Neutral citation [2022] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 June 2022

Before:

BEN TIDSWELL
(Chairman)
WILLIAM BISHOP
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

DR RACHAEL KENT

Applicant/Proposed Class Representative

- v -

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

Respondents/Proposed Defendants

Heard at Salisbury Square House on 4 and 5 May 2022

JUDGMENT

APPEARANCES

Ronit Kreisberger QC, Michael Armitage and George McDonald (instructed by Hausfeld & Co LLP) appeared on behalf of the Proposed Class Representative.

Brian Kennelly QC and Daniel Piccinin (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Proposed Defendants.

A. INTRODUCTION

1. This is the Tribunal's judgment in respect of: (i) an application by Dr. Rachael Kent, as proposed class representative ("PCR"), for a collective proceedings order ("CPO"), pursuant to s. 47B of the Competition Act 1998 (the "CA") ("the CPO Application"); and (ii) an application by the proposed defendants, Apple Inc. and Apple Distribution International Limited (together "Apple"), to strike out or be granted reverse summary judgment in relation to an aspect of the PCR's claim.

2. Apple is well known as the creator of devices such as the iPhone and the iPad, along with its proprietary mobile operating system (the "iOS"). The PCR alleges that Apple has contravened the Chapter II prohibition contained in section 18 of the CA, and Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), by engaging in exclusionary and exploitative abuses of dominant positions in the market for the distribution of individual software applications ("apps") and the associated payment processing market.

3. In essence, the PCR alleges that Apple has foreclosed all competition from potential or actual rivals through its restrictive terms and conditions, and other restraints, imposed in the iOS, so that it is dominant (or indeed holds a monopoly position) in app distribution and payment services. The PCR contends that Apple has abused that dominant position by imposing restrictions on app developers, to force them to distribute iOS apps exclusively via its proprietary store and by charging excessive and unfair prices in the form of the commission charged on transactions. The PCR claims that significant parts of this overcharge have been passed onto consumers, being the iOS device users.

4. The PCR seeks to bring the proceedings on an opt-out basis on behalf of all users of iOS devices (iPhones and iPads), which is estimated to include some 19.6 million UK consumers who have made purchases relating to apps.

5. Apple denies every aspect of the claims and has applied to strike out or alternatively for summary judgment in relation to the excessive pricing aspect of the claim.

B. BACKGROUND

(1) Apps and the means for distributing them

6. Apple introduced its first iPhone to the market in 2007. In 2008, Apple began to allow third party developers to offer native apps to Apple device users. Apps are made available to users through "storefronts", which are geographically focused. Most users in the UK access apps through the UK storefront of Apple's App Store. The App Store operates as a two-sided platform, allowing app developers and consumers to transact with each other.

7. A significant number (in excess of 90%) of apps are free to download. Purchases are mainly made up of:

   (1) a price for downloading the app;

   (2) a payment in order to access additional features in the app; or

   (3) by way of subscription for continuing content, services or experiences.

8. Apple charges developers a commission for paid downloads and in-app purchases (and some subscriptions), as well as charging developers annual fees for access to the App Store and for technical support. Apple does not charge consumers for using the App Store but does offer paid services (for example, iCloud storage).

9. iOS is pre-installed on all Apple devices and Apple does not permit any other operating system to be installed. According to the PCR, Apple's business model is based on the vertical integration of iOS into Apple devices, so that rival operating systems (such as the Google Android system) cannot be used.

10. Developers who wish to distribute apps through the App Store must agree to Apple's contractual terms, which require, among other things, developers to agree:

    (1) The price for paid apps, in the form of pricing tiers.

(2) The payment of commission by the developer to Apple in respect of payments made by device users. This has, for the most part, been set at the level of 30% since 2008.

(3) To use Apple's payment system to process payments, including the deduction of the commission and remittal of the balance to the developer.

11. Developers are not permitted to seek to distribute apps to iOS device users in ways that are contrary to these provisions. According to the PCR, it is technically impossible for iOS device users to uninstall the App Store from their iOS device or download alternative app stores to an iOS device unless the iOS has been modified (such modification is prohibited by Apple in any event).

(2) The alleged abuse by Apple of a dominant position

12. The PCR maintains that there is (i) a market for the distribution of iOS apps to iOS device users and (ii) a market for iOS payment processing, in both of which Apple has a dominant (or monopoly) position by virtue of operating a closed system for iOS devices. The PCR claims that Apple has abused that dominant position by:

(1) Adopting practices which have an exclusionary effect, by restricting the distribution of apps through the App Store and by no other means, and through forcing developers to use Apple's payment processing services (the "Exclusive Dealing Abuse").

(2) Making contracts subject to unconnected supplementary obligations, by requiring payments on the App Store from iOS device users to developers to be transacted through Apple's payment processing services (the "Tying Abuse").

(3) By directly or indirectly imposing unfair purchase or selling prices, in the form of the 30% commission (the "Unfair Pricing Abuse").

13. The PCR's case is that these abuses have caused developers to pay inflated fees to Apple, which the developers have passed on in significant measure to iOS device users who have made purchases through the UK App Store. The preliminary estimate, by the PCR's economic expert, Mr Holt, is a loss to these device users in the range of £535 million to £1,459 million (excluding interest).

(3) Other proceedings and investigations

14. The PCR brings this claim as a standalone action, without reliance upon a regulatory decision to establish liability. However, the PCR brought to our attention a number of other claims and regulatory actions or investigations involving the commission charged by Apple through the App Store. These include:

(1) A Competition and Markets Authority ("CMA") investigation into Apple's conduct in relation to the distribution of iOS apps.

(2) A CMA market study into mobile ecosystems in the UK.

(3) An investigation by the Dutch Authority for Consumers & Markets into the market for App Store services on iOS for dating app providers.

(4) A review by the Korea Fair Trade Commission of compliance by Apple with legislation which prohibits Apple from compelling developers to use its payment system.

