Neutral citation [2023] CAT 32

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

2 May 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 2 May 2023

JUDGMENT (ADJOURNMENT)

APPEARANCES

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

Lord Wolfson KC, Mr Daniel Piccinin, 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.

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 combines, on an opt-out basis, the claims (according to the PCR's estimate) of 23 million 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 Apple's 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 ("TFEU").

2. We have not made a CPO today. The Tribunal, of its own accord, raised questions as to the factual basis of the abuse claim at the outset of the hearing. During the course of submissions, we invited the PCR to make an application for disclosure in order that he may have an opportunity to plead his case with more particularity. On his accepting this invitation we have adjourned the question of certification and have provided directions for the hearing of that disclosure application. Apple's application for reverse summary judgment has also been adjourned. These are the reasons for this adjournment.

(1) The Background to the Claim

3. 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 reports of iPhones experiencing UPOs. In the case of some iPhones this was due to a manufacturing defect with the batteries. The iPhones with defective batteries are not, however, the subject of this complaint. Apple also received reports of UPOs in phones which did not have defective batteries.

4. Apple submitted a witness statement from Alex Crumlin, the Director of iPhone System Integration at the First Defendant, who explains how this problem emerged:

> "35… However, during Apple's investigation into the reports of UPOs, our focus shifted to the impact of the chemical age of the batteries in those iPhones which were experiencing UPOs and how specific uses of the devices also made UPOs more likely. 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.
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> 36. After further investigation, we were able to conclude that a combination of factors were responsible for the increase in the rate of UPOs; namely, the battery state of charge, temperature, and chemical age, in combination with the application or the manner of usage of the particular iPhone itself, and in particular the use of more power-intensive apps, like Snapchat. For the avoidance of doubt, there was nothing to indicate that the likelihood of UPOs occurring had anything to do with iOS 10."

5. In order to address this problem in January 2017 Apple introduced, by way of a software update to Affected iPhones, a performance management feature ("PMF"). This was explained by Mr Crumlin at paragraph 42.

> "Basically, to avoid UPOs, the PMF took steps to limit the load (i.e., the power demand). The PMF in iOS 10.2.1 did this by analysing a combination of factors including device temperature, the battery's state of charge, and the battery's impedance and, if these variables required it, the PMF would manage the maximum performance of some system components (such as the CPU and GPU) to reduce power demand, thereby preventing UPOs. In this version of the PMF, these "mitigations" to reduce the load were "static," in the sense that there were fixed power budgets for each hardware component depending on the iPhone battery's state of charge, temperature, and chemical age. This is because the iPhones 6 and 6s did not have hardware components that could report in real time the amount of power that they required. The budgets were imposed by, for example, reducing or limiting the brightness of the display or by capping the maximum processing speed of the CPU or GPU. Static mitigations are tailored to individual devices and the budgets are increased when an iPhone is fully charged, or used in a warmer environment. In other words, there was no across-the-board slowing of the devices which received the PMF, but a specific response to each iPhone device based on the device temperature, battery's state of charge, and the battery's impedance, at any given time, which minimised the risk of a UPO when conditions were such that one may occur."

6. The essential elements of the PCR's complaint are 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 to have committed a single and continuous abuse of dominant position by failing to address the battery issue openly and fairly, by offering compensation or a free battery replacement. Instead, it is said, Apple sought to conceal the issue and surreptitiously introduced the PMF. It contends that the PMF results in the phone becoming substandard. It is this lack of transparency which is at the heart of the PCR's complaint.

7. Apple resists certification of the claims on two grounds:

   (1) that the PCR's methodology for establishing loss on a class-wide basis does not satisfy the *Pro-Sys* test because there is a fundamental disconnect between the alleged abuse and the alleged loss that the proposed methodology seeks to measure;

   (2) whether it is just and reasonable for Mr Gutmann to act as the class representative in the proceedings.

8. Additionally, Apple has applied to strikeout/obtain reverse summary judgment in respect of the PCR's claim as it relates to the period after 28 December 2017, being the date upon which Apple published information relating to iPhone battery performance.

9. A collective proceedings claim may only be commenced with the sanction of this Tribunal. The Tribunal has an obligation properly to consider whether the proceedings are suitable for being certified. Collective proceedings may be complex and expensive and must on certification satisfy the conditions set out in Section 47B of the 1998 Act, in particular the eligibility and authorisation conditions. As the Tribunal stated in *Gormsen v Meta Platforms Inc and others* [2023] CAT 10 at [3]:

> "Where issues are raised in the course of a collective proceedings application, the Tribunal must resolve them. The converse, however, does not hold good: an absence of objection does not make certification automatic. The Tribunal will, of its own motion, consider whether it is appropriate to make a collective proceedings order. The Tribunal cannot abdicate that responsibility by determining only those matters raised by a party opposing the making of a collective proceedings order."

