Neutral citation [2022] CAT 39

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1408/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 August 2022

Before:

BRIDGET LUCAS QC
(Chair)
TIM FRAZER
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN

ELIZABETH HELEN COLL

Applicant /
Proposed Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Respondents /
Proposed Defendants

Heard at Salisbury Square House on 18 July 2022

JUDGMENT
(CERTIFICATION)

APPEARANCES

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

The Proposed Defendants did not appear and were not represented at the hearing.

A. INTRODUCTION

1. This is the Tribunal's judgment in respect of an application by Ms Elizabeth Helen Coll as Proposed Class Representative ("PCR") for a collective proceedings order ("CPO") ("the CPO Application"). The CPO Application seeks to combine claims pursuant to section 47B of the Competition Act 1998 ("the Act") against the Proposed Defendants (together "Google"). In summary, the PCR alleges that Google has contravened the prohibition in Chapter II of the Act and Article 102 of the Treaty on the Functioning of the European Union by imposing a network of contractual and technical restrictions that eliminate all meaningful competition to Google's Play Store on GMS Devices[1] enabling Google to collect an excessive and unfair Commission[2] on Relevant Purchases[3]. The PCR alleges that such conduct has caused loss and seeks an aggregate damages award.

B. BACKGROUND

(1) The Proposed Claim

2. The nature of the claim the PCR seeks permission to bring is summarised at paragraphs 7 to 10 of the Claim Form, filed on 29 July 2021, as follows:[4]

> "7. The five Proposed Defendants are members of the Google corporate group. As set out below, they comprise a single undertaking (referred to herein as "Google") for competition law purposes. The proceedings concern various abusive practices in which Google has engaged, and continues to engage, in relation to its Android[5] ecosystem for smart mobile devices (smartphones and tablets). In summary, Google has imposed a network of contractual and technical restrictions that hinder the competition that Google's "Play Store" would otherwise face from rival methods of Android App[6] distribution.

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[1] "GMS Device" is defined as meaning "a smart mobile device (smart phone or tablet) which runs on the Google Android operating system and on which the GMS Bundle has been pre-installed".
[2] Defined as meaning "the commission charged by Google on each Relevant Purchase using the PSPPS". The "PSPPS" is defined as meaning "the Play Store payment processing system".
[3] Defined as meaning "(i) any purchase of an Android App in the UK version of the Play Store, which a GMS Device user pays a fee to download …; or (ii) any one-time purchase by a GMS Device user within an Android App downloaded from the UK version of the Play Store, for which the GMS pays a fee … or (iii) any recurring purchase by a GMS Device user within an Android App downloaded from the UK version of the Play Store, for which the GMS Device user pays a fee …" subject to various exclusions.
[4] References to footnotes in Claim Form are excluded.
[5] Defined as meaning "Google's proprietary licensable smart mobile operating system."
[6] Defined as meaning "an app developed for Android by a third-party developer (i.e. not by Google)."

Google then interposes itself between GMS Device users[7] and Android App developers by forcing the latter to use Google to process the payments for all Relevant Purchases. As a result, Google is able to charge a Commission on each and every Relevant Purchase made by GMS Device users. This Commission, which is usually set at 30%, is excessive and unfair, causing GMS Device users to suffer loss and damage.

8. As described in a recent US House of Representatives Report: "…Google's Play Store now functions as a gatekeeper, which Google is increasingly using to hike fees and favor its own apps".

9. … [T]he PCR contends as follows:

a. Google occupies a position of dominance (indeed a position of "superdominance") in each of: (i) the market for the licensing of smart mobile operating systems (the "Licensable OS Market"); and (ii) the market for the distribution of Android Apps to Android Device users ("Android App Distribution Market"). Further, it holds a monopoly in (iii) the market for the provision of payment processing services for Relevant Purchases ("Play Store Payment Processing Market"). […]

b. In breach of Article 102 TFEU and section 18 of the Competition Act 1998, Google has abused its dominant positions by engaging in the following, mutually reinforcing exclusionary and exploitative practices, which do not constitute competition on the merits:

i. bundling the Play Store with other important Proprietary Apps, with the consequence that smart mobile device manufacturers ("OEMs") who wish to pre-install such apps on their devices have no choice but to install, and prominently display, the Play Store […];

ii. imposing a series of contractual and technical restrictions which restrict the ability of Android App developers to distribute Android Apps to GMS Device users via distribution channels other than the Play Store […]; and

iii. requiring that payments for Relevant Purchases be made exclusively through Google's PSPPS, thus preventing Android App developers from utilising other payment processing service providers in respect of Relevant Purchases; and

iv. charging the excessive and unfair Commission in respect of all Relevant Purchases.

10. Ms Coll is the owner of a GMS Device and has made Relevant Purchases in the period set out in this Claim Form. She has thus suffered loss. She brings this claim on behalf of a straightforward and readily identifiable Proposed Class[8] […] of users of GMS Devices who have made one or more Relevant

[7] Defined as including "all users of GMS Devices, whether legal or natural persons" subject to various limited exclusions. "GMS Bundle" is defined as meaning "the bundle of Proprietary Apps and services that Google licenses together, as specified and amended by Google from time to time". "Proprietary App" is defined as meaning "an Android App developed by Google".