(5) Investigations by the Russian Federal Antimonopoly Service, the Japan Trade Commission and the Competition Commission of India into various restrictions imposed by Apple on developers in relation to tools for app development and payment for apps.

(6) A number of private actions in courts in the United States, China and the Netherlands, including one case in the USA (*Epic Games, Inc. v Apple Inc., Case No. 4:20-cv-05640-YGR*) which has resulted in a final judgment.

15. Some of these matters were the subject of submissions in relation to the strike out/summary judgment application and are discussed further below in that context.

C. THE PROPOSED COLLECTIVE PROCEEDINGS

(1) The CPO Application

16. The PCR filed her Claim Form in this matter on 11 May 2021. The then President of the Tribunal made an order on 26 May 2021 permitting service out of the jurisdiction on the Apple entities. A case management conference took place on 14 December 2021 and resulted in a Ruling on disclosure issued on 21 December 2021 ([2021] CAT 37).

17. The CPO Application and the strike out/summary judgment applications were heard together on 4 and 5 May 2022. Ms Kreisberger QC represented the PCR, supported by Mr McDonald in relation to funding issues, and Mr Kennelly QC appeared for Apple.

18. Apple did not oppose the PCR's CPO Application, although it did draw to the Tribunal's attention a number of matters which Apple suggested we should consider in relation to that application. While the CPO Application was not contested (which allowed us to confirm at the end of the hearing that the Tribunal would certify the proceedings), it was incumbent on the Tribunal, as both parties accepted, to satisfy itself that the relevant legal test was met before any order could be made. See *Merricks v Mastercard* [2020] UKSC 51 ("*Merricks*") at [4]. The Tribunal raised a number of points with the PCR's legal representatives prior to the hearing, mainly concerning funding, and we were provided with written and oral submissions on those points.

19. The Tribunal also requested the PCR to undertake inquiries of her consultative group in relation to a specific matter and her response is recorded below.

(2) Legal Framework

20. Section 47B CA sets out the requirements to be fulfilled in order for the Tribunal to make a CPO.

21. First, the Tribunal must be satisfied that the entity bringing the proceedings can be authorised as the proposed class representative (the "authorisation condition"): section 47B(5)(a) CA. The authorisation condition is met if the Tribunal considers that it is "just and reasonable" for the proposed class representative to act as a representative in the proceedings: section 47B(8)(b) CA.

22. Secondly, the claims must be eligible for inclusion in collective proceedings (the "eligibility condition"): section 47B(5)(b) CA. According to section 47B(6) CA and Rule 79(1) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules"), the eligibility condition comprises three cumulative requirements:

    (1) The proposed claims are brought on behalf of an identifiable class of persons: Rule 79(1)(a) of the Tribunal Rules.

    (2) The proposed claims raise common issues, or in other words the same, similar or related issues of fact or law (the "commonality requirement"): section 47B(6) CA and Rule 79(1)(b) of the Tribunal Rules.

    (3) The proposed claims are suitable to be brought in collective proceedings (the "suitability requirement"): section 47B(6) CA and Rule 79(1)(c) of the Tribunal Rules. Rule 79(2) provides that, in determining whether the claims are suitable to be brought in collective proceedings, the Tribunal shall take into account all matters it thinks fit, including:

> "(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
>
> (b) the costs and the benefits of continuing the collective proceedings;
>
> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

(d) the size and the nature of the class;

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C [CA] or otherwise."

23. Following the decision in *Merricks*, it is clear that the Tribunal is not generally required to take into account the merits of the PCR's proposed claim in considering an application for a CPO. That is subject to two exceptions:

(1) Where a strike out or summary judgment application is made. That is the case here and is considered in the section below on that subject.

(2) Under Rule 79(3)(a), the Tribunal is required to determine whether the proceedings should be opt-in or opt-out. One of the relevant considerations set out in that rule is the strength of the claims. It was not suggested by Apple that opt-out proceedings were inappropriate, and we deal with that issue below in the course of considering the CPO application.

(3) Consideration of the CPO Application

(a) The authorisation condition

24. We are satisfied that the authorisation condition set out in section 47B(5)(a) CA is met.

25. Dr Kent is a suitable person to act as the PCR. She is a lecturer in Digital Economy and Society Education at King's College, London, and has conducted research on the interaction of users with digital platforms and apps. She has also worked in managerial positions in the NHS and in private sector consulting. Her experience demonstrates a clear commitment to supporting and protecting consumer rights and suggests she has the ability to manage the litigation on behalf of the proposed class. In her witness statement in support of the

application, Dr Kent assures us that she is able to meet the time commitments which the proceedings may require.

26. Dr Kent will be a member of the proposed class, but there was no suggestion that this or any other interest would conflict with those of the proposed class.

27. The CPO Application included a comprehensive plan for managing the proposed litigation, covering items such as communications with class members, the method of bringing proceedings and the management of steps in the litigation. The plan includes a detailed litigation budget and a proposed timetable. It also provides details of third parties retained to assist with administration of the proceedings and public relations advice.

28. The PCR has established a consultative group, comprising a former Lady Justice of Appeal, a consumer redress expert and an expert in the subject of payment systems.

29. One area in which we asked for additional information from the PCR was the funding for the action. There is a specific requirement in Rule 78(2)(d) of the Tribunal Rules for the Tribunal to consider whether the PCR would be able to pay Apple's costs if ordered to do so. Further, paragraph 6.33 of the Tribunal's Guide to Proceedings 2015 provides that, by extension, the PCR's "*ability to fund its own costs of bringing the collective proceedings is also relevant*", and in that regard the Tribunal will have regard to the PCR's "*financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan referred to above is likely to assist the Tribunal's assessment in this regard*". The level of funding for the PCR's own costs is also relevant to the Tribunal's assessment under Rule 78(3)(c)(iii) of the Tribunal Rules which provides that "*in determining whether the proposed class representative would act fairly and adequately […] the Tribunal shall take into account all the circumstances, including […] (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide*".

