Neutral citation [2026] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1468/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

11 March 2026

Before:
JUSTIN TURNER KC
(Chair)
JANE BURGESS
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN GUTMANN

Class Representative

- v -

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

Defendants

Heard at Salisbury Square House on 10 February 2026

JUDGMENT

APPEARANCES

Philip Moser KC and Natalie Nguyen (instructed by Charles Lyndon Limited) appeared on behalf of the Class Representative

Niranjan Venkatesan KC and Drishti Suri (instructed by Covington & Burling LLP) appeared on behalf of the Defendants

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A. INTRODUCTION

1. This is an application by the Defendants, Apple Inc. and others (**Apple**), for summary judgment and/or to strike out this claim. The claim is a collective proceeding in respect of which we made a contingent collective proceedings order (**CPO**) on 1 November 2023. (The contingency concerned the legality of the funding arrangements which has since been resolved).

2. This claim combines, on an opt-out basis, the claims of consumers and business entities who have acquired certain Apple iPhone models, in particular iPhone 6, 6 Plus, 6s, 6s Plus, SE, 7, 7 Plus (hereafter the **Affected iPhones**). Mr Gutmann's (the **CR**'s) case is that the members of the 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 Competition Act 1998 (**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.

3. The CR's complaint concerns the way Apple addressed the problem of unexpected power offs (**UPOs**) in Affected iPhones from about December 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 about the Autumn of 2016 Apple received reports of UPOs in its iPhone 6s and 6s Plus models, and certain iPhone 6 and 6 Plus devices. In a small number of cases this was because of defective batteries. In other cases it has been explained that a combination of two factors contributed to the occurrence of UPOs.

4. One contributing factor was the chemical age of the phones' batteries. Batteries deteriorate with age: the rate of deterioration depending upon the conditions of use. (The loss of condition of a battery is referred to as its "chemical age" rather than temporal age). UPOs are more likely to occur as the chemical age of a battery increases. Further they are more likely to occur when the battery state of charge is low or when the temperature is low. The second contributing factor

was the introduction of increasingly sophisticated third-party apps which were demanding more power: Snapchat was cited as an example.

5. In order to address this problem, as part of the iOS 10.2.1 update, on 23 January 2017, Apple introduced the performance management feature (**PMF**). The PMF analyses a combination of factors (such as temperature, state of charge and chemical age of the battery). If a phone was at risk of experiencing a UPO the PMF would manage the maximum performance of hardware components, such as the CPU and GPU, by imposing power budgets to reduce overall power demand. The budgets were imposed by, for example, reducing or limiting the brightness of the display or by capping the maximum processing speed of the central processing unit (**CPU**) or graphics processing unit (**GPU**). It is said by Apple that in many circumstances the PMF would not apply at all and in many cases, if it was applied, its application would not be noticeable. Apple nevertheless accepts that in certain circumstances the mitigations imposed would be noticeable to users and may manifest as reduced screen brightness, reduced speaker volume and/or slower launch time for apps. In imposing the PMF, Apple considered that the effects of imposing these power budgets were outweighed by the advantage of avoiding instances of UPOs.

6. The release of iOS 10.2.1 was accompanied with "read me" notes which stated "*iOS 10.2.1 includes bug fixes and improves the security of your iPhone or iPad*". In February 2017 these notes were updated to state "*iOS 10.2.1 includes bug fixes and improves the security of your iPhone or iPad. It also improves power management during peak workloads to avoid unexpected shutdowns on iPhone*".

7. Neither of these statements explains to the owners of Affected iPhones the potential downside of introducing the PMF. Nor was the PMF offered as an option which may or may not be used depending on the user's requirements. It is the negative impact of the PMF, coupled with the failure properly to explain to users this impact of the PMF and giving them an informed choice whether or not to install it, which lies at the heart of this complaint.

8. The application for summary judgment / strike out has three aspects. It is contended by Apple:

a) That summary judgment should be granted on the entire claim, or the claim should be struck out, because it is bound to fail on the law and/or the facts. It is said that the pleaded lack of transparency cannot amount to an abuse of a dominant position.

b) That summary judgment should be granted on the claim, or the claim should be struck out, insofar as it relates to Affected iPhones in which the PMF was installed after 28 December 2017 when Apple published "A Message to Our Customers about iPhone Batteries and Performance".

c) That summary judgment should be granted on the claim, or the claim should be struck out, insofar as it relates to Affected iPhones in which the PMF was installed after March 2018, when iOS 11.3 was introduced.

B. BACKGROUND TO THE PROCEEDINGS AND THIS APPLICATION

9. An application for a CPO was first heard on 2 May 2023. At that hearing this Tribunal expressed the provisional view that there was a lack of evidential support for aspects of the pleaded case. We invited Mr Moser KC, who represented the CR on that application and represents the CR today, to make an application for provisional disclosure from Apple and to renew the CR's application thereafter. An order requiring Apple to provide preliminary disclosure was made on 4 July 2023 and amendments were made to the collective proceedings claim form.