[8] Defined as "All GMS Device users who, during the Relevant Period, used the UK version of the Play Store and made one or more Relevant Purchases" subject to various exclusions. The "Relevant Period"

> Purchases, whose claims are eligible for inclusion in collective proceedings. Those claims are brought on an opt-out basis for UK domiciled members of the Proposed Class and on an opt-in basis for non-UK domiciled members of the Proposed Class, and seek an aggregate award of damages. On a preliminary estimate, the aggregate losses suffered by the approximately 19.5 million Proposed Class Members[9] […] are between GBP 263m and GBP 752m (excluding interest)."

3. The PCR has provided a witness statement in support of the CPO Application. Rule 75(2)(h) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") requires the PCR to confirm that they believe that the claims which it is sought to combine in the collective proceedings have a real prospect of success. Ms Coll has confirmed that this is her belief. Her belief is informed by the initial expert economic report of Mr Derek Holt of AlixPartners. Mr Holt's preliminary view, based on publicly available information, is that Google's conduct which is the subject-matter of the proposed collective proceedings, is likely to have distorted competition and caused loss to GMS Device users.

4. Although the Claim Form makes clear that this claim is brought as a standalone action and does not rely upon a regulatory decision to establish liability, we have been referred to a number of investigations undertaken by competition authorities in relation to Google's Android operating system and Android Apps. These include:

   (1) A market study into mobile ecosystems by the Competition and Markets Authority ("CMA") in the UK, focussing (amongst other things) on Apple and Google's *"effective duopoly"*, and the CMA's interim report of that study.

   (2) An investigation by the European Commission into Google's conduct in relation to the Android operating system and certain Android Apps which concluded in 2018.

   (3) A market study published in April 2019 by the Dutch Authority for Consumers & Markets which included the nature of the Google

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means the period between "1 October 2015 and the date of final judgment or earlier settlement of the present collective proceedings."

[9] Being members of the Proposed Class.

ecosystem, the effect of Google bundling its services, and the impact of the commission charged in connection with the Play Store.

(4) An investigation in the USA by the House Judiciary Committee's Sub-committee on Antitrust, Commercial and Administrative Law into competition in digital markets, focussing on the dominance and business practices of dominant online platforms, including Google.

(5) An inquiry by the Australian Competition & Consumer Commission into markets for the supply of digital platform services.

(6) Legislation brought into effect in South Korea relating to Google's payment processing services.

(7) An investigation by the Competition Commission of India.

5. We were also referred to (a) a number of legal proceedings, relating to Google's conduct in the distribution of Android Apps and its Play Store, brought in a number of jurisdictions including the UK, Australia, and the US, and (b) to a ruling by the Paris Commercial Court which fined Google EUR 2 million in relation to its practices towards Android App developers. The PCR also referred to a *"pilot"* scheme announced by Google on 23 March 2022 in which a small number of participating Android App developers will be able to offer GMS Device users a choice of payment processing services.

6. Google denies the PCR's allegations. On 14 February 2022, Google filed a response to the CPO Application and, for various reasons, contended that a CPO should not be granted. However, on 22 June 2022, Google informed the PCR that it was withdrawing its opposition in the light of recent judgments and Court of Appeal guidance but reserved its rights to make its points in the substantive proceedings that will follow, should the Tribunal make a CPO.

C. THE PROPOSED COLLECTIVE PROCEEDINGS

7. The PCR filed her Claim Form on 29 July 2021. The then President of the Tribunal made an order on 29 September 2021 permitting service out of the jurisdiction on the non-UK Google entities. A case management conference took place on 17 January 2022 at which various directions were given. The contested CPO Application was listed to commence on 18 July 2022 with a time estimate of 2 days.

8. On 22 June 2022, the PCR notified the Tribunal of Google's position and invited us to consider whether or not we would be prepared to determine the CPO Application on the papers. The Tribunal was informed that the PCR "*remains available to answer any questions that the Tribunal may have in relation to her CPO Application but proposes that any such queries could be addressed in writing*". The PCR invited us to adopt this approach, citing cost and time efficiency. We declined to accede to that invitation. We did so for a number of reasons:

    (1) First, and most importantly, as Lord Briggs explained in *Mastercard Incorporated and others v Walter Hugh Merricks CBE*[10] ("*Merricks*") at [4]: "*The CAT is given an important screening or gatekeeping role over the pursuit of collective proceedings.*" In particular: "*... collective proceedings may not be pursued beyond the issue and service of a claim form without the CAT's permission, in the form of a CPO, for which the representative must apply.*" Given the Tribunal's role and the potential impact of a CPO on, in particular, Proposed Class Members, it is important in our view that the conduct of a CPO Application is transparent. We are conscious that this is a developing area of the law. We are not saying that it would (or will) never be appropriate to determine such applications on the papers. However, in our view, this is not the occasion on which to do so, given the developing nature of the relevant caselaw, procedure and practice relating to CPO applications generally.