30. The PCR's own costs are proposed to be funded through:

(1) A litigation funding agreement between the PCR and Vannin Capital PCC for and on behalf of Project Greve PC (the "funder").

(2) Deferred fee arrangements between the PCR and her legal team.

31. We were concerned to understand what provision was made for additional costs in the event that the estimates set out in the litigation budget were exceeded. Mr McDonald directed us to terms which allow the PCR to seek additional funding from the funder in that event, or if that was declined to seek funding from third parties.

32. We also enquired about the circumstances in which the funder might be entitled to terminate its obligation to fund the proceedings, in particular if it ceased to be satisfied about the merits of the action. The PCR notified us during the hearing that she had agreed an amendment with the funder broadly to reflect the wording suggested in a similar funding agreement considered in the decision granting a CPO in *Merricks v Mastercard* [2021] CAT 28. This has the effect, in this case, that the funder must base any such decision on: "*independent legal, and where appropriate, expert advice*".

33. In their Response to the CPO Application, Apple drew our attention to the nature of the funding entity, Project Greve, and the assets available to it to meet its funding obligation. A director of Vannin Capital, Mr Nicholas Fegan, provided a witness statement to explain these matters. Mr Fegan told us that:

(1) Vannin Capital PCC is a protected cell company incorporated under Jersey law. This permits Vannin Capital PCC to establish within itself protected cells, of which Project Greve is one.

(2) A protected cell has no legal identity and is not a body corporate in its own right. However, any liability of a protected cell extends only to the assets of that cell, and not to the other assets of (in this case) Vannin Capital PCC.

(3) Project Greve PC will fund the PCR through a loan facility agreement entered into between Vannin Capital PCC and lenders that are managed by entities within the Fortress Group (of which Vannin Capital PCC is part). Fortress Group is a well known global investment manager and adviser.

34. We were provided with a copy of the documentation recording this loan arrangement and Mr McDonald answered questions from us about the circumstances in which the lenders might decline to fund Vannin Capital PCC. Nothing we saw made us consider that the funding arrangements were insufficient or on inappropriate terms. We did however ask the PCR to provide us with assurance that her consultative group were aware of and were comfortable with the funding arrangements. Following the hearing, the PCR has confirmed that (i) the funding arrangements were concluded some four months before the consultative group was established, and although these were made available to the group, specific views were not sought at that time, (ii) since the hearing, the PCR has sought specific views from the consultative group (with the assistance of counsel), and (iii) the consultative group is content with the terms of the after the event insurance policies and the litigation funding agreement and has not raised any concerns as to the loan facility agreement.

35. In relation to adverse costs, the PCR has in place an "after the event" insurance policy which provides cover for a maximum liability of £10 million. An endorsement to the policy provides Apple with direct rights to enforce the terms of the policy for Apple's benefit. Mr McDonald explained the potential mechanisms available to the PCR to increase the level of cover, if required. It was not suggested by Apple that these arrangements were unsatisfactory and we consider that they provide appropriately for the payment of Apple's recoverable costs if the PCR is ordered to pay those.

(b) The eligibility condition

36. We are satisfied that the proposed class can be identified without difficulty, through the mechanism of the user identification which will allow Apple to identify each device user of the UK App Store. It is also clear that the claim

raises issues which are the same or substantially the same for all of the proposed class members.

37. In terms of suitability of the claims for collective proceedings:

(1) It seems an appropriate means for the fair and efficient resolution of the common issues – indeed, it seems to be a paradigm case for such an approach.

(2) The costs of the proceedings, while significant, will be incurred for the benefit of a large class of claimants (estimated to be 19.6 million people) with the returns to the litigation funder being paid from the residue of unclaimed damages in accordance with Rule 93(4) of the Tribunal Rules.

(3) We were advised by the PCR that there are no separate proceedings by class members of a similar nature.

(4) As noted above, it should be possible to determine membership of the class without difficulty, by reference to Apple's records.

(5) There are a large number of claimants in the class, each of whom will have a relatively small claim, which would be obviously uneconomic to litigate on an individual basis.

(6) In our view, the claims are suitable for an aggregate award of damages.

(7) The PCR has indicated in the Re-Amended Claim Form that she is open to alternative dispute resolution, although that is thought to be unlikely to be possible at this stage.

(c) Opt-in/opt-out

38. Finally in relation to the CPO Application, we are required to consider and specify whether the claims are to be on an opt-in or opt-out basis. It was not suggested by either party that opt-in was a preferrable approach and we agree

that the claims should proceed as opt-out claims, taking into account the factors considered in [37] above, as well as the strength of the claims and the practicality of bringing the proceedings as opt-out.

39. In relation to the strength of the claims, we note that no application was made to strike out the Exclusive Dealing Abuse or Tying Abuse. These are pleaded in a conventional and understandable manner and there was no suggestion that their strength or otherwise would lead to a conclusion that opt-out proceedings were not appropriate.

40. As we explain below, we have refused the application by Apple to strike out/obtain reverse summary judgment on the Unfair Pricing Abuse, and this means the claim is sufficiently credible to pass any threshold required at this stage.

(d) Conclusion on the CPO Application

41. For the reasons set out above, we are satisfied that the requirements for a CPO are satisfied in this case and that the PCR's application for a CPO should be granted on an opt-out basis.

D. THE STRIKE OUT/SUMMARY JUDGMENT APPLICATION

(1) Legal framework

42. Following the Supreme Court's decision in *Merricks*, there have been a number of cases before the Tribunal where an application for a CPO has been met with an application to strike out/for summary judgment. See for example: *McLaren v MOL* [2022] CAT 10; *Le Patourel v BT Group PLC* [2021] CAT 30; and *Gutmann v First MTR South Western Trains Limited and Ors* [2021] CAT 31.

