake such a burdensome disclosure exercise could encourage some of them to opt out of the proceedings.

9. The parties agreed that "The Defendants' intended application for disclosure from class members" should be an agenda item for the May CMC. The parties made both written and oral submissions on the issue. In its skeleton, Apple stated that the searches were directed to the following issues: (i) the value received by developers (categories A and D); (ii) market definition, in particular the extent to which developers can substitute away from means of transacting which attract Apple's commission to alternatives which do not (categories B and C); (iii) the applicable law issue (category E); and (iv) pass on (categories B and D).

10. At the May CMC Mr Piccinin KC submitted on behalf of Apple that defendants are entitled, as a matter of principle, to communicate directly with class members for the purpose of obtaining evidence, without either notifying the class representative or obtaining the Tribunal's permission, and that such communications attract litigation privilege. He relied on the Court of Appeal decision in *Nippon Yusen Kabushiki Kaisha and others v Mark McLaren Class Representative Ltd* [2023] EWCA Civ 1471 *(**McLaren CA**)*. He stated:

> "…We could have just gone off and written to developers and made our requests to them and asked them to produce what they would like to, and we

> could have done all of that under the cover of litigation privilege without bringing it to the Tribunal's attention or to the class representatives' attention."

11. Mr Piccinin further explained that Apple had chosen not to proceed immediately with the proposed communications only because its application to decertify the proceedings remained outstanding and the investigations might prove unnecessary. He stated that, if the decertification application were to be refused, Apple intended to approach certain developers with a view to seeking voluntary disclosure.

12. Mr Carrall-Green, for the CR, submitted that the Tribunal's power to make case management directions includes the power to issue directions regulating any approach by defendants to class members. He relied on certain passages in *McLaren CA,* which were said to vouch the point. He relied on a "postface" in *Del Giudice v. Thomson* [2021] ONSC 2206 (***Del Giudice*)*,*** which was referred to with approval by Popplewell LJ in *McLaren CA* and a decision of the Tribunal in *Mark McLaren Class Representative Ltd v MOL (Europe, Africa) Ltd* [2023] CAT 71 *(**McLaren CAT**)*. In the course of his reply, he invited the Tribunal to make certain directions.

13. In its reasoned order dated 15 June 2026 dealing with various matters discussed at the CMC, the Tribunal addressed the debate which it had heard. The Tribunal concluded, at §37, that, subject to any question of waiver, it is not open to the Tribunal to make an order incompatible with Apple's litigation privilege. The Tribunal considered that conclusion to be supported both by *McLaren CA* and by principle, noting Popplewell LJ's observation in §103 of *McLaren CA* that "privilege is a right, which cannot be overridden as a matter of case management or discretion". The Tribunal further stated that if the CR wished to seek procedural directions in light of the Tribunal's ruling, he should file a properly formulated application taking account of the Tribunal's conclusions, to which Apple would have the opportunity to respond.

14. On 18 June 2026, SSUK wrote to Gibson Dunn stating that the CR continued to have concerns regarding the necessity, proportionality and practical consequences of Apple's proposed disclosure exercise, and inviting Apple to engage with the points which SSUK had previously raised. Gibson Dunn responded on 25 June 2026. They noted that the CR had advanced no proposal of his own for seeking

disclosure from represented persons and characterised the CR's position as being largely to object to the need for such disclosure at all. Gibson Dunn added that, should Apple need to make an application to the Tribunal, sufficient notice would be given to the CR.

15. On 25 June 2026 the Tribunal issued a judgment dismissing Apple's decertification application: [2026] CAT 55.

C. THE APPLICATION

(1) The CR's Position

16. On 2 July 2026 the CR issued the present application seeking various directions under r. 53(1) of the Rules in relation to Apple's proposed communications with represented persons.

17. The Application identifies a number of concerns which the CR has regarding Apple's proposed course of action. The CR contends that represented persons are likely to perceive the proposed requests as burdensome and disproportionate, having regard in particular to the breadth of the proposed categories and the length of the relevant period. The Application also raises concerns regarding what it describes as the commercial implications for developers of providing information and documents to Apple. In that regard, it refers to an alleged practice sometimes described as "Sherlocking", pursuant to which Apple is said to incorporate into its own products functionality developed by third parties. The Application submits that allegations of that nature may contribute to concerns amongst some developers about disclosing commercially sensitive information to Apple. Finally, it contends that some developers may be concerned about possible commercial repercussions arising from Apple's control of access to, and distribution through, the App Store.

18. The CR also relies on experience in other collective proceedings before the Tribunal. In particular, the Application refers to disclosure requests made by Google to developers in *Professor Barry Rodger v Alphabet Inc. & Others*, and to case-management directions subsequently made by the President concerning the content and timing of communications with class members. The CR expresses

concern that Apple's apparent focus on larger developers may result in disclosure being sought from a subset of class members that is not representative of the class as a whole. Relying on observations made in *Professor Barry Rodger v Alphabet Inc. & Others* [2025] CAT 58 at §§130-131, the CR submits that the representativeness of any disclosure sample is of particular significance.

19. More generally, the CR contends that requests of the kind contemplated by Apple may encourage some represented persons, particularly larger developers, to seek to opt out of the proceedings rather than incur the burden of responding to the disclosure requests. The Application submits that any material reduction in participation by such developers could have significant consequences for the conduct and economic viability of the proceedings. Ultimately, it is said that those consequences may form part of the strategic rationale underlying Apple's proposed approach.

20. The CR contends that privilege in the proposed communications (if it ever existed) was lost when Apple voluntarily disclosed the substance of its proposed communications to the Tribunal and the CR, invited comment on its intended approach, and publicly articulated the scope and purpose of its requests. The CR submits that Apple thereby waived any privilege that might otherwise have attached, or alternatively that the necessary conditions of confidentiality for litigation privilege are absent, such that Apple cannot withhold its disclosure-related communications with represented persons from either the CR or the Tribunal.

21. The Application was accompanied by three draft orders. The first sought interim relief preventing Apple from contacting class members for the purpose of seeking disclosure pending determination of the Application. The remaining draft orders (**Order 2** and **Order 3**) sought to regulate both the circumstances in which Apple could seek disclosure from class members and the manner in which any related communications could be made. The Application presents Order 2 and Order 3 on alternative bases.

22. Order 2 proceeds on the basis that Apple has waived litigation privilege in the proposed communications. It seeks directions requiring Apple, before making

either voluntary or formal disclosure requests to class members, to consult with the CR and to provide drafts of its proposed communications and details of the intended recipients. Any disagreement as to either the contents of the communication or the identity of the proposed recipients would be referred to the Tribunal for determination before the communication was sent. Order 2 further seeks to prohibit Apple from communicating with the relevant class members outside that framework.

23. Order 3 is advanced in the alternative, on the assumption that Apple is entitled to maintain privilege over the proposed communications with class members. On that footing, the CR does not seek orders requiring scrutiny of the communications themselves. Instead, the CR proposes a series of procedural safeguards governing the making of disclosure requests.

24. §§1 and 2 of Order 3 are in the following terms.

> "1. Should the Defendants intend to send any communication seeking disclosure from class members (a "Disclosure Communication"):
>
> (1) The Defendants shall, by 4.00pm on [TWO WEEKS FROM DATE OF ORDER]: (a) confirm how each category of their proposed disclosure requests relates to each of the pleaded issues in these proceedings; and (b) the criteria that the Defendants will use to select the intended recipients of the Disclosure Communication (and the number of intended recipients).
>
> (2) The Class Representative shall, by 4.00pm on [FIVE WEEKS FROM DATE OF ORDER] send comments to the Defendants on: (a) the proposed scope of the disclosure requests (and provide any revisions he considers necessary); and (b) the proposed basis for selection of the recipients of the Disclosure Communication (and the number of intended recipients).
>
> (3) Should the parties be unable to agree on any of the matters referred to in paragraphs 1(1) and 1(2) above, the Defendants shall make any application for directions to the Tribunal by 4.00pm on [SEVEN WEEKS FROM THE DATE OF THIS ORDER]. The Tribunal will set down further directions for the hearing of such disputes.
>
> 2. Pending the conclusion of the process referred to in paragraph 1 above, the Defendants shall not make any Disclosure Communication to the class member(s) or otherwise communicate with them. This prohibition does not

> operate to prevent the Defendants communicating with class members in the ordinary course of their business operations."

25. §3 of Order 3 proposes directions that various matters be included with Apple's initial communication to any class member, namely:

    (1) a hyperlink to the Tribunal's webpage for the proceedings;

    (2) the name and contact details of the CR's legal representatives, together with a statement that the class member may discuss the disclosure request, or any other aspect of the proceedings, with them;

    (3) a statement that the class member is under no obligation to provide disclosure absent an order of the Tribunal, and that any application for such an order may be opposed;

    (4) a statement that disclosure requests must be necessary for the fair resolution of the proceedings and reasonable in scope, and that those matters may be contested before the Tribunal;

    (5) confirmation that a decision whether to provide disclosure will not affect the class member's commercial relationship with Apple, including matters such as app review, placement or ranking within the App Store;

    (6) a statement that the class member may request that any disclosed material be placed within a confidentiality ring restricted to the external legal advisers of the parties;

    (7) a statement that the receipt of a disclosure request does not imply wrongdoing on the part of the class member;

    (8) confirmation that Apple would meet the class member's reasonable costs of responding to its disclosure request and that, if an application for disclosure proved unsuccessful, Apple would be liable for the costs occasioned by that application; and

(9) a copy of any reasoned order made by the Tribunal in relation to the request.

26. §4 of Order 3 would apply if Apple had already communicated with class members to seek disclosure from them.

27. §§5 to 7 of Order 3 proposed a number of practical restrictions on Apple's communications with class members, namely:

(1) prohibiting communications outside normal business hours,

(2) preventing Apple from requiring a response in fewer than 28 days, and

(3) requiring Apple, where possible, to ascertain whether a class member had an in-house legal function and, if so, to direct its communications through that function.

28. §8 of Order 3 proposes that if Apple makes any application to the Tribunal for disclosure by a class member, the application should be served on the CR and the CR automatically joined as an interested party.

29. §9 of Order 3 seeks the costs of the Application.

30. Upon receipt of the Application, the Tribunal considered that the issues raised were of sufficient importance and potential wider significance to warrant determination at an oral hearing convened at the earliest available opportunity. On 3 July 2026, the Tribunal made an interim order maintaining the status quo pending determination of the Application, directions were given for Apple to file a response, and a hearing was listed on 27 July 2026 to consider the Application.