[10] [2020] UKSC 51.

(2) Secondly, whilst the PCR offered to answer any questions in writing that the Tribunal might have in relation to this CPO Application, we did not consider that to be a satisfactory substitute for an oral hearing in this case. In our view, we did not consider that it would necessarily prove to be cost or time effective for the parties or the Tribunal to become engaged in what had the potential to become a number of exchanges of correspondence, depending on the questions asked and responses received.

9. As it transpired, there were a number of issues arising from the PCR's expert reports of Mr Holt on which the Tribunal wished to ask clarificatory questions. We considered these issues would be better dealt with at a hearing for the two reasons to which we have referred. Further, although Google withdrew its opposition to a CPO being granted and were not represented at the hearing, Google had raised in correspondence with the PCR various issues relating to the PCR's proposed funding arrangements which it maintained needed to be raised with the Tribunal.

10. Prior to the hearing, by letter dated 24 June 2022, we were also provided by the PCR's legal representatives with further information relating to the PCR's proposed funding arrangements. This information reflected queries raised by this Tribunal in *Kent v Apple Inc (and others)* [2022] CAT 28 prior to, and during the hearing of an application for a CPO in that case which took place on 4 and 5 May 2022.

11. In short, therefore, whilst in theory it may have seemed possible to have a paper-based application, we were greatly assisted by Mr Jones, Counsel for the PCR, who attended the hearing and drew our attention to the relevant evidence (including in relation to the five specific issues that Google suggested ought to be raised with the Tribunal) and relevant authorities, and by Mr Holt who attended and answered our questions.

D. THE RELEVANT LEGAL BACKGROUND

12. Section 47B of the Act sets out the requirements that must be fulfilled in order for the Tribunal to make a CPO. In particular, Section 47B(5) provides that:

> "The Tribunal may make a collective proceedings order only—
>
> (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
>
> (b) in respect of claims which are eligible for inclusion in collective proceedings."

There are therefore two conditions that must be satisfied before the Tribunal may make a CPO: an "Authorisation Condition" and an "Eligibility Condition". This is also reflected in Rule 77 of the Tribunal Rules.

13. The Authorisation Condition is dealt with in section 47B(8) of the Act. The Tribunal may only authorise "*a person to act as the representative in collective proceedings […] if [it] considers that it is just and reasonable for that person to act as a representative in the proceedings*" (section 47B(8)(b)). Rule 78(2) of the Tribunal Rules sets out the factors that the Tribunal will have regard to when determining whether it is just and reasonable for the PCR to act as the class representative:

> "(2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—
>
> (a) would fairly and adequately act in the interests of the class members;
>
> (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
>
> […]
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so; and
>
> […]
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—

(a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;

(b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;

(c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—

(i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(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."

14. The Eligibility Condition is addressed in section 47B(6) of the Act: "*Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings*". Rule 79(1) of the Tribunal Rules provides that if the Eligibility Condition is to be met, the Tribunal must be satisfied that (a) the claims are brought on behalf of an identifiable class of persons; (b) the claims satisfy the "the common issues requirement"; and (c) the claims satisfy the "suitability requirement".

15. Rule 79(2) provides that in determining whether the suitability requirement is met, 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 of the 1998 Act(**a**) or otherwise."

16. Section 47B(7) of the Act provides that should a CPO be made it must include the following matters:

> "(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,
>
> (b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and
>
> (c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings …."

17. Before it makes a CPO, the Tribunal is also therefore required to consider whether the collective proceedings should be "opt-in" or "opt-out." As to this Rule 79(3) of the Tribunal Rules provides that:

> "(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

18. It is now well-established, (*Merricks* at [59]) that the Tribunal is not generally required to take into account the merits of the PCR's proposed claim when considering an application for a CPO. That is subject to two exceptions. The first is where a strike out or summary judgment application is made. That does not apply in this case. The second is when considering whether proceedings should be opt-in or opt-out.

(1) Consideration of the CPO Application

(a) The Authorisation Condition

19. We are satisfied that the Authorisation Condition set out in section 47B(5)(a) of the Act is met. We note that Google no longer contends otherwise. We set out our reasons in the following paragraphs.

20. We are required by Rule 78(2)(a) of the Tribunal Rules to consider whether the PCR would act fairly and adequately in the interests of the class, by reference to the matters set out in Rule 78(3). Ms Coll provided a witness statement in support of the CPO Application which addressed her suitability to act as the class representative. Ms Coll summarised her career in consumer protection, public policy and digital markets. She is an independent consultant focusing on consumer technology policy issues. She provides support and advice to individuals and groups, including consumer organisations, thinktanks and standards bodies to understand the opportunities and risks for consumers across digital markets, and to provide advice. She works on a range of issues including e-commerce, platform marketplaces, online safety, consumer "internet of things", artificial intelligence, product safety, data protection and privacy.