10. The considerations that inform whether a CPO should be granted have recently been described in *Michael O'Higgins FX Class Representative Limited v. Barclays Bank plc* [2022] CAT 16. There is no merits requirement more stringent than the strike out / summary judgment hurdle (paragraph 41):

> "There is, in short, no "Merits Condition" independent of the power of the CAT, on application by a party or of its own motion, to strike out or grant summary judgment. Merits may be relevant when determining whether proceedings, capable of certification, should be certified on an opt-in or opt-out basis, by reason of the express reference to the "strength of the claims" in rule 79(3)(a) of the Tribunal Rules."

11. We considered that it was necessary to determine whether the abuse claim satisfied this relatively low hurdle in this case. This is not a matter which Apple had raised as part of its strike out. We nevertheless required the PCR to address us upon the legal and factual basis of that claim as part of the application for certification.

(2) The Pleaded Case

12. The draft Amended Collective Proceedings Claim Form (hereafter "the Amended Claim Form") alleges that the Proposed Class Members were subject to unfair trading conditions and/or commercial practices by reason of a combination of Apple's iOS licence conditions, which provided that Apple could make available software updates, and the lack of transparency which meant that users were unable to make an informed choice whether or not to accept a download. Particular complaint was made of the download of iOS 10.2.1 which addressed the issue of UPOs by installing the PMF. It is said this "*surreptitiously slowed down the Affected iPhones and/or their batteries in a way that prejudiced users*". Users were not warned of this effect of the PMF and were only told that the update "*includes bug fixes and improves the security*

of your iPhone". It is contended (at subparagraphs 7(f) and 7(g) of the Amended Claim Form):

> "f. Apple's lack of candour and transparency about the battery and throttling issues and failure to afford prompt and effective reparation to all of its customers in the UK (such as through a voluntary product recall, free battery replacement, refund and/or wider compensation) deterred or prevented the Proposed Class Members from exercising their legal rights, whether under their warranty protection or pursuant to their statutory rights, thereby depriving them of obtaining fair timely and effective redress.
>
> g. The Proposed Class Members suffered user detriment as they suffered prolonged substandard performance of their premium handset which **did not provide the superior functionality, technical capabilities and performance which users were led to believe they would experience and/or were significantly less valuable than initially thought**. They paid, or continued to pay instalments towards, an unfair price of over £300 for a premium handset, whose high price did not reflect the reduced technical capabilities and actual lower value of the Affected iPhones." (emphasis added)

13. Later in the Amended Claim Form it was stated, paragraph 148:

> "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. 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."

And at 153(c):

> "Instead, Apple sought to conceal the battery issues by releasing the relevant iOS software updates (iOS 10.2.1, and 11.2, and 12.1) in an attempt to manage the power demands. However, again, it failed to adequately inform its customers in advance of the purpose and effects of those software downloads and/or the detrimental impact they would have on the functionality and performance of the Affected iPhones. It did not disclose to users that the relevant iOS updates incorporated a power management function that slowed down their iPhones. Apple indicated that such updates would improve the user experience, but failed to communicate to users in a timely, transparent and accessible manner that installing such iOS updates would, or would have been likely to, **have resulted in a deleterious effect on the performance and functionality of their iPhone**. Once installed, Apple did not allow users any practical option to uninstall or downgrade to previous iOS versions." (emphasis added)

At paragraph 157 it was stated:

> "Viewed in wider context of Apple's automatic downloads, captive user base and limited switching opportunities its conduct was exploitative and unfair in that it gave the Proposed Class Members no real choice but to accept **inferior handset quality, reduced technical functionality and substandard performance** for the same premium price. The Proposed Class Representatives relies upon the users reports and complaints evidenced in the Sinclair Report exhibited to Gutmann1 at [JG1/3]" (emphasis added)

14. In its skeleton argument for this hearing the PCR elaborated his complaint and submitted that the iPhones with the PMF were "*sub-standard and inferior to advertised expectations*".

