Neutral citation [2024] CAT 18

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

12 March 2024

Before:

JUSTIN TURNER KC
(Chair)
JANE BURGESS
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

**BETWEEN**

**JUSTIN GUTMANN**

Applicant / Proposed Class Representative

-and-

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

Respondents / Proposed Defendants

Heard at Salisbury Square House on 1 March 2024

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**RULING (FUNDING)**

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## APPEARANCES

Mr Nicholas Bacon KC (instructed by Charles Lyndon Limited) appeared on behalf of Mr Gutmann.

Ms Lucinda Cunningham (instructed by Covington & Burling LLP) appeared on behalf of Apple Inc., Apple Distribution International Limited and Apple Retail UK Limited.

## (1) Introduction

1. In a judgment dated 1 November 2023 ([2023] CAT 67) we certified these proceedings, subject to reviewing the terms of a litigation funding agreement which the Proposed Class Representative, Mr Gutmann, indicated was to be re-negotiated in the light of the decision of the Supreme Court in *R (on the Application of Paccar Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28 ("*PACCAR*"). At this hearing we have been asked to consider the terms of the revised litigation funding agreement (the "Gutmann LFA"). The background to these proceedings is set out in our previous ruling.

2. The Proposed Defendants ("Apple") maintain their opposition to certification on the grounds that:

> "(1) The mechanisms in the Revised LFA for the Funder to be paid out of Proceeds ahead of Class Members are inappropriate and call into question Mr Gutmann's suitability;
>
> (2) The Funder's Return under the Revised LFA is excessive and disproportionate. The cost-benefit analysis therefore points against certifying the collective proceedings. Moreover, the mechanism for calculating the Funder's Return is liable to have arbitrary and distortive effects on the incentives of the Funder; and
>
> (3) Further and in any event, the Revised LFA creates the risk of conflicts of interest as between the Funder and Mr Gutmann, and additionally as between the Funder and Class Members."

3. Apple does not contend that the terms of the Gutmann LFA directly prejudice its position but, as it is entitled to do, makes these submissions with a view to persuading us that we should not certify this claim. At the centre of Apple's complaints is the submission that there is no basis in law for creating an obligation on a class representative to pay a proportion of damages to a litigation funder to cover its fee, and that a funder is only entitled to receive its fee from unclaimed damages. This is a point which the parties agreed had not been decided before, although Apple contended that *obiter* comments support its interpretation.

4. In *PACCAR*, the Supreme Court considered the legality of two litigation funding agreements ("LFAs") which determined the funder's maximum renumeration by reference to a percentage of the damages ultimately recovered in the

litigation. The issue which fell for determination was whether this arrangement constituted "damages-based agreements" ("DBAs") under section 58AA of the Courts and Legal Services Act 1990 ("CLSA").

5. By a majority (Lady Rose JSC dissenting) it was held that the funder provided "claims management services" and that consequently the LFAs were caught by section 58AA of the CLSA. It was further held that the LFAs constituted DBAs. The consequence of this is that the LFAs were unenforceable and for this reason there was no proper basis upon which to certify the collective proceedings.

6. The decision was arrived at as a matter of statutory construction rather than policy. Lord Sales JSC stating, at [90]:

> "However, in my view neither of Sir Rupert Jackson's reports nor the Code of Conduct assist in answering the question of statutory interpretation which arises in this case. They post-date the enactment of the statutory definition in section 4 of the 2006 Act by several years and do not provide guidance regarding the policy context in which it was enacted or its purpose. Even if it might be said that it is desirable in public policy terms that third party funding arrangements of the kind in issue in this case should be available to support claimants to have access to justice (as to which I express no view), this is not a reason why there should be any departure from the conventional approach to statutory interpretation…"

7. The courts have observed that class actions necessarily require third party funding and that the placing of unnecessary hurdles in the way of parties obtaining funding may undermine the ability of meritorious claims to be brought and/or increase the cost of funding. But the interests of the litigation funder are not the same as those of the class. As observed by Green LJ in *London and South Eastern Railway Ltd and others v Justin Gutmann* [2022] EWCA Civ 1077 at [83]:

> "By way of preface to our conclusions we acknowledge that it is important for the CAT to exercise close control over costs. There are conflicting considerations at play. On the one hand to enable mass consumer actions to be viable *at all* will invariably necessitate the assistance of third-party funders (see the discussion in *Le Patourel* (ibid) at paragraphs [75] – [80]) and the CAT must therefore recognise that litigation funding is a business and funders will, legitimately, seek a return upon their investment. On the other hand there is a risk that the system perversely incentivises the incurring or claiming of disproportionately high costs. And there is also the risk, highlighted in Canadian literature, that third-party funders have an incentive to sue and settle quickly, for sums materially less than the likely aggregate award. This, if true, risks undermining important policy objectives behind the legislation which include properly rewarding the class and creating *ex ante* incentives upon undertakings to comply with the law."

8. A way to align the interests of a funder with the interests of the class is for the funder's return to be in proportion to the return to the class: but an agreement to that effect is impermissible as a DBA. Since *PACCAR*, LFAs have been put in place where returns are linked to multiples of the initial outlay. As Green LJ observed this does perversely incentivise the funder whose financial incentives may best be served by reaching an early settlement for modest damages. There are nevertheless safeguards within the legal framework in which class actions are conducted to minimise the impact of this potential conflict between the interests of the funder and the interests of the class.

9. An initial safeguard is that class members will have a suitable class representative, in receipt of legal advice, who will act in their best interests in negotiating an appropriate and competitive litigation funding agreement. Additionally, the Tribunal is required to certify a class action and as part of that exercise it will consider the proposed funding arrangements. As stated in *Dr. Liza Lovdahl Gormsen v Meta Platforms Inc and others* [2024] CAT 11:

> "34. We are very grateful to Meta for raising this point. We accept entirely that funding gives rise to at least two issues in relation to which the Tribunal must exercise great care:
>
> (1) First, there is the question of whether – in terms of straightforward allocation – a funder is taking more from the class than they properly should.
>
> (2) Secondly, there is a danger of perverse incentives arising; or (to put it more accurately) in a conflict between funders' interests and class interests manifesting itself. The problem, as we see it, is that funders are (as the law presently stands) precluded from aligning themselves with the class: they cannot, without more, lawfully, seek a return that is based on the damages recovered by the class. To this extent, therefore, the "perverse incentives" are imposed on funders.
>
> 35. Both of these points arise against a context of commercial – and largely confidential – negotiation between the PCR and the funder, into which the Tribunal should be slow to venture. The collective actions regime in this jurisdiction depends on funders being ready and willing to assume the very considerable financial risk in funding litigation that is, on any view, large, complex and enormously expensive. It is not for this Tribunal, on certification, to review the commercial arrangements that have been reached between the class representative and the funder. That was a point made by Mr Bacon, KC, for the PCR, and in substance we agree with it: the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or judgment, and the Tribunal will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a "cash cow" either for lawyers or for funders.

> 36. That being said, there do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out or *in extremis* a blanket refusal to certify…."

10. We respectfully endorse the comments of the Tribunal in *Meta* that the Tribunal should be slow to venture into the detailed negotiations that have given rise to a litigation funding agreement save where provisions are sufficiently extreme to warrant calling out.

11. Additional safeguards may be written into an LFA by ensuring that important decisions in the litigation are not being made by the litigation funder. In this case it is expressly stated, at paragraph 10.1 of the Gutmann LFA, that it is the class representative and solicitor acting on his instructions who shall have independent control over the conduct of the proceedings. Further section 16 of the Gutmann LFA provides that any disputes between the Funder and Mr Gutmann shall be referred to an independent KC.

12. Finally, and importantly, the Tribunal has a supervisory role in determining how proceeds are to be distributed at the end of the proceedings. This means the Tribunal can, at the end of proceedings, revisit whether it is prepared to endorse the payment of the agreed sums to the Funder. At this stage it may have better visibility as to the proportionality of the Funder's fee in relation to the damages awarded and the complexity of the proceedings and can, if necessary, require further evidence to be presented in relation to the appropriateness of the Funder's fee.