10. On 11 and 12 September 2023 we heard a renewed application for a CPO and gave judgment on 1 November 2023 authorising the claim, subject to approval of litigation funding (the **Certification Judgment**). Apple resisted certification and sought summary judgment / strike out on essentially two grounds: the first ground was that there was an insufficient evidential basis to contend that after introduction of the PMF the Affected iPhones were substandard; and the second ground was that the claim was not sustainable after Apple published a "Message

to Our Customers" on its website on 28 December 2017. The first ground was articulated as an argument on the facts. It was not contended that as a matter of law, were the facts to be proven, that there was no arguable case of abuse. As we recorded at paragraph 16 of our Certification Judgment ([2023] CAT 67):

> "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."

11. The first ground partially succeeded in that we ruled that the CR had not shown that there was a reasonable prospect of his succeeding in showing that the Affected iPhones were sufficiently substandard to give rise to a claim for breach of warranty or consumer rights under UK law (the **Substandard Claim**). Nevertheless, we held that he did have reasonable prospects of showing that the reduced performance may give rise to concerns among consumers which may have resulted in their seeking redress had they had knowledge of the PMF. We concluded:

> "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."

12. We nevertheless allowed the Substandard Claim to remain in the collective proceedings claim form, pending disclosure, because the question of whether the Affected iPhones fell short of a legally relevant standard was intertwined with the general allegation that the Affected iPhones were materially impacted by the PMF.

13. Permission to appeal the Certification Judgment to the Court of Appeal was refused by this Tribunal. Apple sought permission directly from the Court of Appeal and there was a hearing before Green LJ and Snowden LJ on 7 May 2024. Judgment was handed down on 21 June 2024. A number of grounds were raised and permission was ultimately refused. However, Apple gained traction with the Court of Appeal on the question of whether we were wrong to allow the Substandard Claim to remain pending disclosure. The Court stated that it was minded to give permission on this point, but the point was then dropped by the CR. The pleadings were amended to remove the Substandard Claim.

14. In its judgment on the question of whether permission to appeal should be granted, the Court of Appeal ([2024] EWCA Civ 702) held:

> "47. Apple does not suggest that the PCR's claim, that Apple's communications with its customers until 28 December 2017 lacked transparency, has no reasonable prospects of success. Nor does Apple suggest that such lack of transparency could not have affected the actions and decisions of consumers. Such contentions would be very difficult in light, for example, of the CMA's provisional views as expressed in the Consultation Letter.
>
> 48. Rather, Apple's basis for contending that the CAT erred is that there is no evidence now, and no prospect of any evidence becoming available, to support the PCR's case that in a counterfactual situation in which Apple had been transparent, the response from consumers would have been sufficiently material that Apple would have considered it necessary to respond to consumer pressure by offering compensation on an ex gratia basis. Apple supports the contention that it would not have offered compensation by pointing to the fact that it did not do so when it made its announcement on 28 December 2017. It also relies on documents which it has already disclosed (such as mitigation tables) and the PCR's own Yonder survey from December 2021 of the (limited) recollection of consumers as to what they knew of the problems with the Affected iPhones.
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> 49. The CAT rejected these contentions on the basis that it could reasonably be expected that further evidence on the likely impact of the introduction of the PMF on consumers in the counterfactual might be available by the time of trial. In that regard, at [42]-[43], the CAT placed particular weight upon the fact that the PCR had not seen materials provided by Apple to the CMA prior to the CMA making its provisional findings in the Consultation Letter.
>
> 50. We consider that this was an evaluative decision that the CAT was entitled to reach on the evidence before it - including what it knew of the CMA inquiry -and we do not think that there is any realistic prospect that this Court would interfere with it.
>
> 51. We have already alluded to the information inequalities that often exist in cases such as this at an early stage. Although some disclosure had been given, as we understand it, the order focussed on documents relating to the technical effects of the PMF on the substantive performance of the Affected iPhones and

> the likely effect that this would have on the experience of consumers in using their Affected iPhones. It did not, for example, include documents in which Apple considered how to respond to consumer complaints or the internal discussions which led Apple to issue the announcement on 28 December 2017 (including the introduction of the discounted battery replacement programme).
>
> 52. Against this background, we consider that the CAT was entitled to take the view that there was a reasonable prospect that full disclosure might provide a better evidential basis for the PCR's allegations. We also have in mind the clear statement from the CAT in [73] that it would expect the PCR's case on causation to be further particularised after disclosure. We consider that this was a legitimate case management approach for the CAT to take at this stage. We reject Apple's submission that it was irrational for the CAT to have taken into account the provisional conclusions set out in the Consultation Letter simply because it related to a different, consumer protection, regime. It will be for the CAT to determine in due course what weight, if any, it attaches to those provisional findings."

15. The second ground for striking out the claim on certification, was that the claim was not sustainable after Apple published a "Message to Our Customers" on its website on 28 December 2017. This was rejected. We concluded at paragraph 48 of our judgment:

> "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."

16. These proceedings were delayed by Apple's appeal against the CR in respect of the judgment of the CAT dated 12 March 2024 ([2024] CAT 18) concerning funding issues. The main ground of appeal concerned the powers of the CAT, at the conclusion of the collective proceedings, to make an order that the funder's fee or return be paid out of the damages awarded to the class in priority to the class and the ability of class representatives to enter into litigation funding agreements contemplating such orders. The Court of Appeal issued its judgment on 16 April 2025 ([2025] EWCA Civ 459) and rejected the argument that on a judgment the CAT had no power to make an order that would result in payment to a funder in priority to the class members (i.e., the funder is not restricted to being paid out of undistributed damages).