21. Ms Coll explains her reasons for wanting to act as the class representative, and her belief that these proceedings: *"represent an opportunity for consumers to pursue the redress which is owed to them in circumstances where each of the Proposed Class Members would not realistically be able to pursue such redress individually*."[11] Ms Coll confirms that she has the time to manage the direction of the proposed collective proceedings on behalf and in the best interests of the Proposed Class Members.

22. Ms Coll confirms her belief that her background, qualifications and experience mean that she is able to understand the issues raised in the proceedings. She has also established a consultative group, comprising a retired High Court Judge experienced in competition law and the collective actions regime, an academic specialising in consumer law, and an expert in the area of payment systems. She will have the benefit of their guidance and that of her legal team, which is experienced in this area.[12] She has also confirmed, and explained the basis for her belief, that she has the experience and ability required to direct and manage complex legal proceedings.[13]

[11] Coll Witness Statement §35.
[12] Coll Witness Statement §36.
[13] Coll Witness Statement §37-40.

23. As regards Rule 78(2)(b), Ms Coll is a member of the Proposed Class as she owns a GMS Device and made Relevant Purchases during the Relevant Period. She has confirmed that she is unaware of any interest that would conflict with those of the proposed class in respect of the common issues to be decided.

24. We are also required to take into account the PCR's proposals for funding the proceedings. This arises in two ways. First, we are required to have regard to the PCR's ability to fund Google's recoverable costs if ordered to do so (Rule 78(2)(d)). Secondly, we are required to 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 … is likely to assist the Tribunal's assessment in this regard*" (paragraph 6.33 of the Tribunal's Guide to Proceedings 2015 (the "Guide")). The PCR's funding arrangements are also relevant to our assessment of whether the PCR would act fairly and adequately in the interests of the class members. The PCR is expected to prepare a plan for the collective proceedings.[14] We are required to take into account whether that plan satisfactorily includes "*any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the [PCR] shall provide*" (Rule 28(3)(c)(iii).

25. In *UK Trucks Claim Limited and Others v Stellantis N.V. and Others* [2022] CAT 25, the Tribunal noted at [32] that:

> "32. […] a CPO application is made at a very early stage of the proceedings. We would not expect, nor would it often be possible, for such a litigation plan to set out in detail how (e.g. by way of disclosure applications or additional expert evidence) the PCR would deal with various issues that may arise. Lord Briggs in *Merricks SC* at [42] regarded the Canadian jurisprudence in this area as persuasive, and in *Godfrey v Sony Corp* [2017] BCCA 302, the British Columbia Court of Appeal stated at [255]:
>
> > "… class proceedings are flexible and dynamic in nature. At the certification stage, the standard that a litigation plan must meet is not one of perfection; … the plan need only set out "a framework within which the case may proceed" and "demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case.""
>
> We respectfully agree and adopt that approach."

[14] Paragraph 6.30 of the Guide.

26. In support of her CPO Application, the PCR provided: (1) a Litigation Plan; (2) the Amended and Restated Litigation Funding Agreement ("LFA"); (3) the Notice and Administration Plan; (4) the Litigation Budget; and (5) the Litigation Timetable.

27. The PCR's Litigation Plan was produced with the assistance of her legal representatives, and Epiq Systems. ("Epiq"). It addresses the matters set out in Rule 78(3)(c) of the Tribunal Rules and paragraph 6.30 of the Guide satisfactorily. It includes information regarding how the PCR proposes to bring the proposed proceedings; how she proposes to communicate with and report to the Proposed Class regarding developments in the proceedings (and in this regard annexes the Notice and Administration Plan); a procedure for governance of the proposed proceedings, and consultation with the Proposed Class; the PCR's proposals in relation to disclosure, witness statements and expert reports; and the PCR's estimated costs, fees and disbursements (and annexes the Litigation Budget). It also addresses on a provisional basis how the PCR considers that any sums awarded by way of an aggregate damages award or settlement might be distributed.

28. The Notice and Administration Plan has been prepared by Epiq (a well known provider of services in this field) and addresses the requirements of paragraph 6.30 of the Guide in further detail. It includes detail as to the building and maintenance of a Claim Website; the proposed method of reporting on developments in the proposed proceedings and an accompanying public relations campaign to be managed by Palatine Communications; how enquiries from Proposed Class Members will be dealt with; and the proposed process for opting out (UK domiciled Proposed Class Members) or opting in (for those domiciled outside the UK) of the proposed proceedings. It also provides a provisional outline of a possible process that would enable the Proposed Class Members to claim a share of any aggregate damages award, setting out what may be required from Proposed Class Members by way of proof.

29. We are satisfied that the Litigation Plan, and the documents filed with it, appropriately set out a framework within which the case may proceed and

demonstrate that the PCR and her legal representatives have a clear grasp of the complexities involved.