43. In each of these cases, the subject matter of the strike out/summary judgment application was also an issue in the CPO application, especially where there was a challenge to expert methodology for the calculation of aggregate damages. In such cases, the Tribunal has on occasion heard evidence from the expert

concerned. That is not so in this case – there is no suggestion that the challenge by Apple to the PCR's Unfair Pricing Abuse has any relevance to the Tribunal's decision on the CPO Application. We did not invite the experts to give oral evidence at the hearing.

44. Rule 41(1)(b) of the Tribunal Rules sets out the Tribunal's power to "*strike out in whole or in part a claim at any stage of the proceedings if … it considers that there are no reasonable grounds for making the claim*".

45. Rule 43(1) of the Tribunal Rules provides in respect of summary judgment that:

> "The Tribunal may of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
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> (a) it considers that—
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> (i) the claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) the defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a substantive hearing."

46. It was common ground that the legal principles governing applications for strike out/summary judgment are those set out by Lewison J in *Easyair v Opal Telecom* [2009] EWHC 339 (Ch) ("*Easyair*") at [15]:

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available

> at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

47. Ms Kreisberger also referred us to the observation of Floyd LJ in *TFL Management v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415 at [27]:

> "[…] the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action."

(2) The law on unfair pricing

48. Unfair pricing is expressly recognised in section 18 CA and Article 102 TFEU as an abuse, by prohibiting dominant undertakings from "*directly or indirectly imposing unfair purchase or selling prices*".

49. The Court of Justice of the European Union's ("CJEU") judgment in Case C-27/76 *United Brands v Commission (EU:C:1978:22)* [1978] 1 CMLR 429

("*United Brands*") is considered the authoritative explanation of the relevant test:

> "248. The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article [102] of the Treaty.
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> 249. It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.
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> 250. In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.
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> 251. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin [...].
>
> 252. The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.
>
> 253. Other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair."

50. The leading authority on unfair pricing under the Chapter II prohibition is the Court of Appeal's judgment in *CMA v Flynn* [2020] EWCA Civ 339 ("*Flynn*"). Green LJ (with whom Richards LJ and Vos C agreed) summarised the relevant case law on the unfair pricing test at [97] as follows:

> "97. I would draw the following general conclusions from the case law about the test to be applied:
>
> (i) The basic test for abuse, which is set out in the Chapter II prohibition and in Article 102, is whether the price is "unfair". In broad terms a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of "normal and sufficiently effective competition", i.e. "workable" competition.
>
> (ii) A price which is "excessive" because it bears no "reasonable" relation to the economic value of the good or service is an example of such an unfair price.
>
> (iii) There is no single method or "way" in which abuse might be established and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon.

(iv) Depending upon the facts and circumstances of the case a competition authority might therefore use one or more of the alternative economic tests which are available. There is however no rule of law requiring competition authorities to use more than one test or method in all cases.

(v) If a Cost-Plus test is applied the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then the authority should determine whether the margin is "excessive". This can be done by comparing the price charged against a benchmark higher than cost such as a reasonable rate of return on sales (ROS) or to some other appropriate benchmark such as return on capital employed (ROCE). When that is performed, and *if* the price exceeds the selected benchmark, the authority should then compare the price charged against any other factors which might otherwise serve to justify the price charged as fair and not abusive.

(vi) In analysing whether the end price is unfair a competition authority may look at a range of relevant factors including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from competing products and/or any other relevant comparable, or all of these. There is no fixed list of categories of evidence relevant to unfairness.

(vii) If a competition authority chooses one method (e.g. Cost-Plus) and one body of evidence and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone.

(viii) If an undertaking relies, in its defence, upon other methods or types of evidence to that relied upon by the competition authority then the authority must fairly evaluate it."

51. Later in the judgment, at [172], Green LJ also commented on the assessment of "economic value":

> "172. Second, the Tribunal did not agree with the submissions of all parties that economic value was simply a matter to be taken into account as part of other components of the test. The Tribunal held that it was not part of the "in itself" test but was part of "a more general assessment" (Judgment paragraphs [427] and [443(6)]). I agree with the parties on this. It is evident from the judgment in United Brands that the reference to "economic value" is as part of the overall descriptor of the abuse; it is not the test. The test should therefore, when properly applied, be capable of evaluating economic value. So, for instance, as the CMA argues, when evaluating patient benefit it would be possible to measure its economic value in the Plus element of Cost-Plus, or even in the fairness element. Equally, if there is evidence of the prices being charged in relevant, comparator, markets which were effectively competitive then those prices could be capable of acting as proxy evidence of the economic value of patient benefit. In so far as an issue of fact arises which can be categorised as an aspect of "economic value" it needs to be measured and it can be evaluated in various parts of that test. If it is properly factored into "Plus" or "fairness" or into some other part of the test, or is reflected in other evidence which can stand as a proxy for economic value, then there is no incremental obligation to take it into account again, as a discrete advantage or justification for a high price. In paragraph [421] the Tribunal states that the

> analysis of economic value conducted at other stages of the test are "broadly similar" but that there is a "different perspective". With respect I do not follow this. The analysis of the Tribunal, for instance as articulated in paragraph [443(6)] of the Judgment (set out at paragraph [40] above), suggests that it is a requirement *discrete* from other components of the test to be applied only after all those components have been worked through. But if this were so it would (wrongly) risk *compelling* a competition authority to double count economic value. In short, economic value needs to be factored in and fairly evaluated, *somewhere*, but it is properly a matter which falls to the judgment of the competition authority as to where in the analysis this occurs." (Our emphasis added).

52. It is also necessary to refer to another part of the judgment, dealing with a question as to whether patient dependency on a drug might not amount to demand side benefit in circumstances where those patients were unable to switch to other products because of clinical guidance. The question was whether, in these circumstances, further investigation into demand side benefit was necessary. Green LJ said the following at [167]:

> "167. Insofar as it is argued that the Advocate General in Tournier was laying down an absolute and immutable rule that whenever there is dependency there was no residual scope for any economic value to arise, I agree with the Tribunal that this is not what the Advocate General was seeking to say and, in any event, is a proposition that is far too inflexible (or "binary" as the Tribunal put it […]). Economic common sense indicates that dependency and the inferences to be drawn from its existence are indeed matters of fact and degree. Even if there is dependency there might still be *some* economic value but not necessarily reflecting the full price demanded."

