



Neutral citation [2024] CAT 23

Case No: 1601/7/7/23

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

12 April 2024

Before:

ANDREW LENON KC  
Chairman  
TIM FRAZER  
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

**DR. SEAN ENNIS**

Proposed Class Representative/Respondent

- v -

- (1) APPLE INC  
(2) APPLE DISTRIBUTION INTERNATIONAL LTD  
(3) APPLE CANADA INC  
(4) APPLE PTY LIMITED  
(5) APPLE SERVICES LATAM LLC  
(6) ITUNES KK  
(7) APPLE (UK) LTD  
(8) APPLE EUROPE LTD

Proposed Defendants/Applicants

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**RULING (PROPOSED DEFENDANT APPLICATIONS)**

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## APPEARANCES

Daniel Piccinin KC and Timothy Parker (instructed by Gibson Dunn & Crutcher UK LLP) appeared on behalf of the Applicants.

Paul Stanley KC, Robert O'Donoghue KC, Daniel Carall-Green and Victoria Green (instructed by Geradin Partners Limited) appeared on behalf of the Respondent.

## TABLE OF CONTENTS

<b>A.</b>	<b>Introduction.....</b>	<b>4</b>
<b>B.</b>	<b>Factual background .....</b>	<b>7</b>
<b>C.</b>	<b>The Claim Form and the PCR’s Expert Evidence.....</b>	<b>8</b>
<b>D.</b>	<b>The September Order.....</b>	<b>13</b>
<b>E.</b>	<b>Apple’s Applications .....</b>	<b>14</b>
<b>F.</b>	<b>The Legal Background .....</b>	<b>15</b>
	<b>(1) The Tribunal’s statutory jurisdiction .....</b>	<b>15</b>
	<b>(2) The power to strike out proceedings.....</b>	<b>17</b>
<b>G.</b>	<b>The Issues.....</b>	<b>19</b>
<b>H.</b>	<b>Issue 1: The Applicable Law .....</b>	<b>19</b>
	<b>(1) Article 6(1) or Article 6(3).....</b>	<b>21</b>
	<b>(2) Article 6(3).....</b>	<b>22</b>
	<b>(3) The PCR’s case .....</b>	<b>24</b>
	<b>(4) Apple’s case .....</b>	<b>25</b>
	<b>(5) The Tribunal’s conclusions.....</b>	<b>28</b>
<b>I.</b>	<b>Issue 2: Territorial Scope .....</b>	<b>36</b>
	<b>(1) Applicable legal principles.....</b>	<b>36</b>
	<b>(2) The PCR’s case .....</b>	<b>41</b>
	<b>(3) Apple’s case .....</b>	<b>43</b>
	<b>(4) The Tribunal’s conclusions.....</b>	<b>44</b>
<b>J.</b>	<b>Issue 3: Forum Non Conveniens.....</b>	<b>45</b>
	<b>(1) Applicable legal principles.....</b>	<b>45</b>
	<b>(2) The PCR’s case .....</b>	<b>46</b>
	<b>(3) Apple’s case .....</b>	<b>48</b>
	<b>(4) The Tribunal’s conclusion .....</b>	<b>49</b>
<b>K.</b>	<b>Issue 4: Alternative Service.....</b>	<b>50</b>
	<b>(1) Applicable legal principles.....</b>	<b>50</b>
	<b>(2) Apple’s case .....</b>	<b>53</b>
	<b>(3) The PCR’s case .....</b>	<b>54</b>
	<b>(4) The Tribunal’s conclusions.....</b>	<b>56</b>
<b>L.</b>	<b>Issue 5: Full and Frank disclosure .....</b>	<b>57</b>
	<b>(1) Apple’s case .....</b>	<b>58</b>
	<b>(2) The PCR’s case .....</b>	<b>58</b>
	<b>(3) The Tribunal’s conclusion .....</b>	<b>60</b>
<b>M.</b>	<b>Tribunal’s overall conclusion.....</b>	<b>60</b>

## A. INTRODUCTION

1. The App Store is an electronic market place owned and controlled by Apple<sup>1</sup> through which software developers can distribute software applications or “apps” to users of Apple iOS devices such as iPhones and iPads. The App Store comes pre-installed on Apple iOS devices and functions as the exclusive gateway through which Apple iOS device users may download native apps for iOS devices.
2. In order to make use of the App Store, developers must enter the Apple Developer Program License Agreement (the “DPLA”) with Apple. Under the terms of the DPLA, app developers are required to pay Apple a commission on purchases of apps, or in-app purchases, made through the App Store. The commission rate is 30% with some exceptions.
3. The App Store operates on a country specific basis, with different countries having their own “Storefront” containing the apps which are accessible to Apple iOS device users who have selected that country as their region on their Apple iOS device. Under the terms of the DPLA, app developers can select the Storefronts through which they wish their apps to be marketed.
4. In these proceedings, the Claimant as the Proposed Class Representative (the “PCR”) is seeking to bring opt-out collective proceedings under section 47B of the CA98 on behalf of all app developers domiciled in the UK. The core allegation is that Apple has contravened Article 102 TFEU/section 18 CA98 by charging excessive and/or unfair commission. The damages claimed are said to reflect the overcharge that developers have paid on these worldwide transactions and/or the lost sales they have allegedly suffered in markets around the world (the “Proposed Claims”). The claim is not limited to revenues derived from transactions through the UK storefront of the App Store (the “UK

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<sup>1</sup> i.e. the Apple corporate group, the members of which form part of a single overall undertaking for the purposes of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) and section 18 of the Competition Act 1998 (“CA98”).

Storefront”) but extends to all transactions worldwide. Apple contends that the Tribunal is in effect being asked to assume the role of competition policeman of the world, a role which it submits the Tribunal should decline, having regard to basic principles of comity recognised internationally.

5. By Reasoned Order of the Chair dated 20 September 2023, the PCR obtained permission to serve proceedings out of the jurisdiction on the proposed First to Sixth Proposed Defendants, which are incorporated in foreign jurisdictions (the “Non-UK Proposed Defendants”), the Seventh and Eighth Proposed Defendants (the “UK Proposed Defendants”) being incorporated in the UK. The PCR was also granted an order for alternative service by courier and email instead of the normal methods of service provided for in CPR Part 6. This was on the ground that normal service would have taken considerably longer and would have prevented these proceedings from being tried at the same time as the collective proceedings in *Kent v Apple Inc* Case No 1403/7/7/21 (the “*Kent* proceedings”) which are pending in the Tribunal. The *Kent* proceedings have been brought on behalf of Apple iOS device users who used the UK App Store. The claim in the *Kent* proceedings includes similar allegations of infringement of competition law to those made in this case, on the basis that the app developers passed on to device users the unlawful commission that they were charged by Apple.
6. Apple has applied for an order striking out these proceedings, or for reverse summary judgment, in so far as they concern commission charged on transactions carried out via Storefronts outside the UK (“Non-UK Storefronts”) or via Storefronts outside the EU (“Non-EU Storefronts”) prior to 1 January 2021. Apple has applied to set aside the order granting permission to serve proceedings out of the jurisdiction on the same basis. Apple has also applied to set aside the order for an alternative method of service on the basis that there were no exceptional circumstances to justify it.
7. The grounds of the strike out, summary judgment, and jurisdiction applications are, first, that the charging of commission on transactions taking place through Non-UK Storefronts or Non-EU Storefronts is conduct which could not give rise to a breach of section 18 of CA98, or Article 102 TFEU. That is because

the law applicable to such conduct is said to be the law of the country in which the relevant Storefront operates and is therefore outside the jurisdiction of the Tribunal (“the Applicable Law Ground”). The PCR disputes the Applicable Law Ground on the basis that the relevant law is the law of England and Wales, where the members of the proposed class are domiciled.

8. Second, Apple contends that the charging of commission on transactions taking place through the Non-EU Storefronts and the Non-UK Storefronts is conduct which falls outside of the territorial scope of section 18 CA98 and/or Article 102 TFEU (the “Territorial Scope Ground”). Article 102 TFEU prohibits an abuse of a dominant position within the internal market or a substantial part of it “in so far as it may affect trade between Member States.” Section 18 similarly prohibits an abuse of a dominant position “if it may affect trade within the United Kingdom.” Apple contends that the charging of commission on sales of apps through Non-UK Storefronts does not affect trade between Member States or trade within the UK. The PCR contends that it does so.
9. Apple also contends that the Tribunal ought to decline to exercise jurisdiction on *forum non conveniens* grounds insofar as the Proposed Claims concern the charging of commission on transactions effected via Non-UK Storefronts and Non-EU Storefronts (to the extent that these parts of the claim have not been excised by reason of the applicable law/territorial scope arguments) leaving these claims to be determined in the relevant foreign jurisdiction.
10. In addition, Apple contends that the Tribunal was wrong to permit alternative service on the Non-UK Proposed Defendants. It argues that, contrary to the PCR’s position, there were no exceptional circumstances justifying departure from service in accordance with the Hague Service Convention.
11. Finally, Apple contends that the order for service of proceedings out of the jurisdiction should be set aside on the ground that the PCR failed in his duty of full and frank disclosure on his without notice application for permission by not properly drawing to the Tribunal’s attention the issue as to whether the claim extended beyond the territorial jurisdiction of the Tribunal and that the PCR thereby concealed a fundamental weakness in his application.

## **B. FACTUAL BACKGROUND**

12. Mobile devices require an operating system. The operating system provides basic functions, including the user interface. The operating system manages all device hardware and any additional software including apps that are subsequently loaded onto the device. iOS is Apple's operating system developed by Apple for use on its mobile devices. Apps must be programmed to be compatible with a specific operating system. An app that runs on Apple's iOS operating system will not function on any other operating system.
13. The first iPhone was launched in 2007. At that stage iOS devices were sold to end users with very few pre-installed proprietary apps, and there were no means (or no means authorised by Apple) for iOS device users to find and download third-party apps. In 2008, Apple launched the App Store through which apps developed by Apple and by third parties can be downloaded. As of 2017, there were approximately 500,000 third party app developers worldwide paying an annual fee to Apple. The current figure is unknown, but may be appreciably higher. For example, in 2019, the worldwide population of professional app developers was said to be 23.9 million and was forecast to grow to 28.7 million by 2024.
14. An app developer who wishes to develop an app for distribution to iOS device users needs access to products and services such as Apple's software and protocols. To gain access to such products and services, it enters into the DPLA. The DPLA offers a limited license to app developers to develop iOS apps using Apple software and distribute those apps, if accepted, via the App Store. The App Store is defined in the DPLA to mean "an electronic store and its storefronts branded, owned, and/or controlled by Apple, or an Apple Subsidiary or other affiliate of Apple, through which Licensed Applications may be acquired".
15. The App Store is a global distribution mechanism for apps but has many different Storefronts tailored to different countries. In December 2023 there were 175 different Storefronts. The Storefronts differ in a number of ways, including different iOS apps, the currency applicable to transactions made and

the applicable price tiers. iOS device users have limited capability to initially choose or to switch to a Storefront which does not correlate to the country in which they are located. By way of example, an iOS device user who resides in Japan and has a Japanese form of payment attached to their Apple ID will have access only to the Japanese Storefront, and all transactions by that user will occur on the Japanese Storefront.

16. Under the terms of the DPLA a developer agrees to appoint the First Proposed Defendant and its subsidiaries as its “commissionaire” or agent to act as the developer’s agent in marketing and delivering the iOS app to end-users in the various geographical regions for which each Proposed Defendant is responsible. A developer agrees and acknowledges that its iOS app will be made available for download “through one or more App Stores” that the developer selects. Each of the First to Sixth Proposed Defendants is responsible for issuing invoices for any purchase price payable to the developer by end-users in the territories for which they are responsible and for collecting the purchase price out of which they are entitled to deduct a commission calculated as a percentage of the purchase price.
17. The App Store earns revenues for Apple in three ways: the Developer Program fee, which is a small annual fee which app developers are required to pay in order to list apps; Apple Search Ads, which app developers can choose to pay to promote their apps; and compulsory commission payments paid by app developers when users purchase digital content.
18. An analysis of the revenues earned by UK-domiciled developers shows that only a small minority of the revenues were earned through the UK Storefront; a majority of the revenues were earned through the US Storefront.