30. As regards the funding arrangements, the PCR's own costs are set out in the Litigation Budget. It is proposed that these be funded through: (1) the LFA between the PCR and Vannin Capital PCC for and on behalf of Project Pontac PC (the "Funder"), and (2) deferred fee arrangements between the PCR and her legal team.

31. The Tribunal was notified by the PCR's legal representative on 13 May 2022 of two amendments made to the PCR's LFA with the Funder. These amendments relate to the treatment of any damages awarded and the termination rights. The latter amendment mirrored one made to the termination rights in the litigation funding agreement in Case No. 1266/7/7/16 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*[15], and provides that the Funder must base any decision to terminate funding on *"independent legal and, where appropriate, expert advice"*.

32. Although Google did not appear before us, Google raised a number of points in correspondence with the PCR. By letter dated 22 June 2022 ("the 22 June Letter"), Google informed the PCR that it remained of the view that "*there are a number of features of the funding arrangements which are unsatisfactory*", of which five features were identified as being of particular concern. Four related to the LFA and one to the After the Event Insurance Policy ("ATE Policy) – which is the means by which the PCR intends to cover any liability to pay Google's costs. Mr Jones, quite properly, took us through each of these points and in so far as they raised information that is confidential, this was done in private session.

33. The four LFA-related points all related to the Funder's own financial arrangements with its own lenders, rather than the LFA entered into between the Funder and the PCR. This arrangement was described by Mr Nicholas Paul Fegan, a director of Vannin Capital PCC in a witness statement dated 31 January

[15] The relevant amendment is set out at [27], [2021] CAT 28.

2022. 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 Pontac is one. A protected cell has no legal identity separate from that of the protected cell company and is not a body corporate in its own right. Any liability of a protected cell extends only to the assets of that cell, and not to the other assets of Vannin Capital PCC. The Funder 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). We were informed that as of 31 March 2022, Fortress manages around $53bn of assets. The funding to be provided under the LFA in this case is £11,290,031.

34. The points raised by Google therefore relate to the contractual basis on which Vannin Capital PCC is entitled to obtain funds from another entity within the Funder's corporate group. We were provided with a copy of the documentation recording the loan arrangement (the "Facility Agreement").

35. Two of Google's points, we were informed, were essentially administrative oversights (funding having continued to be available in the meantime) and which, now they had been pointed out, were being addressed. However, we asked for confirmation that this had been done. That has now been provided.

36. The other two points related to whether or not the availability of funding for this case is ring-fenced, or is in some way dependent on the outcome of other cases funded by Vannin Capital PCC, such that the possible future funding of the proceedings is in doubt.

37. Vannin Capital PCC is a member of the Association of Litigation Funders of England and Wales ("ALF"). As to the significance of this, Mr Jones noted that members of the ALF are subject to a voluntary Code of Conduct and referred us to the Tribunal's judgment in *UK Trucks Claim Limited and others v Fiat Chrysler Automobiles N.V. and Others* [2019] CAT 26 ("*UK Trucks*") at [54] which states that: *"it is wholly unrealistic to suppose that a leading litigation funder that is commercially active in this field would not honour these commitments to the Association […] and thus place at risk the whole regime of*

self-regulation". Whilst in that case, the funder was a founder member of the ALF, we accept the force of this statement. We also accept that the Funder has "*a clear commercial incentive to continue to fund the claims through to judgment (or settlement). […] [it] is investing massive sums, and if the claims came to a halt in, say, two years because the money ran out, the funders will recover nothing*".[16]

38. In what Mr Jones described as "*the extremely unlikely event that the Funder were to default on its obligations under the LFA*", it was submitted that "*(i) Ms Coll would seek funding from elsewhere, and (ii) even in the worst-case scenario (if no funding could be found and Ms Coll's claim was withdrawn) Google's costs would still be covered by the ATE*".[17]

39. As the Tribunal said in the *UK Trucks* judgment:

> "75. […] it is not a requirement under the CAT Rules that the Tribunal must determine the likely costs of the Applicant to the end of trial and be satisfied that the proposed class representative has secured sufficient funding to cover those costs. What is required is for the Tribunal, in deciding whether to authorise a [PCR], to take into account the estimated costs and arrangements which the applicant has made in that regard: rule 78(3)(c)(iii)."

40. Taking into account the Litigation Plan, the Litigation Budget, and the LFA, we are satisfied that (a) the terms of the funding agreement do not impair the ability of the class representative to act fairly and adequately in the interests of the class members, and (b) that adequate funding has been arranged to pursue the litigation effectively in the interests of the class members.[18]

41. Taking into account the documents provided with the CPO Application, listed in paragraph 26 above, and the matters set out in paragraphs 20 to 40 above we are also satisfied that the PCR will act fairly and adequately in the interests of the class members in pursuing these claims.

42. As regards Rule 78(2)(d) of the Tribunal Rules and the ability of the PCR to pay Google's recoverable costs if ordered to do so, the PCR has obtained an ATE

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[16] [2019] CAT 26 at [74]
[17] Skeleton Argument §29(e).
[18] [2019] CAT 26 at [66].

