Neutral citation [2026] CAT 49

Case Nos: 1673/7/7/24
1408/7/7/21

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

4 June 2026

Before:

THE HONOURABLE MRS JUSTICE BACON
(President)
TIM FRAZER
ANDREW TAYLOR

Sitting as a Tribunal in England and Wales

BETWEEN:

PROFESSOR BARRY RODGER

Class Representative

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE ASIA PACIFIC PTE LIMITED
(5) GOOGLE COMMERCE LIMITED
(6) GOOGLE PAYMENT LIMITED
(7) GOOGLE UK LIMITED

Defendants

(the ***Rodger*** **Proceedings)**

AND BETWEEN

ELIZABETH HELEN COLL

Class Representative

- v -

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

Defendants

(the ***Coll*** **Proceedings**)

Heard at Salisbury Square House on 4 June 2026

JUDGMENT (CPO VARIATION APPLICATION) (NON-CONFIDENTIAL)

APPEARANCES

Robert O'Donoghue KC and Daniel Carall-Green (instructed by Geradin Partners Limited) appeared on behalf of the Class Representative in the Rodger Proceedings.

Josh Holmes KC and Kassie Smith KC (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Defendants.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. This is the Tribunal's ruling on Google's application under Rule 85(1) of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**) to vary the collective proceedings order (**CPO**) made in the *Rodger* Proceedings, so that the claims of a limited group of larger app developers would proceed on an opt-in basis while the balance of the class would remain opt-out. The application is resisted by Professor Rodger. For the reasons that follow, we refuse the application.

B. BACKGROUND

2. The application for a CPO in the *Rodger* Proceedings was filed on 23 August 2024, seeking certification of the proposed collective proceedings on an opt-out basis. There was a certification hearing on 6 March 2025. Google did not oppose the application or appear at the hearing, but it did raise in writing various matters which it considered should be brought to the Tribunal's attention when considering whether a CPO should be granted, including in particular various issues concerning Professor Rodger's litigation funding arrangements, as well as some concerns regarding the appointment of the consultative panel.

3. At the close of the hearing, the Tribunal indicated that it would certify the *Rodger* Proceedings subject to various outstanding points. The CPO was made on 23 May 2025, and the Tribunal's reasons were handed down on 6 August 2025. After addressing the matters relating to the litigation funding arrangements and consultative panel which had been raised by Google, as well as other matters which the Tribunal had raised of its own initiative, the Tribunal considered at §§90–92 of its judgment whether the proceedings should be brought on an opt-out basis as sought by Professor Rodger.

4. At §91 of the judgment the Tribunal accepted that the claims were strong, noting that the same conclusion had been reached in relation to the *Coll* Proceedings which raised substantially similar allegations of abuse. The Tribunal went on to state that opt-in proceedings were unlikely to be practicable, for the following reasons:

> "The Proposed Class is likely to contain approximately 2,200 app developers, most of whom will be seeking to recover relatively small amounts. Many of the class members are likely to be small businesses who would be unlikely to have the resources to take the positive steps required to participate on an opt-in basis. In addition, their ongoing relationship with Google may make them reluctant to do so."

5. The Tribunal therefore concluded that the proceedings should be certified on an opt-out basis.

6. Following certification, the proceedings have advanced substantially towards trial, with the present proceedings case managed together with the *Coll* Proceedings. Factual and expert evidence has been exchanged, joint expert statements are due later this month, and the trial is due to commence at the end of September 2026.

C. GOOGLE'S APPLICATION

7. On 18 December 2025 the Supreme Court gave judgment in *Evans v Barclays Bank* [2025] UKSC 48, [2026] 2 All ER 733, addressing the approach to the question of whether collective proceedings should proceed on an opt-in or opt-out basis, and allowing the appeal from the decision of the Court of Appeal in that case. Thereafter, on 13 February 2026, Google wrote to Professor Rodger's solicitors stating that it was going to seek a variation of the CPO, so as to provide for the proceedings to continue on an opt-in basis for the 25 developers with the highest revenues from Google in the relevant period, with the rest of the class remaining opt-out. Google's position was that those 25 developers are large and sophisticated entities, or part of large and sophisticated international groups, with substantial individual claims, and that it was unfair for it to face claims without the direct involvement of those developers and in particular without those developers having to evidence their losses.