### **C. THE CLAIM FORM AND THE PCR’S EXPERT EVIDENCE**

19. The Collective Proceedings Claim Form states that the claims which the PCR seeks to combine are for loss and damage caused by Apple’s breach of duty and in particular by its infringements of Article 102 TFEU and section 18 of CA98. The losses claimed are not confined to the losses allegedly suffered by



UK-domiciled developers as a result of the commission charged on relevant sales made through the UK Storefront but extend to the entirety of the revenues generated by UK-domiciled developers without any geographical limitation. This contrasts with the claims in the *Kent* Proceedings which, being brought on behalf of UK domiciled device owners, are only concerned with the commission charged on transactions entered into by device owners via the UK Storefront.

20. The PCR alleges that Apple is dominant (indeed a 100% monopolist) on the iOS app distribution market, and that it has abused its dominance by charging prices in the form of the commission charged on purchases of apps and on purchases of additional content or subscriptions within those apps which are excessive and unfair in their own right and/or unfair and abusive as a system of pricing (the commission being effectively inescapable, the system failing to reflect the true economic value contributed by app developers or of the services that Apple provides, and the burden of the commission falling on a mere 16% of app developers).
21. The Claim Form states that the proceedings are brought on an opt-out basis on behalf of all UK-domiciled iOS app developers that have sold apps and paid the commission within the relevant period, defined as the period starting six years before the date of the Claim Form and ending on the date of final judgment or earlier settlement of the claim. The Claim Form states that the PCR estimates that there will be between 1,500 and 1,600 members of the Proposed Class.
22. The Claim Form states that the PCR is not aware of any separate proceedings of the same or similar nature on behalf of the Proposed Class Members. In fact, there is a pending class action in the Federal Court of Australia brought on behalf of all developers and consumers located around the world who entered into transactions via the Australian Storefront between 6 November 2017 and 29 June 2022 (*David Anthony v Apple Inc. & anr*) (“the *Anthony* proceedings”). The claimant’s case in the *Anthony* proceedings is that the First and Fourth Proposed Defendants’ practices regarding the charging of commission infringed Australian competition laws. There is therefore a degree of overlap

between the PCR's Proposed Claims and the *Anthony* proceedings which are referred to later in this judgment.

23. The Claim Form defines the relevant market in which Apple is said to be dominant as being “the market for the distribution of Third-Party Apps”. It refers to the Preliminary Economic Report prepared by Mr Joe Perkins, a consulting economist. Mr Perkins concluded that the relevant market:
  - (1) includes, in addition to the distribution of apps *via* Apple's App Store, the distribution of iOS Apps via alternative app stores on the iOS platform (including specialist app stores) and the direct downloading of iOS apps; and
  - (2) is a UK market.
24. In his Preliminary Economic Report, Mr Perkins explained how he had determined the relevant product and geographic dimensions of the market. He had followed the standard framework of the hypothetical monopolist test which identifies demand and supply substitutes and the competitive constraints they impose on the focal product. The outcome of the test provides a set of products sold in a geographic area (together, the market) where a hypothetical monopolist that controlled the sales in that market could increase its profits by increasing the price by a small but significant and non-transitory amount (a “SSNIP”). The logic of the SSNIP test is that, if, taking a candidate market definition, a price rise would not convey any advantage even to a monopolist (usually because the revenue gains from raising prices are offset by the lost sales a higher price causes), the candidate market definition is too narrow and should be expanded. The process of expansion is continued until a set of products and areas is identified that would be profitable for the hypothetical monopolist to control by increasing prices by a SSNIP.
25. In this case the focal product, and thus the starting point for Mr Perkins' analysis, was the market for the distribution of apps via the Apple App Store. Taken as a whole, he concluded that the following substitute services were in the same relevant market as the App Store: the distribution of iOS apps via

alternative app stores on the iOS platform; and the distribution of iOS apps via direct download from websites onto the iOS platform using a mobile device browser.

26. In determining the relevant geographic market, the steps in Mr Perkins' analysis were as follows.

(1) First, a hypothetical monopolist in the distribution of iOS apps via app stores would have the ability to charge different prices to iOS device users in different currency areas if it wanted to. This conclusion was based on the experience in South Korea and the Netherlands, where due to regulatory intervention, app developers can be charged a lower commission. However, there was no scope for differentiation of commissions within the UK.

(2) Second, it was unlikely that App developers would switch away from distributing apps in the UK should the commission rate on the UK Storefront be increased by a small amount. This is because app developers incur few additional costs in listing their apps in multiple different jurisdictions, and thus would suffer a significant reduction in profitability as a result of switching away from distributing their apps in the UK.

27. As noted by Counsel for Apple, the first two steps in the analysis were considering the market by reference to the UK Storefront rather than by reference to the domicile of the app developers. However, at the third stage, Mr Perkins went on to consider whether Apple could in principle set different commission rates depending on the country in which the app developer is located. It was not clear to him whether this would be possible. However, assuming this was possible, it was unlikely that many app developers would switch the location of their domicile to a different country in the event that a small increase in the commission rate is levied on all UK-domiciled app developers (regardless of which App Store Storefronts they choose to list their apps in). This was because the costs of doing so are typically likely to outweigh the benefits of avoiding a 5-10% increase in the commission. He also

concluded that there were substantial practical difficulties in the way of iOS device users switching to a different geographical area without moving country.

28. Mr Perkins concluded, on the basis of this assessment, that the relevant geographic market for the distribution of iOS apps on the iOS platform was the UK. However, he would not expect that whether the geographic scope of the relevant market for the distribution of apps was global or national would make any difference to his assessment of dominance.
29. The two strands of thought in Mr Perkins' analysis in the Preliminary Report were thus that UK domiciled app developers would not switch away from the UK Storefront if the commission rate was increased a little relative to that in other areas and would not move their businesses to another jurisdiction. Mr Perkins did not focus on business transacted via Non-UK Storefronts.
30. By the time of Mr Perkins' Supplemental Report, Apple had challenged the jurisdiction of the Tribunal to hear claims relating to purchases made via Non-UK Storefronts. In this Report, Mr Perkins expanded on the conclusion in his Preliminary Report that UK-based app developers would not in practice change their choice of app distribution services in response to changes in the commission rate charged to app developers based in the UK relative to commission rates charged to app developers based elsewhere. He concluded that if, counterfactually, Apple were to allow variations in the commission rate charged to app developers domiciled in different jurisdictions, the evidence he had reviewed suggested that it was unlikely that a SSNIP in the commission rate charged by Apple to UK-based app developers would lead to any significant switching of domicile by those developers. This was because a SSNIP would have a relatively small impact on total developer net revenues. This impact was, in particular, much smaller than current levels of variation in tax rates between jurisdictions, which themselves lead to limited changes in firms' domicile decisions.

## **A two-sided market**

31. It was common ground for the purposes of Apple’s applications that the Tribunal should approach the issue of market definition on the basis that, as contended by the PCR and supported by Mr Perkins’ reports, the App Store is a two-sided market. One side involves providing products and services which are used by app developers, such as making Apple software available to enable app development, marketing apps to device owners and collecting payments. The other side involves the provision of apps to device owners. The two sides of the platform therefore involve the provision of different products and services to different customer bases. As the Tribunal observed in *BGL (Holdings) Limited v Competition and Markets Authority* [2022] CAT 36 (“*BGL*”) at [147]:

“as a general precept, the markets in which the different Focal Products provided by Platforms are sold should always be assessed separately”.

#### **D. THE SEPTEMBER ORDER**

32. The Collective Proceedings Claim Form and supporting documents were served on the UK Proposed Defendants on 11 August 2023. The UK Proposed Defendants filed Acknowledgements of Service indicating that they would contest jurisdiction.

33. On 25 July 2023, the PCR applied pursuant to Rule 31 of the Competition Appeal Tribunal Rules 2015 (“the Rules”) for permission to serve his collective proceedings claim form and supporting documents out of the jurisdiction on the Non-UK Proposed Defendants.

34. By paragraph 1 of the Reasoned Order dated 20 September 2023 (“the September Order”), the Chair granted the PCR permission to serve his Collective Proceedings Claim Form and supporting documents on the Non-UK Proposed Defendants and, further, permission to effect service of relevant documents on all the Proposed Defendants by alternative methods, namely (1) couriered post to the address of the First Proposed Defendant in California, (2) couriered post to the premises of Gibson Dunn & Crutcher UK LLP in London, and by email to three solicitors working at Gibson Dunn & Crutcher UK LLP’s London office.

35. Pursuant to paragraph 2, and following steps taken by the PCR to effect service, the Collective Proceedings Claim Form, applications and supporting documents were deemed served on 25 September 2023.
36. In accordance with paragraph 3 of the September Order, all the Non-UK Proposed Defendants filed an Acknowledgment of Service on 23 October 2023 indicating that they intended to contest jurisdiction. The applications were duly filed on 6 November 2023.

## **E. APPLE'S APPLICATIONS**

37. Apple's applications were as follows:
  - (1) Under Rule 34(1) of the Rules, for an order that the Tribunal lacks, or alternatively declines, jurisdiction over the PCR's proposed opt-out collective proceedings against the Proposed Defendants under section 47B of CA98 insofar as they concern commission charged on transactions effected via the Non-UK Storefronts.
  - (2) Under Rules 41(1)(a), (b) and/or 43(1) for an order striking-out, alternatively entering reverse summary judgment upon, the PCR's proposed opt-out collective proceedings against the UK Proposed Defendants in respect of commission on transactions taking place through Non-EU Storefronts. That is on the grounds that the conduct complained of could not amount to a breach of Article 102 TFEU as retained and/or section 18 of the CA98.
  - (3) For a variation of paragraph 1 of the September Order insofar as it permitted the PCR to serve relevant documents on the Non-UK Proposed Defendants by an alternative method of service and at an alternative place.

## F. THE LEGAL BACKGROUND

### (1) The Tribunal's statutory jurisdiction

38. The regime established under the recast Brussels Regulation (including as retained during the implementation period) does not apply to these proceedings because they were instituted after 11.00pm on 31 December 2020 (“IP Completion Day”). Whether the Tribunal has jurisdiction to hear the Proposed Claims therefore falls to be determined according to the English common law rules governing the personal jurisdiction of the English courts and tribunals and the statutory provisions defining the scope of the Tribunal’s subject matter jurisdiction.

39. The PCR contends that the proceedings are to be treated as taking place in England and Wales. The Tribunal therefore approached questions of service out and jurisdiction on the same basis as the High Court applying the Civil Procedure Rules pursuant to *DSG Retail Ltd v Mastercard* [2015] CAT 7 at §§17-18. The Proposed Defendants do not take issue with that approach. To obtain permission to serve out of the jurisdiction on the Non-UK Proposed Defendants, the Tribunal had to be persuaded in respect of each that:

- (1) There is a serious issue to be tried on the merits of the claim against them: i.e. that there is a real as opposed to fanciful prospect of success on the claim (which is the same test as would be applied on a summary judgment application by the Proposed Defendants: *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2012] 1 WLR 1804, [2011] UKPC 7 (“*AK Investment CJSC*”) at §71).
- (2) There is a good arguable case that the claim falls within one or more of the categories of case, or “gateways”, set out in CPR Practice Direction 6B at para.3.1. However, where this depends on an issue of law, the Tribunal will normally decide that issue rather than determining whether there is a good arguable case on it: *AK Investment CJSC* at §81.