Policy which provides cover for a maximum liability of £10 million. An endorsement to the ATE Policy provides Google with direct rights to enforce its terms. The PCR is not required to obtain cover for all of the exigencies of litigation that may arise. On any view, £10 million is a significant amount of money for the costs of this action. We note that Google in its response to the CPO Application suggested that this "*could not possibly be sufficient to pay Google's costs*"[19], although it does not now oppose the making of the CPO on this ground. Google made other points in its response relating to the ATE Policy which, except for one which we will come to, are no longer relied upon to oppose the granting of the CPO.

43. We consider that the PCR has demonstrated the ability to pay a substantial level of recoverable adverse costs, and the ATE Policy cover should be sufficient for at least a significant part of the proceedings. If necessary, as proceedings continue, this can be revisited, and the terms of the CPO varied or revoked accordingly.[20]

44. The fifth point raised by Google in the 22 June Letter relates to the ATE Policy, and in particular the Anti-Avoidance Endorsement ("AAE"). The AAE provides that any adverse costs order will be met by the ATE Policy, and that the insurer will not be able to avoid paying Google on the basis that Ms Coll was in breach of the provisions of the ATE Policy. The AAE also provides that: "*if any payment is, or has been made, under this Policy which would not have been made but for the terms of [the AAE]* [i.e. because Ms Coll was in breach of its terms] *the Insurer reserves the right to reclaim the amount of such payment directly from [the PCR]*". Google's point is not that the AAE means that there is a risk that it will not be paid its costs: the whole point of the AAE is that Google will be paid even if the proposed PCR is in breach of the ATE Policy.

45. Google's point is that the fact that the Insurer may be able to reclaim costs from Ms Coll creates a "*material risk of the PCR being inhibited in her pursuit of the Proceedings for fear of creating a situation in which the insurer might be*

[19] At §56.
[20] [2019] CAT 26 at [109].

permitted to avoid cover or cancel the ATE Policy."[21] Google's argument does not therefore go to whether or not the PCR will be able to pay the defendant's recoverable costs if ordered to do so (Rule 78(2)(d)) but rather to whether Ms Coll would be inhibited in her conduct of the case.

46. The problem, it is said, would become particularly relevant in the event that there is a proposed settlement. This is because the ATE Policy provides that the Insurer has a right to terminate should the PCR's legal representatives advise the PCR to agree to settle, and the Insured refuses to follow that advice without the Insurer's approval.[22] In other words, the scenario envisages that (1) the PCR's legal representatives advise the PCR to settle; (2) the PCR does not consider this to be in the best interests of the Proposed Class Members; and (3) the Insurer also insists that the PCR settle. In that situation, Google suggests that the PCR may be forced to settle against her will (and against the interests of the Proposed Class). Mr Jones submitted that for this problem even to arise, the proposed settlement would have to involve the payment of costs to Google by the Insurer. We do not think that is necessarily right. However, it is also not clear to us which costs Google suggests the PCR would be at risk of having to repay: presumably any future costs orders that might be made in favour of Google should she continue the case.

47. In any event, we are not persuaded that this situation is likely to arise, or that the remote possibility that it might can be said to present a material risk that the PCR will not act fairly and adequately in the interests of the class members. In that regard, we note that any settlement would require the Tribunal's approval, including as to terms relating to costs.[23]

48. We were informed at the hearing that the key terms of the ATE Policy and LFA had been explained to the members of the Consultative Group and that their views had been canvassed on these arrangements, and that the members had also been provided with Mr Fegan's witness statement and a copy of the Facility Agreement, whose material terms were discussed with them. We asked for

[21] §56(d) of Google's Response to the CPO Application
[22] Clause 4.1.3.
[23] Section 49A of the Act and 6.125 of the Guide.

confirmation that they were comfortable with the arrangements. We were advised shortly after the hearing that the Consultative Group is content with Ms Coll's funding arrangements, although the terms of the Facility Agreement (to which Ms Coll is not a party) were not discussed in any detail and the members were not requested to express a view on it.

49. Finally, Ms Coll confirms in her witness statement that she is not aware of having any interest that conflicts with the interests of the Proposed Class Members in respect of the common issues, and we note that Google has not suggested otherwise.[24]

(b) The Eligibility Condition

50. In terms of suitability of the claims for collective proceedings, we are satisfied for the purposes of Rule 79(1)(a) that the Proposed Class is identifiable through Google's transaction-level dataset.[25] The Proposed Class consists of "*All GMS Device users who, during the Relevant Period, used the UK version of the Play Store and made one or more Relevant Purchases*".[26] Ms Coll in her witness statement has explained that it will be straightforward for a GMS Device user to work out whether they are in the Proposed Class, by checking their purchase history and Google Play Store country within their Play Store app or registered Google account(s) online.

