Neutral citation [2023] CAT 67

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 November 2023

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 11 and 12 September 2023

JUDGMENT
(APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Mr Philip Moser KC, Ms Anneli Howard KC, Mr Stefan Kuppen, Mr Will Perry and Ms Natalie Nguyen (instructed by Charles Lyndon Limited) appeared on behalf of Mr Gutmann.

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

A. INTRODUCTION

1. This is an application by the Proposed Class Representative ("PCR") for a collective proceedings order ("CPO"), pursuant to section 47B of the Competition Act 1998 (the "1998 Act"). The CPO application seeks to combine, on an opt-out basis, the claims of consumers and business entities who have purchased, or were gifted, certain Apple iPhone models in particular iPhone 6, 6 Plus, 6s, 6s Plus, SE, 7, 7 Plus (hereafter "the Affected iPhones"). The PCR's case is that the members of the Proposed Class have suffered loss as a result of the Proposed Defendants' ("Apple") breaches of statutory duty by infringing: (i) the Chapter II prohibition on abuse of dominance in section 18 of the 1998 Act; and (ii) until 31 December 2020, the EU prohibition on abuse of dominance in Article 102 of the Treaty on the Functioning of the European Union.

2. An application for certification came before us on 2 May 2023. We declined to certify the claim on that occasion, adjourned the question of certification, and invited the PCR to make an application for circumscribed pre-certification disclosure in order that he may have an opportunity to plead his case with more particularity. The area of concern to the Tribunal was whether there was sufficient factual basis for bringing the claim notwithstanding the relatively low hurdle which should be applied at this stage of proceedings. We expressed the concern that the PCR may not be in a position to show that the Affected iPhones, after installation of the PMF, were arguably "substandard" which appeared to be an essential part of his case. We did not, however, express a concluded view on this matter. An order for preliminary disclosure was made on 4 July 2023, and after consideration of that disclosure a draft re-amended collective proceedings claim form was provided on 3 August 2023. This is our judgment on the adjourned application for certification.

3. This Tribunal needs to be satisfied that the eligibility conditions under section 47B(5) of the 1998 Act in accordance with Rule 79(1) and (2) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") are met. It also needs to be satisfied that it is just and reasonable for the PCR, Mr Gutmann, to act as a class representative. The particular issues in dispute on the application for certification are:

(1) Whether damages could be addressed as a common issue and in particular whether the PCR's proposed methodology to assess those damages satisfies the test articulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft* Corp [2013] SCC 57 ("*Microsoft*") as interpreted and applied by the Court of Appeal in *London v South Eastern Railway Limited v Gutmann* [2022] EWCA Civ 1077 ("*Gutmann CA*").

(2) Whether Mr Gutmann is suitable to be authorised as a class representative.

4. A further issue has arisen following the Supreme Court's recent judgment in *R (Paccar) v CAT* [2023] UKSC 28 concerning the legality of the PCR's funding arrangements. The PCR has indicated that he may need to alter his funding arrangements and he is actively pursuing his options. Apple has submitted that, in the event that certification is otherwise appropriate, certification should not take place until new funding arrangements are in place. Beyond agreeing to the course that certification should at this stage be provisional and subject to further submissions as to funding arrangements, we have not been asked by either party to make a ruling on the current or proposed new funding arrangements.

5. In addition, Apple has made applications for reverse summary judgment or to strike out: (i) the claim in its entirety on the ground that the Affected iPhones were substandard or fell short of advertised expectations, amplifying the concerns raised by this Tribunal in May; and (ii) the claim insofar as it relates to acts which took place after 28 December 2017 when Apple published a "Message to Our Customers" on its website. We deal first with the applications to strike out the claim.

(1) The Background to the Claim

6. The PCR's complaint concerns the way Apple addressed the problem of unexpected power offs ("UPOs") in Affected iPhones from 2016. A UPO occurs when the power demanded by an iPhone exceeds that which can be delivered by the phone's battery. It is triggered by a drop in operating voltage and is a

protective mechanism. In autumn 2016, Apple began to receive increased reports of iPhones experiencing UPOs.

7. Batteries deteriorate with age. The rate of deterioration will vary depending on the conditions of use. For this reason, the condition of the battery is described in terms of "chemical age" rather than temporal age. UPOs are more likely to occur as the chemical age of a battery increases, when the charge of the battery is low and when the temperature is low. The increased incidence of UPOs experienced in the Affected iPhones from 2016 was understood to be associated not only with the chemical age of the battery but with the introduction of third-party apps which used more power; including Snapchat. As Mr Crumlin director of iPhone System Integration at the Proposed First Defendant, explained:

> "Specifically, through third-party apps, iPhones were increasingly being used to perform real-time filtering during video conversations, which required significant power from many hardware components at the same time, including the camera, speaker, GPU and CPU. The extent to which these newer third-party apps made simultaneous use of such features was unprecedented at the time. In the fall of 2016, when these apps were being used in colder fall and winter temperatures, and in iPhones with batteries which by that time were already between one and two years old – i.e., the iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus – while still quite rare, it appeared that the rate at which UPOs were occurring, had increased."

