Neutral Citation Number: [2024] EWCA Civ 702

Case No: CA-2023-002464 & CA-2023-002464-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Justin Turner KC, Jane Burgess and Derek Ridyard
[2023] CAT 67

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 21 June 2024

Before :

LORD JUSTICE GREEN
LORD JUSTICE SNOWDEN

- -

Between :

JUSTIN GUTMANN	**Proposed Class Representative / Respondent**
- and -	
(1) APPLE INC. **(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED** **(3) APPLE RETAIL UK LIMITED**	**Proposed Defendants/ Appellants**

- -

Daniel Piccinin KC and Lucinda Cunningham (instructed by **Covington & Burling LLP**) for the **Appellants**
Philip Moser KC and Natalie Nguyen (instructed by **Charles Lyndon Limited**) for the **Respondent**

Hearing date : 7 May 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on Friday 21 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Green and Lord Justice Snowden :

Introduction

1. This is an application by the Proposed Defendants ("Apple") for permission to appeal against the decision of the Competition Appeal Tribunal (the "CAT"): [2023] CAT 67 (the "Judgment"). Pursuant to section 47B of the Competition Act 1998 (the "Act"), subject to resolution of the terms of funding, the CAT certified collective proceedings by the Proposed Class Representative ("Mr. Gutmann" or the "PCR") and refused to grant reverse summary judgment in favour of Apple or to strike out the collective proceedings.

2. The collective proceedings are sought to be brought by the PCR on an opt-out basis, on behalf of a class of consumers and businesses who owned one or more of the different variants of Apple's iPhone 6, SE or 7 (the "Affected iPhones"). The PCR claims that such persons suffered loss as a result of abuse of Apple's dominant position in the iPhone market or the premium smartphone market, contrary to section 18 of the Act and (until 31 December 2020) contrary to Article 102 of the Treaty on the Functioning of the EU.

3. The claim arises from Apple's efforts to deal with an increased incidence of "unexpected power offs" ("UPOs") in the Affected iPhones. A UPO occurs when a mobile phone shuts itself down as a protective measure to avoid damage when the peak power demanded by the phone exceeds that which can be delivered by the phone's battery. The power demanded by a phone can be increased by the use of computationally-intensive third-party applications (such as Snapchat). The performance of the lithium-ion batteries used in phones naturally deteriorates with age and usage over time and is also adversely affected by its state of charge and ambient conditions (in particular by low temperatures). The UPOs were the result of a combination of these factors.

4. It is alleged that Apple became aware of the UPO issue in its iPhone 6 variants in late 2016, but rather than inform customers of the issue in a transparent and timely manner, Apple concealed it and developed a software update known as a performance management feature ("PMF"). The purpose of the PMF was to impose temporary "power budgets" (otherwise referred to in the materials as "mitigations" or "throttling") so as to reduce the power demanded by the applications on the phone in circumstances in which the battery would be unable to deliver the full power required by those applications. One of the ways this was achieved was by capping the maximum processor speeds of the central processing unit ("CPU") and graphics processing unit ("GPU"). This might have had some impact on the speed of scrolling and launching of applications.

5. The PMF was first included in an update to the operating system of the relevant Affected iPhones on 23 January 2017 in iOS update 10.2.1. Its inclusion was, however, not referred to in the information that accompanied the update, and its potential effect on the performance of the Affected iPhones was also not mentioned.

6. The PMF was successful in reducing the prevalence of UPOs, but there was an increase in communications from customers to Apple in late 2017 complaining that their devices

were running more slowly. Media rumours also began to circulate that Apple was intentionally slowing down its phones to encourage users to upgrade to newer models.

7. To address these concerns, Apple published "A Message to Our Customers about iPhone Batteries and Performance" on its website on 28 December 2017. Apple denied the rumours that it had been intentionally slowing down its phones, and explained how the performance of batteries deteriorates with age, usage, state of charge and conditions. Apple also disclosed for the first time that it had introduced the PMF and explained how it might adversely affect the performance of the devices. The message also announced a programme offering to replace older batteries in the Affected iPhones with new batteries at a discounted price.