**(2) The Gutmann LFA**

13. Under the Gutmann LFA, the Funder makes Committed Capital available to be drawn down in tranches in accordance with Schedule 1 for the payment of defined charges of Solicitor's Discounted Charges, Counsel's Discounted Charges, Disbursements, Class Representative's Remuneration, and Upfront ATE Premiums under the ATE policy. (The ATE policy is to meet costs orders made against the PCR, in favour of the Defendants, and no point is taken in relation to it.)

14. The essential structure of the Gutmann LFA is that the Funder will in due course, if the proceedings are successful, be reimbursed the amounts which have been drawn down and in addition a "Funder's Return". Paragraph 5.1 provides:

> "**5. THE FUNDER'S RETURN**
>
> 1. In the event of the receipt (by any party, and at any stage) of any Proceeds, the following amounts will be payable to the Funder (subject to the Priorities Agreement):
>
> a. the Drawn Down Amount;
>
> b. any reasonable External Costs; and
>
> c. the Funder's Return, as calculated in accordance with Schedule 2,
>
> and the Class Representative will be liable to pay these amounts."

15. The contractual obligation falls on Mr Gutmann, being the class representative, to make these payments. Mr Gutmann's position is that such payments are subject to approval by the Tribunal as required by the Tribunal Rules and as reflected in paragraph 10.4(c) of the Gutmann LFA:

> "4. The Solicitor and Class Representative shall…
>
> c. if the Court orders any Proceeds to be paid by the Defendant, apply for an order or approval from the Court that the Class Representative's costs, fees and disbursements, including the Funder's Return, the Drawn Down Amounts, the Success Fees, the External Costs and the ATE Premiums, will be paid in full from the Proceeds prior to the distribution of any Proceeds to the Class Members; and/or…"

16. The Funder's Return is calculated not as a percentage of the damages awarded but by reference to a multiple of the capital it has committed. There are two possibilities set out in Schedule 2 with respect to the Funder's Return by reference to Table 1 and Table 2.

> "The **Funder's Return** will be calculated as follows:
>
> If the Court approves the payment to the Class Representative of costs, fees and disbursements other than from Stakeholder Proceeds, the Funder's Return shall be calculated in accordance with Table 1 (**Funder's Return 1**) and the Priorities Waterfall 1 in Schedule 3 shall apply.
>
> **Table 1:**

| **If the date of Recovery is:** | **Funder's Return is:** |
|---|---|
| **Stage 1**: From the date of the Relationship Agreement up until (i) the issuance of the | 2.05x Committed Capital |

| | |
|---|---|
| proceedings or (ii) expiry of 6 months (whichever is sooner) | |
| **Stage 2**: From the end of Stage 1 until (i) the first case management conference or (ii) expiry of 6 months (whichever is sooner) | 2.55x Committed Capital |
| **Stage 3**: From the end of Stage 2 until (i) award of CPO; or (iii) expiry of 6 months (whichever is sooner) | 3.05x Committed Capital |
| **Stage 4**: From the end of Stage 3 until expiry of 6 months | 3.55x Committed Capital |
| **Stage 5**: From the end of Stage 4 onwards | 3.8x Committed Capital |

If the Court does not approve the payment to the Class Representative of costs, fees and disbursements other than from the Stakeholder Proceeds, then the **Funder's Return** shall be calculated in accordance with Table 2 (**Funder's Return 2**) and the Priorities Waterfall 2 in Schedule 3 shall apply.

**Table 2:**

| **If the date of Recovery is:** | **Funder's Return is:** |
|---|---|
| **Stage 1**: From the date of the Relationship Agreement up until (i) the issuance of the proceedings or (ii) expiry of 6 months (whichever is sooner) | 2.15x Committed Capital |
| **Stage 2**: From the end of Stage 1 until (i) the first case management conference or (ii) expiry of 6 months (whichever is sooner) | 2.65x Committed Capital |
| **Stage 3**: From the end of Stage 2 until (i) award of CPO; or (iii) expiry of 6 months (whichever is sooner) | 3.15x Committed Capital |
| **Stage 4**: From the end of Stage 3 until expiry of 6 months | 3.65x Committed Capital |
| **Stage 5**: From the end of Stage 4 onwards | 3.9x Committed Capital |

For Funder's Return 1 and Funder's Return 2, for each £100,000 of Additional Funding that the Funder agrees to provide, the Funder's Return will increase at each stage by 0.03x

Committed Capital, and the Committed Capital shall increase by the approved Additional Funding."