(2) Apple's Reply

31. In its response dated 10 July 2026, Apple opposes the Application in its entirety and submits that it should be dismissed as an abuse of process. According to Apple, the Application is, in substance, an attempt to revisit and circumvent the Tribunal's ruling of 15 June 2026 that it could not make an order interfering with Apple's privileged communications with class members. The arguments now advanced by

the CR concerning waiver of privilege, or the absence of confidentiality, either had been raised or could and should have been raised at the May CMC. In those circumstances, Apple submits that the Application offends the principles of finality in litigation and the rule in *Henderson v Henderson* (1843) 3 Hare 100.

32. In any event, Apple argues that the waiver case is unsustainable on its merits. No communications have yet been sent to class members; and privilege cannot have been waived in relation to documents which did not yet exist. Any future correspondence seeking information or documents from class members would, says Apple, constitute confidential communications created for the dominant purpose of obtaining evidence in the proceedings and would therefore attract litigation privilege. Privilege has not been lost merely because Apple has discussed its proposed approach with the Tribunal and the CR, or because Apple has disclosed in general terms the categories of information it wished to obtain.

33. Apple also rejects the CR's criticisms of the proposed disclosure exercise. Apple maintains that the CR is not entitled to constrain Apple's efforts to gather evidence for its defence and takes strong objection to the allegations of bad faith, including suggestions that Apple is seeking to burden represented persons, encourage opt-outs, or otherwise undermine the proceedings. The same position is taken in relation to allegations concerning so-called "Sherlocking" practices and any suggestion that Apple's intended communications are motivated by an improper purpose.

34. Apple submits that many of the proposed directions would amount to an impermissible interference with privileged communications between itself and class members, whilst others should be regarded as unnecessary, inappropriate or impractical. Questions concerning the scope or proportionality of any disclosure requests should, says Apple, be addressed if and when an application for an order for disclosure is brought before the Tribunal. On that basis, Apple invites the Tribunal to reject Order 2 and Order 3 and to award it the costs of responding to the Application.

D. THE LAW

(1) The Governing Principles

35. Rule 4 of the Rules sets out the Tribunal's Governing Principles. By virtue of r. 2(2), these inform the exercise of the Tribunal's case-management powers conferred under the Rules and provide the framework within which those powers are to be exercised.

> "**4.**—(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> > (a) ensuring that the parties are on an equal footing;
> >
> > (b) saving expense;
> >
> > (c) dealing with the case in ways which are proportionate—
> >
> > > (i) to the amount of money involved;
> > >
> > > (ii) to the importance of the case;
> > >
> > > (iii) to the complexity of the issues; and
> > >
> > > (iv) to the financial position of each party;
> >
> > (d) ensuring that it is dealt with expeditiously and fairly;
> >
> > (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and
> >
> > (f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal.
>
> [...]
>
> (4) The Tribunal shall actively manage cases.
>
> (5) Active case management includes—
>
> > (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
> >
> > (b) identification of and concentration on the main issues as early as possible;
> >
> > (c) fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;

> (d) adopting fact-finding procedures that are most effective and appropriate for the case;
>
> (e) planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and
>
> (f) ensuring that the main hearing is conducted within defined time-limits.
>
> [...]
>
> (7) The parties (together with their representatives and any experts) are required to co-operate with the Tribunal to give effect to the principles in this rule."

36. The parties to the present proceedings are the CR and Apple. The claims which are being pursued through the vehicle of the collective proceedings are the individual claims of the represented persons against Apple. In opt-out proceedings, UK-domiciled class members who have not opted out of the class are, by r. 73 of the Rules, called "represented persons" because, for practical purposes, they are represented in the proceedings by the CR. However, it is of the nature of opt-out proceedings, such as the present, that a represented person may be unaware that proceedings have been commenced, or even that it has a claim which is being advanced through the collective proceedings, or that it is being represented in these proceedings by the CR. Although represented persons stand to benefit from the proceedings, they are not themselves parties and are not subject to the ordinary burdens which fall on parties to litigation. Those burdens, including in relation to disclosure and costs, fall primarily on the class representative and the class representative's lawyers. As we will explain, these features of collective proceedings condition the approach which the Tribunal takes to any application which may be made to it for an order requiring a represented person to provide disclosure.

(2) The Tribunal's power to give directions

37. Rule 53(1), upon which the Application is founded, confers a broad power on the Tribunal to give directions in proceedings under s. 47A of the Competition Act 1998. Rule 53(2) contains a non-exhaustive list of specific directions that may be made. Those include, at r. 53(2)(l), directions "for the disclosure and the production by a party or third party of documents or classes of documents". Rule 53 is supplemented, in the context of collective proceedings under s. 47B of the 1998

Act, by r. 88. Rule 88(1) provides that the Tribunal may, at any time, give any directions it thinks appropriate for the management of collective proceedings. Rule 88(2) identifies certain examples of such directions, expressly without prejudice to the generality of the power conferred by r. 88(1).

38. The breadth of the powers conferred by r. 53 and r. 88 is not in dispute. Mr Piccinin has accepted on behalf of Apple that the Tribunal possess a broad case-management jurisdiction. Apple does not argue that any of the proposed directions are outwith the powers conferred on the Tribunal by r. 53 and r. 88. Rather, Apple's contentions are: (i) that certain of the CR's proposed directions would impermissibly interfere with Apple's litigation privilege and, on that basis, may not lawfully be made in the exercise of the Tribunal's powers; and (ii) that the other directions sought are unnecessary or inappropriate and should, on that account, be refused.

(3) Disclosure by represented persons

39. Rule 89 makes specific provision for disclosure in collective proceedings in the following terms.

> "**89.**—(1) In addition to the Tribunal's general powers under these Rules to order disclosure, the Tribunal may order, on any terms it thinks fit, disclosure to be given—
>
> (a) by any party to the collective proceedings to any other party
>
> (b) by the class representative to any or all represented persons; and
>
> (c) by any represented person to any other represented person (including a person within a different sub-class), the class representative or the defendant."

Rule 89 supplements the Tribunal's general powers concerning disclosure, which are set out in r. 60 to r. 65, and include a power to order disclosure by a person who is not a party to the proceedings. Rule 89(1)(c) expressly contemplates disclosure being ordered from represented persons (i.e. class members) to a defendant. Apple's stated position is that, depending on the responses to its requests for voluntary disclosure, it may seek orders against represented persons under r. 89(1)(c).

40. Guidance about the Tribunal's practice in relation to disclosure is given by §§5.86 to 5.94 of the Tribunal's Guide to Proceedings, (the **Guide**) which has the status of a Practice Direction pursuant to r. 115(3) of the Rules. The Guide emphasises that disclosure before the Tribunal is not automatic but proceeds pursuant to an order or direction of the Tribunal. It further explains that disclosure should be determined having regard to the Governing Principles in r. 4, and that the parties are expected to co-operate in devising practical and proportionate disclosure arrangements. The Guide states that the purpose of disclosure is to obtain material relevant to the determination of issues raised by the pleadings and that disclosure is not to be used as "a weapon in a war of attrition".

41. The Guide also addresses disclosure against persons who are not parties to the proceedings. It explains that, in deciding whether to order disclosure from a non-party, the Tribunal will ordinarily have regard to the fact that the person from whom disclosure is sought is not directly involved in the litigation and will generally confine any order to clearly identified documents or limited categories of documents. It further contemplates that provision may be made for payment of the non-party's reasonable costs of compliance. §6.68 of the Guide deals specifically with disclosure in collective proceedings and reflects, without further commentary, the availability of disclosure orders against represented persons under r. 89.

42. Since the May CMC in the present case, the Tribunal has issued two decisions on applications under r. 89 for disclosure orders against represented persons.

Ad Tech Collective Action LLP v. Alphabet Inc and Others

43. On 24 June 2026, the Tribunal (Leech J, John Alty and Dr Maria Maher) issued a ruling in *Ad Tech Collective Action LLP v. Alphabet Inc and Others* following a case management conference which addressed, among other things, class member disclosure: [2026] CAT 54 (***Ad Tech***). The defendants had invited the Tribunal to give directions requiring the class representative to write to certain class members (including certain "Large Publishers" who accounted for the majority of the claim) requesting disclosure, and for the class representative then to produce to the defendants the documents disclosed by the class members to the class

representative. The Tribunal accepted that the application fell to be addressed under r. 89(1)(c).

44. The Tribunal did not consider that there was any need to show exceptional circumstances before an order under r. 89(1)(c) may be made: §91. However, it went on to conclude that, if there is a test of exceptional circumstances, that test was met. The Tribunal observed, at §92, that "[l]arge commercial organisations who stand to gain substantially from collective proceedings and who have the most 'skin in the game' must be expected to engage with the process more fully than the smaller entities for whose benefit opt-out proceedings have been brought and certified".

45. The Tribunal issued directions which required: (i) the parties' representatives to meet and seek to agree the scope of the disclosure requests to be made of class members, including in respect of the defendants' requests; (ii) the class representative to identify those class members it considers to account for the majority of the claim value (the Large Publishers) and any others from whom it intended to request disclosure, and any disclosure requests it proposed to make of class members; (iii) the defendants to inform the class representative of any objections to its identification of the Large Publishers; and (iv) the parties to seek to agree the list of class members from whom disclosure was to be requested and the form of disclosure requests. The directions gave the parties permission to apply, in the event of disagreement, to the Tribunal for a hearing at which the Tribunal would settle the form of the requests and the class members to whom these were to be directed. Thereafter the class representative was to write to the relevant class members requesting disclosure in response to the requests, to produce to the defendants all documents received and to identify to the defendants any class members who had not responded together with any explanation received.

46. It will be evident that the process mandated in *Ad Tech* in response to the defendants' application under r. 89(1)(c) is different from that currently envisaged by the defendants in the present case, in that in *Ad Tech* the communication of requests for documents, agreed between the parties or settled by the Tribunal, is to be sent to class members by the class representative and not by the defendants or the defendants' lawyers.

Rodger v. Alphabet and Others

47. On 9 July 2026, the Tribunal (Hodge Malek KC) issued a judgment in *Rodger v. Alphabet and Others:* [2026] CAT 58 (***Rodger*).** In these proceedings a trial had been listed to commence at the end of September 2026. On 10 June 2026, Google plc, one of the defendants, wrote to certain class members requesting voluntary disclosure, seeking a substantive response on the following day and indicating that in the absence of voluntary disclosure, Google would bring a formal disclosure application before the Tribunal. Some of these communications were sent outside of working hours. Two days later, Google filed 17 disclosure applications under r. 89(1)(c). The Tribunal granted orders for disclosure, in modified form. The judgment contains observations of general application about the approach which falls to be taken to applications under r. 89(1)(c) for disclosure against class members.

