IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1468/7/7/22

B E T W E E N :

JUSTIN GUTMANN

Applicant /
Proposed Class Representative

- and -

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

Respondents /
Proposed Defendants

REASONED ORDER (SERVICE OUT OF THE JURISDICTION)

UPON reading the proposed class representative's collective proceedings claim form dated 17 June 2022 and the proposed class representative's application of the same date to serve the proposed first and second defendants collective proceedings claim form out of the jurisdiction pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules").

AND UPON reading the witness statement of Rodger Charles Russell Burnett of 17 June 2022

IT IS ORDERED THAT:

1. The proposed class representative is permitted to serve the proposed first and second defendants out of the jurisdiction pursuant to an application Rule 31(2) of the Tribunal Rules.

2. This Order is made without prejudice to the rights of the proposed first and second defendants to dispute the Tribunal's jurisdiction pursuant to Rule 34 of the Tribunal Rules.

REASONS

3. The applicant and proposed class representative, Justin Gutmann, contends that these proceedings, should permission be granted, are likely to treated as taking place in England and Wales for the purpose of Rule 18 of the Tribunal Rules. I agree. I therefore approach the question of service of out of the jurisdiction on the same basis as the High Court of England and Wales and in accordance with the guidance given in *Epic Games Inc and others v Apple Inc and others* [2021] CAT 4.

4. The proposed first defendant, Apple Inc., is incorporated in California, in the United States of America. The proposed second defendant, Apple Distribution International Limited, is incorporated in the Republic of Ireland. The third defendant, Apple Retail UK Limited, is based in London. (The first and second defendants are hereafter referred to as "Apple").

5. The applicant is applying for authorisation to act as the proposed class representative in standalone claims in opt out proceedings pursuant to section 47A of the Competition Act 1998 (the "Act") for damages caused by Apple's breaches of statutory duty in infringing: (i) the Chapter II prohibition on abuse of dominance in s.18(1) of the Act, and in particular the first and second limbs in section 18(2)(a) and (b) of the Act; and (ii) until 31 December 2020, the EU law prohibition on abuse of dominance in Article 102(a) and (b) of the Treaty on the Functioning of the European Union ("TFEU").

6. Mr Gutmann contends that Apple has leveraged and abused its position of dominance by engaging in a series of inappropriate commercial practices that have caused harm to its customers in the UK. It is said that, over a number of years, starting from at least September 2016 with the release of iOS version 10, Apple leveraged its dominant positions between the hardware market and the software market in the UK through an unfair and abusive course of conduct, which included the imposition of unfair and misleading commercial practices, unfair trading conditions, unfair prices and/or and limited technical development to the prejudice of users, contrary to s.18(1) and (2) (a) and (b) of the Act and/or Article 102(a) and (b) TFEU.

7. In particular it is contended that Apple was aware, from 2015 onwards, that certain models of iPhones contained lithium-ion batteries that were defective in that they were unable to deliver the necessary peak power required by the iPhone central processing unit and operating system and which caused the smartphones to stall or shut down without warning (the "battery issues"). Rather than inform its customers of the battery issues it is said that Apple concealed the battery issues and continued to market and sell the affected iPhones. It is further alleged that it then proceeded to push automatic software updates via its exclusive iOS operating system, which increased the affected iPhones' power demands further beyond the capabilities of their batteries. The iOS updates included a "power management feature", which sought to manage the battery

issues but which actually slowed down, or "throttled", the processor, thereby adversely affecting the performance, functionality and technical capabilities of the affected iPhones. It is contended that this prejudiced users, and that this conduct served to protect Apple's profitability, reputation and market position at the expense of its customers' best interests. In doing this it is said Apple has taken unfair advantage of the opportunities arising out of its dominant position.

8. In the collective proceedings claim form reference is made inter alia to the settlement of a consumer class action in the US relating to similar conduct, breaches of the Italian Consumer Code, a fine by the French DG CCRF and undertakings given to the Competition and Markets Authority following an investigation between 9 August 2018 and May 2019.

9. The proposed class is essentially (I paraphrase) parties who acquired brand-new affected iPhones in the UK and who used the phones incorporating any Apple iOS update from iOS10.0.

10. The relevant market is put in the alternative as the supply of premium smartphones or Apple iPhones in the UK, and the market for iOS operating system in the UK. It is said whether the market is premium smartphones or Apple iPhones the proposed first and second defendants held a position of dominance.

11. The facts which I have briefly summarised above are said to comprise a series of unfair and exploitative commercial practices by which Apple abused its dominant position contrary to s 18(2)(a) and (b) of the Act.

12. In the claim form reference is made to an economic analysis by Dr Greg Harman of Berkley Research Group to support the proposition that the practices complained of have resulted in substantial harm to UK customers.

13. The applicant makes reference to arguments which Apple may raise in defence of these proceedings at paragraphs 33 to 45 of the application for service out which I have taken into account. I have not yet had the opportunity of hearing argument from Apple and express no view as to the merits beyond the conclusion that there is a serious issue to be tried.

14. I further conclude that there is a good arguable case that the claim falls within one of the CPR gateways in particular paragraph 3.1(9) of CPR Practice Direction 6B as being a tort in which damage has been sustained within this jurisdiction. It is said that the substandard performance of the phones and unfair prices are sustained by customers in the UK. I also find that there is a good arguable case that the first and second defendants are necessary and proper parties to the proceedings against the third defendant under 3.1(3). It is said the third defendant sells Apple products in the UK.

The first proposed defendant is responsible for licensing the Apple iOS software and updates and the second proposed defendant is said to be responsible for importing iPhones into the European market including the UK. The second defendant is also the warranty obliger for the UK and the contracting party for Apple's Repair Terms and Conditions.

15. As to forum non conveniens I find that in all the circumstances England and Wales is clearly the appropriate forum for the trial and that the Tribunal ought to exercise it discretion to permit service out of the jurisdiction. In particular I rely upon the fact that the proposed class is resident or domiciled in the UK and will have suffered damage in the UK. I also place reliance upon the fact that the claim relates to UK and EU competition law.

16. Altogether, I therefore consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this action.

Justin Turner QC
Chairman of the Competition Appeal Tribunal

Made: 26 July 2022
Drawn: 26 July 2022