17. In both cases payments may be made from "Stakeholder Proceeds" which are defined by reference to Recovered Costs and Undistributed Damages. The power for the Tribunal to make such an order is not in dispute. But under the first option, Table 1, the Gutmann LFA contemplates payments additionally being made from "Proceeds". Proceeds are defined by reference to all value recovered or received by (or on behalf of) the Class Representative and/or Solicitor (or their representatives) in connection with the Claim *inter alia* on behalf of the Class Members – in other words they include an award of damages made to the class.

18. Schedule 3 sets out the priorities. The Priorities Waterfalls which relate to Table 1 are as follows:

> "1. First, to pay:
>
> a. to the Funder, by way of reimbursement of the Drawn Down Amount and any External Costs;
>
> b. to the Insurer, by way of reimbursement of any sums paid out under the ATE Policy;
>
> 2. Second, to pay:
>
> a. to the Insurer, any deferred and contingent ATE Premium (including any applicable insurance premium tax) subject to the terms of clause 5.3 of the LFA;
>
> b. to the Funder, 60% of the Funder's Return 1;
>
> c. to the Solicitor and Counsel, such sum as is necessary to bring them up from their Discounted Charges to their Basic Charges in accordance with the Solicitor Agreements and Counsel Agreements;
>
> d. to the Solicitor and Counsel, 40% of any Success Fee in accordance with the Solicitor Agreements and Counsel Agreements;
>
> 3. Third, to pay:
>
> a. to the Funder, the remaining 40% of the Funder's Return 1;
>
> b. to the Solicitor and Counsel, the remaining 60% of any Success Fee in accordance with the Solicitor Agreements and Counsel Agreements;
>
> 4. Fourth, to pay damages to the Class Representative and Class Members who claim from the Proceeds; and

> 5. Fifth, the remainder of the Proceeds, being Undistributed Damages, to be paid to the Access to Justice Foundation (or such other payee as the CAT may direct)."

19. Under the circumstances described in Table 1, therefore, repayment of the Funder's outlay and the Funder's fee and payments to solicitors and counsel take priority over the payment of damages to Class Members. This gives rise both to the question of whether this is permissible as a matter of law and whether it is appropriate.

**(3) Is it permissible for an LFA to contemplate payment to the Funder from an award of damages?**

20. The general power to order costs in proceedings before the CAT is found in Rule 104 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules"):

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England and Wales, the Court of Session or the Court of Judicature of Northern Ireland, as appropriate, and include payments in respect of the representation of a party to proceedings under section 47A (claims for damages) or 47B (collective proceedings) of the 1998 Act(a), where the representation by a legal representative was provided free of charge.
>
> (2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings."

21. This is a broad power but it is doubtful that it extends to the Tribunal ordering payment of a fee to a funder. Such a fee may well be unrecoverable as "costs and expenses" as a matter of law in English proceedings. Further Rule 104 is directed to *inter partes* payments of costs not to the payments of a fee from the PCR, on behalf of the class, to the funder.

22. Under Rule 78 of the Tribunal Rules the Tribunal may authorise a class representative to bring collective proceedings. That class representative is required to act fairly and in the interest of the class, and is required to have a plan for "a method for bringing proceedings on behalf of representative persons" (Rule 78(3)(c)). The powers of the class representative are not specified but acting as a class representative necessarily requires the making of decisions on behalf of the class, which will impact the success of the claim and

the damages that members of the class will receive. A class representative will, during the course of collective proceedings, be making crucial decisions relating to the manner in which the claim is fought, the legal advisers to be used, how the claim is to be funded and the quantum of damage to be claimed. A representative must necessarily, subject to the supervision of this Tribunal, have been granted the power to make these important decisions in the litigation, including the decision of what arrangements are appropriate for the funding of the litigation.

23. The issue which falls for determination is whether Parliament intended the power of the class representative, to enter into a litigation funding agreement, was to be curtailed beyond the requirement of acting fairly and in the interests of the class. Other than the illegality of entering into a DBA, we see no reason for reaching a conclusion that it did.

