PTA Template 269C1 - First Appeal

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2024-002758**

ENNIS –v– APPLE INC AND OTHERS

CA-2024-002758

ORDER made by the Rt. Hon. The Chancellor of the High Court

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal against the judgment of the Competition Appeal Tribunal ("CAT") dated 18 October 2024.

Decision: Permission to appeal refused

Reasons

1. The first ground of appeal pursued by the applicants (Apple) is that the CAT erred in deciding that there was no conflict of interest within the proposed class. However, as the CAT correctly pointed out the basis for alleging a conflict was a counterfactual which the class representative was not putting forward and had not pleaded. It is not alleged that the case actually put forward is affected by a conflict of interest. In those circumstances, as the class representative correctly says in his Statement under PD52C.19, the alleged conflict is entirely imagined and illusory.
2. In particular, contrary to Apple's contentions, the class representative does not put his case on the basis that the counterfactual fair price would have fallen on apps which are currently not subject to commission. His case is framed on the basis of Apple's extraordinarily high profit margin and has nothing to do with discrimination between app developers.
3. Apple also contends that there is a conflict of interest because some app developers currently pay a lower rate of commission of 15% rather than the normal 30% and if for example the CAT concluded that the correct counterfactual was one in which the fair price was 20%, that would benefit some app developers but not others. I agree with the class representative's point in the Statement that all the class members are served by arguing that the commission would have been lower than it actually was, which is what he has pleaded. As he points out the pleaded case puts forward an estimate of a counterfactual fair price of 12-15% commission on transactions using Apple's payment system and zero on transactions not using that system. I agree that if he achieves limited success, for example because the CAT concludes that the fair price for commission was 20%, then only some members of the class may benefit from the damages award, but it simply does not follow from that that it will have been contrary to their interests to argue for a lower commission.
4. The second ground of appeal is that the CAT erred in its assessment of the practicability of opt-in proceedings. However, that is a question of evaluation which is quintessentially one for the CAT as an expert tribunal with whose decision on such matters this Court will not interfere, as this Court has repeatedly said both in refusing permission to appeal and in dismissing appeals against case management decisions and evaluations by the CAT. For example, as Green LJ said in *Le Patourel v BT Group plc* [2022] EWCA Civ 593, giving the judgment of this Court, at [57]:

   "On the other hand when it comes to the weighing up of the various factors relevant to the choice of opt-out or opt-in this is essentially an exercise of judgment over facts and evidence by an expert, specialist, body, that will over time accrue an increasing well of experience in how to handle these complex cases. The appellate courts recognise that the case management decisions of the CAT are exercises in pragmatism and that undue formalism and precision are not required: See the summary of the case law in *NTN v Stellantis NV and others* [2022] EWCA Civ 16 at paragraphs [24] - [29]. These considerations broaden the Tribunal's margin of discretion or judgment. This Court should not interfere simply because it might, for the sake of argument, have drawn a different conclusion from the weighing exercise. We would expect that most opt-out/opt-in decisions will involve a weighing exercise of this nature."

5. Apple seeks to argue that the factual situation in the present case, that almost all the value of the claim is confined to a small number of class members has not arisen previously and that this is a compelling reason for the appeal to be heard. However, as the class representative points out correctly in his Statement, this factual situation clearly favours opt-out given the large number of class members with small claims. As the CAT said at [56] of its judgment:

   "In the Tribunal's judgment, the fact that the proceedings might be financially viable on an opt-in basis, because of the number of large PCMs with substantial claims, as Apple contends, would not overcome the impracticability of opt-in proceedings vis a vis the majority of the PCMs with relatively modest claims. The

process of identifying and contacting many thousands of App Developers would be costly and time consuming. Even if they could be contacted and identified, the opt-in rate would probably be very low because of the small sums involved in the majority of claims. An opt-in basis would not be in the interests of the PCMs as a whole. Consistently with the principles set out in *Le Patourel* and *O'Higgins FX*, the opt-out basis is therefore to be preferred."

6. Quite apart from the fact that this assessment was one for the CAT with which this Court will not interfere, the reasoning was entirely correct.

7. The proposed appeal has no real prospect of success and, contrary to Apple's contentions, there was no error of principle by the CAT and there is no other compelling reason for an appeal to be heard.

Signed: BY THE COURT
Date: 17 February 2025

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

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