> "14. Disclosure before the Tribunal is governed by rr. 60 to 65 of the Tribunal Rules. [...] In summary, the relevant principles to be applied in relation to the Application are as follows:
>
> (1) A party's duty to disclose is limited to documents which are, or have been, in its control: r. 60(4) of the Tribunal Rules.
>
> (2) When considering whether to order disclosure the Tribunal will have regard to the governing principle set out in r. 4 of the Tribunal Rules to ensure a case is dealt with justly and at proportionate costs.
>
> (3) Orders for standard disclosure will not generally be made.
>
> (4) Disclosure will be limited to relevant documents, ordinarily by reference to specific pleaded issues and specific categories of documents.
>
> (5) Disclosure will be limited to what is reasonably necessary and proportionate having regard to a number of aspects, including: (i) the nature of the proceedings and the issues at stake; (ii) the cost and burden of providing such disclosure; (iii) whether the information can be obtained by alternative means or be admitted; (iv) the stage at which the proceedings have reached and the impact of any further disclosure on the timetable in the proceedings; (v) the conduct of both sides in seeking to resolve any issues as to disclosure; and (vi) the specific factors listed in r. 4(2)(c).
>
> 15. The Tribunal has jurisdiction to order disclosure from a class member either by way of non-party disclosure under r. 63 or by way of application under r. 89(1)(c). Neither is intended to be a means of obtaining general disclosure from a class member as opposed to a form of specific disclosure where individual documents or discrete categories of documents may be sought. Class members are not parties to the proceedings and non-party disclosure or r. 89(1)(c)

> disclosure should be carefully circumscribed so as not to impose too high a burden on class members. Unlike the class representative who will be funded and fully aware of the issues in the proceedings, in most cases the class member will have to bear the cost and burden of responding to such applications and may even need to engage lawyers to deal with them, subject to whatever costs order the Tribunal may make on applications.
>
> 16. In the context of r. 89, specific guidance has been given in *Ad Tech Collective Action LLP v Alphabet Inc. & Others* [2026] CAT 54 where the Tribunal concluded that there is no requirement to show exceptional circumstances before a class member may be required to give disclosure [...].
>
> 17. The nature and membership of collective proceedings varies considerably in make-up and size. In proceedings where there are very large numbers of class members with relatively small claims the Tribunal may be very cautious before ordering disclosure by class members. This may impose a disproportionate burden on class members with small claims in relation to providing information which may not be particularly useful in resolving the issues between the parties.
>
> 18. However, there may be proceedings, such as the *Rodger* Proceedings, where certain class members represent a significant percentage of the substantial aggregate damages claimed. In such circumstances, these sophisticated parties may well have documents which shed important light on issues such as class membership and pass-on. Even in such cases applications for disclosure from non-parties need to be properly handled, generally after liaising with the class representative, and in a way that does not encourage class members to opt out of proceedings to avoid the burden and consequences of disclosure. Such applications should not be regarded as routine. Although there is no threshold requirement of exceptional circumstances that must be shown before an order is made against a class member under r.89(1)(c), it is expected that any order must be justified as necessary and proportionate in order to fairly resolve the issues in the proceedings, and disclosure will be limited to specific documents and categories of documents as one would expect with any order for non-party disclosure.
>
> 19. As with non-party disclosure applications, in the ordinary case (absent unreasonable conduct or unreasonable opposition to an application), the applicant should be prepared to bear the costs of the application and to pay the respondent's reasonable costs in responding to any application and in complying with any order, including legal costs. The class representative should be notified of any intended application and be able to comment on the process and the documents sought. In most cases the class representative can play a constructive role in dealing with the class members from whom disclosure is sought, and where the respondent wishes to oppose any order or its terms then in principle the Tribunal will be prepared to receive submissions from the class representative both in writing and at any hearing, in addition to the submissions from the respondent."

48. Mr Hubbard, for the CR, relied on §15 of this judgment to support his submission that the Tribunal should order a structured process at this stage. For his part, Mr Piccinin, on behalf of Apple, took issue with §19 of the judgment. He made the

point that the Tribunal should not prejudge how it would determine a question of costs following a successful application under r. 89(1)(c).

49. The Tribunal in *Rodger* also made some comments, on which Mr Hubbard relied, about the procedure which Google had followed before bringing its application.

> "79. The Tribunal is particularly keen that disclosure exercises are managed properly and in a particular way. At the September 2025 hearing the Tribunal dealt with complicated requests for disclosure which had been refined using a Redfern Schedule process. [...]
>
> 80. That process has not been replicated on the present Application. The Application has been made without any consultation with Professor Rodger, who would be the best person to help at least manage this process, and has been imposed on 17 developers with effectively very little notice. [...]
>
> 81. The Tribunal has no criticism at all of the conduct of Professor Rodger in dealing with what is a rather unfortunate and difficult situation. As regards Google, there are arguments that they could have done it better, and the Tribunal has no doubt at all it could have been better handled had more time been available. [...]
>
> 82. [...] Where the Tribunal considers that Google could have done better is in relation to this Application. It was brought only on 12 June 2026, without proper consultation with Professor Rodger, the 16 app developers were given very little notice, and the app developers were by and large not content to give the disclosure sought, were concerned about the burden of disclosure and maintaining confidentiality in very sensitive commercial information. Indeed it has led to some considering to opt out of the proceedings altogether. The lateness and way the Application has been brought do have consequences and it is very unfortunate that we are in the current position. The Tribunal does not accept on the material it has considered on this Application that the 17 applications are part of a deliberate attempt to disrupt or derail the proceedings. Had the Tribunal determined that the Application and the other Disclosure Applications have been brought for the collateral purpose of inducing App developers to opt out of the proceedings, then on that ground the Tribunal would have refused the Application."

50. Both in *Ad Tech* and in *Rodger,* the point is made that an order for disclosure may more readily be justified against a class member which is a large organisation with a significant claim. That is for a number of reasons. First, as the Tribunal observed in *Ad Tech,* an organisation which stands to gain substantially from the proceedings may reasonably be expected to take a more active part. Second, as the Tribunal observed in *Rodger,* such organisations may be more likely to have documents which are relevant to the fair resolution of the case. There is a third point – namely that if the claim is one which could have been pursued as a standalone action, in which the class member would have been required to make general disclosure, it

may more readily be regarded as proportionate and fair to make a disclosure order, although even in such a case, as explained in *Rodger,* an order for disclosure should not be regarded as routine, will require to be justified, will usually be confined to specific documents or categories of documents, and should, so far as possible, be managed in a way which does not undermine the purposes of collective proceedings.

(4) Communication between defendants and class members in collective proceedings

51. We do not have before us an application under r. 89(1)(c). Rather, the Application invites us to issue directions regulating proposed communications by Apple's lawyers to represented persons in which Apple intends to ask those represented persons to respond voluntarily to requests to undertake searches and to produce documents. Depending on the response to those requests, Apple anticipates that it may bring an application under r. 89(1)(c) before the Tribunal. The Rules do not explicitly envisage, nor do they regulate, communications between defendants and class members, whether with a view to obtaining evidence or otherwise.

52. The leading authority is *McLaren CA.* Like the present case, *McLaren CA* concerned collective proceedings before the Tribunal. Following the CPO hearing, and during the opt-out period, solicitors for the defendants sent letters to 21 large members of the class drawing attention to the opt-out date, describing the procedure for opting out, and indicating that the defendants intended to seek disclosure of documents from class members which, if ordered, could involve a commitment of time, effort and cost. The letter invited the class members to take legal advice.

53. On learning of these communications, the class representative applied to the Tribunal for an order restraining further communications between the defendants and class members and disclosure of all prior communications between defendants and class members. The Tribunal took the view that it had been improper to send the letters which had prompted the application. It issued a ruling (the **Ruling**) in December 2022 that the Rules "preclude any communication between a defendant or that defendant's legal representative and a member (actual or contingent) of a

class identified or identifiable under a collective proceedings order made by the Tribunal where that communication concerns those collective proceedings, unless the Tribunal otherwise orders or (subject always to the Tribunal's supervisory jurisdiction) the parties agree": §14 [2022] CAT 53. The Tribunal observed, at §28, that "to the extent that direct communications with class members is necessary or desirable to obtain evidence [...] that is a process that should be conducted under the overall supervision of the Tribunal and not as a litigation 'free for all'."

54. The defendants initiated proceedings to challenge the Ruling and it was these proceedings which were ultimately determined by the Court of Appeal in *McLaren CA*. Meantime, there were further developments in the case before the Tribunal. First, in April 2023, the Tribunal issued an order qualifying the Ruling so as to permit the defendants to communicate with class members "for the purpose of seeking to obtain evidence or information in relation to the factual and/or expert issues [...] without being required to obtain permission from the Tribunal or notify the Class Representative": §20 *McLaren CA*. But the Tribunal placed a rider on that general permission, that any communication to class members adverting to the possibility of a formal application for disclosure would require permission from the Tribunal.

55. The defendants applied under that rider for permission to write to certain large class members seeking voluntary disclosure from them in terms which included a reference to the possibility of an application for disclosure being made. The application for permission disclosed the terms of the proposed letter. The class representative objected to parts of that letter and proposed certain amendments to it. In its judgment issued in November 2023 *(McLaren CAT)*, the Tribunal analysed the proposed communication in some detail. The Tribunal criticised the lack of specificity of the proposed requests. It took the view that the first step should be a communication directed to identifying what disclosure the class members might be in a position to give so that the defendants could consider what would be available, what would be relevant and what disclosure would be proportionate: [2023] CAT 71. In *McLaren CA,* the Court of Appeal characterised the approach taken by the tribunal in *McLaren CAT* 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": §21.

56. The Court of Appeal concluded that the Tribunal had erred in holding that there is an implied general prohibition on communication between defendants and class members. Popplewell LJ (with whose judgment Butcher J agreed) emphasised, at §74, that there is, in the law of England & Wales, no general rule of civil procedure or of professional conduct prohibiting direct communications between a defendant or a defendant's solicitor and a claimant, even where the claimant is legally represented.