17. Disclosure of files of documents from the CMA and the DGCCRF were provided on 29 August 2025 and a Defence was served by Apple on 31 October 2025. Full disclosure is yet to take place.

C. THE APPLICATION TO STRIKE OUT THESE PROCEEDINGS IN THEIR ENTIRETY

18. Three reasons were advanced by Apple to support the allegation that the CR does not have an arguable case of abuse of dominant position at all:

    a) That lack of transparency per se is not capable of amounting to an abuse of dominant position as a matter of law.

    b) That if (contrary to the above) lack of transparency per se can in principle amount to an abuse, Apple was not required by competition law to disclose the particular matters specified in the Re-Re-Amended Claim Form.

    c) That if (contrary to the above) Apple was otherwise required to disclose them, it had a legitimate reason for not doing so which the CR has no real prospect of challenging.

19. The CR submits that making an application at this stage of proceedings for summary judgment, or to decertify the claim, is fundamentally misconceived and is an attempt to derail the procedural timetable and prevent the CR from obtaining disclosure. He draws attention to the fact that Apple has already tried to strike out aspects of this claim during certification and that there is no reason that the points being made today could not have been made then. There is some force in this point. Apple in response says that the law in this area has now been clarified by the Supreme Court in *Evans v Barclays Bank plc* [2025] UKSC 48 and by this tribunal in *Gutmann v First MTR Southwestern Trains Limited* [2025] CAT 64. We are not persuaded that this is a satisfactory explanation of why this application was not made at certification. We recognise, however, that there has been some clarification of the CR's case and that issues between the parties may have narrowed. In those circumstances we consider the correct approach is to consider this matter afresh.

20. There was no dispute between the parties as to the principles which should be applied in deciding whether or not to strike out this claim. The principles are those described by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 at [15] to which we referred in the Certification Judgment. It is not disputed that, for practical purposes, there is no need to distinguish between the legal test for summary judgment and that for striking out or decertifying the claim.

21. It is necessary to consider the case of abuse which has been pleaded. As we have previously observed the Re-Re-Amended Claim Form runs to more than 100 pages and restates the case in different ways. Further, there is a Reply of a further 22 pages. The Court of Appeal, in its judgment of 21 June 2024, stated:

> "36. In fulfilling each of these aims, two of the main case management tools at the disposal of the CAT are (i) to enforce the requirements that pleadings are required to contain a "concise statement of the relevant facts" and a "concise statement of any contentions of law" (our emphasis - see Rules 75(3)(g) and (h) of the CAT Rules), and (ii) to strike out claims or give summary judgment in respect of issues that have no reasonable basis or prospects of success. Enforcing discipline in pleading is likely to be all the more essential given the obvious potential for collective proceedings of this type to be both large-scale and sprawling. Such discipline is not assisted by pleadings that amount to lengthy narratives which include linguistic flourishes better suited to oral argument."

22. It is unfortunate that the CR made no attempt to streamline his pleadings in the light of these observations and it now necessary to give appropriate directions to ensure this is done.

23. Given the difficulty of navigating the Re-Re-Amended Claim Form, and for the purpose of economy in this judgment, we refer to the summary of the case which the CR has set out in his skeleton argument for the hearing of this application on 10 February 2026. We do this mindful of the fact that it is the pleaded case which ultimately matters on this application. Save for one point it was not said by Apple that this summary was not a fair representation of the pleaded case.[1] The CR summarised its case as follows:

[1] CR's Reply to Apple's Defence, pages 181-183 and CR's skeleton argument, para 26.

"Although the CR's case is still to be narrowed and refined following disclosure, the key elements of the alleged abuse, framed by reference to the current state of the jurisprudence, were set out in the CR's Reply. In essence:

(a) Class members have suffered harm and loss as a result of Apple's abuse of its dominant position in the relevant hardware and software markets and the imposition of unfair trading conditions, contrary to s.18 of the Competition Act 1998.

(b) Apple's market power in the relevant market is driven in part by the performance capabilities of its products, its brand reputation, and its eco-system of other related products and services which create consumer lock-in and limit consumer switching to competing eco-systems. In advertising the Affected iPhones, specifically their processing power and graphics performance, Apple both leveraged and sought to sustain its market position.

(c) The Affected iPhones suffered from "Unexpected Power Offs" or "UPOs" – which caused the Affected iPhones to shut down unexpectedly under certain circumstances. The UPOs arose because there was a mismatch between, on the one hand, the peak power demands the Affected iPhones' hardware components could place on the phones' batteries, especially when utilised by modern applications and, on the other hand, the power these batteries were in fact able to deliver.

(d) In order to address the UPOs, Apple introduced the "Power Management Feature" or "PMF", but did so: (i) by way of the iOS 10.2.1 software update, which was pushed onto customers who were given the option either to 'install' or defer installation until 'later'; (ii) without disclosing the reasons for the PMF; and (iii) without disclosing the detrimental side-effects of the PMF, including the throttling of the Affected iPhones' performance, and the severe limitations on core components including CPU and GPU **[CB/3/182]**.