8. A PMF has continued to be used and updated in the iOS operating system. In particular, subsequent updates turned off the PMF by default and it was only activated, if at all, when a device experienced a UPO. Following activation, the user was notified that the PMF had been turned on, and was given the option of turning it off.

9. In 2018, the CMA began investigating whether Apple had breached the Consumer Protection from Unfair Trading Regulations 2008 (the "CPUTR") by a lack of transparency in its communications with consumers concerning the UPOs and the introduction of the PMF into the iOS operating system. Following its initial investigation the CMA issued a letter to Apple dated 27 November 2018 under section 214 of the Enterprise Act 2002 setting out its provisional view and engaging in consultation with Apple ("the Consultation Letter"). The process of which that Consultation Letter formed part concluded in May 2019 when Apple gave undertakings in lieu of enforcement action. Those undertakings were published on the CMA website.

The Claim

10. The collective proceedings claim form was issued by Mr. Gutmann on 17 June 2022 (the "Claim Form"). Mr. Gutmann has never owned an iPhone. He does, however, claim to have extensive experience of consumer issues and was the class representative in another collective proceeding involving rail fares which was certified in October 2021: see Gutmann v First MTR South Western Trains Limited and another [2021] CAT 31. We were told that the second defendant in those proceedings, Stagecoach South Western Trains Limited, has recently settled by the payment of a sum of £25 million.

11. The essential basis of the PCR's claim – at least as originally pleaded - was that the batteries in the Affected iPhones were defective by reason of being unable to deliver the necessary peak power required by the CPU and GPU, leading to UPOs. It was contended that Apple abused its dominant position by concealing these battery issues and secretly introducing the PMF as an update to the iOS to address them.

12. The certification hearing was originally held in May 2023. At that hearing the CAT declined to certify the claim as then formulated and adjourned the application. In its judgment ([2023] CAT 35) at [24]-[32], the CAT explained that the PCR had been unable to point to any primary facts to support the claim that the Affected iPhones were substandard or that users had been materially prejudiced by the introduction of the PMF.

13. The CAT indicated, however, that there should be a form of pre-action disclosure and provision of further information by Apple on these issues and that it would then reconsider the question of certification. A disclosure order was made on 4 July 2023 following a further hearing on 28 June 2023. This included a requirement for Apple to serve (and explain) contemporaneous technical reports and other documents relating to the impact of the PMF on (i) the substantive performance of the Affected iPhones and (ii) the experience of the users of the Affected iPhones, together with non-privileged documents relating to these matters that had been submitted to the CMA and that had been disclosed in class action proceedings in the United States.

14. Following such disclosure, on 3 August 2023 the PCR produced a draft Re-Amended Claim Form. Importantly, the PCR withdrew his allegation that the batteries in the Affected iPhones were defective or had been defectively manufactured. However, he did not withdraw the allegation that following the introduction of the PMF, the performance of the Affected iPhones was "substandard". Nor did the PCR withdraw the allegation that Apple's lack of transparency meant that consumers were deterred or prevented from exercising legal rights to obtain redress, whether under Apple's warranty or pursuant to their statutory rights.

15. By way of illustration, the key elements of the PCR's case were summarised in paragraph [7] of the draft Re-Amended Claim Form as follows:

> "(a) Apple was aware, from 12 December 2016 onwards at the latest, that certain models of iPhones (the "Affected iPhones") contained lithium-ion batteries that were unable to deliver the necessary peak power required by the iPhone central processing unit ("CPU") the graphics processing unit ("GPU") and operating system and which caused the smartphones to stall or shut down without warning (the "battery issues"); ….
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> (b) Rather than inform its customers of the battery issues in a transparent and timely manner and/or instigate a voluntary product recall, Apple concealed the battery issues and continued to market and sell the Affected iPhones.
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> (c) …. The Proposed Class Members were subjected to unfair trading conditions and/or commercial practices as iOS updates, in particular those installing the Power Management Feature … were pre-installed or downloaded and installed automatically to the Affected iPhones without sufficient transparency and/or a meaningful opportunity for users to make an informed choice whether or not to accept the download and/or to remove it subsequently.
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> (d) … Unbeknownst to the Proposed Class Members, the relevant iOS updates included a "Power Management Feature", which sought to manage the battery issues but which actually slowed down, or "throttled", the performance of hardware components, including the CPU and GPU, thereby adversely affecting the performance, functionality and technical capabilities of the Affected iPhones (the "throttling issues").