15. Apple accepts that, from Autumn 2016, there was an increase in devices that experienced UPOs as a result of factors including the battery state of charge, temperature and chemical age in combination with the use of the device. Apple contends the PMF was introduced in order to manage power demands, thereby reducing the frequency of UPOs. The PMF imposed fixed power budgets for each hardware component, depending on the iPhone battery's state of charge, temperature and chemical age. As Mr Crumlin stated at paragraph 42:

> "The budgets were imposed by, for example, reducing or limiting the brightness of the display or by capping the maximum processing speed of the CPU of GPU. Static mitigations are tailored to individual devices and the budgets are increased when an iPhone is fully charged, or used in a warmer environment. In other words there is no across-the-board slowing of the devices which received the PMF but a specific response to each iPhone device based on device temperature, battery's state of charge, and the battery's impedance, at any given time, which minimised the risk of the UPO when conditions were such that one may occur."

And he continued:

> "46. Where these actions were insufficient to prevent a UPO occurring, the PMF would further reduce power consumption by reducing the peak speed of the CPU and GPU. Whilst the behavior of certain tasks, such as smooth scrolling or switching between applications, may have been affected in some cases, a reduction in the peak speed of the CPU or GPU does not necessarily have any impact on the perceived speed of operation of an iPhone. For example, if an iPhone is being used for a task such as watching a video, downloading a file, or reviewing an email, a change to the maximum CPU speed has little to no impact on the behavior of the iPhone. Other tasks, such as making a phone call or accessing a WiFi or cellular network, do not rely to the same extent on the CPU and GPU, and therefore are completely unaffected by the PMF.
>
> 47. Prior to releasing the PMF as part of iOS 10.2.1, we performed user testing of the impact of the steps taken to limit power consumption on iPhone functions including app launch times and scrolling speeds. We worked hard to

> ensure that any impact was kept to the minimum needed and as imperceptible as possible, at least as far as we could tell in the testing environment. Even in cases where there may be some perceptible change in performance, in the estimation of our team, a slightly slower iPhone provides a much better user experience than an iPhone that unexpectedly powers off."

16. Apple does not accept that the introduction of the PMF resulted in a substandard phone.

(3) The Basis of the Claim that there has been an Abuse of Dominant Position

17. Article 102 of the TFEU provides:

> "**Article 102**
>
> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

18. Abuse of a dominant position may comprise imposing "unfair trading conditions". The categories of abuse are not closed and "unfairness" may take different forms. In its analysis of whether there is an abuse arising from the imposition of unfair trading conditions it is necessary to consider whether the disputed condition serves a legitimate purpose and whether it is proportionate to that legitimate purpose. There is at the heart of cases of abuse a material harm to the consumer.

19. The PCR places reliance upon *London & South Eastern Railway Limited v Gutmann* [2022] EWCA Civ 1077 to support the proposition that the failure to provide relevant information to the consumer can be abusive. *London & South*

Eastern Railway Limited concerned an application for a CPO. The complaint concerned the alleged failure to prevent double charging for part of the service provided to rail users. The abuse comprised not making boundary fares sufficiently available for sale by failing to inform customers as to the existence of such fares. The judgment of the court explained, at paragraph 101, that a lack of transparency can be an important factor in rendering unlawful that which might otherwise be lawful. The alleged abuse in that case however was not lack of transparency per se but the consequence which flowed from that lack of transparency being the failure of consumers to purchase the right type of fare. *London & South Eastern Railway Limited* is not authority for the proposition that a failure to communicate facts to a customer is, of itself, an abuse of a dominant position.

20. Manufacturers of computers and other electronic devices do not ordinarily provide consumers with detailed technical information as to how a device they supply works. Computers contain many technical features of which consumers are unaware and which most consumers would not have the technical background to understand. The manufacture of electronic devices, like mechanical devices, necessarily requires engineers to balance the performance of components and to make informed technical decisions and compromises. It is not without more inappropriate, whether from the perspective of competition law or consumer law, for a manufacturer to make a design decision to tune down one component in order to preserve the functionality of another, in circumstances where the device's overall performance is satisfactory.

21. Mr Moser KC, who represented the PCR, declined to comment on the hypothetical question of whether if an iPhone was *manufactured* and sold with a PMF that caused it to operate more slowly than it would without the PMF, that could amount to an abuse. The Tribunal's provisional view was that provided such a phone operated in accordance with the consumers reasonable expectations it is unclear how this could be considered abusive. For the same reasons it is unclear to us why it is potentially abusive to install software *after* sale which slows the phone if that installation serves the purpose of reducing UPOs and does not materially interfere with the phone's performance from the perspective of the user.