(e) Consumers were not able to make a free or informed choice regarding the installation of the PMF. Apple leveraged its 100% monopoly position in the software (iOS) market in order to push software updates onto what was essentially a captive market of customers which, combined with the lack of transparency and misleading statements and omissions about the PMF, meant that customers were forced to download the PMF without all the relevant information as to what it was, why it was necessary, and its effects **[CB/3/182-183]**.

(f) In that regard, CPUTR regulations 3(3), 5(2) and 6 **[Auth/32/1481,1482,1484-1485]** are relevant insofar as they concern the provision by Apple of information (or related omissions) liable appreciably to impair the average consumer's ability to make an informed decision thereby causing him to take a transactional decision that he would not otherwise have taken. The Tribunal will be invited to make findings, based on the factual materials available, that Apple's conduct breached the CPUTR, [confidential material removed] (for example, had they had all the relevant information, consumers might have decided to switch to another model or device). In line with the CJEU's approach in Meta **[Auth/20/1036]**,[2] the Tribunal has the

[2] Case C-252/21, *Meta Platforms Inc and Others v Bundeskartellamt*, EU:C:2023:537, at §62.

> jurisdiction to find such a breach for the purposes of assessing a competition law infringement **[CB/3/183-184]**.
>
> (g) Apple's deliberate concealment of the reasons for, and the effects of, the PMF was calculated so as to preserve its commercial reputation, market position, market value and profitability, and therefore its dominance in the relevant market. In doing so by means other than those that constitute competition on the merits, Apple avoided having to offer redress to users who had already purchased an Affected iPhone, benefitted from a proportion of such consumers that prematurely upgraded their phones sooner than they would otherwise have done and avoided adjusting the retail price of the Affected iPhones for users who had not yet purchased one. Commercial benefit is not restricted to commercial gain in the sense of an increase in profits but also extends to the prevention of commercial loss (which is not limited to pure financial loss) **[CB/3/182-183]**.
>
> Accordingly, the CR's claim does not allege that Apple's lack of transparency in itself amounts to an unfair trading condition. The abuse is the exploitative and exclusionary one as aforesaid.[3] Thus, the CR's case is that Apple's conduct as described at paragraph 26 above constitutes a Single Continuous Abuse and a lack of transparency is an enabling and/or aggravating factor…"

24. The point which was in dispute was the use of the word "calculated" in subparagraph (g) which it was said had not been pleaded in chief and had only been raised in reply. This gave rise to discussion as to what "calculated" meant in this context. We do not propose to resolve that dispute but keep in mind that the word "calculated" is not pleaded and for present purposes we ignore it.

25. Mr Venkatesan KC for Apple also contended that it was not open for the CR to raise "deliberate concealment" because this was a matter which had not been pleaded. We do not understand it to be disputed that Apple deliberately made a choice as to what it did and did not disclose in relation to the PMF. The objection seemed to be that the CR had not pleaded a purpose or motivation for that deliberate choice in chief and could only find support in its allegations in reply. Mr Venkatesan emphasised that allegations had to be properly pleaded in chief and making reference to substantive allegations in a Reply for the first time was inadequate.

26. Apple was concerned about the scope of disclosure around this issue and submitted that as pleadings currently stand the CR could not raise a positive

[3] Cf the Court of Appeal's approach to the relevant 'vice' in *Gutmann Trains CA*, at §101.

case contrary to the matters set out at paragraph 55.1 of the Defence which states:

> "For the vast majority of users, the PMF would not apply at all or would not have noticeable effects. Apple did not refer to the PMF at the time of iOS 10.2.1 because (amongst other things) it was yet to gather comprehensive data from use in the field on the effectiveness and impact of the PMF and wished to receive that feedback as naturally as possible, i.e. without that data being affected or tainted by users having been told that they may experience noticeable effects in cases requiring more extreme forms of performance management. Consistently with this, when Apple published the Webpage, there was an uptick in complaints concerning the effects described in the Webpage…"

Answering this the Reply stated at 29(c):

> "Apple (rightly) admits that it did not refer to the PMF at the time of the release of iOS 10.2.1 (for example, in the second sentence of paragraph 55.1 and the third sentence of paragraph 106.2). However, Apple is put to proof that the reason it did not do so is because, as it now contends, it (i) had not yet gathered comprehensive data on the PMF's impact and effectiveness, despite what appears to have been extensive testing of the PMF during its development and the multiple "beta" releases of iOS 10.2.1, and (ii) sought to obtain untainted user data. In any event, however, the CR denies that such conduct was appropriate or permissible. Changing, and impairing, the fundamental performance capabilities of the Affected iPhones was a design and/or technical change that directly affected users, and of which users should have been informed. As to the second point, paragraph 28 below is repeated."