8. In order to address this problem, Apple introduced, by way of a software update to Affected iPhones, a performance management feature ("PMF"). This reduced the power available to certain components of the iPhone under certain circumstances. It is common ground that the PMF had an impact on phone performance although the extent of that impact is in dispute. This is a matter to which we return below.

9. When the PMF was introduced, by way of a software update (first introduced by iOS 10.2.1), consumers were not properly informed as to its purpose (to reduce UPOs) or its effect (to impose power budgets on some components which may impact performance). It is this lack of transparency which is central to the PCR's allegation of abuse.

B. THE APPLICATION FOR SUMMARY JUDGMENT

10. The PCR has served a draft re-amended collective proceedings claim form which runs to 100 pages. Notwithstanding its length, and perhaps partly because of it, we find that aspects of the claim lack clarity.

11. It is alleged that Apple was dominant in the relevant market, being the iPhone Market or, alternatively, the Premium Smartphone Market, as well as the relevant software market. It is said that Apple has committed a single and continuous abuse of dominant position, including by failing to explain the "battery issues" openly and fairly.

12. The PCR relies upon *Gutmann CA* to support the proposition that abuse can arise from a lack of transparency. This Tribunal authorised a claim in which it was alleged the proposed defendants failed to take sufficient steps to prevent class members being double charged by failing to inform them that Boundary Fares were available: [2021] CAT 31. In *Gutmann CA*, Green LJ observed, at paragraph 101, a lack of transparency can be an important factor in rendering unlawful that which might otherwise be held to be lawful. It can readily be appreciated that double charging will materially disadvantage consumers. In the present case, the question of how it is being said consumers are disadvantaged by the lack of transparency, and why it is being said this lack of transparency may amount to abuse, is more elusive.

13. Engineering a complex product inevitably requires a manufacturer to balance the performance of components in order that the machine as a whole - in this case a smartphone - performs satisfactorily. That balance may require tuning down one component in order to preserve or maximise the function of another. There is in law no general obligation on manufacturers, dominant or not, to be transparent about the engineering decisions and compromises they have had to make in designing a final product.

14. The PCR contends that the circumstances here are different. The nub of his case is that Apple has sold a product which is, or has become, unsatisfactory because of the increased incidence of UPOs and then tried to fix that problem

surreptitiously at a cost to the user. It is said that Apple, by issuing software updates, persuaded users to alter their phones to fix a defect in a way which has left the consumer with a substandard phone. Further it is contended that irrespective of whether or not that repair might have been reasonable in the circumstances, the users should have been given a choice and should have had the opportunity to seek appropriate redress from Apple.

15. The PCR was anxious to emphasise that this is not a defective product claim and that its claim of abuse is not based solely on the provision of a poorly designed or defective product. The complaint arises, it is said, from the lack of transparency.

16. The PCR was unable to point to a case where a lack of transparency relating to a product defect has given rise to an abuse of dominant position. He submits however that the categories of abuse are not closed and that the acts complained of undermine competition on the merits and impact consumer welfare: see *Gutmann CA* [91]. Whether the alleged facts if proven would amount to abuse as a matter of law is not something we have been invited to rule upon today and we agree that this is a matter which is properly to be determined at trial in the light of findings of fact, should those facts be determined to be suitable for trial. The application for summary judgment is based upon the submission that the PCR has no basis in fact for his case of abuse.

17. Apple submits that the PCR's case rests upon a contention that the Affected iPhones were in fact "substandard" and that there is no evidence to which the PCR can point which supports this contention. The PMF software was introduced to address UPOs and, Apple submits, was successful in doing this; reducing UPOs in iPhone 6 by over 70% and iPhone 6s by over 80%. Apple does not dispute that, under certain conditions, the PMF will result in longer launch times for apps, which may be noticed by some users, but contends that there is no evidence that those impacts – even at the highest mitigation levels - render the iPhones "substandard". Consequently, it submits the allegation of abuse must fail.

18. The parties agreed that the relevant standard for determining whether the claim should be struck out, or reverse summary judgment entered for Apple, was that described in *Easyair v Opal Telecom* [2009] EWHC 339 at paragraph 15:

i. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 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 63;

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."

19. It is this test of there being a realistic, as opposed to fanciful, prospect of success which we have applied in this case. We have been reminded by Mr Moser KC, for the PCR, that the PCR, even with preliminary disclosure, has had limited access to documents and that, if this matter were to proceed to trial, further relevant technical documents may be expected to be available.

(1) The Pleaded Allegations

20. The lack of transparency the PCR complains about, which is at the centre of his claim, is the failure to disclose to members of the proposed class the nature of the "battery issues" and how they were addressed. The battery issues are described in the following terms (paragraph 7a of the draft re-amended collective proceedings claim form):

> "Apple was aware, from 12 December 2016 onwards at the latest, that certain models of iPhones (the "Affected iPhones") contained lithium-ion batteries that were unable to deliver the necessary peak power required by the iPhone central processing unit ("CPU") the graphics processing unit ("GPU") and operating system and which caused the smartphones to stall or shut down without warning (the "battery issues"). For the avoidance of doubt, it is not alleged that the cause of the battery issues was a manufacturing defect with the batteries contained in the Affected iPhones."

