



Neutral citation [2024] CAT 6

Case Nos: 1468/7/7/22

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

30 January 2024

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

RULING
(COSTS OF CERTIFICATION AND RELATED MATTERS)

1. This ruling deals with the question of the costs of certification and related matters arising from our judgment of 1 November 2023 ([2023] CAT 67) (the “Judgment”) following argument on 11 and 12 September 2023 (the “September hearing”). In addition to those specific costs the following costs orders were reserved for determination at the September hearing:
 - (a) Costs of the first case management conference which took place on 22 November 2022 (the “first CMC”).
 - (b) Costs of, and occasioned by, the adjourned 2 May 2023 hearing (the “May hearing”).
 - (c) Costs of, and occasioned by, the PCR’s disclosure application dated 11 May 2023 including the hearings on 28 June 2023 and 29 August 2023.
2. Subject to the question of appropriate funding arrangements in the light of *R (Paccar) v CAT* [2023] UKSC 28, which has been stood over, we certified this claim. The route to certification has not, however, been smooth. We declined to certify the claim at the May hearing because of concerns as to the particularity with which primary facts were pleaded by the PCR and invited the PCR to adjourn the application and apply for pre-certification disclosure. Apple cooperated with this approach and agreed to provide disclosure, although there was some further argument as to the scope of that disclosure in subsequent hearings. The disclosure provided has assisted the PCR in pleading his case with greater particularity. For the reasons given in the judgment, we have certified the claim with the caveat that we would not have done so had it been dependent upon the PCR showing that the installation of the PMF resulted in a substandard phone. This allegation, of phones having been substandard, had been a central part of the PCR’s case.
3. In opposition to certification Apple additionally raised three further objections in relation to which we ruled against Apple: being an application for reverse summary judgment (and/or to strike out) of the claim insofar as it related to

matters after publication of Apple's message (see the Judgment at paragraphs 45-48); the alleged failure to meet the *Microsoft* test (paragraphs 49-63) and the suitability of the PCR to be a class representative (paragraphs 64-68). The first and third of these matters were of relatively narrow compass. The question of whether the *Microsoft* test was met was more substantial but had some overlap with the principal question of whether the pleaded primary facts supported an allegation of abuse.

4. The application for certification was adjourned in May principally because of concerns raised by the Tribunal, not Apple. When this matter returned to us in September those concerns had become issues adopted and pursued by Apple in its application for summary judgment of the entire claim, in addition to the three further objections to which we have referred. Much of the May hearing and the September hearings were occupied with the issues raised on that application for summary judgment.
5. Apple's position as to the appropriate costs order in respect of the matters above is as follows:
 - (a) The costs of the first CMC should be costs in the case.
 - (b) Apple should be awarded its costs of the May hearing.
 - (c) Apple should be awarded its costs of the PCR's Disclosure Application.
 - (d) The PCR should be awarded 30% of his costs of the September hearing.
6. The PCR contends that Apple has raised a number of objections to certification from 10 February 2023, when it filed its response, and he seeks his costs in respect of such matters. He also seeks his costs in relation to the three objections to which reference is made above in relation to which Apple has been unsuccessful. In addition, he complains that Apple failed to cooperate with the provision of disclosure documents, prior to the May hearing, and its conduct in

relation to disclosure thereafter. In summary the PCR submits that he should receive:

- (a) His costs of preparing and making the Service Out Application and effecting service out of the jurisdiction; preparing for and attending the November 2022 CMC, insofar as those costs relate to the DGCCRF Report Disclosure; and preparing for and attending the June 2023 CMC.
- (b) 50% of his costs of preparing for and attending the August 2023 CMC.
- (c) 80% of the Class Representative's costs between 18 August 2022 and 30 September 2023, save for the costs specified above.

And that the following shall be costs in the case:

- (d) the costs incurred by the PCR before 18 August 2022.
- (e) 50% of the PCR's costs and 100% of Apple's costs attributable to preparation for and attendance at the August 2023 CMC;
- (f) The balance of 20% of the PCR's costs referred to at (c) above; and
- (g) 100% of Apple's costs from 18 August 2022 to 30 September 2023, save for the costs referred to at sub-paragraph (b) above.

7. This Tribunal has a broad discretion to make a costs order which reflects the overall justice of the circumstances of the case. We agree with the PCR that an appropriate starting point is that the costs of a successful application for certification should be costs of the case and that thereafter it is appropriate to make a defendant liable for costs insofar as it raises points upon which it is unsuccessful during the certification process, which are associated with additional costs.

8. Applying that approach in this case Apple would be liable for costs in relation to its application to strike out the claim after publication of Apple's message and the suitability of Mr Gutmann to act as a class representative.
9. The substantive application for summary judgment and those matters which overlap with the Microsoft test are not so clear cut. The complexity of the certification process has resulted, at least in part, from a failure of the PCR to plead with clarity the primary facts upon which his claim is based. As he points out this is in part because he has not had access to documents but in our view that the lack of clarity was not solely attributable to that fact. This Tribunal has taken the extraordinary course of ordering significant pre-certification disclosure and yet the PCR has still been unable to support aspects of its case for the reasons given in our judgment of 1 November 2023. Although certification has been ordered (subject to *Paccar*) the PCR has not been wholly successful, and account needs to be taken of this in arriving at a fair order as to costs.
10. Looking at the matter in the round we are of the opinion that it would be wrong to order Apple to be liable for any costs at this stage. Insofar as its objections have increased costs this has to be balanced against the faults of the PCR in failing to clarify his case at an earlier stage. For these reasons we hold that all the costs to date (other than costs relating to funding) should be costs in the case.

Justin Turner KC
Chair

Jane Burgess

Derek Ridyard

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

Date: 30 January 2024