27. We are not yet invited to address the scope of disclosure. We note however that the Reply also states:

> "13. Apple's lack of candour and transparency about the battery issues and the true effects of the PMF, including omissions and misleading statements, allowed it to avoid having to offer redress to users who had already purchased an Affected iPhone, or avoid adjusting the retail price of the Affected iPhones for users who had not yet purchased one, and to avoid the reputational repercussions, and risk to its market position, from the sale of Affected iPhones whose performance was in reality severely hamstrung.
>
> 14. At the core of the CR's case therefore is a conduct of concealment by misleading statements and/or omissions that resulted in a detriment to the class and consequently an abuse. By keeping class members ignorant, Apple enabled itself to avoid the commercial consequences of the battery issues. It was able to do so by covertly leveraging its 100% monopoly position in the software (iOS) market in order to protect its dominance in the related hardware (iPhone) market. Further, all of the elements of Apple's conduct – its lack of transparency in relation to the battery issues and UPOs, its lack of transparency and misleading statements and omissions about the PMF and the slowing down of the Affected iPhones' operation, and its leveraging of dominance across markets – form part of a Single and Continuous Abuse. They were all motivated by, and contributed towards, a common aim of allowing Apple to

> maintain its reputation, market position, market value and profitability, by means other than those that constitute competition on the merits, and which would not have been available to a non-monopolist competitor.
>
> 15. The conduct as aforesaid constituted a form of abusive self-protection by the monopolist, including an exploitative abuse of depriving consumers of the opportunity to press for compensation or battery replacements and/or switching to other providers. By the same token the abuse included exclusionary elements in preventing others (e.g. Samsung) from gaining market share at Apple's expense via consumers switching. The CR notes here in relation to categorisations of "exclusionary" and "exploitative" that the distinction is not always relevant (e.g. "there is no clear-cut or absolute distinction in practice between these two categories of abuse and some abuses…may be both…", *Bellamy and Child*, 8th ed., §10.072)."

28. Leaving aside the question of whether this allegation should have been made in the Claim Form rather than in the Reply - which is not in our view determinative of this application for summary judgment - it is plain that the effect of Apple's lack of transparency on users and its motivation to maintain its reputation and market position are in issue. Moreover, we do not see that the matters set out in paragraph 55.1 of the Defence, in respect of which there is a non admission, necessarily excludes, or is inconsistent with, the matters raised in paragraphs 13-15 of the Reply.

29. The CR relies, in his Re-Re-Amended Claim Form, upon regulatory investigations to support his case in the US, Canada, Italy and France in which it is said the facts complained of in these proceedings gave rise to investigations of breaches of consumer law. Particular reliance was placed upon a consultation letter from the CMA to which reference was made in the Certification Judgment. In that judgment we observed that we had not heard argument as to whether confidentiality should be maintained in the letter and in the circumstances considered it necessary to put the citations in a confidential annex to the judgment. When the Certification Judgment went to the Court of Appeal, for application for permission to appeal, the Court expressed its concerns about the importance of open justice. Apple submitted that there was an "absolute right" to protect, as confidential, provisional findings by a regulator. The Court observed that the parties were not at that hearing equipped to deal with the matter and that notice had not been given to the CMA. It stated:

> "In the circumstances, as we indicated at the hearing, we consider that this issue should be resolved for the future on a more considered basis both in this Court and in the CAT where the collective proceedings are to be continued…"

It continued:

> "Accordingly, we consider that in the first instance the CAT ought to hear submissions on the point, including, if so advised, from the CMA and, if appropriate, from representatives of the media or members of the public. This court can then consider the matter further (if necessary) in the light of the CAT's decision."

30. It is unsatisfactory that the parties did not apply to this Tribunal to resolve this issue of confidentiality in the light of the Court of Appeal's clear direction. Even more so given that today a further application is before this Tribunal in which reference is again being made to the CMA letter. It is now 18 months since the Court of Appeal's direction and yet, still, the question of confidentiality has not been resolved.

31. We consider the relevance of this letter below.

(1) Lack of transparency per se

32. The proposition that an allegation of lack of transparency per se unarguably cannot give rise to an abuse of dominant position is a surprising one. Section 18 of the 1998 Act states:

> "18.— Abuse of dominant position.
>
> (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists 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 the contracts.

…"

33. There is nothing explicit in this provision which indicates that lack of transparency can never amount to an abuse of dominant position.

34. Abuse arises when the action of a dominant undertaking detracts from competition on the merits. Asking whether "lack of transparency per se" can give rise to an abuse is inapposite. It is as unhelpful as asking whether "failing to speak", or "failing to type information into a computer" can give rise to an abuse. What matters is the effect of the dominant undertaking's inactions (or actions) on competition in the market.

35. As stated in Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36:

> "91…The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

36. In *London & South Eastern Railway v Gutmann* [2022] EWCA Civ 1077 the Court of Appeal was concerned with the certification of a claim in which it was alleged that the failure to communicate to consumers the availability of boundary fares gave rise to an abuse. Green LJ observed:

> "93. The law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit. This is why most laws worldwide which prohibit abuse of dominance include within the prohibition the imposition of some form of "unfair" terms and prices. These are often described as "exploitative" abuses. There is no single definition of unfairness set out in case law…"

37. Having reviewed authorities including *Deutsche Post* (Joined Cases C-147 & 148/97) and the Decision of the German Federal Supreme Court in *Facebook,* Green LJ concluded:

> "101. A lack of transparency can be an important factor in rendering unlawful that which might otherwise be lawful. In Case 322/81 *Michelin* [1985] ECR

> 3461 the Commission found that the dominant undertaking had granted target rebates to its dealer customers which had the effect of tying them to supplies from Michelin and, in consequence, making it harder for smaller rivals to sell to Michelin's customers. The rebates were abusive for a number of reasons one of which was that they were lacking in transparency. The level of rebate applicable to purchases made by a dealer was not transparently set out. Rebates were offered under a system applied after the event and in uncertain and variable amounts. The lack of transparency and resultant uncertainty had the practical effect of making dealers unwilling to purchase from new sources of supply for fear of losing increased rebate and this in effect tied customers to Michelin and created an entry or expansion barrier to rivals. On appeal the CJEU (*ibid* paragraphs [84] and [85]) upheld the Commission decision. The rebates were abusive because they were part of a "*discount system*" which was "*calculated*" to prevent dealers from being able to exercise a free choice as between suppliers. The vice in that case was the exclusionary effect upon rivals to Michelin, not upon the fairness of the terms offered to dealers. Nonetheless, it illustrates how a lack of transparency can be relevant to whether conduct is abusive."