- (3) In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction. The Tribunal must first identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice, and then determine whether England is clearly or distinctly the appropriate forum: *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337, [2013] UKSC 5 at §§12-18.
40. Where the Tribunal is satisfied that it has personal jurisdiction over a foreign defendant, it must then turn to the limits of its subject-matter jurisdiction which are defined by statute.
41. The Tribunal’s jurisdiction to hear collective proceedings is conferred by section 47B(1) CA98, which renders the scope of that jurisdiction parasitic upon the Tribunal’s jurisdiction to hear civil claims under section 47A CA98:
- “(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies (“collective proceedings”).”
42. The relevant parts of section 47A CA98 are as follows:
- “(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.
- (2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of –
- (a) the Chapter I prohibition, [*or*]
- (b) the Chapter II prohibition,
- (c) the prohibition in Article 101(1), or*
- (d) the prohibition in Article 102.*”
43. The italicised paragraphs in section 47A(2) were removed, and the “or” in subparagraph (a) inserted by amendment with effect from 31 December 2020, subject to transitional provisions which provide that the Tribunal may continue



hear claims in relation to infringements of the prohibition in Articles 101(1) or 102 TFEU which occurred before IP Completion Day. As a result, the Tribunal's statutory jurisdiction extends to collective proceedings where the underlying claims concern an alleged infringement of domestic competition law at any time and/or an alleged infringement of EU competition law before IP Completion Day.

44. It was common ground that, in order to succeed with a claim for an infringement of Chapter II of CA98 or Article 102, the law of England and Wales would have to be the applicable law and that, as regards the territorial scope of those provisions, the PCR would have to prove that the alleged infringements amounted to an abuse of dominant position which "may affect trade within the United Kingdom" for the purposes of Chapter II or which "may affect trade between member states" for the purpose of Article 102.
45. Apple's case was that, for reasons set out under Issue 1 and 2 below, the law of England and Wales did not apply to the charging of commission on transactions taking place through Non-UK Storefronts (or Non-EU Storefronts before IP Completion Day) and that the charging of commission on transactions taking place through Non-UK Storefronts (or Non-EU Storefronts before IP Completion Day) was outside the territorial scope of Chapter II and/or Article 102 TFEU.

## **(2) The power to strike out proceedings**

46. It was common ground that the correct approach to an application to strike out a claim, or enter summary judgment on a claim, is set out in the judgment of Lewison J in *Easyair Ltd v Opal Telecom Limited* [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]

- (iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
- (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 3;
- (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. The consequence of either the Applicable Law Ground or the Territorial Scope Ground succeeding would be that there is no serious issue to be tried as against the Non-UK Proposed Defendants in respect of the Proposed Claims, and permission should not have been granted to effect service of the collective

proceedings claim form. For the same reasons, the claims against the UK Proposed Defendants should be struck out or summarily dismissed.

## **G. THE ISSUES**

48. Taking account of the criteria applicable to strike out/summary judgment set out in *Easyair*, Apple's applications give rise to the following main issues:

- (1) Does the PCR have a realistic as opposed to fanciful prospect of establishing that the law of England and Wales applies to the claim in relation to the charging of commission on transactions effected via the Non-UK Storefronts?
- (2) Does the PCR have a realistic as opposed to fanciful prospect of establishing that the claim in relation to the charging of commission on transactions effected via the Non-UK/Non-EU Storefronts is within the territorial subject matter jurisdiction of section 18 CA 98 and/or Article 102 TFEU?
- (3) Should the Tribunal decline jurisdiction on *forum non conveniens* grounds to the extent that the claims concern the charging of commission on transactions effected via the Non-UK Storefronts?
- (4) Should the Tribunal have made an order for alternative service?
- (5) Should the permission for service of proceedings on the Non-UK Proposed Defendants be set aside on the ground that the PCR failed in his duty of full and frank disclosure?

## **H. ISSUE 1: THE APPLICABLE LAW**

49. As set out above, it was common ground that the Tribunal does not have jurisdiction to entertain claims for breaches of non-UK competition law, other than claims for breaches of EU competition law in respect of the period before 1 January 2021. Therefore, if the applicable law in respect of transactions

effected via Non-UK Storefronts before that date is other than EU law or UK law and if the applicable law in relation to transactions effected via Non-EU Storefronts after that date is other than UK law, the Tribunal does not have jurisdiction to hear the claims in respect of those transactions.

50. The PCR alleges that Apple is subject to a tortious duty to compensate the Proposed Class Members for losses arising from Apple’s alleged breaches of statutory duty. It was common ground that the law applicable to the conduct said to give rise to the breach falls to be determined in accordance with the rules set down in Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (“Rome II”).
51. The provisions of Rome II continue to apply in the UK for the period up to IP Completion Day pursuant to section 7A of the European Union Withdrawal Act 2018 and Article 66 of the EU-UK Withdrawal Agreement. For the period of the Proposed Claims after IP Completion Day, a retained EU law version of Rome II applies, with amendments made by the Law Applicable to Non-Contractual Obligations (Amendment etc) (UK Exit) Regulations 2019 as indicated in italicised text below, to reflect the fact that the UK is no longer an EU Member State.
52. Article 4(1) of Rome II provides for the general rule that the law applicable to a non-contractual obligation arising out of a tort:

“shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damages occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”
53. Article 6 then sets out special rules which concern unfair competition and acts restricting competition. According to Recital (21) to Rome II, Article 6 is not an exception to the general rule in Article 4(1) but a clarification of it. In other words, the principle that the applicable law is the law of the place where the damage occurs applies to Article 6, taking into account the particular circumstances of unfair competition and restrictions of competition.
54. Article 6 provides as follows:

- “1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.
2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.
3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.  
  
(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court [of the domicile of the defendant] / [*in a part of the United Kingdom*], may instead choose to base his or her claim on the law of the court seised, provided that the market in [that Member State] / [*the United Kingdom*] is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the [Member State of that court] [*the United Kingdom*].”

**(1) Article 6(1) or Article 6(3)**

55. Apple initially submitted that the rule in Article 6(1) rather than the rule in Article 6(3) was applicable to the PCR’s claims but it was ultimately common ground that Article 6(3) was the relevant rule. Although an excessive pricing claim does not readily fall within the concept of a “*restriction of competition*” in Article 6(3), Recital 22 of Rome II states:

“The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law”.

56. As noted by Counsel for the PCR, there is no suggestion that some infringements of competition law are carved out of Article 6(3) and governed by Article 6(1). Furthermore, the *travaux préparatoires* for Rome II support the view that the concept of “unfair competition” in Article 6(1) was not designed to embrace competition law as conceived of in the UK, but was essentially concerned with the protection of fair conduct between competitors

and the domain of what in England would be intellectual property and economic torts. The Rome II proposal stated as follows:

“The purpose of the rules against unfair competition is to protect fair competition by obliging all participants to play the game by the same rules. Among other things they outlaw acts calculated to influence demand (misleading advertising, forced sales, etc.), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor’s staff, boycotts), and acts that exploit a competitor’s value (passing off and the like).”

Similarly, it stated that the “unfair competition” provision would govern “the case of enticing away a competitor’s staff, corruption, industrial espionage, disclosure of business secrets or inducing breach of contract”, and a collective action for an injunction against the use of unfair terms in consumer contracts.

57. Unfair pricing may be characterised as a “restriction of competition”, since it involves a dominant firm directly exploiting its position by imposing a price that is materially above the price that would obtain in a competitive market: the restriction of competition is that the counterparty is denied the benefits of competition and forced to pay an unfairly high price. The remedy is to remove this restrictive effect on price. As Marcus Smith J held in *Optis Cellular Technology LLC v Apple Retail UK Ltd* [2023] EWHC 1095 (Ch), at [444].

“the law’s purpose where excessive prices exist because of an abuse of dominance is to remove the pernicious effect of dominance on prices”.

## (2) Article 6(3)

58. Article 6(3)(a) provides that the law applicable to a restriction of competition is the law of the country where the market is, or is likely to be, affected. Article 6(3)(b) applies where the market is, or is likely to be, affected in more than one country. The PCR’s primary case was that its claim is governed by Article 6(3)(a) rather than 6(3)(b) although, if the Tribunal took the view that the market was affected in more than one country, it would rely on Article 6(3)(b).
59. The scope of Article 6(3)(a) and (b) were considered by the Tribunal on an application for determination of a preliminary issue in *Westover Ltd and ors v Mastercard Inc and ors* [2021] 5 CMLR 14, [2021] CAT 12 (“*Westover*”).

*Westover* concerned follow-on claims arising out of the interchange fee investigations. Where customers used Visa/MasterCard branded payment cards to make purchases, the merchant's acquiring bank paid an interchange fee to the cardholder's issuing bank in respect of those payments. In default of any bilateral agreements, the amount of the interchange fee was determined according to certain 'scheme rules' put in place by Visa and MasterCard. These rules provided for certain multilateral interchange fees ("MIFs") to be paid. Certain "domestic MIFs" were payable in respect of domestic transactions (i.e. where the card issuer and merchant were in the same country) and certain "cross-border MIFs" were payable where the card issuer and merchant were in different countries. It was common ground that the relevant markets were national in scope. The Tribunal held that that in relation to Italian domestic MIFs, the restriction could not be said to affect the UK market so that Italian law applied in accordance with Article 6(3)(a), whereas the cross-border MIFs applied in both Italy and the UK so that claims for damages resulting from those MIFs fell under Article 6(3)(b).

60. The Tribunal held as follows:

"53. In applying art.6(3)(b), we think it is necessary to address three questions:

- (a) what is the non-contractual obligation on which the claim is based;
- (b) what is the restriction of competition out of which that obligation arises; and
- (c) does that restriction of competition directly and substantially affect the market in the country of the forum?"

61. The answer to (a) was the liability for the damage caused by the infringement of Article 101; the answer to (b) was the restriction of competition constituting the infringement of Article 101 in setting a MIF with the consequence of restricting competition in various distinct national acquiring markets. As to (c), where the relevant geographic markets were national in scope and fees were set at a particular rate for situations where the card issuer and the merchant were based in the same country, that fee could not affect competition in a different country. A claim would have to be brought under Article 6(3)(a). Where, however, the relevant geographic markets were national in scope, but a single fee was set for situations where the card issuer and merchant were in different EEA states or world regions, the restriction could affect the market in each of

the countries or regions concerned. Actions for damages resulting from those restrictions could therefore be brought under Article 6(3)(b).

### (3) The PCR's case

62. The PCR's case, in relation to Article 6(3)(a) and (b), was, in summary, as follows:

- (1) Based on Mr Perkins' expert evidence, which was not challenged by any expert evidence from Apple, the affected market for the purposes of Article 6(3)(a) is the UK market for the distribution of apps on the iOS platform. The market is limited geographically to the UK because UK app developers would be unlikely to switch domiciles in the event of a hypothetical monopolist charging a supra-competitive price in the UK.
- (2) For the purposes of Apple's applications, the PCR's case as to the affected market was to be treated as correct unless it was not realistically arguable.
- (3) Apple's challenge to the PCR's market definition was not suitable for summary determination and should be addressed at trial. Market definition is an inherently difficult exercise requiring an analysis of many factors and in which judgement is critical. That is especially true in a case involving a two-sided platform, where "the range of analytical tools that can be deployed [...] is both vast, and vastly controversial"; *BGL* at [119]. The PCR relied on the observation of the Court of Appeal in *Iiyama (UK Ltd) and others v Samsung Electronics Co Ltd and others* [2018] EWCA (Civ) 220 ("*Iiyama*"), in which the question was as to the applicability of Article 101 to a worldwide cartel:

"57 ... Assessment of the various elements which constitute the intrinsic nature of the private law claims for infringement of Article 101 brought by these particular claimants is not in our view a question suitable for summary determination, unless the court considers it incapable of argument with any real prospect of success that the applicable law will be found at trial to be EU law."



(4) If (contrary to the PCR's primary case) the Tribunal took the view that the market was affected in more than one country, Article 6(3)(b) would come into play and would, like Article 6(3)(a), lead to the application of English law. The UK market is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises.