24. Section 47C(6) of the Competition Act 1998 (the "Act") grants to the Tribunal a power in opt-out proceedings to make orders in relation to unclaimed damages:

> "(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.
>
> (3) Where the Tribunal makes an award of damages in opt-out collective proceedings, the Tribunal must make an order providing for the damages to be paid on behalf of the represented persons to—
>
> (a) the representative, or
>
> (b) such person other than a represented person as the Tribunal thinks fit.
>
> (4) Where the Tribunal makes an award of damages in opt-in collective proceedings, the Tribunal may make an order as described in subsection (3).
>
> (5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.
>
> (6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

25. This is reflected in the Tribunal Rules which provide:

"**Distribution of award**

93.—(1) Where the Tribunal makes an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to—

(a) the class representative; or

(b) such person other than a represented person as the Tribunal thinks fit.

(2) Where the Tribunal makes an award of damages in opt-in collective proceedings, it may make an order as described in paragraph (1).

(3) An order made in collective proceedings in accordance with paragraphs (1) and (2), may specify—

(a) the date by which represented persons shall claim their entitlement to a share of that aggregate award;

(b) the date by which the class representative or person specified in accordance with paragraph (1)(b) shall notify the Tribunal of any undistributed damages which have not been claimed;

(c) any other matters as the Tribunal thinks fit.

(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.

(5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session.

(6) Subject to any order made under paragraph (4), the Tribunal shall order that all or part of any undistributed damages is paid to the charity designated in accordance with section 47C(5) of the 1998 Act(a) and a copy of that order shall be sent to that charity."

26. In *Walter Hugh Merricks v Mastercard Inc and others* [2017] CAT 16, the Tribunal considered the scope of section 47C of the Act. It was argued, by Mastercard, that under this provision the power of the Tribunal to order the payment of costs and expenses did not extend to the payment of a fee by a third-party funder. Mastercard relied upon the jurisprudence of the courts of England and Wales to support this position. The Tribunal held that the section 47C was not so limited:

> "115. Sect 47C CA introduced new and distinct provisions concerning the costs of collective proceedings. We see no reason to give the words used a special meaning or to treat them as terms of art governed by jurisprudence on very

> different statutory provisions. In the ordinary sense, if a third party agrees to provide substantial monies in order to fund litigation, the payment which has to be made to that third party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings."

And at paragraph 119 the Tribunal stated:

> "119. For the Applicant, it was emphasised that payment of the fee charged by the funder was essential for the operation of the Funding Agreement. Clearly, no commercial funder would provide substantial funding and assume the significant financial risk of major litigation without consideration, and the structure of the collective proceedings regime for opt-out proceedings was to enable that consideration to be paid out of the unclaimed damages awarded to the class of claimants. The Applicant could not be expected to assume an independent personal liability to the funder for its fee. The statute should accordingly be given a purposive interpretation to encompass a funding structure such as the present. In that regard, we were referred to a range of extra- judicial material which recognised the importance of third party funding in enabling access to justice."

27. It is therefore clear that the Tribunal has the power to order payment of a funder's fee out of unclaimed damages. The Tribunal did not on this occasion decide whether the Funder's fee could be paid otherwise out of damages.

28. In *PACCAR*, Lord Sales JSC considered, from paragraph 96, a submission that the UKTC opt-out LFA was not a DBA because the funder's recovery was subordinate to a prior payment to class members of their full share of damages with payment coming from the unclaimed damages. In this context he stated at [98] that:

> "As the appellants point out, according to the procedural rules in the Tribunal and by virtue of the Competition Act 1998 the funder of opt-out proceedings always takes the risk that all of the damages recovered will be distributed to members of the class with the result that there will be nothing left to pay its fee and also takes the risk that the Tribunal might decline to exercise its discretion to order a payment in favour of the funder."

29. Lord Sales was plainly contemplating an arrangement whereby the funder would only have the opportunity to pay a funder's fee out of unclaimed damages. But by the use of the phrase "always takes the risk" in combination with the observation and "also takes the risk that the Tribunal might decline to exercise its discretion" he was not, in our view, deciding that there was no power for the Tribunal to sanction payment of a funder's fee out of damages which had not achieved the status of being "unclaimed". That is not a matter which was argued in *PACCAR*.