8. Google's variation application was filed on 27 February 2026. Professor Rodger's response to the variation application was filed on 10 April 2026, and Google's reply was filed on 8 May 2026. In that reply Google proposed, as an alternative, that the claims of the five largest developers by claim value should proceed on an opt-in basis.

9. Google's application relies principally on two matters. The first is the Supreme Court's judgment in *Evans*, which Google says materially altered the approach to Rule 79(3) of the Tribunal Rules. The second is what Google says is a change in the factual picture, in particular evidence that a very large proportion of the value of Professor Rodger's claim is concentrated in a small number of developers, together with issues said to arise as to intra-group arrangements, territorial scope and the proper identification of losses in relation to those developers. On Google's analysis, the top 25 developers have an average individual claim value of between £[✂] and £[✂]. If reduced to the top five developers, those are said to have an average individual claim value of between £[✂] and £[✂].

10. Professor Rodger submits that the application should be refused. He says, in summary, that Google is seeking far too late in the day to reopen the basis on which these proceedings have been prepared for trial; that *Evans* did not effect the kind of legal change for which Google contends; that the facts on which Google now relies were either already available to Google or do not materially alter the position reached at certification; and that, in any event, the balance of justice remains strongly in favour of leaving the proceedings on the existing opt-out footing. He further submits that Google's proposal would create serious practical difficulties for his claim, and would risk derailing the trial timetable.

11. The evidence relied on by the parties in relation to this application includes, for Google, letters from its economic expert Robin Noble, and two witness statements from David Cran, a partner at Google's solicitors RPC. On Professor Rodger's side, the Tribunal has seen witness statements from David Gallagher and Anthony Ojukwu, Partners at Professor Rodger's solicitors Geradin Partners; Adrian Chopin, on behalf of Professor Rodger's funder; and Simon Newman, the CEO of the Online Dating and Discovery Association, a trade association which includes app developers of all sizes. Professor Rodger also relies on two letters from Professor Amelia Fletcher, Professor Rodger's economic expert. We do not attempt to summarise that evidence here, but have taken it into account in reaching our conclusion.

D. LEGAL FRAMEWORK

12. Section 47B of the Competition Act 1998 permits collective proceedings to be brought on either an opt-in or an opt-out basis. Rule 79(3) of the Tribunal Rules provides that, in deciding whether proceedings should be opt-in or opt-out, the Tribunal may take into account all matters it thinks fit, including in particular, (a) the strength of the claims, and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.

13. Rule 85(1) provides that the Tribunal may vary or revoke a collective proceedings order at any time. Rule 85(2) requires the Tribunal, in deciding whether to do so, to take account of all the relevant circumstances, including in particular whether the criteria for certification set out in Rule 79 still apply or apply in the same way as when the order was made.

14. Professor Rodger refers to the test set out in *Tibbles v SIG* [2012] EWCA Civ 518, [2012] 1 WLR 2591, for applications to vary or revoke an order pursuant to CPR r. 3.1(7), submitting that the test should apply by analogy to applications to vary a CPO certification under Rule 85. In *Tibbles* the Court of Appeal held that although r. 3.1(7) is apparently broad and unfettered, "considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion" (§39(i)). It concluded that the discretion under r. 3.1(7) to vary or revoke an order should normally only be exercised "(a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated".

15. While *Tibbles* has, as Professor Rodger notes, been applied in the Tribunal several times, we do not consider it to be strictly applicable to Rule 85, which sets out specific provisions for the variation or revocation of a CPO. Where that rule is relied upon, the Tribunal will consider the factors set out within it. That does not, however, mean that finality, delay and prejudice are irrelevant factors

in that assessment. On the contrary, they are likely to be highly material circumstances in the application of Rule 85, not least because Rule 85(2)(a) expressly directs the Tribunal to consider whether the Rule 79 criteria for certification still apply or apply in the same way as when the order was made. Absent a material change of circumstances, or a situation in which the decision was made on a basis that turns out to have been incorrect, it is in practice unlikely that an application under Rule 85 will succeed.

16. The central question for us is therefore whether the Tribunal should now vary the existing CPO in light of all the relevant circumstances of the case, including in particular whether the Rule 79 criteria for certification still apply in the same way as when the order was made.