21. There is no complaint that the batteries in the iPhones were defective, rather it is complained that they were unable to deliver peak power. Nor is there any particularized case that the batteries were foreseeably improperly specified when the phone was designed and manufactured. Further, we did not understand the PCR to dispute Apple's explanation that the battery issues arose because of the demands placed upon batteries by certain third-party apps. It was common ground that the inability to deliver peak power was dependent upon the chemical age of the battery and the conditions of use.

22. Apple does not dispute that in certain circumstances the PMF will have an impact on the performance of iPhones including limiting the brightness of the screen, reducing maximum speaker volume and capping maximum processor

speeds for the CPU and GPU, which may have some impact on scrolling and launching applications.

23. In particularising his case of abuse, the PCR makes the following allegations. He contends, at paragraph 148 of his draft re-amended collective proceedings claim form:

> "In summary, in the present case, the abuse emanates from Apple's initial failure to respond in a fair and transparent manner to explain the battery issues to users and address the shutdown problems experienced by the Affected iPhones from the point at which Apple became aware of these issues (which, at the very least, was with the release of iOS 10.2 on 12 December 2016, as this update contained a diagnostic feature designed to allow Apple to gather information about the UPOs experienced by users). Instead of remedying the problem for all of the Affected Products at the outset – for instance by offering a refund or compensation, or by issuing a voluntary product recall and/or offering an immediate battery replacement (for example, as it did with the earlier manufacturing defects in certain iPhone 6S batteries in 2016) – Apple sought to conceal the battery issues. As a result, Apple was able to continue charging, and/or escape the consequences of having previously charged, prices that did not reflect the actual lower value of the Affected iPhones, resulting in Apple imposing unfair prices on consumers because Apple charged (and consumers paid) premium prices for handsets that could not perform as expected."

24. At paragraph 156 it is alleged that:

> The abusive single continuous infringement resulted in customer detriment since the Proposed Class Members were left with Affected iPhones that performed significantly below the level reasonably expected and/or were significantly less valuable than initially thought. The Affected iPhones had been acquired at a premium price on the reasonable assumption that the handset displayed premium technical features and superior functionality. In actual reality, the quality, functionality, speed and performance of the Affected iPhones was sub-standard (and inferior to advertised expectations), in that users would not reasonably have expected that the Affected iPhones would be subject to: (a) UPOs, in particular before the installation of the relevant iOS updates [citation from CMA Consultation Letter] ; and/or (b) after the relevant iOS updates, significant levels of throttling of key hardware components (in particular the CPU and GPU), which resulted in a materially worse user experience than would have occurred had the Power Management Feature not been implemented [citation from CMA Consultation Letter]. The high price was rendered unfair once Apple became aware of the fact that it did not reflect the reduced technical capabilities and actual devaluation of the Affected iPhones. Apple did not offer a refund to adjust the price that had been, or was being paid, or offer some other form of adequate redress to take account of the inferior quality, substandard performance and inadequate functionality of the Affected iPhones to users who had already purchased an Affected iPhone, or adjust the retail price of the Affected iPhones for users who had not yet purchased one, as well as for users upgrading from one Affected iPhone to another."

25. Paragraph 158 states:

> "Further, Apple's lack of transparency and concealed use of the throttle hindered its customers' ability to make informed decisions. It was therefore likely to distort Proposed Class Members' decisions, including as to whether to buy an Affected iPhone or install relevant iOS upgrades, and impeded or deterred them from exercising their legal rights, whether under Apple's warranty (while it remained in force) or through separate complaints, to seek a refund or replacement battery [Reference to CMA Consultation Letter]. Apple's course of conduct distorted the economic balance between the parties in Apple's favour, enhancing its reputation, brand loyalty and lucrative sales of the Affected iPhones at the expense of users. Apple was thereby able to preserve its profitability and consolidate and maintain its market position in the wider premium smartphone market. Although not a necessary element of the abuse, Mr Gutmann reserves his right to amend these particulars pending further disclosure regarding Apple's commercial strategy and motivations for adopting this course of conduct."

26. And at paragraphs 171 – 172:

> "Members of the Proposed Class were faced with an invidious choice between: (a) continuing to pay premium prices for, and enduring the substandard performance and reduced technical capabilities of, their Affected iPhones in the face of serious battery and throttling issues – with an increased risk of unexpected shutdowns or reduced performance resulting from the Power Management Feature; (b) replacing the iPhone battery at their own cost; or (c) upgrading to a new phone early before the natural life-end of the Affected iPhone (often by paying any associated charges and penalties).
>
> Whichever option the Proposed Class Members took, they suffered inferior quality, substandard performance, and incurred costs if they sought to mitigate their situation by replacing their battery or handset early. Apple's concealment of the battery and throttling issues and its failure to provide timely and transparent explanations of the purpose and effects of the Power Management Feature and/or timely and effective redress meant that users of the Affected iPhones, who were already in a weakened bargaining position in their relationship with Apple, were therefore unable to make an informed choice about whether to retain, switch or upgrade their device, or exercise their legal rights, and suffered detriment as a consequence."

27. We have cited certain paragraphs but, as we have noted, the proposed re-amended collective proceedings claim form is long and the allegations of abuse are put in various ways. What is nevertheless clear from the claim form, and from submissions made before us, is that the PCR's primary case is that the Affected iPhones, after the PMF had been surreptitiously installed, had "substandard performance" and "performed significantly below the level reasonably expected". Alternatively, it is contended that the Affected iPhones with the PMF installed did not perform as a premium phone should.