30. Our interpretation of section 47C(6) of the Act is that it provides a power for the Tribunal to pay unclaimed damages to the class representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings as an alternative to their passing to a charity. In the absence of sections 47C(5) and (6) it might be thought that undistributed damages would have to be returned to the defendant. Section 47C is silent as to whether damages may be paid by the class representative to the funder.

31. If the legislature had intended that costs or a funder's fee could not be paid out of damages, there is no reason why it would not have stated this. Moreover, section 47C(3)(b) plainly contemplates that the Tribunal can order the payment of damages to such other person as it sees fit, and we see no reason why this power could not extend to litigation funders in appropriate circumstances. Section 47C(3)(b) is consistent with the view that a class representative has (again subject to supervision by the Tribunal) the power to agree to pay a proportion of damages to a litigation funder.

32. In addition to relying upon the statements to which we have referred in *Merricks* and *PACCAR*, Apple contend that in opt-out proceedings where members of the class have no control over the proceedings it is necessarily wrong to deprive them of damages in order to meet the fee of a litigation funder. Whereas questions of proportionality and fairness arise, we see nothing plainly wrong in the suggestion that proportionate sums may be paid to a funder from damages. Most litigants in complex proceedings, even if they are entirely successful, will recover only a proportion of their costs from a costs award in their favour and will inevitably have to look to the damages recovered to meet the shortfall.

33. If a collective proceedings claim is successful, the class will be awarded costs and damages. The costs award is unlikely to cover the entirety of the sums paid out by the Funder. It is difficult in these circumstances to see why there should be an impediment to a Tribunal ordering that a proportion of damages should cover costs which have been paid by the Funder in the event there are insufficient unclaimed damages to meet the shortfall. As Green LJ (giving the judgment of the court) observed in *BT Group plc and another v Justin Le Patourel* [2022] EWCA Civ 593:

> "99. Finally, we address for the sake of completeness an issue that arose briefly during the hearing concerning whether an order for an account credit provides opportunity for the class representatives and funders to be paid. The concern has arisen because the *only* occasion where costs are expressly dealt with in the context of the opt-out/opt-in regime is in relation to the allocation of undistributed damages to charity. Here the law empowers the CAT to make provision for costs in favour of the representatives out of the sum otherwise to be paid to charity: see s 47C(6) CA 1998 and r 93(5). We detect no difficulty here. It would defeat the purpose of opt-out proceedings, which might routinely require third party funding, if costs orders could not be made in any case where an account credit was the chosen means of achieving distribution. As to this the CAT has a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid. It also has a broad discretion to make orders as to costs under r 98 which applies to the collective action regime. The Tribunal could for instance make a sequential order that: (i) there be an award of damages; (ii) costs be defrayed from the award (before or after the damages are paid to the representative or authorised third party); and (iii) the residue is then to be distributed according to whatever method is considered by the CAT to be most appropriate be that a fixed sum, an account credit or by some other sensible means. We record that Ms Ford QC for BT did not seek to argue that if an account credit was, in the event, made by the CAT that this gave rise to any difficulty as to costs."

34. In this passage Green LJ is not *expressly* addressing the payment of a funder's fee, above that which it has paid out to fund the litigation, but by making reference to "its power to ensure that funders and representatives are paid" he was not excluding such payments. Apple contend that this comment was *obiter* and the reference to "costs" in this rule could not include a reference to the reimbursement of costs from damages and in that respect the court had erred. Even if that is correct it does not meet the fact that there is a power to award damages to "such other person" under Rule 93(1) and section 47C(3)(b) of the Act.

35. We conclude there is a power for this Tribunal, at the conclusion of proceedings, to make an order that a funder's fee be paid out of damages awarded to the class and that it is not impermissible for a class representative to enter into a litigation funding agreement which contemplates this. There is no express prohibition under the Act or the Tribunal Rules which prevents this. Self-evidently a funder must be paid for the risk it takes. If a reasonable return is dependent upon the happenstance of whether there are sufficient unclaimed damages that has the potential to increases the risk for funders and consequently the cost of litigation funding. Insofar as an express power to make such a payment to a funder is required, that power is provided by section 47C(3)(b) of the Act.