E. DISCUSSION AND CONCLUSIONS

(1) Whether the Rule 79 certification criteria apply in the same way as when the CPO was made

17. In our judgment, Google has not established that it is appropriate to vary the CPO. We start with the question of whether any different assessment should now be made of the application of the Rule 79 certification criteria, and in particular the criteria set out in Rule 79(3) which are relevant to the determination of whether collective proceedings should be opt-in or opt-out.

18. So far as the strength of the claims is concerned, there is no basis on the present application for concluding that the claims should now be viewed materially differently from the way they were viewed at certification. At that stage, the Tribunal took the view that the claims were strong ones. Google did not suggest otherwise, and notably did not seek either strike-out or summary judgment in relation to any aspect of the claims. Nor does Google's application suggest that the assessment of the merits of the claims has in any way changed in the light of the progression of the case to trial.

19. Professor Rodger contends that, if anything, the position on the merits is even stronger than at certification, on the basis of (in particular) the Tribunal's recent

judgment in *Kent v Apple* [2025] CAT 67. We do not need to decide whether *Kent* or indeed other recent materials relied on by Professor Rodger in this regard are admissible, or whether they involve similar factual and legal arguments. It is sufficient to say that nothing in Google's application suggests a weakening of the merits of the claims advanced in these collective proceedings.

20. Google's application turns, instead, on the practicability issue, contending that a very substantial proportion of the aggregate claim value is concentrated in a small number of developers who could, in Google's submission, opt in to the proceedings if the claim were to be recertified on that basis for those developers.

21. The problem with that submission is that the proposition that a substantial proportion of the claim value is concentrated in a small number of developers is not a new one: it was always the case, from the outset of certification of the proceedings. Professor Fletcher's first expert report, served in support of Professor Rodger's application for certification, said in terms that "A small number of developers earn a large share of total developer revenue" and that either 2% or 3% of the class (depending on the counterfactual commission rate chosen) suffered damages of more than £1m.

22. Likewise, as Professor Rodger points out, the more recent analysis by Professor Fletcher that Google now purports to rely on, regarding the differentiation in revenues of the members of the class, does not rely on any new factual material, but is based on Google's own transaction data, which Google always had and could have relied on at the certification stage if it had wished to do so. The arguments now raised by Google as to the revenues, resources and sophistication of the largest developers could therefore have been made when the Tribunal was first considering whether the proceedings should be certified as opt-in or opt-out.

23. Mr Holmes KC says that, at the time of Professor Rodger's certification application, Google relied upon the Court of Appeal's judgment in *Evans* ([2023] EWCA Civ 876) as to practicability, and that the approach adopted in that judgment has now changed in light of the judgment of the Supreme Court.

24. We accept that the Supreme Court set out a somewhat different approach to the assessment of practicability by comparison with the approach of the Court of Appeal. But we are not persuaded that there was anything specific in the judgment of the Court of Appeal which would have precluded Google from advancing the arguments on practicability of opt-in which it now makes. Rather, the comments of the Court of Appeal in *Evans* related to the assessment made by the Tribunal of the specific facts of that case, which are different from the facts of the present case.

25. Nor does the judgment of the Supreme Court suggest a different approach to the assessment of practicability to the approach that was adopted by the Tribunal in the present case at the time of the original certification decision. While the Supreme Court noted that it was relevant to consider the composition of the proposed class, including any identification of distinct groups of claimants, having done so the Supreme Court said that what is required is for the Tribunal to "stand back and make an overall assessment of the balance of justice" (§120). The Tribunal did that in the present case, and the basis of that assessment has not materially changed.

26. The class in these proceedings remains a very large class, comprising what is now estimated to be around [✂] UK-domiciled app developers. While Google has identified a small number of app developers with very significant claims, the difference in the claims of the class members are on a sliding scale rather than representing a qualitative difference that would, on the evidence currently before us, enable a principled split of the class. In particular, as the evidence of Professor Fletcher shows, the identification of the top developers by claim size varies according to the year and the way in which loss is calculated. In addition, contrary to Google's submissions that the "top 25" developers identified by it are all large and sophisticated entities (either themselves or through their corporate groups), the evidence of Mr Ojukwu is that at least seven of those developers appear to be either small or medium-sized companies.