28. It is contended that, had consumers been properly informed of the substandard performance of the Affected iPhones after installation of the PMF, they could have exercised their legal rights to obtain redress by way of financial compensation or battery replacement.[1] The "legal rights" to which reference is made include breach of warranty and/or consumer rights.

(2) The Analysis of the Application for Reverse Summary Judgment and/or to Strike Out the Claim

29. When this matter last came before us, we pointed out that this Tribunal was unclear as to why it was being said that, because power budgets were implemented by the PMF and processor speeds slowed in certain circumstances, the Affected iPhones were "substandard" and fell short of representations made to consumers and/or the expectation of consumers. The PCR has been unable to explain, with any particularity, what the relevant standard should be. Furthermore, it cannot be assumed that because a phone is measurably slower in certain circumstances it is "substandard". Such a case requires articulation of the expected standard.

30. To support the allegation that the iPhones were arguably slowed by the PMF to the extent that they were substandard and a consumer may have legal redress the PCR pointed to two documents. The first was a press release dated 9 September 2014 entitled "*Apple Announces iPhone 6 & iPhone 6 Plus – The Biggest Advancements in iPhone History*". It makes reference to "blazing fast performance" of the A8 chip included in these phones. We doubt that a reference to "blazing fast performance" in a press release assists in setting a standard to which the Affected iPhones can be said to fall short. Further we doubt that this sort of reference to performance in an advert could form the basis of an actionable claim even if the Affected iPhones were disappointingly slow.

31. The PCR also made reference to a press release of 9 September 2015 entitled *Apple Introduce iPhone 6s & iPhone 6s Plus* which makes reference to Apple's

[1] The PCR contended that the batteries should be replaced not with a superior battery but with the same type of battery which, presumably, would, on the PCR's case, be equally unable to deliver the necessary power as they aged.

third generation chip producing a 70% faster CPU and 90% faster GPU. However, as pointed out by Apple, this is not a representation that Affected iPhones are faster than the iPhone 5, as previously suggested, but is referring to improvements over the iPhone 6. It does not therefore assist the PCR.

32. The PCR made the submission that the Affected iPhones should be superior to the iPhone 5 that predated it but as yet has not articulated with particularity why he contends Affected iPhones are inferior to the iPhone 5.

33. In our judgment, the PCR has not at this stage of proceedings been able to put forward primary facts which lead us to conclude it has a reasonable prospect of success in showing that users who were in possession of Affected iPhones had a potential legal claim against Apple for compensation because the Affected iPhones were "substandard" or fell short of particular representations made to consumers.

34. The PCR made clear, however, that his case was not dependent upon members of the class having an entitlement in law to compensation for being in possession of an Affected iPhone. He submits that the lack of transparency could give rise to abuse if the PMF impacted performance notwithstanding that this did not give rise to a breach of warranty or consumer law. He contends that, if consumers had full knowledge of the impact of the PMF and were dissatisfied, Apple would likely have had to respond to consumer pressure even in the absence of such a legal claim. It is therefore necessary to consider whether there are reasonable prospects of the PCR establishing at trial that purchasers may be disappointed with the performance of the Affected iPhone with the PMF installed such that they would have, if Apple had been transparent, sought and obtained redress from Apple.

35. Disclosure has been provided by Apple which gives some further insight into the circumstances under which processor speeds are reduced by the PMF. Mitigation tables have been disclosed which detail the circumstances in which there will be a reduction in processing speed for the Affected iPhones: this is dependent upon the chemical age of the battery, temperature and charge. The tables also quantify the reduction in processor speed in each case. The tables

evidence a notable reduction in processor speed in certain circumstances. It is difficult, however, from the tables alone, to know what this means in terms of user experience across the proposed class and whether this is arguably sufficient to lead to consumer dissatisfaction.

36. Apple has additionally provided disclosure of various internal messages between Apple employees. One of these, dated 3 January 2017 from Alec de Reitzes to Ramsay Tantawi, states: "*Additionally, Dustin ran qualitative tests fully throttled, and the effects of throttling were noticeable, but deemed liveable*". Throttling ("throttled") is a reference to the engagement of the PMF and supports the view that such throttling may be noticeable (as Mr Crumlin acknowledges). The reference to it being "deemed liveable" is consistent with this potentially being of concern to consumers but not of such concern that the consumers would not put up with it. Figures of the impact of these mitigations on the opening of apps in other emails from Mr De Reitzes (of 5 January 2017) indicate increased launch times for apps under certain conditions, including up to 3.5 times for Safari at the highest mitigation level. It is not possible to conclude one way or another, without hearing evidence, whether taking up to 3.5 times longer to open an app will negatively impact the performance of the product from the perspective of consumers to leave them dissatisfied with Affected iPhones.

37. The PCR, in his pleading, makes reference to other class action proceedings and regulatory decisions arising out of the same facts, which he contends are supportive of his case. Apple submitted that in the light of the rule in *Hollington v Hewthorn* [1943] KB 587 no weight should be given to such decisions. We do not agree. The judgment of Green LJ in *Evans v Barclays Bank plc* [2023] EWCA Civ 876 (with which Snowden LJ and the Chancellor agreed) makes clear, at [99], that the findings of other tribunals could be relevant in showing that there is a serious case to advance, although not binding on this Tribunal.