> "74. There is no general rule in civil litigation which prevents a defendant or its legal representative from communicating directly with a claimant about the case. Nor is there any rule of professional conduct for solicitors which imposes a blanket ban on communications from a defendant's solicitor to a claimant directly where the claimant is legally represented. No doubt the court would be able to impose such a restriction if the circumstances of an individual case required it, although I am unaware of any particular instance of it having done so. However, the default position is that there is no prohibition on direct communication between the person whose claim is being advanced and the person against whom it is being advanced, notwithstanding that one or both of them may have solicitors on the record conducting the litigation. Absent fact-specific reasons for an order being made in a particular case, the general rule and widespread position in practice is that such communications are permitted. That is not regarded as contrary to the Overriding Objective."

57. Popplewell LJ noted, at §§75-77, that in none of the three ways in which civil claims can be advanced by or on behalf of a group of claimants with a community of interest is there any general prohibition on defendants communicating with members of the group. At §§79-80, he concluded that there is no basis for treating collective proceedings under s. 47B of the 1998 Act differently. At §§ 87-96 he considered and rejected a submission seeking to support the Ruling by reference to the role of the class representative, whether before or after certification. Among other points, he noted, at §89, that in ordinary civil litigation the claimant's solicitor is not "required to be the conduit for communications: defendants and their solicitors are free to communicate directly with claimants".

58. The defendants in *McLaren CA* supported their challenge to the Ruling by contending that it had the effect of interfering with their litigation privilege and their ability to gather evidence: §22. Popplewell LJ addressed this argument in the following passage.

"101. [...] the decision of the CAT on the disclosure application [i.e. the application which was determined in the November 2023 judgment] illustrates that the Ruling has been interpreted as requiring intensive scrutiny of any permission to make a direct communication because it involves an exception to a general rule, and this is encouraged by what was said by the Tribunal [...] that it is a 'process which should be conducted under the overall supervision of the Tribunal'. [The CR] maintains that this is the correct approach. The Ruling therefore affects not only whether permission is granted but how applications for permission are to be approached. That has ramifications for a number of arguments advanced by Ms Demetriou for the appellants as to the practical consequences of the ruling.

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 [defendants] 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 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 in 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 privilege or foregoing their legitimate pursuit of evidence.

104. Ms Ford [counsel for the class representative] suggested that no litigation privilege existed in such a situation either because the communication was with 'an opponent' or by reference to the doctrine of common interest privilege. This was mistaken. The common interest she invoked was between the class representative and members of the class. The litigation privilege in issue, however, is that of a defendant in its communications with a member of the class; whilst that privilege does not exist vis a vis that particular class member in the communication between them because it lacks the quality of confidentiality, it remains vis a vis all the other members of the class, with whom the defendant has no common interest.

105. A consideration of the effect of the Restriction on privilege does not stop with what has happened or may happen in any particular case; what matters for the purposes of testing the argument is whether privilege may be invaded in all cases to which the Restriction applies, i.e. all collective proceedings. There is an obvious risk of that occurring in relation to most applications for disclosure from represented class members, which are specifically contemplated by rule 89(1)(c). [...]".

59. Popplewell LJ further illustrated the point at §105 by noting that if a potential expert should also be a member of the class and if there were to be a general rule prohibiting communication with class members, the defendants would have to disclose to the class representative approaches being made to potential expert witnesses. He observed:

> "This would be contrary to the overriding objective in Rule 4 of putting the parties on an equal footing or dealing with the case fairly. It would unfairly interfere with the defendants' pursuit of evidence and the fair conduct of their defence. One could multiply examples. [...]".

60. At §108, Popplewell LJ drew together his conclusions on the defendants' argument from practical consequences in the following terms.

> "108. My conclusion so far as practical consequences are concerned is that whilst there are potentially unsatisfactory consequences on both sides' case, there are three aspects which militate against the implication contended for [...]. The first is that it is likely to inhibit a defendant's ability to conduct its defence, and thereby operates unfairly, an unfairness which is not remedied by the ability to seek permission from the CAT which involves having to forego legal privilege. The second is that it may unfairly interfere with a defendant's legitimate interests in the normal conduct of its business, and the normal course of business of class members. It might be said that each of these could be avoided by a careful case management approach by the CAT towards the applications for permission, so as not to require disclosure to the class representative in anything more than generic form, and/or the use where appropriate of confidentiality clubs with which the CAT has plentiful experience. But that has not been the experience 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. Further, if the application for permission were framed in such generic terms as to avoid the problem (e.g. we wish to seek some disclosure of documents from some class members) it would not enable the CAT to determine whether a departure from an existing prohibition implied in the Rules is justified. I am not persuaded that the adverse practical consequences of the Restriction can be avoided in this way."

The reference to the "experience of the Ruling in this case" is apparently a reference back to §21 and to *McLaren CAT,* in which the Tribunal applied detailed scrutiny to the defendants' proposed communication and refused to allow that communication to be sent.

61. Popplewell LJ fortified his conclusion that the Rules do not imply any general prohibition on defendants communicating with class members by reference to two cases from Ontario. Neither of these was concerned with requests for evidence; one

involved a multi-media campaign seeking to persuade class members to opt out; the other *(Del Giudice*) with a notice to class members (who were the defendant's customers) offering certain facilities to them. Popplewell LJ took these cases to support the conclusion that, in Ontario, there is no blanket prohibition on communications between defendants and class members, and that any restriction which might be imposed on such communication has to be justified on a fact-sensitive basis. He quoted from the "postface" in *Del Giudice* which suggested that the following procedure should be followed if the defendant in a class action wishes to communicate with class members, out of the normal course of business and on a topic substantively significant to the class action: (i) the defendants' lawyer should, as a means of avoiding problems and objections, ask class counsel if there are any problems with or objections to the proposed communication; (ii) class counsel should respond with its objections, if any, appreciating that "for unofficial notices from the defendant", the court has a "high threshold" for exercising its supervisory jurisdiction; (iii) the defendant's lawyer should consider those objections seriously; (iv) if there remains a dispute between the parties about the notice, the parties should consider scheduling a case management conference; (v) if after considering class counsel's comments there remains a dispute, but the defendant decides not to schedule a case management conference, the defendant should issue its communication (understanding that doing so runs a risk of an application for the issue of a corrective notice); (vi) neither side should use this opportunistically or tactically; and (vii) if there is a motion, the court's role is purely adjudicative.

62. Popplewell LJ observed that these comments suggest that "it is not regarded as necessary in practice in Canada to have an a priori prohibition on communications between defendants and class members; and that restrictions on communication can be addressed on a case-by-case basis with the cooperation of the parties. Such cooperation is required under the Rules by Rule 4(7)." He suggested, at §115, that the *Del Giudice* postface might form a helpful starting point for a practice direction, or for orders which the Tribunal might make at the first CMC, or when making a CPO, to guide the parties as to communications from defendants in an appropriate case, though he did not express any view about the terms or frequency of such orders.

63. In concluding that there is no general prohibition on defendants communicating with class members, Popplewell LJ founded on the flexibility of the Tribunal's active case management powers. He addressed and rejected a submission that the Ruling had been justified (or could be held by the Court of Appeal to be justified) in the alternative by reference to those powers. He recorded, at §99, that the defendants had accepted that the Tribunal could impose a restriction on communications by defendants with class members in appropriate circumstances in individual cases. He observed, at §134, that it remained open to the class representative to invite the Tribunal to make an order on a case management basis in light of the Court of Appeal's decision on the interpretation of the Rules. In making that observation, he did not suggest that it could not be open to the Tribunal to make an order prohibiting communication between defendants and class members if the facts and circumstances justified it. It may be recalled that the letters which had prompted the Ruling were not, as such, directed to obtaining evidence, but appear to have been directed, during the opt out period, to inviting class members to consider carefully whether or not to opt out in light of the potential disclosure burden.

64. We take the following propositions from the Court of Appeal's judgment in *McLaren CA*.

(1) In the law of England & Wales, there is no general rule, whether of civil procedure or of professional conduct, which prevents a defendant or its solicitor from communicating directly with a claimant about the case, even where that claimant is legally represented. Specifically, such communication for the purpose of investigating the case and obtaining evidence is legitimate. There is no feature of the collective proceedings regime which justifies a different default rule for communications between defendants and class members. We take these propositions from §§ 74-80 and 103.

(2) The Tribunal may, in the exercise of its case management powers, impose restrictions on communications between a defendant or its legal representative and class members. However, any such restriction requires, in the absence of legislation, to be justified by reference to specific factual circumstances and

not on a generic basis. We take these propositions from §99, §§114-115, §124(6) and §134.

(3) For the reasons set out in the Tribunal's reasoned order in the present case following the May CMC, the Tribunal has no power when exercising its case management powers to impose a restriction or requirement which would be incompatible with the defendant's litigation privilege.

(4) Equally, in assessing whether any proposed restriction or requirement is justified in the circumstances, the Tribunal requires to comply with the General Principles. Specifically, the Tribunal should not – indeed, cannot consistently with the General Principles and the Tribunal's obligation to respect and secure the fair trial rights of both parties – impose in the exercise of its case management powers a restriction or requirement which would unfairly inhibit the defendant's legitimate pursuit of evidence and the fair conduct of its defence. We take these propositions from §103 and §105.

65. Mr Hubbard, on behalf of the CR, in our view correctly, characterised privilege as a negative right to resist the disclosure of certain documents. He presented a careful analysis of *McLaren CA* to show that the specific decision of the Tribunal in that case which had interfered with privilege, as such, was the rider to the April 2023 order, which required the permission of the Tribunal for any communication directed to obtaining evidence which referred to an application being made to the Tribunal. The practical effect of that rider was to require the defendants to disclose the content of proposed communications which would be privileged, in order to obtain permission. We accept Mr Hubbard's analysis. The Court of Appeal specifically deprecated the effect of the rider:§108. We take from that passage, and from the reference at §103 to an "unfair dilemma", the general proposition that the Tribunal may not, consistently with respect for litigation privilege and the right to a fair trial, impose a requirement on a defendant which would either directly require the defendant to disclose privileged communications to the Tribunal or to the class representative, or which would impose a practical requirement on the defendant to disclose the intended content of such communications as a precondition to being permitted to undertake legitimate investigations.

66. Mr Hubbard's analysis is of assistance in explicating the precise boundary of the restriction placed on the Tribunal's powers by reference to litigation privilege. We accept Mr Hubbard's further submission that a prohibition on a defendant communicating with class members at all (as opposed to a requirement to seek permission from the Tribunal for such communication) would not, as such, be incompatible with litigation privilege. Such a prohibition would, as he contended, simply prevent privileged documents from coming into existence. But as Mr Piccinin submitted, that corollary of Mr Hubbard's analysis demonstrates that litigation privilege is not the only constraint on the Tribunal's use of its case management powers in the present context. The underlying premise of Popplewell LJ's reasoning in *McLaren CA* is that, as a general rule, a defendant in collective proceedings may legitimately communicate with class members for the purpose of seeking and obtaining evidence relevant to the dispute. It follows that any restriction which the Tribunal might impose on such communications would require to be justified by reference to specific circumstances, sufficient to justify the restriction imposed, and would require to be tailored not only to avoid putting the defendant in the "unfair dilemma" identified by Popplewell LJ but so as not to interfere unfairly with the defendant's legitimate investigation of the case against it.