22. Apple faced with the problem of UPOs sought to address that problem by introducing the PMF. If the performance of the Affected iPhones after installation of the PMF was broadly satisfactory, and in accordance with the representations made at the point of sale, and the Affected iPhones now enjoyed the added benefit that they were less vulnerable to UPOs, it is unclear why the PCR contends the lack of transparency is abusive. That case was not developed in front of us. The PCR submitted, however, that it *was* potentially abusive if the customer does not give its informed consent to a software update *and* that after installation of that update the iPhone is no longer performing as a premium phone should or is not then performing in accordance with the manufacturer's representations.

23. The case that it was abusive to leave the consumer with a substandard iPhone is squarely put by the PCR. It rests upon a contention that after installation of the PMF the Affected iPhones were in fact substandard. It was the lack of particularity of the facts underlaying this position which was of concern to the Tribunal. We therefore pressed Mr Moser to address us on factual basis for the PCR contending that the Affected iPhones were substandard from the perspective of the user after installation of the PMF.

(4) The Factual Basis for the Allegation that the Affected Phone were Substandard

24. The Amended Claim Form makes reference to a number of statements and decisions to support the allegation of abuse. We invited the PCR to identify those which it contended were supportive of the allegation that Affected iPhones after the introduction of the PMF were substandard. Reliance was placed on a statement by Apple published in December 2017 which is pleaded at paragraph 87 of the Amended Claim Form in the following terms:

> "The "support" article first published in December 2017, but subsequently updated, now states that *"[t]he level of perceived change* [in daily device performance] *depends on how much performance management is required for a particular device"*, but that:
>
> *In cases that require more extreme forms of this performance management, the user may notice effects such as:*

- Longer app launch times
- Lower frame rates while scrolling
- Backlight dimming (which can be overridden in Control Center)
- Lower speaker volume by up to -3dB
- Gradual frame rate reductions in some apps
- During the most extreme cases, the camera flash will be disabled as visible in the camera UI
- Apps refreshing in background may require reloading upon launch."

25. This document is consistent with the position that in certain circumstances the PMF reduces power consumption which can impact these parameters. It is not saying that this will happen all the time and does not in itself support the position that the iPhone will in these circumstances be substandard. Mr Moser made the submission that the Affected iPhones would be substandard if they performed less well than the earlier iPhone 5 but this statement by Apple does not of itself evidence that the performance is inferior to iPhone 5.

26. Reliance was also placed on the official report of the French DG for Competition Policy, Consumer Affairs which records that a complaint was made by a consumer body making the allegation that iOS updates will cause slowdowns. Reference is made in the report to the aforementioned statement by Apple as proof of this fact. This resulted in a fine for Apple as a deceptive commercial practice. Leaving aside whether it is appropriate for this Tribunal to place reliance on assessments made by other tribunals and regulators, these conclusions do not support the proposition that the Affected iPhones were consequently substandard: an important element of the case being advanced in this jurisdiction.

27. The PCR also drew our attention to a complaint made in a US class action which was settled on 3 April 2020 for $310 million. Again the complaint does not evidence primary facts which support the proposition that the Affected iPhones were substandard.

28. The PCR relied upon two expert reports from Andrew Sinclair, a chartered engineer and the owner of a telecommunications consultancy, Asa Tek Limited. Mr Sinclair does not disclose the results of any technical assessment he has made of Affected iPhones. His first report mostly comprises helpful technical background. He does not go so far as to say the Affected iPhones with PMF are

substandard or their performance is unacceptable. He states at paragraph 108 of his report:

> "108. As previously mentioned, in general terms, the higher the processor speed, the faster individual semiconductor gates in the processor switch between states and the greater number of state changes per unit time, leading to higher current flow and thus higher battery power demands. If a processor is not able to draw the necessary electrical current from the battery to perform the assigned tasks, then it will simply stop processing. In my opinion *"dynamically managing the performance"* of the Central Processing Unit (CPU) and Graphics Processing Unit (GPU) is likely to include reducing the speed at which the processors are clocked. Slowing the clock speed of the processor could lead to Users experiencing issues such as longer application launch times, lower frame rates whilst scrolling, and gradual frame-rate reductions in some applications."

29. We do not understand Apple to dispute this position – at least at this stage of the proceedings. Indeed this information appears to come principally from Apple's own statements. Nevertheless it remains a jump to go from the fact that a PMF, in order to avoid UPOs, slows processing speeds to the suggestion that the resultant iPhone is substandard and no longer consistent with the performance of a premium product.