38. The PCR has made reference in its draft re-amended collective proceedings claim form to pleadings filed in US class actions. Given these are just allegations and not findings we have attached no weight to them. Reference is also made to a €25 million fine by the French regulatory authority, the DGCCRF, and its

finding that Apple's PMF software updates "*were likely to lead to a slower operation*". During the course of the proceedings Mr Crumlin was interviewed by the DGCCRF and his answers are recorded in minutes entitled a *Report of Statement and Takings Copies of Documents*. These minutes are said to be confidential. We have not heard argument as to whether confidentiality of the minutes should be maintained and consider it appropriate, at this stage of proceedings, to cite from those minutes in a confidential annex to this judgment.

39. Given their brevity, the French DGCCRF minutes are of limited assistance in identifying primary facts to support the case being advanced in this jurisdiction.

40. Reference is also made by the PCR to an investigation opened by the UK Competition and Markets Authority (the "CMA"). This was concluded in May 2019 with Apple giving undertakings in lieu of enforcement action. We were shown the CMA consultation letter. In Annex B of the letter, reference is made to Apple's commercial practices and its lack of transparency. We have not heard argument as to whether confidentiality in the said letter should be maintained and consider it appropriate, at this stage of proceedings, to cite from the letter in a confidential annex to this judgment.

(3) Conclusion on the Application for Reverse Summary Judgment and/or to Strike Out the Claim

41. For the reasons given, we are not persuaded that the PCR has in these proceedings advanced primary facts which means it has realistic prospects of showing that the installation of the PMF has resulted in a substandard phone such that consumers, if they had been aware of its effect, would have had a legal claim against Apple for breach of warranty or statutory rights. We nevertheless consider that there is a reasonable prospect of the PCR showing at trial that the negative impact of the PMF on the performance of Affected iPhones was sufficiently material that, had it been disclosed to members of the class, it would have impacted the commercial balance between consumers and Apple. It is arguable that had Apple been transparent and warned consumers of the problem with UPOs, and that this problem was to be addressed by installing a PMF which impacted the performance of the Affected iPhones, then consumers would have

reacted in such a way that Apple would have found it appropriate or necessary to compensate them. Keeping class members ignorant was arguably to the detriment of the class and consequently arguably an abuse upon which there is a reasonable prospect the PCR could succeed.

42. We conclude that the application to strike out the claim fails and this matter should proceed to trial. Further, it can reasonably be expected that more evidence may be available at trial relating to the materiality of the negative impact of the PMF on consumers and its benefits in mitigating the problem of UPOs. It is apparent from at least footnotes 3-6 and 15 of the CMA consultation letter that Apple provided information to the CMA in relation to this matter which the PCR has not yet had the opportunity of reviewing.

43. We do not consider it is appropriate, at this stage, to strike out only those allegations which suggest the Affected iPhones were "substandard" such that, had Apple been transparent, members of the class would have been able to exercise their legal rights under warranties. Notwithstanding that we have not been persuaded that on the materials before the court there is a reasonable prospect of establishing this at trial, it appears to us that the question of whether the Affected iPhones fall short of a legally relevant standard is intertwined with the general allegation that the performance of the phones was materially impacted by the PMF. We also bear in mind that the CMA has had access to material with which the PCR has not yet been provided. In the circumstances the appropriate course is to proceed to disclosure with the pleadings in their current form. We turn to the question of how actively to case manage the claim going forward below.

44. In places in the PCR's draft amended collective proceedings claim form it is suggested that existence of UPOs may have amounted to an abuse (see for example paragraph 156). This is a distinct matter from the complaint of lack of transparency around the installation of the PMF. The existence of UPOs per se is not something which we understood was relied upon on this application for certification and is not a complaint which we are certifying.

(4) The Application for Reverse Summary Judgment or to Strike Out the Allegation of Abuse After 28 December 2017

45. The claim of single continuous abuse is founded on Apple's lack of transparency in relation to the PMF. In the circumstances, Apple contends that it cannot survive the publication of a message on its webpage of 28 December 2017 which was picked up by a number of media sources and, it is said, put matters in the public domain. The message is entitled "*A Message to Our Customers about iPhone Batteries and Performance*". It described how batteries age, the problem with unexpected shutdowns and stated: "*users may experience longer launch times for apps and other reductions in performance*". It also contained a hyperlink to a support article entitled "*iPhone Battery and Performance*".