53. Mr Kennelly relied heavily on the Court of Appeal's decision in *Attheraces v British Horseracing Board Limited* [2007] EWCA Civ 38 ("*ATR*"). The facts of this case were somewhat unusual: the defendant, BHB, charged third parties for data which it gathered through its primary activity of administering British horse racing. The claimant sold the data overseas for significant sums, to websites and television channels interested in racing and betting. The costs of producing the data were low compared with the price charged by BHB and the claimant alleged that BHB held a monopoly position and that the price charged was excessive and unfair under Chapter II CA and Article 102 TFEU.

54. At trial, the judge approached the question by establishing a counterfactual competitive price on a costs-plus-reasonable-profit ("cost plus") basis. The Court of Appeal decided that the trial judge had erred in refusing to take into

account the relevance of the data to the claimant purchaser when assessing economic value.

55. The following passages from the judgment of the Court of Appeal in *ATR*, delivered by Mummery LJ, discussed the use of a cost plus approach and held that there was no single test:

> "207. How is the critical judgment of the economic value of the pre-race data to be made? That has to be determined before deciding whether BHB is seeking to charge ATR a price which abuses its dominant position by trying to obtain substantially more than the economic value of the pre-race data. There is nothing in the Article or its jurisprudence to suggest that the index of abuse is the extent of departure from a cost + criterion. It seems to us that, in general, cost + has two other roles: one is as a baseline, below which no price can ordinarily be regarded as abusive: the other is as a default calculation, where market abuse makes the existing price untenable.
>
> 208. ATR argued that, if the indicator of abuse is a presumptive competitive price, cost + is what a competitive price should be. This seems to us to be at best a rule of thumb. Competition may drive price below cost for a time or in a part of the market. Where profit is obtainable, the margin of profit will be as great as the market will yield, reflecting such factors as elasticity of demand. Thus, even a hypothetically competitive market may yield a rate of profit above, as well as below, the reasonable margin represented by cost +. Those and related issues were usefully discussed by Laddie J in *BHB Enterprises Ltd v. Victor Chandler (International) Limited* (cited above). It seems to us that the most that a successful challenge under Article 82 can achieve in a case like this is a re-negotiation, not a cost + limit on prices, for whatever else Article 82 does it does not create a European system for determining prices.
>
> …
>
> 213. As already noted, the Commission's decision in *Scandlines* supports the view that the exercise under Article 82, while it starts from a comparison of the cost of production with the price charged, is not determined by the comparison. This in itself is sufficient to exclude a cost + test as definitive of abuse. Mr Roth accepts that there is no single methodology or litmus test of abuse: the court has a choice of methods, but not an unlimited one. His contention is that the judge has gone outside the admissible limits of method in coming to his conclusion. Mr Hollander, also contending that the choice of methodology is for the court, defends both the choice made by the judge and the way he has implemented it.
>
> 214. As the expert witnesses in the present case agreed, economic theory recognises the relevance of externalities to price. The judge rejected BHB's argument that the benefit of the system to overseas bookmakers was a relevant externality. But it was incontestable that the overseas bookmakers were paying ATR, in a competitive market, amounts which afforded it a handsome profit which it wanted, so far as possible, to keep. The facts found by the judge do not suggest that anybody is going to go out of business as a result of the alleged abuse of dominant position. Despite its elaborate legal and economic arguments and the high levels of moral indignation, the case is about who is

> going to get their hands on ATR's revenues from overseas bookmakers. There is no need to classify the benefit derived by the bookmakers from the deployment of part of BHB's products as a "positive externality" in order to recognise that it has a bearing on whether their pricing is excessive."

56. Mr Kennelly also relied on a decision of the European Commission in *Scandlines*, mentioned in the passage quoted above (*Scandlines Sverige AB v Port of Helsingborg* - Case COMP/A.36.568/D3). This concerned a port in Sweden. A ferry operator complained that the port charges were unfair under the predecessor of Article 102 TFEU, by reference to the costs of production of the service plus a reasonable margin (being a determined percentage of the production costs). The Commission rejected that approach, saying:

> "221. The Commission does not exclude that the question whether a price is unfair may be assessed within a cost-plus framework which encompasses the respective relations between the production costs, the price (or the profit margin) and the economic value of the product/service. However, in such an assessment, the economic value of the product/service cannot simply be determined by adding to the costs incurred in the provision of this product/service a profit margin which would be a pre-determined percentage of the production costs.
>
> …
>
> 226. Moreover, the "cost-plus approach" suggested by *Scandlines* only takes into account the conditions of supply of the product/service. The determination of the economic value of the product/service should also take account of other non-cost related factors, especially as regards the demand-side aspects of the product/service concerned.
>
> 227. The demand-side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service.
>
> 228. As a consequence, even if it were to be assumed that there is a positive difference between the price and the production costs exceeding what *Scandlines* claims as being a reasonable margin (whatever that may be), the conclusion should not necessarily be drawn that the price is unfair, provided that this price has a reasonable relation to the economic value of the product/service supplied. The assessment of the reasonable relation between the price and the economic value of the product/service must also take into account the relative weight of non-cost related factors."

57. We were also referred to a number of other cases which discuss unfair pricing, including the CJEU's judgment in Case C-177/16 *Autortiesbu un Komunicesanas Konsultaciju Agentura/Latvijas Autoru Apvieniba v*

Konkurences Padome [2017] 5 C.M.L.R. 19 ("*Latvian Copyright*") and the Tribunal's judgment in *Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31 ("*Albion Water*").

58. *Latvian Copyright* concerned the rates charged by a copyright management organisation which held a monopoly position in Latvia. As Green LJ noted in *Flynn* at [78]: "*This was not a case involving a Cost-Plus analysis since in cases involving intangible property, such as copyright, it is recognised that such an analysis might be artificial*". Instead, the approach used was to consider comparables from other EU countries.