67. We have been provided with information about two cases in which the Tribunal has recently issued directions regulating disclosure requests to class members (as opposed to applications to the Tribunal for an order under r. 89).

(1) In *Spottiswoode v. Airwave Solutions Ltd,* the Tribunal (Bacon J, President) made a directions order on 6 March 2026 (***Spottiswoode***)*,* which included directions about disclosure. This included directions *inter alia*: (i) that the defendants provide a draft proposal for the provision of disclosure from a sample of class members other than the Home Office; (ii) that the defendants file a Redfern schedule setting out inter alia any disclosure requests and justifications for the same from a sample of class members other than the Home Office; (iii) that the class representative respond to the defendants' Redfern schedule requests in respect of those disclosure requests; (iv) that the defendants reply to that response; and that there be a further CMC for the purposes of considering any outstanding issues in relation to disclosure. At the

May CMC in the present case, the Tribunal was told that these directions had been made on the proposal of the defendants in that case.

(2) In *Rodger,* Google plc wrote to certain class members on 10 June 2026 requesting voluntary disclosure, seeking a substantive response on the following day and indicating that in the absence of such disclosure, Google would bring a formal disclosure application before the Tribunal. We were shown a skeleton argument which narrated that, in response, the Tribunal issued a letter on 19 June 2026 stating its expectation that, in relation to any future communications: (i) Google should first consult with the class representative prior to sending the communication; (ii) any dispute as to the terms of the communication should be referred to the Tribunal before being sent to the class member; (iii) any communication should not be sent to a class member out of hours without prior approval by the Tribunal; and (iv) the class member should be given a reasonable opportunity to respond to the communication.

68. Mr Hubbard founded on these as precedents for directions such as those which he invited the Tribunal to make in Order 2. However, he accepted that, so far as the directions issued in these cases required the defendants to disclose to the class representative the content of a proposed communication with class members and envisaged the Tribunal adjudicating on the terms of the proposed communication, on the authority of McLaren CA, such directions would, in the absence of waiver, involve an invasion of privilege. There is, of course, no objection to defendants, pursuant to their duty of co-operation under r.4(7) of the Rules, agreeing to, or proposing, sensible practical arrangements, such as those proposed in *Spottiswoode* and *Ad Tech*, for the management of disclosure requests to class members.

(5) Professional codes of conduct

69. We have quoted Popplewell LJ’s observation at §74 of McLaren CA that there is no rule of professional conduct applicable to solicitors regulated by the SRA which imposes a “blanket ban” on communications from a defendant’s solicitor to a claimant directly where the claimant is legally represented. In advance of the hearing, the Tribunal asked the parties to provide it with information as to whether

there are any relevant rules of professional conduct which would be relevant to such communications. It did so on the view that a proper understanding of what those rules would require of the defendants' solicitors, when writing to class members, might be relevant to the exercise by the Tribunal of its power to issue directions.

70. Mr Hubbard advanced a submission that Popplewell LJ had stated the position too absolutely in §74 of *McLaren CA*. He relied on an observation of Kekewich J in *Re Margetson and Jones* [1897] Ch 314 to the effect that it is a professional rule that where parties to a dispute are represented by solicitors neither of those solicitors should contact the principal of the other touching the matter in question. Whilst he accepted that the current SRA Code of Conduct does not contain an explicit rule to that effect, he noted that the Bar Standards Board Handbook states (gC24) that "where the other side is legally represented and you are conducting correspondence in respect of the particular matter, you are expected to correspond at all times with that other party's legal representative – otherwise you may be regarded as breaching CD3 [the core duty of honesty and integrity] or Rule C9 [which sets out certain requirements which follow from that core duty]".

71. Mr Hubbard also drew to our attention the Codes of Conduct of lawyers in other jurisdictions which contain explicit prohibitions on such communication. These include r. 7.2-6 of the Model Code of Professional Conduct issued by the Federation of Law Societies of Canada as amended April 2024 (the terms of which are reflected in the Rules of Professional Conduct of the Law Society of Ontario), which provides, subject to certain limited qualifications, that if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner, approach or communicate or deal with the person on the matter. A similar rule is found in the Australian Solicitors Conduct Rules, issued by the Law Council of Australia in July 2026.

72. Mr Hubbard relied on a decision of the Supreme Court of South Australia, *Legal Practitioners Conduct Board v. Wharff* [2012] SASCFC 116 which discloses, at §12, that the rationale for that rule is to protect claimants against the solicitation of information by the opposing legal practitioner contrary to the claimant's interests, as well as to prevent the undermining of the other party's trust and confidence in

their own legal practitioner. He submitted that there is nothing in the SRA Code of Conduct which would preclude us giving the directions sought in the Application and invited us to conclude that, although Apple's proposed communications may not be contrary to any explicit rule of professional conduct applicable to solicitors in England & Wales, we should bear in mind the underlying reason why in many jurisdictions solicitors are constrained from communicating with represented claimants – in particular to protect claimants from requests for disclosure from the opposing party's lawyer which may be contrary to their interests.

73. The Canadian cases on which the Court of Appeal relied in *McLaren CA* were concerned with pre-certification communications between defendants and class members to which the Canadian rule of professional conduct to which we have referred did not apply. However, once the class has been certified and the opt-out period expired, that professional rule (at least in Ontario and Quebec) apparently prevents communication between the defendant's lawyer and class members without the consent of class counsel or the approval of the Court. A fuller account of the Canadian position than was available to the Court of Appeal in *McLaren CA* may be found in the judgment of Martin Sheehan JSC in *Option Consommateurs v. Samsung Electronics Canada Inc* 2023 QCCS 2388 (***Option Consommateurs***):

> "[60] In August 2022, Justice Perrell summarized the applicable Ontario jurisprudence regarding communications with putative or existing class members. The principles he developed are, for the most part, in line with Quebec authorities on the issue [...]
>
> 60.1. Both before and after authorization, the court can exercise its discretion and impose conditions on communications between the parties, counsel and class members to ensure the integrity of the class action process and the protection of class member's rights.
>
> 60.2. An order restricting communication by the parties to class members prior to authorization is extraordinary. [...]
>
> 60.3. Absent evidence of inappropriate behaviour, class counsel, defendant's counsel and the defendant personally are entitled to communicate with putative class members as if they were non-parties and the court should refrain from interfering with such communications unless it is demonstrated that intervention is required to safeguard the integrity of class proceeding.
>
> [...]
>
> 60.5. Courts must be extremely vigilant with regards to communications during the pivotal opting-out period. The Court must balance the preservation of the integrity of the class action mechanism and the parties' freedom of expression.

> 60.6. After the expiry of the opt-out period, the status of class members is very close to that of a party to the proceedings. [...]
>
> 60.7. At this point in time, Defendants' counsel's right to communicate with class members is restricted by the provisions of the Code of Professional Conduct of Lawyers that deal with communications between counsel and a known represented party.
>
> 60.8. After the opt-out period has expired, direct communications between the defendants and confirmed class members should only take place either in the presence of class counsel or with specific approval by the court. Such restrictions are justified to avoid affecting the balance of power between the parties and reducing the effectiveness of the class action mechanism to facilitate access to justice, modify harmful behaviour and conserve judicial resources."

It would accordingly appear that, once the class has been certified and the opt-out period expired, the professional rule to which we have referred prevents communication between the defendant's lawyer and class members, at least in Ontario and Quebec, without the consent of class counsel or the approval of the Court.

74. Likewise, and apparently for the same reasons, it would appear that in US federal courts, once a class has been certified, "[d]efendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation": *Manual for Complex Litigation,* published by the US Federal Judicial Center 2004, p. 300.

75. This information about the approach taken in Canada and the US discloses that it would be possible to have a collective action regime in which direct contact by the defendant with class members is generally prohibited following certification. §60.8 of *Option Consommateurs* explains in general terms why such a restriction is regarded as justified in Canada. There would be no inherent unfairness in such a restriction, provided that defendants are free to obtain an order authorising class members disclosure where that is justified. *McLaren CA* tells us that this is not the position in England & Wales having regard to the absence of any provision in the Rules to establish a statutory regime for dealing with post-certification class disclosure questions other than an application under r. 89. Here, in the absence of legislation, the starting point is that defendants are free to seek voluntary disclosure from class members – indeed, that such communication is, as a general rule,

legitimate, even if some regulation or restriction may be justified by the specific circumstances of a particular case.

76. Popplewell LJ's observation in *McLaren CA* that there is no "blanket ban" on a solicitor in England & Wales communicating with a claimant who is represented by a lawyer is vouched by the materials which were placed before us. That is not to say that the professional obligations on solicitors place no constraints on such communications. The SRA has produced guidance for firms and individuals who conduct litigation. This states that the duties of a solicitor when conducting litigation are set out in the SRA's Principles and Codes of Conduct. Principle 2 is that solicitors should always act in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons. Principles 4 and 5 state that solicitors should always act with honesty and with integrity. The Code of Conduct includes the following provisions:

> "1.2. You do not abuse your position by taking unfair advantage of clients or others.
>
> [...]
>
> 1.4. You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client)."

Part 2 of the SRA Code of Conduct contains further requirements in respect of dispute resolution, and specifically in relation to the collection of evidence.

77. The SRA Principles and SRA Code of Conduct impose requirements with which any solicitor contacting a claimant directly would be required to comply – and it may be that in some circumstances such contact would not be professionally acceptable. It would not be appropriate for us to purport to adjudicate on the ambit or application of the SRA Principles and Code of Conduct. Those are matters for the professional regulator. As we have explained, the passages from the Court of Appeal judgment in *McLaren CA* which we have quoted above, in particular §103, proceed on the footing that in collective proceedings direct communication between the defendant or its solicitor and class members with a view to seeking and obtaining evidence is legitimate (and Popplewell LJ also states at §89 that, in ordinary civil litigation there is no requirement for a claimant's lawyer to be the

conduit for such requests) and we are bound by the Court of Appeal's analysis. Class members, it may be observed, are not clients of the lawyer instructed by the class representative, even if that lawyer might, in a broad sense, be said to represent the class members inasmuch as their individual claims are combined in the collective proceedings and the lawyer is instructed by a class representative who is party to those proceedings and who owes fiduciary obligations to the class members.