(i) Apple's argument that the conduct in this case happens on a country-by-country basis, so that the only restriction of competition that directly and substantially affects the market in the United Kingdom is conduct in relation to the UK Storefront, is artificial. There is essentially one global App Store. Apple does not impose different charges or conditions in respect of sales made on any particular versions of the App Store or in any particular countries with the exception of the dating app sold via the Storefront in the Netherlands and sales made via the South Korean Storefront, which are subject to slightly lower commissions as a result of regulatory interventions in those two countries and not a voluntary difference imposed by Apple.

(ii) Article 6(3)(b) would enable the selection of UK competition law even if the restriction of competition in question affected the market in a country outside the EU. Rome II is not limited to selection between the laws of different EU Member States, and its jurisdictional basis was not so limited.

#### **(4) Apple's case**

63. Apple contended that the PCR's case that the UK was the affected market for the purposes of Article 6(3) in relation to transactions effected via Non-UK Storefronts was not realistically arguable for the following reasons:

(1) The PCR's identification of the location of the market as the place of the app developer's domicile, rather than the place where the distribution / agency services (on the PCR's characterisation of the

market) are provided, was misconceived. Apple entities are appointed to act as agents for the developers. They market and distribute the developer's apps on behalf of the developer, at prices chosen by the developer, in the Storefronts selected by the developer.

- (2) It makes no sense to define the location of the market by reference to the domicile of the developer. That is not where the competition (or alleged lack of competition) in the market for the provision of distribution services takes place. The provision of distribution services via the Non-UK Storefronts (as analysed by the PCR) is analogous to a physical retail distribution market or delivery service. Such a market is located in the place where the physical stores are located. A UK-based developer who wishes its games to be sold in physical stores in Melbourne will have to choose between competing game retailers in Melbourne. Similarly, a flower delivery service in Melbourne competes in a market that is located in Melbourne, even if the customer is domiciled in London. If there were competing iOS app stores or other distribution channels (the pleaded relevant market) that could distribute iOS apps to users in Australia, the competitive set for a developer wishing to distribute apps to Australian consumers would consist of those app stores.
- (3) The Proposed Claims challenge the legality of commission applied to transactions between two groups of third parties, developers and consumers. Apple may face claims from both developers and consumers in relation to the same commission. A claim brought by consumers in a foreign jurisdiction would be governed by the competition law of that foreign country, as is actually happening in the *Anthony* proceedings in Australia. The PCR's case that the law of England and Wales applied to its claim would mean that different systems of law would apply to the same commission, giving rise to potential inconsistencies in the resolution of pass-on issues.
- (4) The approach adopted by Mr Perkins to geographic market definition, according to which the geographical scope of the market is determined

by asking whether, if Apple discriminated against UK developers by charging them a higher commission, many developers would change their domicile to avoid the higher rate, is unprecedented, arbitrary and meaningless. The market for almost any goods or services could be defined as having any arbitrarily narrow domicile dimension, because there are few goods or services so expensive that customers would move home or business domicile to avoid a small price increase targeted at people living at a particular address or domiciled in a particular place. It has no logical connection with the economic activities in question.

- (5) As the Tribunal held in *BGL*, market definition should not be over analytical or over dependent on expert evidence:

“114(8). Although we appreciate that market definition is, from time to time, referred to as a science, we consider such a description to unduly accentuate the technical aspects of what ought to be a common sense exercise of judgment, informed substantially by an understanding of the thinking of persons in the market in question.”

- (6) The reason why the PCR has defined a class that consists of UK-domiciled developers (and therefore has defined a market limited to them) must be that the collective action regime only permits class representatives to pursue litigation on behalf of persons on an opt-out basis where those persons are domiciled in the UK. But in order to meet that definition it is only necessary for a company to have been incorporated in the UK and to have a registered office there, irrespective of where the parent company might be domiciled or where the group’s or even the company’s real centre of operation lies.

- (7) Apple referred, by way of illustration of the arbitrariness of domicile in the context of market definition, to the position of Bumble Holding Limited, one of the highest billing UK-domiciled developers on the App Store whose London registered office is that of Reed Smith Corporate Services Limited. It employs just 25 people. Its ultimate parent company, Bumble Inc, is headquartered in Texas. 89% of Bumble Inc’s nearly £400m revenue came from North America, with

the remaining 11% coming from the rest of the World. If the Bumble group brought a claim arguing that Apple's commission was excessive, Apple submitted that it was difficult to imagine that its expert economist would have attributed any significance to the fact that those revenues are routed through Bumble Holding Limited or concluded that the relevant market was the UK on the basis that Bumble Holding Limited was domiciled there.

- (8) Article 6(3)(b) does not assist the PCR in relation to services provided in relation to the Non-UK Storefronts. Requiring app developers to pay commission in respect of transactions effected via the Non-UK Storefronts has no effect on the market in the UK. Apple's conduct in this case is more closely analogous to the setting of the domestic MIFs in *Westover* than the setting of the cross-border MIFs in that case.
- (9) Further and in any event, Article 6(3)(b), even in its EU law form, only ever applied to enable choice of law for claims where the market affected is in a country in which Rome II applies. Article 6(3)(b) has no application to claims concerning restrictions of competition in countries outside the EU. It never enabled, for example, the selection of UK or German law to apply to a claim relating to restrictions of competition in the US or Japan. The logic of Article 6(3)(b) is that, since EU competition laws are all harmonised to a considerable extent, including not only the substantive law but also the law relating to causation and loss, the selection of one Member State's law to apply to a claim concerning another Member State's market ought not to have extremely unfair consequences, or consequences that are inconsistent with the principle of comity. It is doubtful whether the EU legislator would even have had competence to enact a provision like Article 6(3)(b) if it extended to situations with no connection with the EU.

## **(5) The Tribunal's conclusions**

64. Given the way that the relevant market is defined in the Claim Form and in Mr Perkins' reports, the primary question for the Tribunal is whether the PCR has

a realistic prospect of establishing that, for the purposes of Article 6(3)(a) or (b), the market affected by the alleged infringement of section 18 CA98/Article 102 TFEU is the UK market for app distribution services supplied by Apple to app developers, being (according to the PCR) one side of the two-sided market intermediated by the App Store.

65. There is no clear guidance in Rome II as to what is meant by an “affected” market or how the location of an affected market is to be ascertained. The PCR relies on the market definition exercise carried out by Mr Perkins in his reports. That exercise was, however, concerned with market definition for the purposes of competition law, not as a means of identifying or locating the affected market for the purposes of Article 6(3). The purpose of market definition for the purposes of competition law is, as Mr Perkins explained in his Preliminary Report, to identify the main competitive constraints faced by the supplier as a first step towards assessing the supplier’s market power. The purpose of defining the market which is or is likely to be affected by a restriction of competition, for the purposes of Article 6(3), is to identify the country or countries with a sufficient connection to the dispute in order to determine the applicable law.

66. *Dicey, Morris & Collins on the Conflict of Laws* (16<sup>th</sup> ed, Sweet & Maxwell 2022) (“Dicey”) suggests (at paragraph 35-058) that Article 6(3) requires courts to undertake a process of market definition in order to determine the applicable law and that the most obvious starting point for that exercise would be the principles developed in the context of Articles 101 and 102 of TFEU and Articles 101:

“... but these principles may be thought to be overly complex, not fit for purpose and likely to create difficulties insofar as a single market transcends national borders.”<sup>2</sup>

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<sup>2</sup> A similar view is expressed by Professor Dickinson in *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2008) at 6.64: “The requirement for individual litigants, and their legal advisers, to undertake legal-economic analysis of this kind is in order to determine the law applicable to a non-contractual obligation is one of the least satisfactory aspects of the Rome II Regulation and seems likely significantly to increase costs in cases of this kind.”

67. Dickey goes on to say, by reference to Case C-27/17 *AB flyLAL-Lithuanian Airlines v Starptautiska Lidosta "Riga" VAS* [2018] ECLI:EU:C:2018:533, [2019] 1 W.L.R. 669 ("*AB flyLAL-Lithuanian Airlines*"), Case C-451/18 *Tibor-Trans Fuvarozó és Kereskedelmi Kft.v DAF Trucks NV* [2019] ECLI:EU:2019:635a and Case C-30/20 *RH v AB Volvo* [2020] ECLI:EU:C:2021:604, at [31] that the ECJ takes a pragmatic approach in identifying the place in which damage is located for the purposes of Article 7(2) of the Brussels I regulation and has indicated that it considers this approach to align with Article 6(3)(a). That approach involves two stages, the first being to identify the relevant market "albeit in a rather impressionistic sense"; the second being to link the impact of the restriction to a place within the geographical area of the market where the claimant has concluded (or not concluded) one or more transactions in consequence.

68. In *AB flyLAL-Lithuanian Airlines* one of the issues was as to the location of the place where the harmful event, consisting of predatory pricing, took place for the purposes of Article 5(3) of the recast Brussels I Regulation. The ECJ considered two elements. First it identified the affected market as being "the market for flights from and to Vilnius Airport", which had been distorted by the unfair competition. Second, it held that that the place where the claimant had suffered damage was where it conducted the main part of its sale activities. The ECJ held as follows:

"40. That approach, based on the alignment of those two elements, is consistent with the objectives of proximity and predictability of the rules governing jurisdiction, since, first, the courts of the member state in which the affected market is located are best placed to assess such actions for damages and, secondly, an economic operator engaging in anti-competitive conduct can reasonably expect to be sued in the courts for the place where its conduct distorted the rules governing healthy competition.

41. Moreover, as observed by Advocate General Bobek in point 52 of his opinion, determining the place where the damage occurred in such a manner satisfies the requirement of consistency laid down in recital (7) of Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) ( OJ 2007 L199 , p 40), in so far as, under article 6(3)(a) of that Regulation, the law applicable to actions for damages based on an act restricting competition is that of the country where the market is, or is likely to be, affected."

69. The PCR's approach to the question of the affected market in relation to foreign Storefronts is open to a number of objections. The PCR's case that the affected market is located in the UK relies on a market definition developed for the purposes of competition law. As a matter of impression, however, the market for app distribution services in relation to transactions effected via foreign Storefronts is located in the foreign country concerned, not in the UK. The PCR's market definition treats the location of the various national Storefronts as irrelevant even though the location of the Storefronts may be considered to be the place where Apple's marketing of app services takes place. It was submitted on behalf of the PCR that the foreign Storefronts are no more than a metaphor but there is a real locational dimension to the Storefronts in that each Storefront is accessible from a particular country or region and is selected by app developers under the terms of the DPLA. It is difficult for a device owner located in a given country to switch to an App Store accessible from another country. So, for example, an app delivered to a French device owner will almost certainly be purchased through the French Storefront. That is why the *Kent* proceedings brought on behalf of UK device owners can conveniently be limited to sales via the UK Storefront. The distribution services associated with a given Storefront are necessarily associated with that Storefront and may be seen as taking place in that country.
70. Apple's distribution services themselves do not exist in isolation. They exist only to ensure that a product or service is made available to a downstream user. An app is not developed for its own sake but in order to expose it to sale. Distribution services are sought and provided in order to enable the developer to expose its products for sale to the device owner. The services are not fully provided until the app reaches the Storefront and is thereby exposed for sale. On this basis, the services are provided at the place of the Storefront.
71. In the Tribunal's view, a parallel may be usefully drawn between the delivery of digital content via the App Store and the provision of retail distribution or delivery services, as Apple submits. The competition for the provision of the physical delivery services is *prima facie* the place where the delivery takes place, irrespective of the domicile of the supplier, and the same may be said of the app market. If there were competing iOS app stores or other distribution

channels (the pleaded relevant market) that could distribute iOS apps to users in Australia, the competitive set for a developer wishing to distribute apps to Australian consumers would consist of those app stores.