38. This indicates that lack of transparency can be an element in abuse.

39. To support its position that transparency per se cannot amount to an abuse Apple relied upon a decision of this Tribunal on an application for certification in *Gormsen v Meta Platforms Inc and others* [2023] CAT 10. This case concerned the terms and conditions imposed by Facebook upon its users. It was said these terms and conditions entailed misleading representations and failed to explain the nature and extent by which a user's personal data would be collected and utilised. The Tribunal stated:

> "30(1). This is an allegation that is extraordinarily difficult to pigeonhole as an abuse of a dominant position. It seems to turn on an allegation that Users were misled by the T&Cs and/or by other statements made or not made by Meta. The substance of the claim appears to be one of misleading or misrepresenting consumers, and seems to us to be maintainable independent of any finding of dominance. As is well-known, dominance (which we assume here, because it is alleged in the Claim Form) brings with it special responsibilities which are not incurred by non-dominant undertakings. These allegations seem to us not to be competition law infringements <u>at all</u>, but rather some other – possibly consumer protection based – claim.
>
> 30(2). We say this not because we have a concern about arguability (as we have repeatedly said, we are not considering questions of strike-out), but because of two other concerns."

40. These observations were specifically said to be made "*not because we have a concern about arguability*". No application to strike out had been made and these observations are not authority for the proposition that lack of transparency per se is incapable of giving rise to an abuse.

41. Apple also placed reliance upon the final decision of this Tribunal in *London & South Eastern Railway v Gutmann* [2025] CAT 64. Our attention was drawn in particular to paragraph 61 where it was stated:

> "*Michelin* was accordingly a case of exclusionary abuse, where the discount system placed pressure on purchasers to buy their tyres from Michelin and not its competitors. Although the lack of transparency in the discount system was a factor, we agree with Mr Ward KC that it was relied on as an aggravating factor of the effect of a system which was inherently exclusionary. We were not referred to any case where the lack of transparency of an otherwise innocuous system could in itself constitute an abuse."

42. The last sentence needs to be read with care. The Tribunal is not saying that it has heard argument as to whether transparency could constitute an abuse and are ruling that it could not. The lack of transparency to which reference is made is in the context of an "otherwise innocuous system". That is an important qualification and it is not the CR's case. The CR's case is not lack of transparency per se but lack of transparency in the context of surreptitiously introducing a PMF which may impact iPhone performance.

43. Additionally, the CR referred to CJEU authorities in which lack of transparency was a factor that rendered a relevant system abusive for some other reason. *Michelin* (C-322/81) concerned a discount or rebate system for its dealers which was found to be abusive because it tied dealers to Michelin. Aspects of that system fell for consideration including lack of transparency. It was stated at [83]:

> "Furthermore, the lack of transparency of Michelin NV's entire discount system, whose rules moreover changed on several occasions during the relevant period, together with the fact that neither the scale of discounts nor the sales targets or discounts relating to them were communicated in writing to dealers meant that they were left in uncertainty and on the whole could not predict with any confidence the effect of attaining their targets or failing to do so."

44. There is nothing in this judgment that suggests that lack of transparency can only be a factor in abuse in particular circumstances.

45. We have no hesitation in concluding that it is arguable that a lack of transparency can be a factor, and a dominant factor, in abuse of a dominant position and there is no established rule of law to the contrary. The question

which this Tribunal will be required to address at trial is whether the totality of Apple's actions, as pleaded, which includes lack of transparency, amounts to an abuse.

(2) Lack of transparency in the circumstances pleaded: Apple was not required by competition law to disclose the particular matters specified in the Re-Re-Amended Claim Form

46. We have set out a summary of the case advanced by the CR above. We assume in the CR's favour that it will be able to prove the pleaded facts at trial. It is not contended, on this application, that the CR will be unable to prove the pleaded facts.

47. Apple points out that from the pleadings that it is apparent that certain matters are not in issue. It summarises these at paragraph 24 of its skeleton argument:

> "The CR accepts that:
>
> (1) Neither the Relevant iPhones nor the batteries in them were defective; nor was the supply of those iPhones an abuse: Amended Reply, [19]; RRACF, [7(a)], [102(a)].
>
> (2) The occurrence of UPOs was not an abuse: Amended Reply, [19]; RRACF, [7(g)].
>
> (3) The introduction of the PMF was not of itself an abuse: Amended Reply, [21].
>
> (4) The Relevant iPhones did not become defective or substandard after the introduction of the PMF: RRACF, [7(g)]; [156]; footnote 1.
>
> (5) Apple's 2018 battery replacement programme was not an abuse: Amended Reply, [24].
>
> (6) Apple's decision not to offer a refund or some other form of voluntary redress was not of itself an abuse: RRACF, [159].
>
> (7) Apple did not deliberately slow down the Relevant iPhones for the purpose of inducing users to upgrade to other models."