78. All that said, when we come to consider the Application, we bear in mind that what Apple proposes is a direct communication by its lawyers to claimants whose claims against Apple are combined with others in the present proceedings and soliciting the voluntary production of documents the provision of which may be contrary to the interests of the claimants in question. Against that background, it seems to us that where a class member has its own legal department, Apple's proposed communication should be directed to that legal department rather than to commercial contacts of Apple; and Mr Piccinin confirmed Apple's intention to do that. Equally, if, to Apple's knowledge, any class member should have instructed external lawyers in connection with the class member's claim or these proceedings, we would expect the proposed communication to be directed to those lawyers. And, as we will explain, we consider that certain information should be included in any such communication.

79. We note that the professional rules applicable to solicitors regulated by the Law Societies of Scotland and Northern Ireland, as in Canada, Australia and the United States, contain specific rules prohibiting contact between a lawyer and "the client of another regulated person" (r. B1.14 of the guidance promulgated by the Law Society of Scotland) or "any person whom he or she knows to be represented or advised in the case or matter by another lawyer" (§5.5 of the CCBE Code of Conduct for European Lawyers, applied by §3 of the Solicitors Practice Regulations promulgated by the Law Society of Northern Ireland). It would not be appropriate for the Tribunal to express a view in this case as to whether or not, or how, those rules would apply to communication from a defendant's lawyer to class members in collective proceedings. We reserve our position as to how an application such as the present would fall to be addressed in Tribunal proceedings in Scotland or Northern Ireland.

(6) Conclusions

80. At this stage, we make the following general observations, which arise from our discussion of the legal position.

    (1) There is, in the absence of legislation, no general prohibition on defendants in collective proceedings (or indeed the class representative) requesting represented persons to provide them with documents or information relevant to the issues in the case.

    (2) Any such communication from the defendant, or the defendant's solicitor, to a class member must comply with any direction which the Tribunal may give and should be framed in terms which do not take unfair advantage of the class member, bearing in mind that the class member has a claim against the defendant which is combined in these collective proceedings. We propose to set out later in this judgment certain information which we consider should be included in the proposed communications.

    (3) Class members are under no obligation to respond voluntarily to a request to provide documents or information – whether that request should come from defendant or from the class representative. Any class member who receives such a request is entitled to insist that a formal application be brought before the Tribunal so that the Tribunal can determine the extent to which, if at all, that class member should be required to disclose information or documents for the purpose of the proceedings.

    (4) If the defendants apply for an order under r. 89(1)(c) for disclosure by a class member, the class member will be given an opportunity to respond to that application, and to object to providing the disclosure sought. The class representative will also be given an opportunity to respond to any such application. The class representative will usually be better placed than the class member to advance arguments, for example, about the relevance of the disclosure sought to the issues in the proceedings.

(5) Any order for disclosure against a class member requires to be justified as necessary and proportionate in order to fairly resolve the issues in the proceedings. The Tribunal has recognised that an order for disclosure against class members "should be carefully circumscribed so as not to impose too high a burden on class members": *Rodger*, §15. The Tribunal will accordingly, as a general rule, frame an order for disclosure against a class member so as to require specific disclosure of individual documents or defined categories of documents the production of which is justified as necessary and proportionate in the context of the proceedings.

(6) Class members may have legitimate concerns about the disclosure of documents which contain confidential or commercially sensitive information. The Tribunal has well-established processes for protecting justified claims to confidentiality whilst ensuring that the proceedings are conducted fairly. In the context of an application for disclosure under r. 89(1)(c), the Tribunal can consider whether any claim to confidentiality or commercial sensitivity justifies refusal, or restriction, of the order sought. If an order is granted, the Tribunal can consider whether it should put in place arrangements to protect the confidentiality of the information in question.

(7) The Tribunal has wide power to regulate the costs associated with any application for disclosure under r. 89(1)(c), including power to direct that the party seeking an order under r. 89(1)(c) bear the reasonable costs incurred by the class member in complying with the order. Whilst the Tribunal cannot prejudge the decision on costs in any particular case, the starting point in the ordinary case is that – unless there is a good reason to make some other order – the party seeking a disclosure order against a class member should be prepared to bear the costs of the application and to pay the class member's reasonable costs in responding to any application and in complying with any order: *Rodger,* §19.

E. THE PARTIES' SUBMISSIONS

(1) The CR's submissions

81. The CR submits that "Apple's strategy appears to be to try to stifle this claim [...] by tactical devices". His overarching concern is that the intention, or at least the likely effect, of the proposed communication is to intimidate represented persons into opting out of the proceedings. Mr Hubbard supported that submission by referring to the following circumstances: (i) the timing of the April letter relative to Apple's decertification application; (ii) Apple's response to the CR's request that it explain the link between its document request and the pleaded issues so as to facilitate a co-operative approach; (iii) the breadth of the disclosure sought – which the CR characterises as "a highly intrusive and generalised interrogation, trespassing on every aspect of a developers' business over a prolonged period", some of which is likely to be regarded by class members as sensitive and confidential; (iv) Apple's response to the terms of Order 3 as regards the information to be provided to class members and as regards costs; and (v) Apple's indication that the focus of its requests will be on the larger app developers, whose participation underpins the funding of the proceedings.

82. Against that background, the CR states that the purpose of the Application is to ensure that "the CR and the Tribunal retain an appropriate measure of oversight of, and involvement in, the process by which Apple engages with the class". Mr Hubbard explained that Order 2, which is the CR's primary Application, is advanced on the footing that Apple has waived privilege. Order 3 is a fallback, which arises only if the Tribunal determines that Apple has not waived privilege. The CR reminds the Tribunal of its duty under r. 4 to actively manage cases, including encouraging the parties to co-operate with each other in the conduct of the proceedings and to adopt fact-finding procedures which are most effective and appropriate for the case.

83. The CR resists Apple's contention that the Application is an abuse of process. He reminds the Tribunal of the circumstances in which the issue arose shortly before the CMC and the limited determination which the Tribunal made. He points out that the Tribunal's reasoned order expressly envisaged an application by the CR

for procedural directions in light of that determination. He contends that it is not realistic to contend that the argument on waiver should have been made at the CMC. He relies on *Johnson v. Gore-Wood* [2002] 2 AC 1 (***Johnson***), 31C-E for the proposition that it is too dogmatic to hold that just because a matter could have been raised in earlier proceedings it should have been, so as to render the later raising of it necessarily abusive.

84. The CR advances the following submissions in support of his position that Apple has waived privilege in its proposed communications with class members. In its April letter, Apple set out the categories of documents which it proposes to request from class members. The letter asked that the proposal form part of the agenda for the May CMC and specifically asked the Tribunal to read it. It was included in the hearing bundle and referred to in Apple's skeleton for the CMC. The issue was discussed at the CMC. The letter was thereby put into the public domain and lost any confidential character, either generally or at least in respect of the CR and the Tribunal. When Apple communicates with class members, those communications will not attract privilege because the content of the communications has, by reason of Apple's April letter, lost the confidential character required to underpin a claim to privilege. Apple had made a deliberate choice not simply to write to the class members under cover of litigation privilege but to share the substance of its proposed communication proactively with the CR and the Tribunal. The waiver of privilege extends not only to the initial communication with class members but to any further communication which flows from, and forms part of the same chain as, that communication. The CR relies on *Mohammed v. Ministry of Defence* [2013] EWHC 4478 (QB) (***Mohammed***), §20 (Leggatt J), *SmithKline Beecham Biologicals SA v. Connaught Laboratories Inc* [2000] FSR 1, 12 (Bingham CJ), Hollander on Documentary Evidence, 6th ed (1997), p. 224, *Gotha City v. Sotheby's* [1998] 1 WLR 114, 118H-119A, *Three Rivers District Council v. Governor of the Bank of England (No. 6)* [2005] 1 AC 610, 646 (***Three Rivers***), §24, *Horton v. Kowski* [2025] EWHC 1621 (Ch), § 54, Passmore on Privilege, 5th ed (2025), para. 7-038, *Buttes Gas & Oil Co v. Hammer (No. 3)* [1981] QB 223, 252E-F, *Scottish Lion Insurance Co Ltd v. Goodrich Corp* 2011 SC 534, §46 and *Brennan & Ors v. Sunderland City Council* [2009] ICR 479, §63.

85. On the footing that there has been a waiver of privilege, the CR invites us to make Order 2. He contends that this would be consistent with the collaborative approach enjoined by the Rules, the Guide and the authorities. By providing the CR and the Tribunal with an opportunity to have input into the proposed communication, Order 2 would, says the CR, "mitigat[e] the dangers inherent in Apple's Proposal". In the alternative, the CR invites us to make Order 3, which he contends would not be incompatible with Apple's litigation privilege.

(2) Apple's submissions

86. Mr Piccinin, on behalf of Apple took issue with the allegation that Apple is attempting to oppress or harass class members with a view to stifling the claim. He stated that Apple is simply doing what any commercial litigant does, namely instruct its external solicitors, who are regulated by the SRA, to seek to gather evidence on a voluntary basis from people who have relevant evidence to give. Defendants, he pointed out, are not generally required to offer any explanation or justification for the steps they take to investigate claims. He submitted that it was wrong to say that Apple proposed to ask for material with no relevance to the case. He pointed the Tribunal to the justification provided in the skeleton for the May CMC.

87. Mr Piccinin told us that depending on the response to Apple's requests for voluntary disclosure, Apple might bring an application before the Tribunal to which the class member in question and the CR would have an opportunity to respond. No class member could be compelled to provide anything they were not willing to provide without first being given a fair hearing by the Tribunal. Mr Piccinin acknowledged that the approach might lead some represented persons to decide that they wished to opt out of the proceedings, but he contended that there would be nothing in principle wrong with a class member making such a decision. He pointed out that if any class member did wish to opt out, it would have to apply to the Tribunal to be permitted to do so.

88. Apple invites the Tribunal to conclude that the Application is an abuse of process, on the basis: (i) that the CR is seeking to bring forward matters, notably the argument on waiver, which Apple contends could and should have been raised at

the CMC; and (ii) the Application is "in substance a repackaged form of the application he made at the CMC". Apple relies on the well-known passages on abuse of process in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529, 536C per Lord Diplock and *Johnson,* 31 per Lord Bingham. It relies specifically on the species of abuse described in *Henderson v. Henderson* (1843) 3 Hare 100 and described by Lord Sumption in *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2014] AC 160, §24. For the proposition that the rule applies to interlocutory hearings and requires that points be raised at the first opportunity, Apple refers to *Chanel Ltd v. FW Woolworth & Co Ltd* [1981] 1 WLR 485, 492H-493A per Buckley LJ and *Koza Ltd v. Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018, §42 (Popplewell J).