46. The PCR contends that the Apple apology was defective in that it failed to provide sufficient details. In particular, it is contended in his skeleton argument for these proceedings *inter alia*:

> "Apple failed to explain in the apology in a clear and comprehensive manner (i) that the PMF resulted in significant reductions in the performance of hardware components; (ii) that these hardware components were throttled, capped, limited etc.; (iii) that throttling was likely to take place with all Affected iPhones once a certain period of battery ageing has elapsed (Sinclair 2/30); (iv) that there was an inevitable and significant trade-off between battery life/performance and performance of other hardware components – i.e. users would have to endure the consequences of either UPOs or the PMF; or (v) the full range of functions impacted by the PMF (see 64(b) above). Instead, Apple presented the PMF as a positive and innovative feature which had very little impact on substantive performance and user experience (emphasis added): "About a year ago in iOS 10.2.1, we delivered a software update that improves power management … With the update, iOS dynamically manages the maximum performance of some system components when needed to prevent a shutdown. While these changes may go unnoticed, in some cases users may experience longer launch times for apps and other reductions in performance."
>
> …
>
> On the further webpage titled "iPhone Battery and Performance", Apple set out further details about the impact of the PMF towards the very bottom of the page: "In some cases, a user may not notice any differences in daily device performance. … In cases that require more extreme forms of this power management, the user may notice effects such as …" (emphasis added). Apple then listed a number of functions that may have been impacted by the PMF. This explanation suffered from the same issues set out at sub-paragraph (b). In addition, Apple's list of functions (in particular "lower frame rates whilst scrolling" and "gradual frame rate reductions") were drafted in a technical way

> that did not explain in user-friendly language the practical impact on user experience."

47. It is also contended that Apple's notice may not have come to the attention of consumers in that it was not communicated to consumers individually and may not therefore have achieved sufficient prominence.

48. We are not in a position today to rule that there is no reasonable prospect of the PCR succeeding on showing that there was abuse after 28 December 2017. In particular, the extent of dissemination and how consumers would have understood the message and responded to it, given its timing, requires evidence. We are in no position to conclude that the proposed class as a whole saw and understood the contents of the message. Moreover, informing customers after the PMF has been installed, by way of apology, will not necessarily have had the same impact as informing them prior to such installation. In our opinion, such matters are plainly not suitable for summary determination.

C. ELIGIBILITY

(1) No Plausible or Credible Methodology for Measuring Loss

49. The *Microsoft* test was adopted by the Supreme Court in *Mastercard Inc v Merricks* [2020] UKSC 51. In *Microsoft*, Rothstein J stated at paragraph [118]:

> "In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a classwide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

50. In *Gutmann CA,* Green LJ explained:

> "**Observations on the Microsoft test**
>
> [53]. *Not a statute:* The Microsoft test is not a statutory test. There is no magic to it. It articulates a common sense approach that any court should be able to apply. It confers upon the court or tribunal a broad discretion to approve of the methodology to be used at trial. This is evident from the following terms used in the test: "sufficiently credible or plausible", "some basis in fact", "a realistic

prospect of establishing loss on a class-wide basis", "the methodology cannot be purely theoretical or hypothetical", "grounded in the facts of the particular case", "some evidence of the availability of the data to which the methodology is to be applied." The words "sufficiently", "some" (used twice in the test), "grounded", "realistic" and "purely", highlight both the discretion conferred upon the CAT to make a value judgment, but also the relative nature of the exercise.

[54]. *The test is counterfactual:* The methodology is based upon a counterfactual model of how the market would have operated absent the abuse. It is quintessentially hypothetical and, for this reason, will use assumptions and models and, frequently, regression analysis. It is therefore not a fair criticism to make of a methodology that it is hypothetical; though, equally, the CAT will expect to see "some" factual basis for the assumptions and models deployed, hence also the reference in Microsoft to the methodology not being "purely" theoretical or hypothetical.

[55]. *Absence of disclosure:* The methodology is subject to a certification assessment prior to disclosure and is thereby necessarily provisional and might, properly, identify refinements and further work to be carried out after disclosure. In many competition cases there will be a distinct informational asymmetry between a claimant and a defendant which might be exacerbated in aggregate damages, top down, cases where the relevant information might predominantly be in the possession of the defendant. At the certification stage all that might be possible is for the class representative to advance a methodology identifying what might be done following disclosure. This is why in Microsoft the Court referred, in prospective terms, to there being "some evidence of the availability of the data to which the methodology is to be applied."

[56]. *Issues not answers:* At the certification stage the methodology must identify the issues, not the answers. The CAT is concerned to identify the issues and gauge whether the methodology proposed for determining those issues is workable at trial when the issues are tested and might lead to different answers, some in favour of defendants. Because of this the CAT will wish to assess whether, if the defendants do win on some issues at trial, the methodology is capable of being adjusted so as to reflect only partial victory by the class.

[57]. *Intuition and common sense:* Judges are expected to use their common sense. In this case the acceptance by the CAT of the assumption made by the expert, Mr Holt, that Travelcard holders could be assumed, rationally, to wish to pay the lowest possible fare is an example of the CAT arriving at a conclusion it considered was common sense or "informed guesswork". The validity of this approach has repeatedly been endorsed in case law: see e.g., Merricks (ibid) paragraphs [48] – [51].

[58]. *The breadth of the axe and the nature of the claim:* In forming its judgment at the certification stage the CAT will bear in mind that at trial it is armed with a broad axe by which it can fill gaps and plug lacunae in the methodology. The axe head is adjustable and can expand and retract to meet the nature of the case…"

51. In support of there being a credible or plausible methodology to establish a common basis for loss, the PCR has served expert evidence in the form of three

expert reports from Greg Harman of Berkeley Research Group (UK) Limited. These reports describe and refine a methodology that the PCR may adopt in determining loss on a class wide basis. Mr Harman was invited to assume (see paragraph 2.3.5 of this Supplementary Provisional Report of 6 April 2023) that:

I. Apple would have been transparent about the Battery Issues as soon as it became aware of them;

II. Apple would have been transparent about the key features and characteristics of the PMF and the impact of its installation on the device's performance; and

III. Apple would have provided prompt redress in the form of free battery replacements, a partial refund, a reduction in the retail prices of the Affected iPhones and/or other equivalent redress.