72. The PCR had no convincing answer to Apple's argument that applying the law of England and Wales to claims by UK based app developers in relation to transactions effected via foreign Storefronts is likely to give rise to inconsistency with claims brought by end-users in foreign jurisdiction in relation to the same transactions applying the law of the foreign country, as is actually happening in the *Anthony* proceedings in Australia.
73. The PCR's approach to the definition of the market as a matter of competition law, by reference to whether UK domiciliaries would choose to change their location in the event of an increase in commission, is novel and questionable. Domicile is very rarely relevant in defining antitrust markets and is not used in Rome II other than in relation to defendants (Article 6(3)(b)). The test of whether a person or business would move home or business to avoid a small price increase could be used to justify almost any geographic limit.
74. The issue for the Tribunal is, however, not whether the PCR has established that the UK is the country where the market is or is likely to be affected by Apple's alleged restriction of competition but whether it has a realistic prospect of doing so at trial. In order for Apple to succeed with the Applicable Law Ground, the Tribunal would have to dismiss as doomed to fail the PCR's case that Apple's app distribution services are provided to UK domiciled app developers in the UK, that it is in the UK that those app developers suffer a loss of revenue and hence that the affected market is located in the UK.
75. The Applicable Law Ground begs the question as to how the affected market should be identified and located. As noted above, there is no clear guidance in Rome II as to the criteria to be applied. The exercise of determining the nature and location of the affected market, in the context of a global internet business in which entities with their place of business in one country carry out transactions via a trading platform accessible to consumers in another, is a novel and particularly difficult one.



76. Mr Perkins' reports are coherent and rationally argued, using reliable data sources and following a standard analytical framework which is not yet challenged by any expert evidence from Apple. Dismissing the PCR's case presupposes that, adopting a correct market definition, the affected market, in relation to the foreign Storefronts, is somewhere other than the UK. Apple has, however, not yet advanced its own market definition, stating in its Reply to the PCR's written submissions on these applications:

“Finally, it should be made clear that none of the above involves the Proposed Defendants advancing a positive case on market definition for the purpose of this Application. ... This jurisdiction challenge is not the occasion for the Tribunal to consider the Proposed Defendants' case on market definition.”

77. The issue of the applicable law may well have been suitable for determination as a preliminary issue as in *Westover* but, notwithstanding the powerful arguments put forward by Apple, we are not satisfied that the PCR's case should be summarily dismissed as hopeless at this stage, given the expert evidence of Mr Perkins, unchallenged by any evidence from Apple, and the absence of any alternative positive case on market definition being advanced by Apple.

78. Given our conclusion on Article 6(3)(a), it is not necessary to consider separately Article 6(3)(b) but, were it necessary to do so, our conclusions would be as follows.

79. As a preliminary matter, it follows from our conclusion in relation to Article 6(3)(a), that, in the Tribunal's view, the PCR has a realistic prospect of establishing that the UK market for app distribution services supplied by Apple to app developers is, for the purposes of Article 6(3)(b), “directly and substantially affected” by the restriction of competition resulting from the charging of commission pursuant to the DPLA.

80. The two issues raised by Apple were, first, as to whether the market is likely to be affected “in more than one country”; second, whether Article 6(3)(b) is limited in scope to situations which produce a distortion of competition within the EU and cannot apply to claims concerning restrictions of competition in countries outside the EU.

81. As to the first issue, neither party was contending that the alleged restriction of competition affected more than one country. The PCR’s primary case was that the restriction only affected the market in the UK. Apple’s case was that, in relation to foreign Storefronts, the restriction only affects the country where the Storefront is located; the fact that a developer may have to pay 30% commission on iOS sales through the Japanese Storefront might have effects in the Japanese app distribution market but this conduct cannot be said to affect the UK app distribution market.
82. In the Tribunal’s view, it is reasonably arguable that the restriction of competition affects the market for the distribution of app services in more than one country, not just the UK, on the footing that the commission is charged by a single contract, the DPLA, which is worldwide in scope. Apple does not impose different charges or conditions in respect of sales made on any particular versions of the App Store or in any particular territories, apart from the two exceptions of the Storefront in the Netherlands and the Storefront in South Korea referred to above. The PCR would therefore have a reasonable prospect of establishing that the restriction of competition in the present case is akin to the cross-border MIFs in *Westover* and is not to be equated with the Italian domestic MIF in that case.
83. The second issue, as to whether Article 6(3)(b) is a universal provision or applies only to restrictions affecting EU markets, is a purely legal issue which does not appear to have been addressed in any reported case. It is a controversial topic among commentators.<sup>3</sup> The argument in favour of the universal application is essentially that, in accordance with Article 3 of Rome II,<sup>4</sup> the Regulation is of “universal application” meaning that it applies to determine the applicable law in all cases falling within its scope, irrespective of whether the facts of the case have any link to the law of a Member State of the EU (before the IP Completion date) or to the law of the United Kingdom.

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<sup>3</sup> See for example, *International Antitrust Litigation – Conflict of Laws and Coordination*, eds. Basedow & ors pp.100-102; *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Dickinson) at 6.64.

<sup>4</sup> “Any law specified by this Regulation shall be applied whether or not it is the law of [a Member State]/the United Kingdom or part of the United Kingdom”.

84. It was submitted by the PCR that, consistently with this principle of universal application, Article 6(3)(b) should be construed as applying to a situation where the market is, or is likely to be, affected in more than one country, irrespective of whether the other country is outside the EU. The text of Article 6(3) does not include any limitation on its scope and refers to “more than one country” rather than “more than one Member State” which it could have done had the intention of the legislator been to confine its application to markets affected in the EU. The purpose of Article 6(3)(b) is to facilitate the effective enforcement of competition law affecting more than one market, by enabling a claim to be brought under English law, if the conditions in Article 6(3)(b) are satisfied, rather than requiring a claimant to apply a “mosaic” of different laws applicable to different markets. That purpose is as relevant to claims covering markets outside the EU as to markets within the EU.
85. Apple’s arguments in support of a limited application of Article 6(3)(b) were, first, that, according to Recital (1) of Rome II, the Community is to adopt “measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market” (Recital (1)). It is not necessary for the functioning of the internal market to render claims concerning markets outside the EU governed by the law of an EU Member State.
86. Second, Recital (23)<sup>5</sup> explains that the concept of a restriction of competition under Article 6 is limited to conduct prohibited by Article 101/102 TFEU “or by the law of a Member State”. That is consistent with the legislature not having contemplated its extension to conduct outside the remit of any Member State’s competition law and suggest that Article 6(3)(b) is limited to situations which produce a distortion of competition within a Member State or within the internal market and which are prohibited under Articles 101 and 102 TFEU or

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<sup>5</sup> “... the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.”

under the law of a Member State and does not extend to a situation where the affected market is located outside the EU.

87. Third, Article 6(3)(b) is an exception to the general rule that claims are subject to the law of the place where the damage is suffered. However, as the exception applies only in the competition context, permitting a claimant to elect the *lex fori* engenders no unfairness where the damage is suffered across several Member States because, by definition, they all share a common competition law (i.e. TFEU Articles 101 and 102 and complementary national provisions). However, extending the Article 6(3)(b) exception beyond EU borders would be unfair in that the claimant's election under that provision would retrospectively extend the law of an EU Member State/ the UK to conduct over which, at the time, it had no application and the imposition of EU/UK competition law on markets in foreign countries, even if those countries have different competition laws or no competition law at all.
88. In the Tribunal's view, the arguments in support of the limited application of Article 6(3)(b) are compelling and, had it been necessary to decide the issue, the Tribunal would have concluded that it was not open to the PCR to rely on Article 6(3)(b) in relation to restrictions of competition affecting markets outside the EU.
89. Notwithstanding the Tribunal's conclusion in relation Article 6(3)(b) of Rome II, we reject the Applicable Law Ground of Apple's applications on the basis that the PCR has a realistic prospect of successfully establishing that the claim is governed by UK law pursuant to Article 6(3)(a).

## **I. ISSUE 2: TERRITORIAL SCOPE**

### **(1) Applicable legal principles**

90. It was submitted on behalf of the PCR that, if the Tribunal concluded that there was a realistically arguable case that the applicable law to the PCR's claims was English law, it would not be necessary to go on to consider the question of territorial scope under Article 102. We agree with Apple that this submission

was incorrect. The territorial scope of Article 102 is set by a Treaty which is the primary tier of EU law. It cannot be extended by the application of a Regulation such as Rome II which is lower in the EU hierarchy of norms. It is therefore necessary to consider the scope of Article 102 irrespective of the effect of Rome II. That was the approach followed by the Court of Appeal in *Iiyama*, in which, having decided the question of applicable law, it went on to consider territorial scope as a separate matter.

91. Article 102 TFEU prohibits an abuse of a dominant position within the internal market or a substantial part of it “in so far as it may affect trade between Member States”. Section 18(1) CA98 similarly prohibits an abuse of a dominant position “if it may affect trade within the United Kingdom”. Pursuant to section 60A(2) CA98, the Tribunal should interpret the Chapter II prohibition with a view to securing that there is consistency with the way in which the CJEU interpreted Article 102 before IP Completion Day.
92. There are two tests for determining whether conduct is within the territorial scope of UK/EU law, the implementation test and the qualified effects test. Conduct taking place outside of the EU may fall within the territorial scope of EU competition law where it is implemented in the EU (*Ahlström Osakeyhtiö v. Commission* [1988] 4 CMLR 901) or satisfies the “qualified effects” test because “it is foreseeable that the conduct in question will have an immediate and substantial effect in the EU” (*Intel Corp Inc v European Commission* (C-413/14P) [2017] 5 CMLR 18 (“*Intel*”) at §49).
93. In *Iiyama*, the Court of Appeal noted (at §91) that *Intel* technically concerned the territorial jurisdiction of the European Commission but that there was no reason to think that the territorial scope of the Commission’s jurisdiction differs in principle from the territorial scope of Articles 101/102 TFEU. The Court of Appeal went on to consider the ECJ’s endorsement of the General Court’s explanation that “Intel’s conduct was intended to produce an immediate effect in the EEA and was capable of doing so”. The Court of Appeal held as follows:

“92. ... The points of particular significance which we extract from the General Court’s explanation are:

- a) the recognition that conduct intended to delay the launch of a competing product worldwide could constitute a direct effect in the EU, ‘and not merely a knock-on effect’;
- b) the absence of sales by Intel of CPUs to Acer in the EU did not mean that the effect in the EU of Intel’s conduct could only have been indirect; and
- c) viewed as a whole, the infringement was capable of ‘changing the effective competition structure in the common market’.

93. Furthermore, the need to take account of the offending conduct *as a whole* is a theme repeatedly emphasised by the court in its judgment in *Intel*. It applies to all three elements of the qualified effects test. In relation to foreseeability, the court said at [50] that it is necessary to examine the relevant conduct ‘viewed as a whole’, in order to determine whether the Commission has jurisdiction to apply EU competition law. In relation to immediate effect, the court (as we have seen) endorsed the approach of the General Court. And on the question whether the effect would be substantial, the court said at [56], again agreeing with the General Court, that “it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to access the substantial nature of its effects on the market of the EU”.

94. *Iiyama* was a damages claim arising out of two world-wide price-fixing cartels made wholly outside the EU. The cartel products were sold to innocent third party manufacturers based typically in East Asia who used the products to build a monitor which was then sold to the parent company of the Iiyama group for importation into the EU. The Court of Appeal held that there was a serious issue to be tried as to whether the inflated prices paid by the claimants as a result of the cartels constituted a foreseeable, immediate and substantial effect in the EU so as to bring the claim within the territorial scope of Article 101 even though the cartel products were first supplied to entities outside the EU and then to the parent company outside the EU, stating:

“100. What matters is that the cartel was always intended to have worldwide effect, including in the EU, and it must have been contemplated that the supply chains whereby cartelised goods ended up being purchased within the EU might include intra-group transactions. The important point is that purchases are ultimately made, at an inflated cartel price, within the territory of the EU. The existence of such purchases, on any substantial scale, must therefore have an effect on the operation of the internal market.”

95. In *Unlockd Ltd v Google Ireland Ltd* [2018] EWHC 1363 (Ch) (“*Unlockd*”) the issue was whether the removal by Google of apps containing the claimants’ software from Google’s Play Store outside the EU was within the territorial scope of EU competition law. The first claimant was an Australian company and the parent company of the *Unlockd* group. The other two claimants were English subsidiaries. The defendants were all members of the Google group.