48. The CR seeks to clarify its position on point (4). Whereas it no longer pursues the allegation that the Affected iPhones fell below a particular standard which gave rise to a breach of contractual terms or a claim for breach of UK consumer rights, it does maintain that the PMF resulted in Affected iPhones that gave rise to a materially worse user experience.

49. It was contested whether, in determining abuse, we should have regard to the fact that Apple's actions may have breached the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR). It is in this context that the CR has referred to the CMA letter.

50. Apple objects to any reliance being placed on the CMA letter in the light of the decision of the Supreme Court in *Evans*. The importance of the rule in *Hollington v Hewthorn* for this Tribunal was emphasised in the judgment of Lord Sales SCJ. In the light of that judgment, it is clear that any evaluative judgments made in the CMA letter will be inadmissible at trial. However, Lord Sales stated:

> "158. The argument that counsel for Mr Evans put at the forefront of their submissions on admissibility is that, even if the rule in *Hollington v Hewthorn* or the principle underlying it would apply at a trial of proceedings before the Tribunal, it does not (and would not in the High Court) preclude reliance on findings made by another decision-maker for the purpose of defeating a strike-out or summary judgment application or otherwise demonstrating the strength of claims at an interlocutory stage. In support of this argument, reliance was placed on cases holding that a party could rely on findings of another court for the purpose of demonstrating that there was a serious issue to be tried: see *JSC Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep 242, paras 115-116; *Sabbagh v Khoury* [2014] EWHC 3233 (Comm), paras 202-207; *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWHC 2437 (Ch), paras 17-57. In the last of these cases, at para 40, Mellor J concluded from the earlier authorities that:
>
> > "there is a limited exception to the rule in *Hollington v Hewthorn* which is applicable in situations where the case is at a preparatory stage yet the court has to consider what evidence at trial there might be. … [M]aterial (inadmissible at trial) can assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage."
>
> 159. We endorse this analysis save only to observe that reliance on findings of another decision-maker for the purpose of identifying evidence which can reasonably be expected to be available at trial is not inconsistent with the rule in *Hollington v Hewthorn* and is therefore not strictly an exception to it. Likewise, it is not inconsistent with the principle underlying that case to rely on prior judgments or reports in so far as they record evidence of relevant facts: see eg *Rogers v Hoyle*, p 307, para 49. It is only in so far as such material contains opinions on matters of fact (as opposed to recording evidence) that the material is inadmissible (unless it qualifies as expert evidence)."

51. It follows that we can have regard to the contents of the CMA letter to give perspective on the sort of evidence which may be available to the CR at trial. Given that the disputes of fact are relatively narrow it seems unlikely the CR

will need to rely upon that letter for this purpose and we have not had regard to its contents in this judgment.

52. Apple contends that the CR has not pleaded breach of the CPUTR. From paragraph 176 of the Re-Re-Amended Claim Form there are references to breaches of the CPUTR "by analogy". Further paragraph 16 of the Reply states that the CR "*intends in due course to amend the Claim Form to make clear that Apple's conduct breached the CPUTR*…". Mr Moser explained that it is intended that these amendments to the Claim Form will be made after disclosure has been obtained.

53. We agree that it is arguable that breach of the CPUTR will be a relevant factor in assessing whether Apple's pleaded activities amount to competition on the merits. We were referred to the CJEU decision in *Meta Platforms Inc v Bundeskartellamt* [2023] 5 CMLR 22 in which it was stated:

> "46. On the other hand, in accordance with Article 5 of Regulation 1/2003, the national competition authorities have the power to take, inter alia, decisions finding an abuse of a dominant position by an undertaking, within the meaning of Article 102 TFEU, whose objective is to establish a system which ensures that competition in the internal market is not distorted, having regard also to the consequences of such an abuse for consumers in that market.
>
> 47. As the Advocate General observed, in essence, in point 23 of his Opinion, when taking such a decision, a competition authority must assess, on the basis of all the specific circumstances of the case, whether, by resorting to methods different from those governing normal competition in products or services, the conduct of the dominant undertaking has the effect of hindering the maintenance of the degree of competition existing in the market or the growth of that competition (see, to that effect, judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, EU:C:2021:238, paragraphs 41 and 42). In that respect, the compliance or non-compliance of that conduct with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition and to assess the consequences of a certain practice in the market or for consumers.
>
> 48. It follows that, in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR."

54. We turn then to the submission that in the context of the pleaded facts, lack of transparency cannot give rise to an abuse of dominant position. Once Apple's

broad proposition of law has been dismissed there is not much remaining in Apple's submissions. Apple picks up on the following statement in our Certification Judgment:

> "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."

55. Apple, unsurprisingly, supports this comment and submits that it describes this case, and that there is nothing "special" or "different" in the pleaded case. We do not agree. What is different about this case is that by installing the PMF, Apple has intervened in the behaviour of an Affected iPhone already owned by customers. It has done this without explaining the potential negative impact of the PMF on the phone and without giving the owner of the Affected iPhone the option of declining the PMF. Apple has made a decision, on the user's behalf, that installation of the PMF is in the user's best interests notwithstanding that it may impact performance of the Affected iPhone. We cannot, on an application for summary judgment, say that this is materially the same as making engineering compromises during the process of manufacture.