52. He describes the counterfactual in the following terms:

> "There are three primary differences between the Actual and Counterfactual Scenarios. First, consumers suffered from substandard performance, resulting either from unexpected shutdowns that occurred, and/or due to the non-transparent imposition of the PMF in iOS software updates, which reduced their iPhone's performance. Second, as they did not know the underlying causes, a proportion of consumers incurred additional costs to replace the batteries of their Affected iPhones. Third, a proportion of consumers upgraded their phones earlier than they otherwise would have. Based on this I identified three potential heads of loss:
>
> (I) Substandard Performance losses, where users suffered a loss due to paying full price for their Affected iPhones, which did not perform as advertised/expected, compared to the Counterfactual Scenario in which their willingness to pay would have been reduced by knowledge of the Battery Issues and PMF…
>
> (II) Battery Replacement losses, where users incurred additional costs to replace the batteries of their Affected iPhones, which they would not have incurred in the Counterfactual Scenario…; and
>
> (III) Premature Upgrade losses, where users upgraded their Affected iPhones sooner than they otherwise would have done in the Counterfactual Scenario and may have also incurred upgrade charges or penalties. Given the limited publicly available information on upgrade rates, I have not presented a provisional estimate for this head of loss at this stage."

53. To assess substandard performance losses, the methodology he adopts is to use CPU speed as an appropriate metric to reflect the performance capability of a smartphone. He proposes to use a hedonic price analysis to arrive at a value for a reduction in that processing speed. He contends that the academic literature consistently observes a statistically significant and material relationship between CPU speed and the price consumers are prepared to pay for a smartphone.

54. In addition, he intends to derive a value to the free battery replacement Apple would have provided in his counterfactual.

55. Apple contends that this is not a credible or plausible methodology by which to assess loss because it departs from the abuse, which is said to be the lack of transparency, and instead is attempting to put users of Affected iPhones in the position they should have been had the phones not required the PMF. Apple reminds the Tribunal that this is not a claim for breach of contract or breach of consumer law and that the PCR has disavowed such a claim. It also submits that the performance issues would have remained the same even if Apple had been transparent.

56. Apple draws our attention to the concerns raised by this Tribunal in *Liza Lovdhal Gormsen v Meta Platforms, Inc and Others* [2023] CAT 10. In that case the PCR failed to satisfy the Tribunal that misleading statements made by Meta gave rise to a class wide loss which would have led to a renegotiation. Instead the Tribunal was of the view that either a class member would not have subscribed to Facebook or would have subscribed anyway. Apple says parallels may be drawn here. Apple contends that there is no evidence to support any assertion that, if Apple had provided more information about the alleged battery issues and the operation of the PMF at an earlier stage, it would have been driven by commercial pressures to offer redress in the form of reduced prices, refunds or free batteries.

57. The most straightforward case might be if the PCR was in a position to show that the Affected iPhones were "substandard" such that this gave rise to a legal claim against Apple. In these circumstances it can be argued that if consumers

knew about the reason the Affected iPhones were substandard, they would have sought legal redress and as a result Apple would have had to compensate the class. Deriving a loss arising from the lack of transparency by reference to the reduced speed of the phones or providing free replacement batteries, as contemplated by Mr Harman, is a plausible approach to assessing loss across the class in these circumstances. It is arguable that there would be a direct causal relationship between transparency, or lack of it, and the ability of consumers to seek the compensation to which they are entitled. We have however found that the primary facts with which we have been presented do not give rise to a sufficiently arguable case that consumers had a legal claim against Apple. We therefore need to consider the counterfactual in the light of the case which, we have concluded, has a reasonable prospect of success at trial.

58. If it is shown at trial that there was abuse arising from the lack of transparency concerning the circumstances surrounding, and impact of, the PMF, then Apple may have illegitimately protected its reputation and goodwill. It does not necessarily follow from this that the proposed class has suffered loss. But if, as the PCR contends, the counterfactual is that in these circumstances Apple would have offered redress to the proposed class because of inter alia slower processing speeds, then the class will have suffered loss. It is contended that such compensation may take the form of free battery replacements or financial compensation to consumers.

59. Apple's response to this is to contend that this counterfactual is highly speculative and not supported by evidence. Moreover, it contends that its position is supported by the fact that when it informed consumers of the reason for, and impact of, the PMF on 28 December 2017 it was not faced with a wave of consumer protest. It offered a battery replacement program (at a discounted cost to the consumer) which many consumers did not take advantage of. Further, when later versions of operating software gave consumers the option of switching the PMF off, very few did.