59. In *Albion Water*, the Tribunal considered an appeal from a decision by the Director General of Water Services (the regulator) that the price charged by Dŵr Cymru (which also competed with Albion Water for customers) for access to its network of water pipes was not unfair. There had been a cost plus approach to determining whether or not the relationship between the economic value and the price charged suggested unfairness, and in allowing the appeal the Tribunal noted:

> "266. When assessing the relationship between the disputed price and the economic value of a service, and thus the potential unfairness of a price, we must take into account the competitive conditions and any related abusive conduct that may enable the undertaking concerned to fulfil its pricing ambitions."

60. The competitive conditions included the fact that Dŵr Cymru was both a supplier to and competitor with Albion Water, and could effectively lower its own retail price to the level of its input costs (the costs of transporting the water). This meant that the economic value of the service (transport of the water) could be said to be equivalent to reasonable costs of transport and processing for retail.

(3) The PCR's pleaded case on unfair pricing

61. It is necessary to explain how the PCR puts her case on unfair pricing. This is set out in the Re-Amended Claim Form, supplemented by two expert reports from Mr Holt.

62. To establish that Apple's commission is excessive (the first limb of the *United Brands* test), the PCR relies on:

(1) Public sources which report the net revenue from the App Store (said to be in the region of $15 billion) and Apple's costs for running the App Store (said to be in the region of $100 million).

(2) Mr Holt's comparison of Apple's return on capital employed ("ROCE") compared with its weighted average cost of capital ("WACC").

(3) A decision made by Apple to reduce commission to 15% for small app developers.

(4) Concerns expressed by developers (including through litigation) about the level of commission.

63. To establish that Apple's commission is unfair (the second limb of the *United Brands* test), the PCR relies on:

(1) The persistency of the commission rate, which was set in 2008 and has largely been unadjusted since then.

(2) The fact that Apple's profit margin (as assessed by Mr Holt) has increased through this period.

(3) The drop in commission to 15% applicable to some developers, which is said to have happened in response to regulatory scrutiny.

(4) The other sources of revenue which Apple obtains from developers in relation to the App Store.

(5) The response of developers to the commission level, including attempts to bypass the App Store and complaints, including litigation.

(6) A comparison carried out by Mr Holt between the commission and prices for other products and services which might serve as relevant comparators.

64. Much of this was the subject of dispute before us, through Apple's Response to the CPO Application and especially through the expert report of Apple's expert economist, Professor Hitt. There was particular disagreement between Mr Holt and Professor Hitt about what other services or products (primarily offerings through other online games and app stores) were suitable comparators and also what their pricing actually was. We were in no position to resolve these disputes, not least because both experts acknowledged the limits on their information, but also because that would have been inconsistent with the limited exercise we were undertaking in these applications.

65. It should also be noted that Mr Holt described his findings in most respects as preliminary, reflecting the fact that he has had no access to Apple's internal material and limited access to material about the activities of third parties (that being limited to publicly available information).

(4) The Arguments of the Parties on Strike Out/Summary Judgment

(a) Apple

66. Apple argues that the Unfair Pricing Abuse claim advanced by the PCR is fundamentally flawed, by failing to take account of the real economic value which developers and consumers derive from the fifteen years (and continuing) of innovation in the iOS ecosystem. This intangible value cannot be measured through a cost plus approach, which would ignore the demand side benefits delivered to developers and device users.

67. The demand side benefits include (but are not limited to) the innovations which Apple has produced which allow developers to create value, for example with new features in apps for which users are willing to pay extra. Professor Hitt provided a long list of the innovations which Apple has made. Examples are GPS sensors and gyroscopes built into software and hardware, which allow

developers to create new experiences for users. Other innovation reduces the costs and effort required of developers to produce and market apps. Apple drew a comparison with a hit song or film, where the fact that the revenues generated by the product significantly exceed the costs of production does not indicate unfair pricing.

68. Apple asserts that the PCR's approach, as set out in Mr Holt's evidence, makes no attempt to grapple with this aspect of economic value and is therefore bound to fail. In particular, Apple says that:

(1) Mr Holt's ROCE/WACC comparison is just a cost plus methodology.

(2) Costs are not a meaningful measure of the economic value of intangible products and services (especially where there is constant innovation).

(3) Such products can be sold at prices that do not need to be justified by reference to their costs of production (citing *ATR* and *Latvian Copyright*).

(4) There is a considerable demand side value to the App Store which has to be measured in order to measure economic value properly. It is a requirement of the *United Brands* test that this exercise, of identifying and measuring demand side value, has to be carried out (citing *Flynn*, *ATR* and *Scandlines*).

(5) It is not sufficient (or even possible) to make this assessment of demand side factors through a cost plus exercise or (by extension) a ROCE/WACC comparison (citing *ATR* and *Scandlines*).

(6) The PCR has made it plain that she intends to disregard demand side aspects (which she has the burden to prove):

(i) Mr Holt expressly disavows any responsibility for taking them into account and suggests Professor Hitt should do the work if he thinks it is relevant.

(ii) Mr Holt's work is limited to cost and margin analysis and does not otherwise seek to reflect demand side factors.

(iii) To the extent that Mr Holt relies on a review of comparators to assess demand side factors, this is "hopeless" and should not be permitted to go to trial.

(iv) The Re-Amended Claim Form reflects Mr Holt's approach and therefore suffers from the same defects.

(b) The PCR

69. In response, the PCR says:

(1) Economic value is not a separate test, but an objective of the exercise set out in *United Brands* (citing *Flynn*).

(2) The *United Brands* test has a tripartite structure, involving:

(i) A legal test of whether the price is unfair.

(ii) An economic concept of economic value.

(iii) The methodology for determining whether the test is met (citing *Flynn*).

(3) The choice of method is flexible and will depend on the facts of the case. It is not consistent with the law to impose any particular methodology, as Apple seeks to.

