IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

BETWEEN:

DR. RACHAEL KENT

Applicant /
Proposed Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LTD

Respondents /
Proposed Defendants

REASONED ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form treated as filed on 11 May 2021 and the Proposed Class Representative's application treated as made on 11 May 2021 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules") for permission to serve the collective proceedings claim form on the First and Second Proposed Defendants out of the jurisdiction ("the Rule 31(2) Application")

AND UPON reading the first witness statement of Lesley Jane Hannah made on 10 May 2021 in support of the Rule 31(2) Application

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve the First and Second Proposed Defendants outside the jurisdiction.

2. This Order is made without prejudice to the rights of the First and Second Proposed Defendants to apply pursuant to Rule 34 of the Tribunal Rules to dispute the Tribunal's jurisdiction. Any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc.* [2021] CAT 4, at [3].

REASONS

1. I think it is likely, as the Proposed Class Representative contends, that the proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Tribunal Rules. The Tribunal therefore approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18].

2. I am satisfied that there is between the Proposed Class Representative and the First and Second Proposed Defendants a real issue to be tried in respect of standalone claims for damages in respect of alleged breaches of Article 102 of the Treaty on the Functioning of the European Union ("Art 102 TFEU") (prior to 31 December 2020) and s.18 of the Competition Act 1998, which prohibit the abuse of a dominant position. The relevant markets which are put forward in the collective proceedings claim form are well arguable and there is a seriously arguable case that the First and Second Proposed Defendants, which are members of the Apple corporate group, are dominant in those markets.

3. As regards dominance, the preliminary analysis of Mr Holt filed with the collective proceedings claim form is said to be consistent with the preliminary view of the European Commission, published on 30 April 2021 in respect of its investigation in Case AT.40437 – *Apple – App Store Practices (music streaming)*, that Apple's app store is the sole gateway to consumers using Apple's smart mobile devices running on Apple's smart mobile operating system and the Commission Decision dated 18 July 2018 in Case AT.40099 – *Google Android*, which concluded that app stores for other smart mobile operating systems do not belong to the same product market as app stores for Android devices. See also the decision on jurisdiction in *Epic Games* at [88].

4. As regards the alleged abuse of dominance, it is seriously arguable that the alleged contractual and technical restrictions regarding distribution and payment processing, which are said in the collective proceedings claim form to arise from the Apple Developer Program Licence Agreement (to which the First Proposed Defendant is a contracting party and under which the Second Proposed Defendant is appointed an agent in respect of end-users located in the UK) and Apple App Store Review and Guidelines, constitute abusive conduct and that this conduct has an appreciable effect on trade within the UK and (before 31 December 2020) between Member States of the EU. In that regard, I note that Apple's conduct in connection with the Apple app store is currently the subject of regulatory investigations by competition authorities in a number of jurisdictions, including by the Competition and Markets Authority in the UK. It is also the subject of private antitrust proceedings in the US.

5. In respect of the tort gateway under PD6B paragraph 3.1(9), I am satisfied that there is an arguable case that the conduct at issue caused losses to the proposed class members, in which case such losses were sustained or will be sustained within the UK. The claimants comprising the class on whose behalf the Proposed Class Representative seeks to bring these proceedings are Apple iPhone or iPad users ("iOS Device Users") who made relevant purchases via the UK version of Apple's app store.

6. I am further satisfied that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings. The class comprises an estimated 19.6 million iOS Device Users in the UK. The claim is based on UK and EU competition law and it appears from the Apple Media Services Terms and Conditions ("the Apple Ts & Cs"), which give rise to the contract with the Second Proposed Defendant when UK iOS Device Users purchase an iOS app, or purchase digital products within an iOS app, that the Apple Ts & Cs envisage that UK iOS Device Users can bring actions in their own jurisdiction. The First Proposed Defendant is based in the US and the Second Proposed Defendant is based in Ireland. Further, although there are a number of claims in the US which seeks redress against Apple on behalf of consumers, the US Sherman Act does not appear to apply extra-territorially so as to extend to claims of the present kind by UK consumers: see *Hoffmann-La Roche Ltd v Empagran S.A.* 542 US

155 (2004). Altogether, I therefore consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim.

The Hon Mr Justice Roth Made: 26 May 2021

President of the Competition Appeal Tribunal Drawn: 26 May 2021