The third defendant was incorporated in Delaware and based in California. It was the parent company of the first and second defendants which were incorporated in Ireland.

96. The claimants had developed software for apps on the Android operating system as a means of delivering advertisements to consumers on the unlocking of their Android device. The software was incorporated into apps available for download on the defendants' service Google Play Store and it made use of Google's advertising service AdMob. The claimants supplied their product to the UK market through a partnership with Tesco Mobile, whose app incorporated the claimants' product, and to the US and Australian markets through different versions of the Play Store. In 2018, Google informed the claimants that it was suspending the supply of the AdMob service for the claimants' product and also removing apps containing the claimants' product from the Play Store. The claimants contended that such action would have a devastating impact on their business and lodged a claim alleging breach of Articles 101 and 102 TFEU and Ch II of the Competition Act.
97. The first and second defendants agreed not to contest jurisdiction if the claim against them was limited to suspension/removal of the product from the Play Store and AdMob within the EU and the third defendant agreed not to contest jurisdiction if the claim against it was limited to suspension/removal of the product from the Play Store and AdMob within the EU. However, the latter also contended that there was no serious question to be tried as to an alleged infringement of EU competition law regarding such suspensions/refusals carried out outside the EU. The critical issue was therefore whether such suspensions/refusal outside the EU were within the territorial jurisdiction of the court.
98. The claimants put their argument as to territorial jurisdiction on two main bases. First, they contended that the claim was analogous to the claim in *Iiyama* in that the conduct complained of concerned a single, global policy and a single decision of Google concerning the Unlockd product, which had an immediate and substantial effect in the EU. EU competition law therefore reached that conduct wherever it was implemented. Secondly, they submitted that since the

suspension as applied in the US and in Australia had serious financial consequences for the Unlockd group which would reduce intra-group funding, this weakened the ability of the second claimant to compete in the UK (and of the Unlockd group generally to expand in Europe) and so fell within the scope of EU competition law. They claimed damages on the basis of loss to Unlockd's global business and an injunction effectively requiring Google to provide access to its Google Play Store for AdMob services all over the world.

99. Roth J rejected both arguments. The case of *Iiyama* did not support the argument that, because the action taken was a single global policy having foreseeable substantial and immediate effect down the line of Google's arrangements for the supply of its services, Google's conduct in denying access to its services in the US or in Australia had an effect on trade within the EU so as to constitute an infringement of Article 102. The facts of *Iiyama* were quite different, involving as they did a worldwide cartel with an intended effect on the EU internal market. There was nothing in the judgment of the Court of Appeal to suggest that if Iiyama's putative Australian subsidiary had purchased finished products incorporating cartel products in Australia, or its American subsidiary had done so in the US, those companies could bring a claim for damages in the English courts for infringement of Article 101, or indeed that damages based on such non-EU purchases could have been claimed by Iiyama's parent company.
100. Roth J also referred to the prohibition decision of the European Commission in *Google Search (Shopping), Re* (AT.39740) [2018] 4 CMLR 12. This was an Article 102 TFEU case concerning Google's practice of giving prominence on the results page of the Google general search engine to Google's own comparison shopping website through its "Product Universal" product. Google launched Product Universal in the US and in Member States of the EU. Although Google was found to be dominant in the market for general search services in all those markets and Product Universal was a standard form product developed centrally by Google, the Commission found that Google's infringement of Article 102 only started in each national market within the EU from the moment that Google launched its Product Universal there. The remedy imposed to bring the infringement to an end only applied to users of



Google “in the thirteen EEA countries in which the offending conduct takes place”. There was no question of the Commission requiring Google to cease this practice as applied to users in countries outside the EEA.

101. Roth J went on to reject Unlockd’s alternative argument based on the weakening of the Unlockd group through the decline in revenue from the US and Australia, which in turn meant that funding for the business in the UK and elsewhere in Europe was diminished, leaving the second claimant a weaker competitor. This was not the *immediate* effect required under the qualified effects test.
102. Having decided that there was no serious issue to be tried, the issue of *forum conveniens*. i.e. whether the English court was clearly the appropriate forum for claim a claim concerning Unlockd apps outside the EU fell away, but Roth J went on to hold that he did not consider that the English court was the appropriate forum, stating as follows:

“50. Where allegedly anti-competitive conduct concerns the Australian market, that is a matter for Australian competition law, and similarly where it concerns the US market, that is a matter for US Federal or State antitrust law.  
...

51. I recognise that when a global company pursues an allegedly anti-competitive international strategy which may affect its competitors in many different markets across the world, it is much more convenient if such an adversely affected competitor could bring its complaint against that conduct in one forum. But mere convenience is not a basis to extend further the extraterritorial reach of EU competition law, still less does it make it appropriate for the English court to assume the role of competition policeman of the world.”

## (2) The PCR’s case

103. The PCR contended that the conduct of Apple satisfied both the implementation test and the qualified effects test. It had realistic prospects of establishing that Apple’s conduct was implemented within the UK/EU and had an immediate and substantial effect in the UK/EU.

104. The PCR relied on the following passage in *Intel* emphasising the need to take the conduct of the offending undertaking, viewed as a whole, into account when considering all three elements of the qualified effects test.

“56. Accordingly, in view of the considerations set out in [50] above, the General Court did not err in law in holding that, faced with a strategy such as that adopted by Intel, it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to assess the substantial nature of its effects on the market of the EU and of the EEA.”

105. It was argued on behalf of the PCR that in the present case there was a single contract made between Apple and the UK-based developers which led to a single course of conduct through the extraction of commission for distribution services through the App Store, albeit one which has different Storefronts in different countries. This was not a case of a bundle of separate contracts or separately negotiated transactions.

106. Apple’s conduct was implemented in the UK because the commission was imposed by a contract entered into in the UK by UK businesses. The qualified effects test is also met. Taking each of the three criteria (foreseeability, substantiality, and immediacy) in turn:

- (1) It was (directly) foreseeable that, if Apple charged an excessive or unfair commission on app sales, the sellers of those apps (i.e., the app developers), including those in the UK, would be affected.
- (2) The substantiality criterion was satisfied having regard to the fact that the commission of 30% in most instances has been imposed for many years and is caused by Apple—the world’s most valuable company, and a 100% monopolist in the relevant market.
- (3) The immediacy criterion relates to the causal link between the conduct and the effect under consideration. It was difficult to conceive of a closer causal link than that between the charging of an excessive price and the damage suffered by the persons paying that price.

107. The PCR contended that *Unlocked* was a “starkly different” case which did not establish any principle but was simply an application of well-established principles to the circumstances of that case. It was concerned with a denial of access to a market in which consumers can buy products, not about the level of commissions paid by developers. Here, the complaint is not that Apple is excluding developers from consumer markets. It is that it is overcharging them for services which it provides to them on an upstream distribution market in the UK; this has direct and immediate effects in the UK. *Unlocked* is not authority for the proposition that, where a distributor and marketer sells services to UK-based developers in the UK, the developers’ claims that the terms of that relationship are abusive must be sliced up and decided by the law of each place in which sales to device users are or might be made.

### (3) Apple’s case

108. Apple’s case was that section 18 CA98 and/or Article 102 TFEU as retained do not extend to the charging of commission in relation to transactions taking place via Non-EU Storefronts before IP Completion Day and via Non-UK Storefronts thereafter.

109. It submitted that the reasoning in *Unlocked* was dispositive of the territoriality issue in the present case. The focus in *Unlocked* was on the denial of access to services in particular countries, not on the location of the company that was asking for those services. As Roth J explained in *Unlocked*, the critical factor establishing an arguably immediate effect in the EU in *Iiyama* was the commerce that was the subject of that claim consisting of purchases made by the claimants at an alleged overcharge in the EU. Apple relied on the following passage in Roth J’s judgment:

“32. There is nothing in the judgment of the Court of Appeal to suggest that if Iiyama’s putative Australian subsidiary had purchased finished products incorporating LCDs or CRTs in Australia, or its American subsidiary had done so in the US, those companies could bring a claim for damages in the English courts for infringement of art.101, or indeed that damages based on such non-EU purchases could have been claimed by Iiyama’s parent company. To the contrary, such a position would in my view be inconsistent with the basis of reasoning emphasised by the Court in the passage I have quoted.”

110. Similarly, according to Apple, the commerce consisting of the purchase of services outside the EU/UK (e.g. the distribution of apps via the US or Australian Storefront) by UK domiciliaries was outside the scope of the CA98 and TFEU and not reasonably arguable. The charging of commission on relevant sales through (for example) US or Australian Storefronts affects the conditions under which the proposed class members can supply their iOS apps and digital content into the US and Australian markets. But that conduct has no foreseeable, immediate and substantial effect on the conditions under which the proposed class members supply their products into an EU or UK market. In much the same way, Google's decision not to distribute certain apps through its US and Australian Play Stores had no immediate and substantial effects on Unlockd's ability to supply into an EU/UK market.
111. Apple contended that whether or not the charging of commission on transactions effected via different Storefronts amounted to the implementation of a global policy was immaterial for the reasons given by Roth J in *Unlockd*. The fact that a policy may have substantial effects in an EU market is not a reason to extend the territorial scope of EU competition law to cover any conduct implementing that same policy in any number of non-EU markets around the world.
112. The fact that the UK-domiciled developer received less money in its bank account – which may or may not be in the UK – did not constitute an immediate effect in the UK. If it were otherwise, a party based in the UK with a bank account here could, for example, bring a claim in the English Court about a real estate agent's commission in Australia infringing UK competition law, which would be a surprising way to distribute competition law competence.

#### **(4) The Tribunal's conclusions**

113. The issue for the Tribunal is whether the PCR has realistic prospects of success in establishing that Apple's conduct in relation to transactions effected via Non-UK Storefronts was either (i) implemented in the EU/UK or (ii) foreseeable that it would have an immediate and substantial effect in the EU/UK.

114. *Unlockd* is helpful to Apple in as much as Roth J rejected the argument that conduct outside the EU is to be taken to have a foreseeable substantial and immediate effect in the EU if it forms part of a global policy affecting EU and non-EU jurisdictions. If the charging of commission in relation to non-UK/EU Storefronts is not otherwise conduct satisfying the implementation or qualified effects test, the fact that it forms part of a global policy would not give rise to plausibly arguable case. Roth J's rejection of the argument based on the weakening of *Unlockd* group through the decline in revenue from the US and Australia, on the basis that this weakening was very far from an "immediate" effect, is not, contrary to Apple's case, dispositive of the question whether its conduct had an immediate and substantial effect in the EU/UK. The judgment in *Unlockd* does not address the question whether the charging of excessive and unfair commission to app developers based in the UK amounts to implementation and/or an immediate effect in the UK. That issue is essentially one of fact and the facts of *Unlockd* were materially different from the facts of the present case. In the Tribunal's view, despite the cogent arguments advanced by Apple, the PCR has a realistic prospect of establishing that Apple's overcharging of commission to app developers based in the UK in relation to commerce transacted on Non-UK Storefronts did amount to conduct implemented in the UK and/or that it was foreseeable that Apple's conduct in overcharging UK-based app developers in respect of commerce transacted on non-UK Storefronts would have an immediate and substantial effect in the UK.

115. It follows that the Tribunal rejects the Territoriality Ground of Apple's applications.

## **J. ISSUE 3: FORUM NON CONVENIENS**

### **(1) Applicable legal principles**

116. In the context of the application for permission to serve outside the jurisdiction, the PCR must show that England and Wales is clearly and distinctly the proper forum for the trial of the claims. This test derives from the decision of the

House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 481:

“The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right.”