(4) Mr Holt has not purported to conduct a cost-plus approach – that is, he has not sought to define a competitive counterfactual by adding a "reasonable" profit to properly allocated costs. Instead, he has measured profits using ROCE/WACC as a means of determining whether there is a "red flag" that requires further investigation.

(5) In any event, cost plus or a similar approach is an accepted starting point and cannot be criticised in a case where it can be performed.

(6) Cost plus can in appropriate cases satisfy both limbs of *United Brands* – properly assessing economic value (citing *Albion*).

(7) In other cases, there is a variety of methods which can be chosen to encompass all aspects of economic value, including demand side factors. This can for example be done through assessing the prices charged by relevant comparators (which can demonstrate what value a customer attaches to a similar product) and feedback from customers (which provides qualitative evidence of perceived value).

(8) It is relevant to consider the full context of the case, including the assertion of dominance (or indeed a monopoly position) and the other abuse claims advanced by the PCR. It is proper to assume, for the purposes of these applications, that these other arguments will succeed. In particular, Mr Holt is justified in concluding that the existence of a monopoly position, which gives Apple the status of a gatekeeper, is a better explanation of the excessive margins than any real demand side factor.

(9) In any event, Mr Holt has undertaken a number of exercises which do take account of the demand side:

(i) His assessment of relevant comparators.

(ii) His review of developer complaints.

(iii) His analysis of the persistence and magnitude of Apple's margin at excessive levels.

(10) Mr Holt has given evidence in the context of the CPO Application and it would be wrong to treat his evidence as more than just a preliminary

view. Apple is taking unfair advantage of a report prepared for a different purpose.

(5) The Tribunal's Decision on the Strike Out and Summary Judgment Applications

(a) The legal test

70. The conclusions set out by Green LJ at [97] of *Flynn* are directly relevant and we adopt and apply them here. The legal test is one of unfairness, which arises when the dominant undertaking has reaped trading benefits which it could not have obtained in "*conditions of normal and sufficiently effective competition*". The concept of "*economic value*" is part of the overall descriptor of the abuse, providing a useful (and indeed necessary) lens for assessing whether the test is met, but is not in itself the test, nor a separate element of the test. The exercise can be carried out at either stage of the two part test set out in *United Brands* (i.e. when considering if a price is excessive or considering whether it is unfair). The method chosen in any case to carry out the assessment needs to be appropriate to make a judgment about whether the legal test is met, while factoring in economic value (see also *Flynn* at [172]).

71. It follows that the choice of appropriate method needs to be sensitive to the particular facts of a case, which will include making sure that factors which are relevant to an assessment of economic value are considered and properly taken into account.

72. *ATR, Scandlines, Latvian Copyright* and *Albion Water* do not, in our view, determine what the correct method and approach to economic value should be in a case like this. We have found these cases to be of limited assistance in determining these applications. Instead, our approach is to consider this case by reference to the principles set out in *United Brands* and explained in *Flynn*. There is no single prescribed method to establish the abuse and it is important to avoid rigid rules which interfere with a considered approach to individual factual situations.

73. In relation to the question of assessing demand side benefit, the point of the *United Brands* test is to look at price in the context of a dominant (in this case, an assumed monopolist) seller. That exercise involves hypothesising what the price would have been in the presence of workable competition, or normal and sufficiently effective competition, to determine whether there may be unfairness.

74. That can be a complex exercise, especially in the case of a monopoly where there is said to be deliberate exclusion of competition to sustain gatekeeper status, so as to prevent normal competition arising. Care needs to be taken not to regard consumer willingness to pay as representing recognition of value by those consumers, given the lack of choice.

75. The extent of any inferences to be drawn from such a monopoly situation are matters of fact and degree (*Flynn* at [167]). Even if such circumstances prevail here, as the PCR alleges, there may also be benefits, which could be significant, to developers and device users which may explain why the commission can be justified, even if there are other indications that the price is excessive.

76. To the extent they exist, it is necessary for those benefits to be taken into account in the *United Brands* analysis, which means that the tools employed to make the assessment have to be capable of identifying and measuring that demand side benefit.

77. It is clear that cost plus is a conventional starting point for the *United Brands* analysis, and, where it can be performed, there is no basis to criticise that. The question is whether, standing back from that exercise, it sufficiently takes account of the factors relevant to economic value, including any demand side factors, or whether further steps or analysis are required to do that. That will depend on the facts, including the nature of the product or service and the competitive conditions.

78. It is not necessary to quantify a demand side benefit with precision, or as a numerical value, and we do not accept that the assessment of economic value requires separate identification of a demand side value. Demand side factors

need to be taken into account, but there are a number of ways in which this can be done, by the application of conventional economic theory and tools. For example, the prices charged by relevant comparators can provide evidence of the value consumers place on a product or service.

79. We do not accept that there is any established rule for assessing demand side factors in relation to intangible products or services or as a result of innovation. Neither *ATR* nor *Latvian Copyright* decide that and both cases turn on their particular facts. Instead, each case needs to be carefully assessed on its merits by reference to the product and service in question and the economic and other evidence.

(b) The Strike Out Application

80. In her Re-Amended Claim Form at [118], the PCR expressly recognises the need to consider demand side factors as part of the exercise of considering the abuse. She also pleads a methodology which is capable of reflecting demand side factors (namely the review of relevant comparables and complaints from developers).

81. The PCR also asserts (Re-Amended Claim Form at [123(a) and (b)] and [124]) that the persistence of the rate of commission and the exceptionally large and increasing profitability of the App Store indicate that the market is not competitive. She alleges as a result that the commission does not reflect the economic value of the App Store but is a fee paid under duress by developers who are wholly dependent on Apple for distribution.

82. This puts in issue the question of whether the alleged monopoly position of Apple is sufficient to draw a conclusion that demand side factors do not justify the prices that are alleged to be unfair. As is made clear in *Flynn*, that is not a matter of principle but one of fact which the PCR will have to prove at trial. However, for present purposes, her position is clear on the pleadings.