89. Apple resists the contention that it has waived privilege in future communications which it may have with class members. In his oral submissions, Mr Piccinin pointed out to the Tribunal that the initial approach to class members might well be followed by further communications, particularly if the class members should be willing to provide voluntary disclosure. He submitted that the whole course of communications would be covered by litigation privilege. The mere fact that a litigant tells its opponent that it proposes to engage in a privileged communication does not waive privilege in that communication. Whilst, by reason of the April letter, it is not confidential that Apple proposes to ask class members for information and documents in the categories set out in that letter, Apple has neither disclosed which class members it will approach, nor provided any draft of the proposed communication, nor committed to asking only for the categories of information referred to in the April letter or requesting information in that form. Mr Piccinin made the point that in various contexts a litigant may tell the Court what it is that it is proposing to do, including for example disclosing proposed investigations in order to justify an extension of time. Doing this would not involve any waiver of privilege in relation to the future steps which had been disclosed to the court. It would, observed Mr Piccinin, be very unfortunate if a party which has chosen to be transparent with the Tribunal about its intentions were to suffer the significant disadvantage of being treated as having waived its litigation privilege. Apple founds on *Director of the Serious Fraud Office v. ENRC* [2018] EWCA Civ 2006; *Three Rivers*, §10 and *Mohammed*, §14; and Hollander on Documentary

Evidence, 15th ed, §§23-11 (citing *R(AL) v. Serious Fraud Office* [2018] 1 WLR 4557), §§23-15 and §§23-16 (in particular the quoted passage from the judgment of Elias J in *Brennan* [2009] ICR 479 to the effect that the ultimate question is whether fairness requires full disclosure).

90. Mr Piccinin contended that §§1 and 2 of Order 3 are incompatible with Apple's litigation privilege or at least are not orders which may lawfully be made standing the analysis of the Court of Appeal in *McLaren CA.* §2 contains a prohibition on Apple communicating with class members for the purpose of requesting evidence without first complying with the procedure set out in §1. That procedure envisages Apple providing information to the CR and if the parties do not agree, applying to the Tribunal for directions. Mr Piccinin submitted that this effectively meant that Apple would, in the case of disagreement, require the permission of the Tribunal to send the letters. He contended that a prohibition on sending a communication seeking evidence without permission was the very thing which in *McLaren CA* had been found to be an invasion of privilege. Even to order a process of engagement between the parties, which left it ultimately to the defendants to decide the terms of their correspondence – as in *Del Giudice* – would engage the "vice" identified by Popplewell LJ, of requiring a party to disclose its litigation strategy to its opponent. To order Apple to tell the CR the basis upon which it proposes to select class members for the purposes of communication would be akin to ordering Apple to tell the CR how it is going to go about selecting potential witnesses and that would simply be inappropriate.

91. Mr Piccinin accepted that it would be open to the Tribunal to issue the other directions sought in Order 3. However, he urged us not to do so, on the basis that, in the absence of some evidence of misconduct, the Tribunal should trust Apple's solicitors to act properly and leave them to get on with their evidence-gathering efforts. The Tribunal should not, he said, seek to micro-manage communications between Apple's solicitors and represented persons. Such orders would not be made in the High Court, even in complex litigation, and as the analysis in *McLaren CA* showed, there is no relevant distinction with collective proceedings. Where Apple has stated that it is going to do or say something, there is no need to issue a direction to that effect. Apple has not acceded to certain of the proposed directions, where this would in effect involve it in giving advice to class members, but these

could be dealt with in the Tribunal's judgment, to which a link would be provided in any communication with the class members.

F. DISCUSSION

(1) Is the Application an abuse of process?

92. We reject Apple's submission that the Application is an abuse of process. The argument was advanced on the basis that the Application is essentially a "repackaged" form of the application made at the CMC and the arguments, particularly in relation to waiver, could and should have been advanced at the May CMC. However, as Lord Bingham observed in *Johnson* at 31C-E, it is:

> "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case focusing attention on the critical question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before."

93. True it is that Apple's proposed approach to class members was on the agenda for the May CMC. There was a discussion about that proposal at the CMC which focused on the correct interpretation of *McLaren CA.* The Tribunal had no written application before it on behalf of either party which would give concrete focus to its consideration of the legal issues which were debated before it, and the Tribunal took the view that it should address the issues argued before it only to the limited extent of confirming that the Tribunal has no power, whether by case management directions or otherwise, to make an order which is incompatible with litigation privilege.

94. During the May CMC hearing, Mr Piccinin for Apple took issue with the Tribunal dealing with an application for an order advanced by counsel for the CR during his oral submissions which had not been "foreshadowed in an application in the proper way". The Tribunal stated in its reasoned order that if the CR wished to seek an order regulating Apple's proposal, he should formulate an application to which Apple could respond. It can hardly be an abuse of the Tribunal's process for a party

to bring forward an application which the Tribunal itself explicitly anticipated in this way, unless there is something else about the circumstances which renders the application an abuse. Further, insofar as the outcome of the discussion at the CMC was confirmation that the Tribunal could not make an order in response to such an application which would be incompatible with privilege, it is not abusive for the applicant to contend, on any available ground (including waiver), that the orders which he now seeks may lawfully be granted by the Tribunal compatibly with Apple's right to litigation privilege.

(2) Has Apple waived litigation privilege in respect of the proposed communications?

95. There is no dispute that the information contained in the April letter is no longer confidential. It is accordingly a matter of record that Apple proposes to approach class members to request that they undertake searches or that the categories of proposed search are those set out in the Annex to the April letter. Having placed that letter before the Tribunal and invited the Tribunal to place it on the agenda for the May CMC, Apple could have no objection to discussion of that letter before the Tribunal. Nor, indeed, could Apple object if the Tribunal were to issue directions in respect of the proposal contained in that letter provided that in making directions regulating any future correspondence between Apple and class members the Tribunal acts compatibly with Apple's litigation privilege (assuming that has not been waived) and does not otherwise impose unfair restrictions on Apple's investigation of the case against it.

96. Equally, it is not a matter of dispute that the proposed communications between Apple's solicitors and class members would be subject to litigation privilege unless that privilege has been waived. Whilst we do not consider that there is any conceptual barrier to a waiver of privilege in future communications, the issue is whether, looked at objectively, the circumstances of this case disclose that Apple has given up its privilege in respect of the anticipated communications. We have concluded that, considering the matter objectively, the disclosure in the April letter of the approach which Apple proposes to take did not constitute a waiver of privilege in future communications with class members.

97. It does not follow from the fact that the content of the April letter is no longer confidential that Apple has waived privilege in that future course of communication. Whilst Apple has disclosed in some detail the searches which it proposes to ask class members to undertake, the purpose of the letter was to solicit comment from the CR and, indeed, from the Tribunal about the proposal. The April letter did not inhibit Apple's freedom to revise its approach, including in light of any comments which the CR or the Tribunal might make. The terms of any future correspondence with represented persons, or the identity of those to whom inquiries would be addressed, were not fixed or predetermined by the April letter.

98. There is no inconsistency between disclosing the searches which Apple proposes to ask represented persons to undertake, for the purposes of inviting comment from the CR and the Tribunal whilst at the same time maintaining privilege in any future course of correspondence which Apple might have with any particular class member. Mr Piccinin's analogy of the disclosure which a party might well make of its intentions as regards the ingathering of evidence, in other litigation contexts, seems to us to be apposite. We accordingly reject Mr Hubbard's contention that privilege in Apple's future communications has been waived.

(3) To what extent are the proposed directions incompatible with Apple's litigation privilege?

99. Mr Hubbard accepted that we could only make draft Order 2 if we were with him on the question of waiver. We accordingly dismiss the Application so far as it invites us to make draft Order 2.

100. Mr Piccinin contended that the first two paragraphs of draft Order 3 would also be incompatible with Apple's litigation privilege, or at any event would be incompatible with the decision in *McLaren CA.* Paragraph 1 proposes that should Apple intend to send any communication seeking disclosure from class members (a "Disclosure Communication"), Apple shall "confirm how each category of their proposed disclosure requests" relates to pleaded issues, and the criteria used to select the intended recipients of the Disclosure Communication.

101. It would be a natural reading of the proposed order, as drafted, that Apple would require, if the order were to be granted, to disclose to the CR and to the Tribunal the "proposed disclosure requests" which they intend to include in the proposed Disclosure Communication, as well as the criteria for selection of the intended recipients (and the number of proposed recipients). It seems to us that an order which had that effect would be incompatible with Apple's litigation privilege. It would be tantamount to requiring Apple to disclose the key substantive terms of its proposed communication with class members. That, it seems to us, would involve us undertaking an exercise such as that which was undertaken in *McLaren CAT* and would be directly contrary to the strictures expressed about that exercise in *McLaren CA*.

102. There is a more limited or nuanced order which, in our view, might be made, compatibly with privilege. As we have already observed, Apple's April letter is not confidential. It seems to us that it would be open to the Tribunal to order an exchange, along the lines of that envisaged in the *Del Giudice* postface, about the terms of that letter. The *Del Giudice* postface envisages that it is for the defendant to decide, following such an exchange, the terms of any communication, and that the role of the court or tribunal is strictly an adjudicative one. An order which envisages directions by the Tribunal, but leaves open what directions the Tribunal could, would or might make, is not, as such, incompatible with litigation privilege, since it may be taken that the Tribunal would not issue directions which would breach privilege or otherwise unduly interfere with the defendants' right to investigate the case against them.

(4) Discretionary considerations: paragraphs 1 and 2 of Order 3

103. Although we consider that it would be open to us to make directions along these lines, we decline to do so.

104. Apple is entitled to pursue legitimate lines of inquiry and undertake legitimate investigations into the case against it and potential lines of defence. In this jurisdiction, *McLaren CA* tells us that, at least in the absence of legislation introducing a regime for post-certification class disclosure which puts the Tribunal in control of any request for disclosure from class members at that stage, it is, as a

general rule, legitimate for defendants to communicate with class members inviting voluntary disclosure.