**(4) Are the mechanisms in the Gutmann LFA inappropriate, is the Funder's Return excessive and disproportionate, and does the LFA create a risk of conflicts of interest between the Funder and Mr Gutmann?**

36. Having set out the legal background, we take Apple's three reasons compendiously reflecting the way in which they were argued. Table 1, in Schedule 2, provides that at "Stage 5" (which represents the point at which the proceedings are at) it is agreed that the Funder is entitled to receive 3.8 x Committed Capital at the conclusion of proceedings in addition to the drawn down amount. Given the Committed Capital is £18,587,324.16 this represents an uplift of over £70 million. This is a very large sum, but we do not at this stage conclude that it is "sufficiently extreme to warrant calling out", and that this, of itself, is a reason for refusing to certify these proceedings. That is not to say that this fee will not be subject to scrutiny by this Tribunal at the conclusion of these proceedings, in the light of a better understanding of the reason for this fee, the market, and the proportionality of the fee in relation to the damages to be paid.

37. Ms Cunningham, who has argued this application persuasively for Apple, submits that Mr Gutmann has no right to contract to alienate a part of the damages which would otherwise be distributed to class members, and that this makes him unsuitable as a fiduciary. Apple point to Schedule 3 and the fact that under the agreement payment to members of the class is subordinate inter alia to the payment of what it contends will be exorbitant profits. Mr Bacon KC, for Mr Gutmann, submits that although this agreement contains such provision, it in no way binds the hands of this Tribunal. He accepts that the Tribunal will have a complete discretion as to the priorities and the sums to be awarded, and that the Gutmann LFA will not create a presumption in favour of the Funder.

38. The priorities relating to Table 1 may be relevant in the event that there are insufficient unclaimed damages to meet the Funder's fee. This could arise in quite different circumstances. For example, in one case it might be that the litigation has been relatively unsuccessful and that the total award of damages is small relative to the fee being charged by the Funder. In these circumstances the Tribunal may well refuse to give absolute priority to the Funder. But in another case there may be a relatively large award of damages in circumstances where an efficient method has been derived for making payments to the class

such that unclaimed damages are relatively small. If this were the position, there may be good reason for giving priority to the Funder to claim all or part of his fee prior to distribution to the class. A further case which might arise is where a fee is determined to be proportionate, but the Funder submits that it should not need to wait until it is known what damages remain unclaimed before receiving any payment.

39. Given these different potential circumstances, and in the light of Mr Bacon's acceptance that Schedule 3 does not set up any presumptions which impact the Tribunal's discretion, we do not consider the terms of the Gutmann LFA to be inappropriate.

40. We also attach weight to the fact that Table 1 and "Priorities Waterfall 1" only form one aspect of the Gutmann LFA. The agreement specifically contemplates that the Tribunal may not make an award out of damages. This engages Table 2 and "Priorities Waterfall 2" in which case the question of priority for the Funder over the class does not arise.

41. As to the potential conflicts between the Funder and the class, these are, up to a point, inevitable in any LFA. We consider that the protection written into the Gutmann LFA to which we have referred above, coupled with the supervisory jurisdiction, makes that potential conflict manageable.

42. The final point raised by Ms Cunningham is that the fact that the Funder's fee is payable from, and limited to, the amount of proceeds received, which provides a natural cap on the fee, she submits, makes this agreement a DBA. Mr Bacon acknowledges that the fees to be paid cannot exceed the payments made to the class by way of damages. Ms Cunningham recognised that the same point had arisen in *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited* [2023] CAT 73 ("*Neill*") and *Dr. Rachael Kent v Apple Inc. & Apple Distribution International Ltd* [2024] CAT 5 *("Kent")* where the Tribunal held that a natural cap of this sort does not mean the LFA is a DBA. We agree. Ms Cunningham did not argue this point at length but made it clear she was reserving the point for any appeal given that there is to be an appeal on this point in *Neill* and *Kent*.

43. Having reviewed the Gutmann LFA we certify these proceedings. The decision is unanimous.

Justin Turner KC
Chair

Jane Burgess

Derek Ridyard

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

Date: 12 March 2024