30. Mr Moser used the analogy of a car which was advertised as travelling at speeds of up to 200mph but in fact was only capable of travelling at a much slower speed. A consumer may consider this unsatisfactory. The difficulty with this analogy is that Mr Moser was unable to pin down what the equivalent to 200mph was in this context. He was repeatedly asked to identify the parameter which the Affected iPhones should have achieved but failed to achieve, but was unable to do this.

31. In addition to statements from Apple, Mr Sinclair also relied upon a study by Primate Laboratories which was published on a social media platform called GeekBench. Users can test the speed of their phones using third party software. No one from Primate Laboratories has given evidence. Mr Sinclair compared data from iPhones with iOS 10.2.0 with Affected iPhones with iOS 10.2.1. He suggests that the data indicates that the introduction of iOS 10.2.1 reduced peak performance of the iPhone 6 device by up to 42.7%. No doubt this data may be the subject of debate but even taken at face value it is not a measure of iPhone performance, from the perspective of the consumer, under ordinary use.

32. It follows that as yet the PCR has been unable convincingly to point to primary facts which support the position that the Affected iPhones are substandard or that users have been materially prejudiced by the introduction of the PMF.

(5) The Application for Disclosure

33. During the course of the hearing we expressed the provisional view that there appeared to be a lack of evidential support for the pleaded proposition that users were required *to accept inferior handset quality, reduced technical functionality and substandard performance for the same premium price*. The PCR submitted that Apple may hold relevant documents to make good this aspect of its case. It pointed out that there was an inequality of arms in that Apple was aware of the documents which had been submitted to the French and Californian authorities and yet had refused to provide any disclosure in this jurisdiction in advance of certification, notwithstanding that extensive requests in writing had been made. In the circumstances we invited the PCR to consider whether a preferred course might be to apply for disclosure from Apple and for it to resubmit its application for certification after relevant documents had been obtained.

34. The PCR agreed to this course. It outlined the disclosure it would seek by reference to a schedule to a letter from Charles Lyndon dated 7 November 2022, in particular Request No 3 which sought disclosure in Apple's possession of "data" inter alia on the impact that the PMF had on device performance, equivalent to the Geekbench data. In addition reference was made to a letter of 28 March 2023 in which it was said the witness statements of Mr Crumlin and Mr Coulson evidence that Apple is in possession of testing data. After further discussion we indicated that we were not contemplating extensive disclosure of raw data at this stage but the Tribunal was contemplating disclosure of technical reports.

35. At the hearing Apple did not object in principle to something akin to pre-action disclosure being provided but was not in a position to make submissions as to proportionality or how readily documents could be obtained. We therefore have given the following directions. That the documents in respect of which disclosure is sought by the PCR be identified by 11 May 2023. That any

objections to that disclosure be provided by 25 May 2023. That the parties should thereafter seek to narrow any disputes and in the event that a hearing is required to determine remaining disputes that should take place in the week commencing 26 June 2023.

36. We should make clear that we have not decided the question of whether, with or without further technical evidence, this case should be certified. The certification hearing will be refixed for the second week of September 2023 at which further issues relating to certification will be heard including the question of whether it is just and reasonable for Mr Gutmann to act as the class representative in the proceedings.

(6) The Hearing of Apple's Case that Certification Should be Refused because the Proposed Methodology for Establishing Loss on a Class-Wide Basis does not Satisfy the *Pro-Sys* test

37. Apple urged us at the hearing to hear full argument on the issue of whether the methodology being proposed failed the *Pro-Sys* test. It submitted that this would, if it was right, be dispositive of the action. We have adjourned that application.

38. The PCR's principal head of loss is Substandard Performance Losses. He ties this to the failure of Apple to communicate the introduction of the PMF and the fact that this resulted in substandard Affected iPhones. He contends that had customers known about this they could have sought redress from Apple by obtaining newer batteries or compensation.

39. Apple contend that there is a fundamental disconnect between the lack of transparency allegations and the alleged loss that the methodology seeks to measure. It contends that "*the correct measure of loss, if any, must therefore turn on what customers would have done with the additional information*". Without deciding the point it seems that the issue of the extent to which the iPhone is substandard may be a factor in deciding what customers would have done with additional information and this may impact the question of whether the proposed methodology satisfies the *Pro-Sys* test. In these circumstances we

do not consider it preferable to hear that issue in advance of further disclosure. Similarly, we do not consider it appropriate to hear the strike out application until the PCR has had the opportunity to consider disclosure documents and, if advised, refine its case.

Justin Turner KC
Chair

Jane Burgess

Derek Ridyard

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

Date: 2 May 2023