51. We are also satisfied for the purposes of Rule 79(1)(b) that the claim raises common issues which are the same or substantially the same for all of the Proposed Class Members. The Claim Form identifies the following:[27] the definition of the relevant economic markets; whether the Proposed Defendants hold a dominant position on those relevant markets; whether the Proposed Defendants have abused and/or continue to abuse their dominant positions; and the rate and duration of the Proposed Class Members' entitlement to pre-

[24] Coll Witness Statement at §62-64.
[25] Claim Form at §199. Expert Report of Robin Noble at §2.5.
[26] The definitions of "GMS Device"; "GMS Device users"; "Relevant Period"; and "Relevant Purchases" are respectively set out in footnotes 1, 7, 8 and 3 above.
[27] §205(a)-(e).

judgment interest. Google does not dispute that at least some issues are common to the Proposed Class and raise the same, similar or related issues of fact or law.

52. The PCR also contends that issues of loss, namely (a) whether any abuse(s) of dominance by the Proposed Defendants caused Proposed Class Members to pay a higher price when making Relevant Purchases than they would have done absent the infringements and, (b) if so, the aggregate loss suffered by the Proposed Class Members, are common to the Proposed Class. The PCR relies upon the methodology explained in Mr Holt's two expert reports.

53. The test to be applied is that laid down by the Canadian Supreme Court by Rothstein J in *Pro-Sys Consultants Ltd v Microsoft Corp* 2013 SCC 57, [2013] CLR 477, as approved by Lord Briggs in *Merricks* at [40]:

> "In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied".

54. The *Pro-Sys* test is a "*low threshold*": establishing "*some basis in fact*" for the satisfaction of the "common issues requirement" requires "*only a minimum evidentiary basis and [is] not an onerous [test]*".[28] As this Tribunal said in *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and others* [2022] CAT 10 at [107]: *"[r]ealistic prospect", means just that. It does not mean that the Tribunal must satisfy itself that the methodology is bound to work, or will work on the balance of probabilities, whatever the evidential challenges. The Tribunal is not conducting a mini-trial*". The Tribunal's role is not to determine the best methodology available, but to assess the one put forward by the PCR.[29] The Tribunal's role is also not to choose between the rival approaches of the parties' respective expert economists.[30] Proportionality is an important issue when considering the appropriateness of any particular

[28] [2020] UKSC 51 at [41].
[29] [2022] CAT 10 at [97] and [135].
[30] *Gibson v Pride Mobility Products Ltd* [2017] CAT 9 at [106].

methodology for estimating class-wide loss which is an issue to which the "broad axe" principle applies.[31]

55. Google, relying on the report of their expert, Mr Robin Noble (of Oxera Consulting LLP), raised numerous criticisms of Mr Holt's methodology. Google does not, however, now seek to oppose a CPO on this ground. Mr Jones explained to us the PCR's response to the various points of criticism Google had raised. In this regard, we note that various aspects of Mr Holt's reports which were the subject of criticism are necessarily preliminary and provisional at this early stage in proceedings, in particular given that disclosure has yet to take place. We also note that this is an industry which is likely to be rich in transaction data.

56. We advised the parties[32] that there were some issues on which we wished to ask clarificatory questions of Mr Holt arising from his reports. We are grateful for Mr Holt's attendance at the hearing in order to deal with our questions. In short, the points were as follows:

(1) The implications of including tablets (in addition to smartphones) in relation to market definition. In short, Google's share of the tablet market is growing, but is not as extensive as its share of the smartphones market. Mr Holt explained to us that the inclusion of tablets would have no impact on his market definition analysis, given the specific products he has focused on. Mr Holt also explained to us the basis upon which he has estimated the degree of overlap between Android smartphone and tablet users, and that he would expect disclosure to provide further information in this regard. Mr Holt also confirmed that, as the aggregate damages calculation is on the basis of "spend per device," it is not affected.

(2) The volume effect. Mr Holt has not been asked to look at a methodology to take this into account. He explained that he referred to the "volume

[31] [2020] UKSC 51 at [51] and [121].
[32] By letter dated 13 July 2022.

effect" looking at matters from the perspective of a purchaser of apps. In other words, it is not a case of considering (from the point of view of the seller) sales that would have been made, but for the alleged overcharge and the loss of profit on those sales. Rather, the volume effect (from the point of view of the purchaser) is an assessment of what purchases a purchaser would have made but for the alleged overcharge. Mr Jones confirmed that the volume effect does not affect the calculation of aggregate damages because no damages are sought in this regard in the Claim Form.

(3) The dispersion of alleged harm amongst users. Mr Holt's reports refer to the fact that certain key segments of app purchases (such as games) account for a large proportion of Relevant Purchases. Mr Holt informed us that he had not been asked to consider how this might influence the way in which damages would be distributed. In terms of incidence of harm, Mr Holt informed us that, whilst there may be some slight variation in Commission charged, it was unlikely to relate to any particular segment of app purchasers. This is a matter on which Mr Holt anticipates more information will become available on disclosure.