56. It follows that the pleaded case is in our view not amenable to an application for summary judgment, or being struck out. We remain of the view that the claim of abuse of dominant position should proceed to trial and that the claim is properly certified.

57. The claim, as summarised in the CR's skeleton argument and in its pleadings, is directed at the situation where the PMF is installed on a phone which is already being used by a consumer. We do not consider there is an arguable case of abuse insofar as phones are sold with the PMF already installed, or for that matter where it is installed on first activation prior to use. Once it is accepted that the phone being supplied does not fail to meet any relevant standards or representations as to the phone's performance, it cannot be an abuse to have engineered into the phone's design a method for moderating UPOs. It follows that the Affected iPhones, which are the subject of these proceedings, should

only be those in which the PMF was downloaded after the Affected iPhone was already in use.

(3) Even if Apple was otherwise required to disclose the relevant facts, it had a legitimate reason for not doing so which the CR has no real prospect of challenging.

58. This limb of Apple's application was given relatively little attention. It is correct that it is not disputed that the PMF was introduced to address the problem of UPOs. Apple contends that it did not provide more information because it "had not gathered comprehensive data from use in the field as to the effectiveness and impact of the PMF". The CR is putting Apple to proof as to these reasons. It is not clear at this stage why the absence of comprehensive data precluded Apple from explaining the purpose of the PMF, or giving customers the choice of whether or not to install it. Plainly this defence is not amenable to an application for summary judgment.

(4) Does the CR have an arguable case of abuse after December 2017?

59. The significance of this date is that on its Webpage of 28 December 2017 Apple published "A Message to Our Customers about iPhone Batteries and Performance". This gave information about battery issues that users may experience. In our Certification Judgment we stated at [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."

60. Permission to appeal this ruling was rejected by the Court of Appeal at paragraphs [46] – [52] concluding:

> "Against this background, we consider that the CAT was entitled to take the view that there was a reasonable prospect that full disclosure might provide a better evidential basis for the PCR's allegations. We also have in mind the

> clear statement from the CAT in [73] that it would expect the PCR's case on causation to be further particularised after disclosure. We consider that this was a legitimate case management approach for the CAT to take at this stage. We reject Apple's submission that it was irrational for the CAT to have taken into account the provisional conclusions set out in the Consultation Letter simply because it related to a different, consumer protection, regime. It will be for the CAT to determine in due course what weight, if any, it attaches to those provisional findings."

61. Apple attempts another bite at the cherry on the ground that, at trial, in *London & South Eastern Railway v Gutmann* it was held that competition law does not impose an obligation to organise a business to achieve the best outcome for customers. As a general proposition we accept that statement but such a general proposition does not assist in resolving the issues in this case. We reject this aspect of Apple's application.

(5) Does the CR have an arguable case of abuse after March 2018?

62. In March 2018 iOS 11.3 was introduced which had the following effect:

a) The PMF was turned off by default;

b) The PMF was activated, if at all, only when a UPO occurred;

c) When a UPO occurred, users were notified that the PMF had been turned on and were given the option to turn it off.

63. The CR has not, on this application, articulated a case as to why this optional use of the PMF is an abuse of a dominant position. The point he takes is that it is an abuse of process to strike this aspect of the case out now given that an application to strike out this part of the claim was disavowed by counsel for Apple on the application for certification. Mr Moser refers to *Koza Limited v Koza Altin Isletmeleri* [2021] 1 WLR 170 at [42] where the Court of Appeal emphasised that the principle in *Henderson v Henderson* applies to interlocutory proceedings.

64. We are of the view that it would be wrong to let this aspect of the case proceed to trial just because this point might have been taken on certification. It is not

an efficient administration of justice to let claims that are bound to fail proceed to trial. As currently pleaded, we see no basis upon which this installation and optional use of the PMF can give rise to a claim of abuse of a dominant position.

D. CONCLUSION

65. The application for summary judgment and/or to strike out the claim fails insofar as it relates to the claim in its entirety or abuse after December 2017.

66. The application for summary judgment and/or to strike out the claim after March 2018 succeeds for the reason that installing iOS 11.3 on a phone was unarguably not abusive. It does not follow from that finding that a phone which was already in use when iOS 11.3 was installed is not an Affected iPhone by reason of earlier software installations.

67. Having reviewed the way the CR now puts its case we rule that the claim should only proceed insofar as the Affected iPhones are defined as phones in which the PMF was introduced during use and that insofar as the claim extends beyond this it should be struck out. We invite, if necessary, further argument on what amendments are appropriate to give effect to this ruling.

68. We require Apple to make an application to this Tribunal to determine the confidentiality of the CMA letter.

69. We require the CR forthwith to replead his case concisely to take account of the observations of the Court of Appeal at [36] of its judgment of 21 June 2024. Such repleading should not await further rounds of disclosure but should form the basis upon which disclosure takes place. We invite the parties to agree a timetable for amendments to the Claim Form, Defence and Reply. Further directions can be given as necessary at the forthcoming CMC this month.

Justin Turner KC
Chair

Jane Burgess

Derek Ridyard

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

Date: 11 March 2026