



Neutral citation [2024] CAT 22

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 April 2024

Before:

JUSTIN TURNER KC
(Chair)
JANE BURGESS
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN

JUSTIN GUTMANN

Applicant / Class Representative

-and-

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(3) APPLE RETAIL UK LIMITED

Respondents / Defendants

RULING
(FUNDING: COSTS AND APPLICATION BY APPLE FOR PERMISSION TO
APPEAL)

(1) Costs

1. We invited the parties to agree costs in the case but the Class Representative seeks its costs in relation to Apple's unsuccessful application to oppose the Gutmann LFA. It observes that Apple sought to oppose certification on various grounds and was unsuccessful in its opposition.
2. It is correct that Apple was unsuccessful in opposing the Gutmann LFA, but we consider it artificial to isolate this matter from the earlier LFA advanced by the PCR which it is now common ground was illegal in accordance with *PACCAR*. The need to file the Revised LFA and the need for a further hearing to consider its terms arose from the inadequacy of the first LFA. It is correct that Apple could have taken a neutral position at this hearing but we do not consider that it was inappropriate for Apple to draw our attention to the unusual structure of the Gutmann LFA and make submissions in relation to it.
3. Taking matters in the round we find that the appropriate order as to costs is costs in the case.

(2) Permission to Appeal

4. We have decided to grant permission to appeal to the Court of Appeal from our decision of 12 March 2024. Apple has advanced three proposed grounds of appeal.
5. By Ground 1 Apple contends that the Gutmann LFA is a DBA for essentially the reasons advanced in *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Ltd* [2024] CAT 1. Although the Tribunal in *Neill* held that such an arrangement is not a DBA (an assessment we have agreed with) the correctness of this decision is to be reviewed by the Court of Appeal. There is force in the submission that this case, which raises similar issues, should therefore also be reviewed by the Court of Appeal.

6. By Ground 2 Apple contends that the Tribunal erred in concluding that a funder's fee may be paid out of damages which are not "undistributed". As we recorded in our judgment this is not a point which, to our knowledge, has been decided before and we recognise that the conclusion the Tribunal has reached is arguably inconsistent with obiter statements in other cases. We consider this is a point upon which the Court of Appeal may reach a different conclusion.

7. By Ground 3 Apple contends that the Gutmann LFA creates perverse incentives and makes Mr Gutmann an unsuitable class representative. Insofar as there are perverse incentives these may theoretically arise in all funding arrangements which are not DBAs. We have some doubt as to whether this ground of itself has a reasonable prospect of success but given there is some overlap with Grounds 1 and 2 we are satisfied that this is an appropriate matter for the Court of Appeal to consider.

Justin Turner KC
Chair

Jane Burgess

Derek Ridyard

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

Date: 8 April 2024