(4) The approach to business users. This is relevant given the issue of pass on. Mr Holt explained that it may be possible to identify business users from data provided by Google on disclosure. Mr Holt also noted that certain key segments would appear to be essentially consumer-focused (the vast majority of spending is in relation to games). He also considered that a number of businesses may have separate contractual arrangements with Google as regards Android Apps that may then be distributed to their employees. The group of relevant business users making Relevant Purchases through the Play Store may be a relatively narrow one.

57. As we have indicated, Mr Holt confirmed that he had not been asked to consider a methodology for distribution. Mr Jones referred us to the Notice and Administration Plan. That states (at paragraph 12.11) that Proposed Class Members are likely to have digital records of their purchases; that this would

facilitate the validation of claims, which could be as individualised as possible. We questioned Mr Jones as to whether or not this was feasible, or desirable if there are a number of low value claims. Mr Jones drew our attention to one possibility to deal with such claims which is addressed in the Notice and Administration Plan. In any event, we accept that the "*fairest method will best be left until the size of the class and the amount of the aggregate damage are known*".[33]

58. We are satisfied that the claims are suitable for inclusion in collective proceedings. Suitability in this context means suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages.[34] The factors we are to take into account and listed in Rule 79(2) of the Tribunal Rules are not separate suitability hurdles, each of which must be surmounted, but potentially relevant factors which are to be weighed in the balance (with any other factor the Tribunal thinks fit).[35]

(1) There are clearly common issues. We consider that these include the issue of loss. Collective proceedings are an appropriate means for the fair and efficient resolution of the common issues. It seems to us to be a paradigm case for such an approach.

(2) The costs of pursuing the proceedings are plainly significant. However, they will be incurred for the benefit of a large class of claimants: estimated to be 19.5 million. Any order for adverse costs will be met by the ATE Policy. The PCR's costs will be covered by the LFA. If the claim is successful, any shortfall in costs recovered from Google may be directed to be paid from undistributed damages pursuant to Rule 93(4).

(3) We were advised by the PCR that there are no other pre-existing proceedings.

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[33] [2020] UKSC 51 at [77].
[34] [2020] UKSC 51 at [56].
[35] [2020] UKSC 51 at [61].

(4) As we have noted, the size of the class is significant. We are satisfied that Proposed Class Members ought to be capable of being readily identified. It is unlikely that any other form of litigation would provide a practical or proportionate way of pursuing their claims.

(5) In our view, the claims are better suited to an aggregate award than to a large number of individual awards.

(6) The PCR has indicated her openness to considering any fair proposals for alternative dispute resolution.

(c) Opt-in/opt-out

59. We are required to consider and specify whether the claims are to be brought on an opt-in or opt-out basis. Ms Coll seeks a CPO on an "opt-out" basis for Proposed Class Members domiciled in the United Kingdom on the Domicile Date, and an "opt-in" basis as regards Proposed Class Members domiciled outside the United Kingdom on the Domicile Date.

60. Rule 79(3) provides that when deciding whether collective proceedings should be "opt-out" or "opt-in" we are required to have regard to all factors we think fit, including those set out in Rule 79(2) and, in addition, the strength of the claims, and whether it is practicable for the proceedings to be brought as "opt-in" given the circumstances including the estimated amount of damages individual Proposed Class Members are likely to recover.

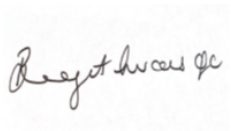
61. Neither party suggested that, as regards those domiciled in the United Kingdom, opt-in was preferable. We consider that the Proposed Claims should proceed as "opt-out" proceedings. In so deciding, we have taken into account our findings in paragraph 58 above. In addition, as regards the strength of the claims, Google, whilst denying liability has not applied to strike-out, or sought summary judgment, on any aspect of the Proposed Claims. We are not required to conduct a full merits assessment of the claim at this stage. Taking a high-level view of the strength of the claims, whilst there has been no decision as to infringement, we bear in mind the matters referred to in paragraphs 4 and 5 above. We

consider that the Proposed Claims are sufficiently strong to proceed on an opt-out basis.

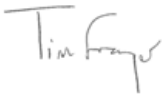
62. We also consider that it is appropriate for the claims of Proposed Class Members who are domiciled outside the United Kingdom to proceed on an "opt-in" basis. It would be inappropriate to proceed in relation to such claimants on a basis so as to bind them, notwithstanding the fact that they are domiciled elsewhere and may, as a consequence, be unaware of the existence of these proceedings. However, if such Proposed Class Members wish to avail themselves of the opportunity to join these proceedings then it is plainly right that they should have the opportunity to do so.

E. CONCLUSION

63. For the reasons set out above, we find that the requirements for a CPO are satisfied in this case. We grant the PCR's Application for a CPO, as indicated at the hearing on 18 July 2022 and in the form to be approved by the Tribunal. Our decision is unanimous.



Bridget Lucas QC
Chair



Tim Frazer

Professor Michael Waterson

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

Date: 31 August 2022