117. As Lord Goff made clear in the above quotation, the burden will rest upon a defendant who seeks to persuade a court or tribunal that it should decline to exercise jurisdiction over proceedings started in this country as of right.
118. In considering the appropriate forum, the fundamental consideration is the interests of all the parties and the ends of justice. The factors to be taken into account are wide-ranging and should include i) the personal connection which the parties have to England; ii) the factual connections which the events have with England; iii) the question which law should apply; iv) the possibility of there being a *lis pendens* in another court; and iv) the possibility that other persons may become party to, and affect the overall shape of, the litigation (see *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] 5 CMLR 5, [2017] EWHC 374 (Ch) at §187.
119. It was common ground that the jurisdiction clause in the DPLA, providing for any litigation or other dispute resolution between the developer and Apple to take place in the Northern District of California, was not enforceable in relation to the claims that the PCR seeks to combine. Apple did not contend that the courts of California would be an appropriate forum for the trial of the PCR’s claims.

## **(2) The PCR’s case**

120. The PCR submitted that, once it was accepted that UK law applies to the present claims because (*inter alia*) the effects are felt on a UK market, it becomes easy to see that the UK is the appropriate forum. In addition, as found in the September Order, there is a range of other factors pointing compellingly in favour of the UK. In particular, the domicile of the Proposed Class Members,

the whereabouts of witnesses from among the Proposed Class Members and of the documentary evidence held by the Proposed Class Members and the location of the PCR’s legal representatives and experts who are all based in the UK.

121. Further, as Roth J held in *Epic*—specifically concerning Apple—if a multinational company trades on a global scale, it can expect to have to bring evidence to defend its conduct in courts around the world. Accordingly, the circumstance that Apple would have multiple US-based witnesses is not, in this context, a material one. By contrast, it is unfair to expect small businesses such as the Proposed Class Members to do so (or to participate in class proceedings abroad).
122. It would not be efficient, and would give rise to a greater risk of inconsistent outcomes, for this case to be decided in a different forum from the *Kent* proceedings, given the substantial overlap between the two cases. Apple does not suggest that its claims are justiciable in the US, and does not challenge the PCR’s submission that being required to litigate in the USA would cause the Proposed Class Members serious prejudice. Apple has failed to do what it must under the *Spiliada* test — i.e., to show that there is another forum which is clearly or distinctly more appropriate than this Tribunal. It has suggested that “many [EU jurisdictions] have well-established collective action regimes, such as the Netherlands and Portugal” but it has not attempted to show that, in any of those jurisdictions the Proposed Class Members would be entitled to sue, that foreign law could be applied (as Apple’s logic would require in relation to sales made to device users in other territories) or that opt-out proceedings are available.
123. Apple’s proposal is instead that each claim sought to be brought in these collective proceedings be broken up into multiple elements—one for each territory in which the relevant app developer’s apps were bought. That is not only unworkable, and contrary to the efficient administration of justice, but it also fails to meet the “requirement for the court to consider the proper place for the case as a whole” *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2020] AC 1045, at [74].

124. Apple objects that the PCR's approach will lead to administrative difficulties because of the overlap with the *Anthony* proceedings in Australia but any such difficulties can be easily resolved, insofar as the Proposed Class Members are already compensated in *Anthony*, by requiring the PCR to take that into account by giving credit at the appropriate stage.

**(3) Apple's case**

125. Apple submitted that the Tribunal should decline to exercise jurisdiction over the Proposed Claims to the extent that they concern the commission charged on transactions effected through Non-UK Storefronts, including those concerning EU Storefronts before IP Completion Day, on the ground that the PCR's claims extend beyond the claims in the existing *Kent* proceedings, have a minimal connection to the UK and, in the circumstances, should be tried in the jurisdictions in which the relevant Storefronts operate.

126. Apple contended that the centre of gravity of the Proposed Claims was not in England and Wales. Only a small minority of the revenues earned by UK-domiciled developers are generated by relevant sales through the UK Storefront. The vast majority of the claim value therefore derives from transactions entered into with iOS device owners domiciled in other countries through Storefronts in respect of which any commission is paid to a Non-UK Proposed Defendant. In those circumstances, the fact that the Proposed Class Members happen to be domiciled in the UK ought to be accorded minimal weight.

127. A further reason relied on by Apple for declining jurisdiction in relation to non-UK Storefront commerce is that the commission payable on transactions effected via a particular Storefront may be the subject of competition claims both by developers and by iOS device owners/consumers domiciled in any number of different countries. In those circumstances, it would be sensible for the Tribunal to leave the determination of the effect (if any) of the commission charged on transactions taking place via Non-UK Storefronts to be dealt with by the courts of the jurisdictions in which those other Storefronts operate. Otherwise, there was a real risk of different courts handing down inconsistent



judgments on the same issues as illustrated by the pending *Anthony* proceedings in Australia.

128. Apple urged the Tribunal not to assume the role of competition policeman of the world and argued that alleged abuses of competition law are best determined in the courts of the market which is allegedly affected, as observed by Roth J in *Unlocked*. It referred to the situation in countries such as the Netherlands and South Korea, where regulators are applying their laws to regulate the terms on which Apple operates but only in relation to the Storefronts in those countries.
129. Apple also argued that there were two further reasons why the Tribunal should decline to exercise jurisdiction over the Proposed Claims insofar as they allege that the commission charged on transactions effected via the various EU Storefronts infringed Article 102 TFEU (as retained). First, issues as to the application of Article 102 TFEU terms should be determined by the courts of the EU Member States who retain the ability to refer issues of EU competition law to the CJEU for binding guidance. Second, this Tribunal only has jurisdiction to determine alleged infringements of Article 102 TFEU in its retained EU law version insofar as they occurred up to IP Completion Day. Accordingly, a significant proportion of the relevant claims period falls outside of the Tribunal's retained EU law jurisdiction. It would be better for the courts of the EU Member States to deal with EU law claims arising from the Proposed Defendants' pricing conduct on the EU Storefronts in a comprehensive way.

#### **(4) The Tribunal's conclusion**

130. The Tribunal is satisfied that it is clearly and distinctly the appropriate forum for the trial of the PCR's claims in relation to commission charged on transactions effected via Non-UK Storefronts, for the following reasons.
131. First, there are substantial connecting factors to this jurisdiction, as identified by the PCR, in particular the location of the members of the proposed class, the witnesses and the documentary evidence, the likely application of the law

of England and Wales and the location of the PCR's legal representatives and experts.

132. Second, there is no other obviously suitable jurisdiction. Class members, which are mostly small businesses with modest-sized claims, would face obvious difficulties in bringing proceedings abroad. Apple is one of the world's best-resourced companies and would have no difficulty defending proceedings here. The Tribunal accepts the PCR's argument that requiring app developers to bring proceedings in each territory of the foreign Storefronts is impractical. Apple has failed to demonstrate that the Proposed Class Members would be entitled to sue in any other forum.
133. Third, these factors easily outweigh the countervailing factors put forward by Apple in arguing that the Tribunal is not the *forum conveniens* and that the UK based app developers should sue Apple elsewhere. It is uncertain to what extent consumers will bring proceedings in other jurisdictions challenging Apple's commission, giving rise to a risk of inconsistent judgments. The Tribunal does not accept that there would necessarily be any risk of double recovery from the *Anthony* proceedings and these proceedings given that, as the PCR points out, the app developers would *prima facie* have to give credit for any damages recovered in the *Anthony* proceedings. The advantages of allowing claims to proceed in the courts of EU Member States because of the possibility of appeals to the CJEU and the limited timespan of the Tribunal's retained EU law jurisdiction are, in the Tribunal's view, marginal. The UK has an extensively developed case law on unfair pricing.

## **K. ISSUE 4: ALTERNATIVE SERVICE**

### **(1) Applicable legal principles**

134. Rule 111(16) of the Tribunal Rules provides that a collective proceedings claim form shall be served on a defendant outside the jurisdiction "by any method permissible under Part 6 of the CPR in relation to proceedings in England and Wales". Rule 111(2) of the Rules provides that the Tribunal may make an order permitting and specifying an alternative method of service or place

“[w]here it appears to the Tribunal that there is a good reason to authorise service by a method or at a place not otherwise permitted by these Rules”.

135. It is common ground that the Non-UK Proposed Defendants are based in countries which are signatories to the Hague Service Convention, and that the PCR sought permission to effect service otherwise than in accordance with the terms of that Convention.
136. In *Nokia Technologies Oy v OnePlus Technology (Shenzhen) Co Ltd* [2022] 1 All ER (Comm) 1384, [2022] EWHC 293 (Pat) at §21, Marcus Smith J held that the correct approach in the case of an application for alternative service of a claim form out of the jurisdiction where there is a convention in place is as follows:

“18. In *Abela v Baadarani* [2013] UKSC 44, Lord Clarke made quite clear that service was intended to ensure the proper communication of relevant documents to a defendant. Emphatically, service is not a forum for the playing of technical games. The reason alternative service and service generally is more fraught in cases involving proceedings and defendants out of the jurisdiction is simply because it involves the coercive processes of the English courts being foisted upon the defendant who is out of the jurisdiction. That is why one must tread more carefully in the cases of service out of the jurisdiction than in cases of service in the jurisdiction where it is simply a question of ensuring that proceedings and people completely under the control of the English courts are properly dealt with in a fair and just way in accordance with the overriding objective.

19. In that context, Lord Clarke clearly recognised the importance of bilateral treaties and conventions in relation to service out, noting at 34 that alternative service on parties and territories affected by such treaties or conventions ran the risk of subverting the provision of those treaties. That, if I may say so, is entirely clear. If one has entered into a convention with another state for the service of civil proceedings on persons in that state, then to disregard those provisions would be disrespectful and contrary to the rules of comity between nations.

...

21. It seems to me that there is a two-fold test in this kind of case. Applying and reading across rule 6.15 to the extraterritorial case, one must find a good reason to permit alternative service as opposed to the usual form of service, which in this case is service pursuant to the Hague Convention. Over and above that, though, because the Hague Convention is not a rule of domestic law but a rule operating on the plain of international law, there must be special or exceptional circumstances to justify a departure from the standard rules.

...

31. I turn now to the second stage, special or exceptional circumstances justifying a side stepping of the Hague Convention. It seems to me that this second stage involves a balancing and consideration of the importance of properly conducting what are regular proceedings in this jurisdiction, against departing from the regular form of service stipulated by a foreign state for the service of persons within its borders. Put shortly, it is due administration of justice versus comity and it is where the interests of the former outweigh those of the latter that special circumstances or exceptional circumstances exist.”

137. In *M v N* [2021] EWHC 360 (Comm), Foxton J listed the types of case in which factors had been held sufficient to justify an order for alternative service in a Hague Convention case as follows:

“i) Cases in which an attempt is being made to join a new party to existing proceedings, where the effect of delay in effecting service on the new party under the HSC will be either substantially to interfere with directions for the existing trial, or require claims which there is good reason to hear together to be heard separately: see for example *Avonwick Holding Limited v Azitio Holdings Limited and others* [2019] EWHC 1254 (Comm) and *Evison Holdings Limited v International Company Finvision Holdings LLC* [2020] EWHC 239 (Comm).

ii) Cases where the proceedings have been begun with a without notice injunction application, which is to be served immediately or in short order on the respondent. As Calver J noted in *Griffin Underwriting Limited v Varouxakis* [2021] EWHC 226 (Comm),[57]:

“In my judgment, in a case such as this where a party seeks a freezing injunction, because the court is making a number of coercive orders with the risk of committal for contempt, as well as the claimant giving an undertaking in damages, it is important that the proceedings be constituted formally as soon as possible which, in my judgment, fully justifies an order for alternative service, despite this being a Hague Convention case.”

See also the same judge in *AXIS Corporate Capital UK II Limited v ABSA Group Limited* [2021] EWHC 225 (Comm), [104] and Bryan J in *Abu Dhabi Commercial Bank PJSC v Shetty* [2020] EWHC 3423 (Comm), [113-115].

iii) Cases where an expedited trial is appropriate, and the order for alternative service is necessary to achieve the required expedition (as in *Daiichi Chuo Kaisha v Chubb Seguros Brasil SA* [2020] EWHC 1223 (Comm), [47]).

iv) It has also been suggested that an order for alternative service might be appropriate when the order sought arises out of a hearing which has already taken place, and delay in service under the HSC might lead to the issues being determined a prolonged period after the fact-finding has been undertaken (Marashen, [67]), or in cases in which the financial consequences of requiring service under the HSC might make pursuit of a low value claim financially unviable (Marashen, [73]).”