105. Apple has been transparent about what it proposes to do and, as we have explained at §9, has identified, albeit in broad terms, the issues which it wishes to investigate through requests of class members. Those issues are, on the face of it relevant or potentially relevant issues which Apple is entitled to investigate. Apple's investigations need not, as proposed in §1 of Order 3, be confined to issues which are currently pleaded. Apple is entitled to investigate whether or not there is evidence which would support a line of defence which is not currently pleaded or other amendments to the currently pleaded case.

106. As the Tribunal explained in its decertification judgment, the class in this case includes some significant organisations with large claims. The claims of those class members form a very significant part of the aggregate damages sought in these proceedings. They are likely to hold documents which are relevant to issues in the case, and in respect of which some disclosure is likely to be justified, even if not the very wide-ranging disclosure which Apple proposes. We refer to the discussion at §50 above.

107. The searches which Apple proposes to ask class members to undertake are, on the face of it, very wide-ranging indeed. Whilst we cannot prejudge how the Tribunal would view an application for a disclosure order, the parties can expect that the Tribunal would scrutinise closely the justification advanced for the requested disclosure and would approach that task in light of the general approach which we have already outlined. But what we have before us at this stage is a proposal by Apple to approach represented persons seeking co-operation on a voluntary basis. Those represented persons may choose to respond to that request, or to reject it. Any represented person is entitled to insist that Apple obtain a disclosure order from the Tribunal adjudicating on the disclosure which is properly justified in these proceedings. If represented persons choose to provide voluntary disclosure to Apple, that is a matter for them.

108. Apple acted properly, pursuant to its obligation of co-operation in r.4(7) of the Rules, in disclosing to the CR and to the Tribunal its proposed course of action.

That provided an opportunity for the parties to consider whether there might be an agreed approach to managing disclosure requests, such as the process proposed by the defendants in *Ad Tech* and in *Spottiswoode*. It also provided an opportunity for the CR to comment on the proposal. As we have observed, Apple has disclosed the issues which it is seeking to investigate. The CR has had an opportunity to engage with the proposal in light of that disclosure.

109. In the circumstances of this case, it does not seem to us that further Tribunal-ordered engagement is likely to be fruitful at this stage. If we were to order such a process, in the absence of agreement such as was apparently reflected in the order made in *Spottiswoode*, the Tribunal's role would perforce be a limited one. A difficulty with the CR's approach is that he invites the Tribunal to treat Apple's April letter in effect as if it were an application under r. 89, when Apple has been clear that it is not, at this stage, seeking any order from the Tribunal. Mr Hubbard accepted that the issue for the Tribunal, when addressing the scope of a proposed communication seeking voluntary co-operation, would not be entirely the same question as the scope of an order under r. 89, albeit that it should, he said, be informed by the same considerations. It does not seem to us that we should, in the absence of an agreed process, be drawn into comment which might be taken to approve or disapprove a communication, the terms of which we cannot see, and which could prejudge a future application under r. 89. It is for Apple to determine, in the first instance, the matters which it wishes to investigate by seeking voluntary disclosure, aware as it will be that the approach which it takes may well fall to be scrutinised by the Tribunal in the future should it bring an application for a disclosure order to the Tribunal.

110. As we have explained above, the CR put at the forefront of his submissions the allegation that Apple's motivation in bringing forward the proposal, or at least a likely effect of the proposed communication, is to encourage some class members to apply to the Tribunal to opt out of the proceedings. The CR postulates that, on an extreme scenario, opt-outs by some large class members could affect the viability of these proceedings. If this were to happen, it could deprive the large cohort of class members with viable and non-trivial claims, which likely could not be pursued other than through opt-out collective proceedings, of the access to

justice which the collective proceedings regime, instituted by Parliament, is intended to secure.

111. In light of our observations at §105 and §106 above, we do not consider that we should infer that Apple's motivation in bringing forward this proposal is to bring improper pressure to bear on class members. Although the proposed requests are unusually wide-ranging, Apple has identified issues which it is, on the face of it, entitled to investigate, including by way of potential disclosure at least from large class members. The timing of the April letter is explicable, in light of the Tribunal's direction that outstanding disclosure issues be raised at the May CMC. It so happened that the decertification application was before the Tribunal at that time, but that does not, in our view, justify any adverse inference as regards Apple's motivation. Mr Piccinin explained why Apple had declined to include certain statements in the proposed communication and, as we explain below, we have generally accepted those explanations.

112. As to the effect of the proposed communication, the issues which the CR apprehends may or may not arise. There is, in a case such as the present one, always the possibility that represented persons will apply to opt out. As Mr Piccinin submitted, there would not necessarily be anything untoward in a decision by a class member to apply to opt out. Any application by a class member to opt out at this stage would, in any event, require the permission of the Tribunal. Such concerns about the possible reaction of class members could not justify preventing Apple from taking legitimate steps to investigate the case against it, and to seek to obtain evidence which may assist in its defence.

113. We do not consider that we should make an order requiring Apple to justify the basis upon which it proposes to select the represented persons with whom it proposes to communicate. The CR seeks to justify that proposal on the basis that the Tribunal needs to be satisfied that disclosure is being sought from a representative group of class members. It does not seem to us that this is an exercise upon which we should embark at this stage. Apple is entitled to decide how to direct its investigations, at least when it does not seek an order from the Tribunal in support of its inquiries.

(5) Discretionary considerations: other directions proposed in Order 3

114. Mr Piccinin did not suggest that we could not lawfully make the other directions proposed in Order 3, and it seems to us that we would be justified in making certain of those directions. There is, as we have observed, nothing wrong with a represented person choosing to provide disclosure voluntarily to Apple, in response to its request, provided that the represented person makes a free and properly informed decision in that regard.

115. We recognise that the communication is to be sent by Apple's lawyers, who are regulated professionals, and we proceed on the basis that they will fulfil their professional responsibilities as set out in the SRA guidance and Code. But, as Mr Piccinin pointed out, those responsibilities are framed in broad and flexible terms. The Tribunal has an interest which is separate from that of the professional regulators, and it seems to us that the Tribunal can and should be prescriptive about certain matters which it would regard as good practice for a communication such as the communication proposed by Apple. Although we recognise that it might be thought unnecessary for us to issue a direction requiring Apple to do things which Mr Piccinin, on behalf of Apple, has told us they intend to do in any event, it seems to us that there would be merit in recording these in a formal direction, particular when we propose to add certain further directions.

116. There is no dispute that the initial communication to class members should be in writing. There is also no dispute that Apple should, and will, make reasonable endeavours to identify whether any class member to which they propose to send a Disclosure Letter has a legal department, and, if so, they will send the letter to that legal department. There is also no dispute that Apple should give class members a reasonable time to respond (and, since we propose to issue a direction prescribing a minimum period, we do not consider it necessary to issue a direction that the communication must be made within business hours). There is no dispute that the letter should include a link to the Tribunal's webpage for the proceedings and a copy of, or a link to, this judgment (though Mr Piccinin made a reasonable point that a hyperlink may not be practicable). Apple agrees that a refusal by a class member to give disclosure will not affect the class member's commercial

relationship with Apple and has confirmed that this will be stated in any initial communication with a class member.

117. Mr Piccinin resisted the direction proposed at §3(2) of Order 3 that the communication with the class member include contact details for the CR's legal representatives and an indication that the class member may discuss the disclosure communication with those legal representatives. He submitted that the disclosure request would, of its nature, be confidential and told us that it would be marked as such. To agree that the letter could be discussed with the CR would be to waive privilege. He relied in that regard on §104 of *McLaren CA,* which we have quoted above to vouch the proposition that a communication with one class member remains privileged vis-a-vis the other class members (and the CR). It seems to us that, even if class members are constrained from discussing the contents of the request with the CR or his lawyers, it would be helpful for class members to have these contact details. A class member, which may not previously have been aware of these proceedings, may well wish to contact the CR or the CR's lawyers to obtain information about the proceedings. Discussion between a class member and the CR is, it goes without saying, entirely proper provided that it respects any confidentiality legitimately asserted by Apple. We will accordingly direct that the communication provide the relevant contact details, but, in light of Mr Piccinin's submissions, we decline to give the permission sought by the CR that class members may discuss Apple's proposed communication with the CR or the CR's lawyers.

118. Mr Piccinin resisted various proposed directions – namely, those at §§3(3), (4), (6) and (8) of Order 3, which set out certain general legal propositions. Whilst some of these propositions may be uncontroversial (though, as we have already explained, Mr Piccinin took issue with the proposed direction about costs), he made the point that it is not appropriate for Apple's lawyers to purport to give advice on the legal position to class members. He made the helpful suggestion that the matters in contention could be addressed by the Tribunal in its judgment, and a direction issued that the proposed communication specifically draw attention to the relevant paragraphs of the judgment. Whilst we accept the general thrust of Mr Piccinin's submission, we take the view that the following matters should be expressly stated on the face of the communication:

(1) that the class member is under no obligation to undertake any searches or to make any disclosure in response to the requests in the letter, unless the Tribunal makes an order to that effect;

(2) that the Tribunal has made no such order;

(3) that the class member is entitled to insist that Apple obtain a disclosure order from the Tribunal, and will have an opportunity to resist any application which Apple may make for such an order; and

(4) that the class member is entitled to take its own legal advice before responding to the letter.

We agree with Mr Piccinin's suggestion that the other points would more appropriately be addressed by directing that the letter specifically draw attention to §80 of this judgment.

119. Mr Piccinin resisted the proposal, at §3(7) of Order 3, that the communication contain a statement that receipt of the communication does not imply wrongdoing. We agree with him. We take the view that the very inclusion of such a statement would be liable to suggest (wrongly) that receipt of such a communication might be taken to imply wrongdoing and we accordingly decline to issue the proposed direction.

120. Mr Piccinin told us in terms that there have been no communications which would engage §4 of Order 3, and we accordingly consider it otiose to make the direction proposed in that paragraph.

121. There is no dispute that if Apple applies for disclosure by a class member, the application should be intimated to the CR and the CR should be joined as an interested party. No harm will be done by giving directions to that effect at this stage.

G. CONCLUSION

122. For all these reasons, we propose to discharge the interim order made on 3 July 2026, grant the Application to the extent which we have indicated above by making directions in the terms which we have indicated, and otherwise dismiss the Application. On the application of the CR, we will grant a short stay of this judgment, to allow him to consider whether or not to seek permission to appeal and whether or not to make an application for a stay pending the determination of such an application. We will direct that any application in respect of the costs of the Application be made within 14 days from the hand down of this judgment, with a reply within 7 days thereafter.

123. This is the unanimous judgment of the Tribunal.

James Wolffe KC	Tim Frazer	Anthony Neuberger

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

Date: 8 September 2026