60. These are points which Apple may be able to develop in due course to describe what it contends to be the correct counterfactual (assuming there is any abuse at all). In our assessment, this is not really an attack on the economic methodology

of assessing loss but rather an attack on the nature of the abuse and the correct counterfactual. We keep in mind Green LJ's words in *Gutmann CA* that at certification, prior to disclosure, the methodology is necessarily provisional, given the asymmetry between the parties, and that this Tribunal is currently armed with a broad axe which is to be adjusted to the context of the case. Just as we are not in a position, at this stage of proceedings, to say there is not a sufficiently arguable case of abuse so we are not in a position to say that the PCR has no reasonable prospects of establishing a counterfactual which will give rise to a loss common to the class.

61. At trial the correct counterfactual *may* be that if Apple had been transparent, it would have offered all users of Affected iPhones new batteries free of charge. The loss arising from a lack of transparency in these circumstances could be calculated by reference to the value of battery replacement. Alternatively, Apple may have offered members of the class a partial refund or a financial incentive to update their phone to a later model because of the throttling they were experiencing with the Affected iPhones. Again, there is no methodological impediment to performing a relevant calculation of loss in these circumstances.

62. A further possibility is that Apple might succeed in showing that consumers would not, on a class-wide basis, have sought or obtained any compensation from Apple and would have just put up with the impact of the PMF or seen the PMF as beneficial. In these circumstances it may be argued that there is no loss, but that will be because the PCR has fallen short on the facts not because there is a fatal flaw in the methodology.

63. We conclude that the methodology being advanced by the PCR offers a realistic prospect of establishing loss on a class wide basis if he establishes the aforesaid relevant facts at trial. We recognise that the methodology may require refinement in the light of the facts as they emerge and that this is a matter to which the Tribunal will need to have regard as a matter of case management.

D. AUTHORISATION CONDITION

64. Apple submitted that Mr Gutmann should not be authorised to act as a class representative for essentially two reasons. First it is said that Mr Gutmann is not an owner of an iPhone and is therefore not a member of the intended class. No authority has been drawn to our attention in support of the proposition that a class representative *must* be a member of the class. Further, Rule 78(1)(a) provides that the Tribunal may authorise an applicant to act as a class representative "whether or not the applicant is a class member". We accept, as Apple reminds us, that collective proceedings may be capable of being misused and may be used unfairly but we have scrutinised the merits of this case in some detail in this judgment and do not find this case to be improper.

65. Second it is suggested that Mr Gutmann has brought a claim which has no factual basis and that parts of his claim have been abandoned. We accept that the behaviour of a class representative, prior to certification, may be a relevant consideration in determining whether a class representative is acting “fairly and adequately in the interests of the class members”, but we see nothing out of the ordinary in this case. As to abandoning parts of the claim, it is not necessarily inappropriate to refine a claim by abandoning, at an early stage, those aspects which are not sustainable, in the light of facts as they emerge.

66. It had previously been suggested that a further reason why Mr Gutmann is not suitable as a class representative is that he was a professional litigant, however that is not a matter which was pressed before us at this certification hearing. Mr Gutmann points out that he has been authorised in other proceedings, which we note. Further, there is nothing which has been drawn to our attention in relation to the conduct of those proceedings to suggest he is not a suitable class representative.

67. Having regard to the matters set out in Rule 78 of the Tribunal Rules and the submissions made by the parties, we are satisfied that it is just and reasonable that Mr Gutmann act as the class representative in these proceedings.

E. CONCLUSION

68. For the reasons given we find that the requirements of a CPO are met in this case, subject to the resolution of the terms of funding to which we have referred above.

F. ACTIVE CASE MANAGEMENT

69. In *Mark McLaren Class Representative Limited v MOL (Europe Africa) Limited* [2022] EWCA Civ 1701 Green LJ explained, in the context of issues around pricing theories, that the duty on the CAT, as a gatekeeper in collective proceedings, is a proactive one and that it should, in *that* case, have set out more clearly how it expected the trial to proceed (at [45]):

> The duty on the CAT as gatekeeper in collective proceedings is proactive as well as reactive. Once the CAT has decided to make a CPO that is not the end of the gatekeeper role. A CPO "… is neither the beginning or the end of measures whereby the CAT may case manage collective proceedings". A class representative might not have to overcome a very high hurdle to obtain a CPO but the CAT should nonetheless ensure that from the certification stage the case proceeds efficiently to trial. This role might well entail the CAT imposing substantial case management burdens on the parties at an early stage.

70. There remains a lack of clarity and specificity in the PCR's case. This impacts both the questions of the existence of abuse and the manner in which loss to the class is to be assessed. We consider this to be precisely the type of case where the active case management, to which Green LJ referred, will be important.

71. We are sensitive to the submission that there is an inequality in information at this stage of proceedings and that the PCR has had access only to limited disclosure. We are of the provisional view that once certification is in place, this matter should proceed to disclosure on the current pleadings. The question of abuse should be determined at a first trial on the assumption Apple is dominant in the relevant market.

72. We consider that the question of dominance and quantum should be heard at a second trial. We invite further submissions as to whether aspects of causation should form part of the first trial or be held over to the second trial.

73. Once disclosure has been reviewed, we expect the PCR to refine and narrow his pleaded case. Insofar as he is maintaining aspects of his case, he will be required to provide further particulars in relation to abuse and causation. In the context of those further particulars, we shall actively review whether certification continues to be appropriate.

Justin Turner KC
Chair

Jane Burgess

Derek Ridyard

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

Date: 1 November 2023

Confidential Annex to Judgment

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