**(2) Apple's case**

138. Apple contended that the Tribunal should not have granted the PCR permission to effect alternative service outside of the jurisdiction on the Non-UK Proposed Defendants. It contended as follows:

- (1) In applying a test of whether alternative service was justified by “good reason”, the Tribunal had thereby misdirected itself. Orders for alternative service ought to be made in Hague Convention cases only in exceptional or special circumstances.
- (2) The desire of a claimant to avoid the delay inherent in service by the methods permitted under the Hague Convention will not without more justify an order for alternative service.
- (3) The PCR was unable to show that there was good reason to order alternative service (still less that there were exceptional or special circumstances). The additional factor relied upon by the PCR, namely the desire to ensure that its proposed collective proceedings could ‘catch up’ with the *Kent* Proceedings and be tried at the same time, found favour with the Tribunal. However, the PCR’s evidence to the effect that effecting service in accordance with the Hague Service Convention would lead to delays of many months appeared to relate to the delays that would flow if the PCR were to effect service by the ‘transmission method’ in accordance with Article 5 of the Hague Convention (i.e. through the central authorities nominated by the sending and receiving states), rather than post in accordance with Article 10(a).
- (4) All of the relevant jurisdictions with the exception of Japan have consented to service by post. Service by post under Article 10(a) still requires the involvement of the Foreign Process Section of the King’s Bench Division. However, even assuming that the 9-week backlog in the Foreign Process Section will apply where a party wishes to effect postal service in accordance with Article 10(a), that is not a substantial

period of delay of a kind that would justify departure from service in accordance with the Hague Service Convention. Once the documents have been processed by the Foreign Process Section, there is no reason to believe that there would be any additional substantial delay on the receiving country end. All have efficient, well-functioning postal systems. The joinder of iTunes KK in Japan (which does not permit postal service) was not essential.

- (5) The Tribunal should place very little weight upon the PCR's desire to avoid a 9-week delay (or any longer period) in effecting service in circumstances where he has put forward no explanation, still less any good explanation, as to why he has only now taken steps to issue his Proposed Claims. The *Kent* Proceedings claim form was published on 4 June 2021 and certified in June 2022. To the extent that the PCR is feeling the pressures of time, that is entirely of his own making.

### **(3) The PCR's case**

139. The PCR contended as follows:

- (1) The issue between the parties is whether, in circumstances where a defendant is domiciled in a state which is party to the Hague Service Convention, "exceptional" or "special" circumstances must be shown before an order for alternative service is made, or whether there merely needs to be "good reason". There has been a debate in the authorities about this. However, the position articulated in the modern authorities is that where a party to be served is domiciled in a Hague Service Convention state and that state has objected (under article 10) to service otherwise than through a designated authority, an order for alternative service will only be granted in "exceptional circumstances". Where a party to be served is domiciled in an Hague Service Convention state, but no objection has been filed, the court should simply have regard to this as a "relevant factor" when considering whether a "good reason" has been established.

- (2) The authorities cited by Apple largely pre-date the modern authorities cited above, and in any event do not bear out the proposition that “exceptional” or “special” circumstances are always required where an Hague Service Convention jurisdiction is concerned. Ultimately, however, the debate about the test does not matter since Japan has objected to postal services so that the “exceptional circumstances” test must be met in respect of Japan. Moreover, the factors on which the PCR relies constitute “exceptional circumstances”. “Exceptional circumstances” may be found to exist where the delay would result in litigation prejudice. In this case, as the Tribunal recognised, without an order for alternative service on the First to Sixth Proposed Defendants, the timetable proposed by the PCR to allow these proceedings to catch up with the Kent Proceedings by July 2024 would be put at risk. Service through the transmission method via central authorities in accordance with Article 5 of the Hague Service Convention would take approximately 8 to 10 months. That is a factor that should carry considerable weight.
- (3) Little if any weight should be placed on Apple’s objection that any time pressure is of the PCR’s own making. That is because, as the Supreme Court has said, “(save, perhaps, in exceptional circumstances) events before the issue of the claim form are not relevant” when assessing whether alternative service should be validated retrospectively: *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043, at [48] per Lord Clarke (with whom Lord Neuberger, Lord Reed, and Lord Carnwath agreed: 2047F). The same rule ought to apply by analogy to the prospective consideration of alternative service.
- (4) Given the existence of the *Kent* proceedings, the fact that both Apple and its London solicitors (Gibson Dunn) are already before this Tribunal, dealing with nearly identical issues, the prejudice to comity attendant on ordering alternative service in this case may be seen as slight.

**(4) The Tribunal's conclusions**

140. Whether or not the test is articulated as “good reason” or “special or exceptional circumstances”, the underlying question when considering whether to order alternative service, sidestepping the requirements of the Hague Convention is, as noted by Marcus Smith J in *Nokia*, whether the interests in the due administration of justice outweigh the interests of comity. The more restrictive the relevant contracting state has been in what it regards as appropriate to permit by way of service, the better the reason or the more exceptional circumstance that must be shown by the party seeking to justify alternative service. The PCR accepts that in this case, as Japan has objected to service by post, exceptional circumstances need to be shown.
141. The crux of the issue is whether the delay in serving proceedings in accordance with the Hague Convention which, it is not disputed, would prevent the PCR from “catching up” with the *Kent* proceedings, with both claims being tried at the same time avoiding inconsistent outcomes, is a sufficiently exceptional circumstance to justify alternative service. Whilst, in general the desire of a claimant to avoid the delay inherent in service by the methods permitted under the Hague Convention will not without more justify an order for alternative service, delay causing litigation prejudice is capable of being an exceptional circumstance, as the cases referred to by Foxton J above illustrate.
142. In our view, the loss of the opportunity to catch up with the *Kent* proceedings, if service was to be effected in accordance with the Article 5 of the Hague Convention, was an exceptional circumstance justifying the order for alternative service. That conclusion would not be affected if, as alleged by Apple, the PCR had delayed in bringing proceedings. The potential advantage of having both cases tried at the same time and avoiding inconsistent outcomes would remain, irrespective of whether any blame attached to the PCR for the delay. Furthermore, as in *Nokia*, the effect of alternative service on comity would be “slight or non-existent [...] This was not a case of a true stranger being dragged kicking and screaming across the threshold of these courts.” The fact that the PCR could have chosen not to join iTunes KK in Japan and thereby avoided the requirement of transmission method of service does not



alter our conclusion. iTunes KK was appropriately joined as a proposed defendant as one of the agents appointed under the DPLA.

143. The fact that, as a result of Apple's applications which are the subject of this judgment, there has been a significant delay in the PCR's application for certification, with the consequence that the prospects of "catching up" with the Kent proceedings, or even of having any issues determined on a joint basis, have now receded does not, in the Tribunal's view, invalidate retrospectively the basis on which the order for alternative service was originally made.
144. For these reasons, the Tribunal declines to set aside the order for alternative service.

#### **L. ISSUE 5: FULL AND FRANK DISCLOSURE**

145. The legal principles were not in dispute. In advancing its ex parte applications for service out of the jurisdiction, the PCR was subject to an obligation to give full and frank disclosure. The principles governing that duty were summarised in *Sloutsker v Romanova* [2015] 2 Costs LR 321 at §51.

- “(i) An applicant for permission to serve proceedings outside the jurisdiction is under the duty of full and frank disclosure which applies on all applications without notice.
- ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know: *Brinks Mat v Elcombe* [1988] 1 WLR 1350, 1356 (1) and (2) (Ralph Gibson LJ). Put another way, disclosure should be made of “any matter, which, if the other party were represented, that party would wish the court to be aware of”: *ABCI v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485, 489 (Waller J).
- iii) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.
- iv) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure

was innocent is an important, though not decisive, consideration. See *Brinks Mat* at pp. 1357 (6) and (7) and 1358 (Balcombe LJ).

- v) In the context of permission for service outside the jurisdiction the court has a discretion to set aside the order for service and require a fresh application, or to treat the claim form as validly served and deal with the non-disclosure by a costs order: *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31; [2011] 2 AC 495, [136] (Lord Collins).”

## **(1) Apple’s case**

146. Apple complains that the PCR failed:

- (1) to point out the global reach of the Proposed Claims insofar as they seek to challenge the Proposed Defendants’ pricing practices applied to App Store transactions around the world (and thus their differences from the claims in the *Kent* Proceedings);
- (2) properly to draw to the Tribunal’s attention and/or address in substance the issue of whether the Proposed Claims extend beyond the territorial jurisdiction of section 18 CA98 and/or Article 102 TFEU as retained and the judgment of the High Court in *Unlocked* and subsequently failed to properly draw the Tribunal’s attention to these issues insofar as they were raised in Gibson Dunn’s letter of 26 July 2023 and make submissions on the same where those submissions would necessarily have had to make clear the intended scope of the Proposed Claims.

147. These failures are said to have been serious and to have served to conceal the fundamental weaknesses in the PCR’s application for permission to serve out of the jurisdiction. Apple contends that insofar as paragraph 1 of the September Order is not set aside by reason of the grounds set out above, the Proposed Defendants submit that paragraph 1 ought to be set aside for material non-disclosure.

## **(2) The PCR’s case**

148. The PCR rejected Apple’s complaint. It submitted, in summary, as follows:

- (1) The PCR's application for permission to serve the documents out of the jurisdiction dealt adequately with the applicable law including the basis on which it contended that the law of England and Wales applied pursuant to Article 6(3). It was not necessary to deal with territorial scope.
- (2) In any event, the argument based on *Unlockd* is not something that the PCR was required to cover in order to present the matter fairly. There is an important distinction between disclosing arguable defences known to a claimant and anticipating all of the points that might be raised in opposition to the claim. *Unlockd* was not an important defence, known to the PCR, about which the Tribunal was not informed. It is, at most, an arguably helpful authority in support of a general proposition which the Tribunal was certainly alive to.
- (3) Further, the procedural history shows that the PCR did not withhold any information from the Tribunal. Specifically, the PCR made his application on 25 July 2023 (referring in passing to *Unlockd* in the supporting witness statement). Apple sent its letter referring to *Unlockd* (in the context of the "Scope of the Claim", not "Jurisdiction") the following day. Apple asked the PCR to forward its letter to the Tribunal. The PCR did precisely as Apple had asked and sent Apple's letter to the Tribunal the very same day. The Chair was aware of *Unlockd* and referred to it in the Reasoned Order.
- (4) Even if there was some breach of the duty of full and frank disclosure, the consequence should not be the setting aside of service out of the jurisdiction: the overriding question for the Tribunal is what is in the interests of justice, and (especially in a case where the borderline between material facts and non-material facts may be an uncertain one) it is not in the interests of justice for service to be set aside.

**(3) The Tribunal’s conclusion**

149. In the Tribunal’s view, there was no breach of the duty of full and frank disclosure on the PCR’s part. The witness statement in support of the applications drew attention to the argument that might be raised by Apple that the class members’ losses were suffered in the place where customers buy apps rather than where the app developers are located. Given the way that the PCR put his case as to the application of UK law, it was not necessary to draw further attention to the territorial scope of the claims. The PCR drew Gibson Dunn’s letter dated 26 July 2023 to the attention of the Tribunal as requested. The Tribunal has rejected Apple’s argument that the reasoning in *Unlockd* completely undermined the PCR’s case. It was not necessary to refer to that case in any greater detail in order to present the matter fairly.

**M. TRIBUNAL’S OVERALL CONCLUSION**

150. Apple’s applications are unanimously dismissed.

Andrew Lenon KC  
Chair

Anthony Neuberger

Tim Frazer

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

Date: 12 April 2024