



Neutral citation [2022] CAT 55

Case Nos: 1468/7/7/22

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

22 November 2022

Before:

JUSTIN TURNER KC  
(Chairman)  
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 22 November 2022

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**RULING (DISCLOSURE)**

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## APPEARANCES

Ms Anneli Howard KC, Mr Stefan Kuppen, and Mr Will Perry (instructed Charles Lyndon Ltd) appeared on behalf of Mr Gutmann.

Mr Brian Kennelly KC, Mr Daniel Piccinin and Ms Gayatri Sarathy (instructed by Covington & Burling LLP) appeared on behalf Apple Inc., Apple Distribution International Limited and Apple Retail UK Limited.

1. Permission to serve out of the jurisdiction against the First and Second Respondents was given by order of the Chair on 26 July 2022 on the basis of a Collective Proceedings Claim Form of 17 June 2022. Service was effected on 17 and 18 August 2022.
2. The Proposed Class Representative (the “PCR”) contends inter alia that from 2015 certain iPhones had defective batteries and that the Respondents abused their market power by leveraging their dominant position by engaging in unfair practices, including: continuing to sell affected iPhones which they knew were not fit for purpose; failing to inform users as to the defective nature of the batteries and failing to resolve that issue; and concealing the problem by installing a power management feature which throttled the performance of the phones.
3. The members of the proposed class are users of certain iPhones and are said to include 26.1 million people. It is claimed that aggregate losses are at least £853 million. The PCR seeks a collective proceedings order and the Respondents have made it clear that they will oppose the grant of the collective proceedings orders and may seek summary disposal of this application pursuant to rule 79(4).
4. This is the hearing of the first case management conference in this matter and directions are sought to facilitate the hearing of the application for a collective proceedings order and any such summary application.
5. The Tribunal is grateful to the parties for agreeing certain directions and providing a composite draft order. The principal issue in dispute today is disclosure. In the Collective Proceedings Claim Form, reference is made to various proceedings which are said to be supportive of the PCR's case. These are set out at paragraph 31. In particular at paragraph 31(b) is a reference to a decision by the French General Directorate for Competition Policy, Consumer Affairs and Fraud Control dated 7 February 2020 (the “DGCCRF Decision”); as a consequence of which the Respondents were fined €25 million for misleading commercial practices by omission, a finding that the Respondents have not appealed.

6. The PCR initially sought disclosure of information or documents relating to six classes but is today only pursuing an application for disclosure in relation to one of these classes, being this DGCCRF Decision. The DGCCRF Decision is not in the public domain but there is a press release which states:

“Seized on January 5, 2018 by the Paris Public Prosecutor’s Office to investigate the complaint of an association against Apple, the DGCCRF indeed showed that iPhone owners had not been informed that the updates of the iOS operating system (10.2.1 and 11.2) they were installing were likely to lead to slower operation of their device.

These updates, released during the year 2017, included a dynamic power management device which could, under certain conditions and in particular when the batteries were old, slow down the operation of the iPhone 6, SE models and 7.

Unable to revert to the previous version of the operating system, many consumers would have been forced to change their battery or even buy a new phone.

The National Investigation Service of the DGCCRF therefore transmitted to the Paris Public Prosecutor’s Office in 2019 the conclusions of its investigations, considering that this lack of consumer information constituted a misleading commercial practice by omission. With the agreement of the public prosecutor, a transaction was offered to the Apple group – which accepted it – including the payment of the sum of €25 million and the publication, for one month, of a press release on its website.”

7. It is submitted by the PCR that disclosure is necessary for securing fair and expeditious conduct of the proceedings. The PCR also submits that the DGCCRF Decision addresses essentially the same exploitative conduct that these proceedings are concerned with and makes reference to the inequality of arms between the PCR and the Respondents.

8. The Respondents resist the application. They point to paragraph 6.28 of the guide to proceedings which states:

“The Tribunal does not encourage requests for disclosure as part of the application for a CPO. However, where it appears that specific and limited disclosure or the supply of information (cf Rule 53(2)(d)) is necessary in order to determine whether the claims are suitable to be brought into collective proceedings (see Rule 79(1)), the Tribunal may direct that such disclosure or information may be supplied prior to the approval hearing.”

9. The Respondents submit that “necessary” means just that and to succeed on this application the PCR must show that this decision is necessary in order to obtain certification. Initially, counsel for the PCR suggested that “necessary” may not

govern the requirement of disclosure and only relates to the supply of information, but in reply accepted that “necessary” will govern specific and limited disclosure in that passage also.

10. But the question that needs to be considered is what does “necessary” mean. The Respondents suggest it is a narrow construction, it means strictly necessary and unless that necessity is shown the application must fail. Indeed, the Respondents contend that the objection is a point of principle based upon the construction of that provision.
11. The practical difficulty with this approach and this construction is that today we are not in a position to assess conclusively what is going to be necessary on the certification hearing. The Respondents are not in a position to say what all the issues will be on that hearing. Equally, they have also reserved their position as to whether or not they will seek to strike out this claim and, if the claim is to be struck out, accept that that application may raise further issues. The Respondents’ position is whether or not disclosure is necessary should be determined once the issues on certification have crystallised and also once they have made any application to strike out the claim.
12. The Respondents also referred to some discussion in a case management conference held on 12 December 2018 in the *Trucks* Collective Proceedings (case numbers 1282/7/7/18 and 1289/7/7/18). In those proceedings the President was considering, at a similar stage, whether or not to give disclosure of a decision. It is apparent from reading the transcript that the proposed class representatives in those proceedings had a redacted version of the decision already and the question which arose was whether or not to give disclosure of the full decision without redactions. We did not really get a lot of assistance from that discussion; we did not have the relevant documents in front of us and it seems there are no principles identified beyond what is already in paragraph 6.28.
13. The Tribunal asked counsel for the Respondents if there were any other reasons why disclosure should not be given at this stage and counsel accepted that

disclosure could be given. It was not suggested it was burdensome or created any other practical or legal difficulties.

14. We have decided to order disclosure of the DGCCRF Decision. The reason is that it seems likely that this document has information which will inform the PCR as to matters relating to the claim about which he is not yet informed.
15. The point of principle that disclosure should not be ordered until it has been shown it is strictly necessary is, we have decided, an unduly restrictive reading of paragraph 6.28 and the suggestion that we should all be coming back on a day between now and the hearing of the certification to reargue this point seems extremely unattractive.
16. In those circumstances, we will order disclosure of the DGCCRF Decision. We will order disclosure of the original French DGCCRF Decision and, if there is a translation as well, a copy of a translation should also be produced.
17. This ruling is unanimous.

Justin Turner KC  
Chair

Jane Burgess

Derek Ridyard

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

Date: 22 November 2022