27. It also remains the case that on Google's figures the vast majority of the class members ([✂]%) have claims worth no more than a few hundred pounds, and [✂]% of the class have claims of £10,000 or less. Google accepts that for all of

these class members opt-in proceedings would be unviable. The comments of the Tribunal at certification regarding developers' reluctance to opt in also continue to be supported by the evidence before the Tribunal. That includes in particular the evidence of Mr Ojukwu and Mr Newman, who explain the concerns expressed by developers about retaliation by Google, and the likely impact of that on participation in these proceedings on an opt-in basis.

28. Standing back and making an overall assessment as we are required to do under *Evans*, therefore, we accept Professor Rodger's submission that the overall balance of justice continues to favour the existing opt-out structure.

(2) Other factors

29. There is, moreover, a further very important factor that weighs heavily against the grant of the application, and that is the stage at which the proceedings have now reached. As we have already noted, the trial is due to commence in less than four months and there will be an intense period of trial preparation for all parties between now and then. It goes without saying that considerable work has been undertaken by the parties and by the Tribunal on the basis of the case as originally certified.

30. We are not satisfied that the hybrid solution proposed by Google could be introduced now without a real risk of completely derailing the trial. On the contrary, a shift to opt-in for even a limited group of developers would almost certainly require complex and time-consuming further steps in relation to participation and case management. As Mr Gallagher has explained, at the very least there would need to be a process by which those developers could take advice and decide whether to opt in, followed by contractual arrangements and negotiations in relation to funding and representation. All of that would impose a substantial additional burden on Professor Rodger's solicitors at a time when all parties are already intensely engaged in preparations for trial.

31. In the *CICC* opt-in proceedings the Tribunal allowed six months for the exercise of building the book of opt-in class members, and subsequently accepted that the exercise may have required more than six months in practice: [2026] CAT

15, §104. We do not accept Google's submissions that this could be resolved in good time ahead of the trial. Even if the relevant developers are now identifiable, the point made by Mr Gallagher is that considerable time would be required for the process of renegotiation between Professor Rodger and the funders and potentially ATE insurers, consideration by the opt-in class members as to whether they wished to actively participate in the proceedings, potentially requiring board and/or shareholder approvals, and if they did seek to do so then negotiations between those opt-in class members and solicitors as to the basis of their representation arrangements. That would create a vast amount of additional work for Professor Rodger just to get those claims up and running, which we do not consider could feasibly be accommodated in the existing timetable to trial.

32. There is, moreover, the very real question of whether the claims would be able to proceed at all on a hybrid basis at this late stage. The funder has already indicated, through the evidence of Mr Chopin, that it would probably regard a switch to a hybrid case as a material adverse change, giving it a right to terminate the existing funding agreement. There is, moreover, no certainty that replacement funding or ATE insurance would be available at this short notice before trial, or on what terms. Quite the contrary, Mr Chopin gives detailed reasons why it would be very unlikely that the funder would be prepared to provide funding for opt-in claims at the present stage, the main reason being the difficulty of building a sufficient book of claims with a high enough claim value in time for the trial – precisely the point that Mr Gallagher's evidence reinforces. The grant of Google's application would therefore put the funding of the entirety of the claim in jeopardy.

33. These comments do not mean that a decision on opt-in versus opt-out must be driven by the availability of funding. That would be an approach that was deprecated by the Supreme Court in *Evans* at §§124–5. The fact that a group of small claimants is unable to obtain funding for a claim does not, therefore, mean that the Tribunal should provide an advantage to larger entities with substantial claims by bundling them together with claimants with a quite different profile. The problem here is, however, a different one: it is that the proximity to trial means that excising the largest claimants from the class would fundamentally

alter the viability of funding, leading to a real risk of the collapse of the *Rodger* Proceedings. We do not consider that this would be in the interests of justice in circumstances where, as set out above, Google has not identified any reason justifying such a course.