83. Taken together, these allegations are sufficient to give Apple more than adequate notice of the case being advanced in relation to demand side factors

and the facts being relied on for that. We do not accept Apple's argument that the pleadings disclose a legal error or defective approach, either in relation to the correct legal test for the abuse or for the consideration of economic value in that exercise. Both elements are clearly recorded and accepted by the PCR as relevant and necessary.

84. Insofar as Apple argues that the method which the PCR relies on is defective as a matter of pleading or discloses an error of law, we disagree:

(1) The precise method to be adopted in proving this abuse is not prescribed by the cases.

(2) On the contrary, it is a matter left open for the choice of the regulator (or by analogy in this case, the PCR).

(3) In this case, the PCR has pleaded facts which could found a methodology that takes into account demand side factors. In particular, the pleaded case on comparators at [125] to [129] of the Re-Amended Claim Form. The PCR also advances an argument about the lack of competitive conditions which is relevant to the assessment of demand side factors.

(4) To the extent a method is pleaded, it is expressed by the PCR as a preliminary approach and is likely to develop as more information becomes available. This is a reasonable position, given the current stage of the proceedings.

(5) The method is open to challenge at trial, and will no doubt be contested by Apple, but that is where this debate should be resolved and not through a strike out.

85. There are reasonable grounds for making the claim and we therefore dismiss Apple's application for strike out.

(c) The Summary Judgment Application

86. This part of the application requires us to consider not only the way in which the PCR puts her case, but also the evidence which has been or is likely to be assembled to prove it. That includes the first and second expert reports from Mr Holt.

87. Mr Holt's work to date is clearly expressed as being preliminary in nature. His first report was prepared in support of the PCR's CPO Application, in which the merits of her case might not be expected to be scrutinised in depth. We agree it is likely – indeed inevitable – that Mr Holt will want, and should be able, to refine his approach following disclosure and the further investigations which might reasonably be undertaken during these proceedings. However, it is correct, as Apple say, that Mr Holt's second report followed Apple's Response and the report of Professor Hitt, both of which made it plain that this application was on foot.

88. Mr Holt does not employ a cost plus method to determine what he finds to be the excessive nature of the commission. The ROCE/WACC comparison he conducts is a different methodology, and does not seek to add a reasonable return to an identified cost base. It does not (as cost plus does) seek to determine a hypothetical price which might have been obtained in conditions of workable competition. ROCE/WACC is instead a conventional and well accepted method of determining the profitability of a business, or part of it. It does not purport to identify or measure demand side factors, although it can serve as a reference point for consideration of such matters, which is what we understand Mr Holt to do when he considers the outcome of the comparison (a very high level of profitability) with factors such as the (alleged) monopoly power of Apple.

89. We agree with Apple that Mr Holt is somewhat abrupt in his explanation of his assessment of demand side factors. For example, in his second report he says:

> "2.2.6 I agree with Professor Hitt that aspects of the Apple ecosystem (such as device features) may increase the demand for iOS Apps which use those features, and vice versa; but he has not explained why that is relevant to the assessment of whether Apple's App Store's profits are excessive."

90. It is possible to read that sentence as being inconsistent with the PCR's pleaded case, and there are other passages where Mr Holt might be taken as suggesting that the burden of proof on this issue is on Apple, not the PCR (which is the position acknowledged by the parties). We are however cautious about drawing such a conclusion, without the benefit of any oral evidence. We also understand that Mr Holt has in fact considered demand side factors in a number of ways:

(1) By attempting to identify suitable comparators, which is an exercise designed to identify a price which would prevail in conditions of workable competition (and which would therefore reflect demand side characteristics).

(2) By assessing feedback from developers (including in litigation which is a matter of public record), which one would expect to reflect their views on the value they receive from the service Apple provides.

(3) By considering the context of Apple's profitability (determined through the ROCE/WACC comparison), which in his view suggests that the substantial margin may be secured through other factors (the alleged gatekeeper status) than demand side value attributed by developers and device users.

91. As a consequence, we do not accept Apple's argument that the PCR's Unfair Pricing Abuse claim has no reasonable prospect of success:

(1) It is not correct that Mr Holt has ignored demand side factors (the exercise of reviewing comparators, if nothing else, demonstrates that).

(2) Despite apparent difficulties with comparators (which was the subject of dispute between Mr Holt and Professor Hitt), we do not accept that Mr Holt will be unable to develop his analysis and we cannot therefore exclude the reasonable possibility that Mr Holt will in due course be able to make that argument good.

(3) As to the dispute about comparators, it is plainly not appropriate for us to seek to determine that at this stage. Complex disputes between experts regarding data and methodology are not likely to be suitable for disposal by way of summary judgment, as is made clear in *Easyair* at [15(v)].

(4) It may well be the case that Apple will in due course be able to show that the methodology chosen by the PCR does not adequately assess economic value because it fails to take into account demand side factors. That, however, is a matter for trial.

(5) As noted in the section on strike out above, the PCR has pleaded a case which is consistent with the requirements of *United Brands*, as summarised in *Flynn*, and discloses no legal error or defective approach.

92. We therefore dismiss Apple's application for summary judgment.

E. CONCLUSION

93. We grant the PCR's application for a CPO, as indicated at the hearing on 5 May 2022 and in the form approved by the Tribunal.

94. We dismiss the applications by Apple for strike out and for reverse summary judgment on the PCR's Unfair Pricing Abuse claim. In doing so we express no view on the merits of the PCR's case or the arguments advanced by Apple in response, other than to determine that there are reasonable grounds to advance the claim and it has a realistic prospect of success.

95. These decisions are unanimous in all respects.

96. The costs of the CPO Application are to be costs in the case. We will receive submissions in writing on the appropriate order for costs in relation to the strike out and summary judgment applications, if those costs cannot be agreed between the parties.

Ben Tidswell
Chairman

William Bishop

Tim Frazer

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

Date: 29 June 2022