34. Even in the extremely unlikely case that all of these points could be overcome, the inevitable further hearings that would be required for disclosure, evidence and other consequential matters mean that the consequence of splitting the class at this stage will be to create a significant amount of further work for the parties and the Tribunal, which again we consider could not realistically be accommodated in the remaining time before the trial. We do not accept Google's submission that this could be resolved by moving some issues to be addressed in early 2027, after the trial has concluded. That would be entirely unsatisfactory in circumstances where the trial has been set down for a period of three months; this trial has already been delayed by a year in order to enable the *Rodger* and *Coll* claims to be heard together; and the expectation of all parties, including this Tribunal, is that all of the issues that are live in these proceedings should be addressed in the evidence and submissions at that trial.

(3) Overall assessment

35. Considering all of the relevant circumstances, as we are required to do under Rule 85, we consider that the interests of justice are better served by allowing the proceedings to continue on the basis on which they were certified. We are not persuaded that the Rule 79 criteria no longer apply or apply in a different way from that considered by the Tribunal when the CPO was made. In addition, the recertification of the proceedings at this late stage would create serious practical and procedural difficulties, and would carry a real risk of entirely derailing a trial for which the parties and the Tribunal have already undertaken extensive preparation.

F. FURTHER COMMENTS

36. We consider that it is important to make two further comments in relation to the arguments of the parties.

(1) Possibility of further evidence/disclosure from specific developers

37. First, maintaining the proceedings on an opt-out basis does not mean that Google is left without procedural means to address the concerns which it says arise in relation to the claims of some of the developers in the class. Mr Holmes' position is that on any basis, whether Google's variation application succeeds or fails, limited and targeted disclosure will be required to address the discrete issues of whether certain developers fall within the class definition and/or have suffered actionable losses in the amount claimed on account of principal/agency relationships and/or intra-group arrangements. If that is the case, Google may make an application under Rule 89(1)(c), which provides for disclosure to be given by any represented person to any other represented person, the class representative or the defendant. Mr O'Donoghue KC accepts that an application is available to Google under that provision, whether the present proceedings are opt-in or opt-out.

38. That application could, indeed, have been made at any time in the proceedings, and it is surprising that no such application has previously been made, if (as Google contends) the consequence of that disclosure might ultimately be that a large part of the claim volume falls away. If Google wishes to make that application now, it will need to do so very promptly, so that it can be addressed by the Tribunal and any disclosure provided by the relevant developers in good time before the trial.

(2) Hybrid proceedings generally

39. Our second comment concerns hybrid opt-in/opt-out proceedings in general. The Supreme Court in *Evans* recognised that it may in some circumstances be appropriate to distinguish between groups within a proposed class. In our view there is nothing in principle which prevents the Tribunal, in an appropriate case, from certifying proceedings on a hybrid opt-in/opt-out basis. While, as we have noted, *Evans* endorsed the approach of making an "overall assessment", the Supreme Court did not say that such an assessment must inevitably involve a binary choice between opt-in and opt-out proceedings.

40. However, if a hybrid certification is adopted in a particular case, the Tribunal must be satisfied that such an approach is both just and workable. It will need to address carefully how the division between the classes is drawn, how notice and participation are to be managed, what consequences follow if some entities opt in and others do not, and how the revised structure fits with the management of the proceedings as a whole.

41. We note that there have only been two cases so far where collective proceedings have been certified on a hybrid opt-in/opt-out basis. The first is the *CICC* proceedings, where separate SPVs were set up from the outset of the case for the opt-in and opt-out claims against each of Visa and Mastercard, with individual agreements with the solicitors entered into by each individual class member that chose to opt in. The Tribunal's judgment at [2026] CAT 15 highlights some of the ensuing practical and procedural challenges arising in those proceedings. The second case is *Ad Tech v Alphabet*, where the proceedings were originally designated as opt-out in respect of publishers and opt-in in respect of publisher partners, but where the only class member to opt in has subsequently withdrawn from the proceedings. These cases serve to emphasise that the definition of the relevant classes and the management of the proceedings in such cases are likely to be complex matters that require very careful consideration.

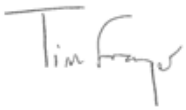
42. For the reasons we have given, this is not a case in which it would be appropriate to undertake that exercise on the eve of trial.

G. CONCLUSION

43. Google's application to vary the collective proceedings order is therefore dismissed.

44. This decision is unanimous.

The Honourable Mrs Justice Bacon
President



Tim Frazer

Andrew Taylor

Charles Dhanowa CBE, KC (Hon)
Registrar

Date: 4 June 2026