> (e) … Contrary to the prohibition in s.18(1) and (2)(a) [of the Act], Apple surreptitiously slowed down the Affected iPhones processors, limiting and compromising the performance, technical capabilities and functionality of the Affected iPhones and/or their batteries in a way that prejudiced users. That conduct served to protect Apple's profitability, reputation and market position at the expense of its customers' best interests.
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> (f) Apple's lack of candour and transparency about the battery and throttling issues meant that Proposed Class Members were hindered in their ability to make informed decisions. It was therefore likely to distort Proposed Class Members' decisions, including as to whether to buy an Affected iPhone in the first place or install relevant iOS upgrades, and 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. Apple did not voluntarily offer such redress either (such as through a voluntary product recall, free battery replacement, refund and/or wider compensation) or adjust the retail price of the Affected iPhones, and was able to avoid having to do so due to its lack of transparency, which allowed it to avoid the significant adverse reputational and commercial consequences it would otherwise have suffered.
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> (g) The Proposed Class Members suffered user detriment as they suffered prolonged substandard performance of their premium handset, whether in the form of UPOs or as a result of the throttling issues, which did not provide the superior functionality, technical capabilities and performance which users reasonably expected (and were led to believe by Apple's marketing materials) they would experience and/or were significantly less valuable than initially thought. They suffered loss because 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, while Apple's lack of candour and transparency allowed it to avoid having to offer redress to users who had already purchased an Affected iPhone, or adjust the retail price of the Affected iPhones for users who had not yet purchased one, as well as for users upgrading from one Affected iPhone to another."

16. That draft Re-Amended Claim Form was then the subject of further argument at the adjourned hearing on 11 and 12 September 2023. In addition to opposing certification on the basis that there was no credible or plausible methodology to establish a common basis for loss, Apple also applied for reverse summary judgment and/or for the Claim to be struck out and objected to the authorisation of Mr. Gutmann as the class representative.

The CAT's Judgment

17. In its Judgment, after setting out the background, the CAT dealt first with the application for reverse summary judgment and/or for the Claim to be struck out. It quoted various paragraphs of the draft Re-Amended Claim Form before summarising the PCR's primary case at [27]-[28] as follows,

> "27. … the PCR's primary case is that the Affected iPhones, after the PMF had been surreptitiously installed, had "substandard performance" and "performed significantly below the level reasonably expected". Alternatively, it is contended that the Affected iPhones with the PMF installed did not perform as a premium phone should.
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> 28. It is contended that, had consumers been properly informed of the substandard performance of the Affected iPhones after installation of the PMF, they could have exercised their legal rights to obtain redress by way of financial compensation or battery replacement. The "legal rights" to which reference is made include breach of warranty and/or consumer rights."

18. The CAT then made the point, at [29], that an allegation that a phone was "substandard" so as to support legal claims for breach of warranty or consumer rights required articulation of the expected standard below which it was alleged that the phones had fallen. The CAT analysed the evidence and submissions of the PCR in this respect before concluding, at [33]:

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

19. The CAT also recognised that the PCR had also put its case in an alternative way. It stated, at [34]:

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

> Affected iPhone with the PMF installed such that they would have, if Apple had been transparent, sought and obtained redress from Apple."

20. The CAT then considered some of the documents that had been disclosed by Apple. The CAT indicated that it placed little or no weight upon documents relating to other class actions in the United States and regulatory proceedings in France, but it did refer to certain paragraphs of the CMA Consultation Letter which it described as making reference to Apple's commercial practices and lack of transparency. The CAT indicated that it had not heard argument about whether to maintain confidentiality in the Consultation Letter, and thus included a quotation from the relevant paragraphs in a confidential annex to its Judgment.

21. The CAT expressed its conclusion on the application for reverse summary judgment and/or strike out in paragraphs [41]-[43] as follows:

> "41. For the reasons given, we are not persuaded that the PCR has in these proceedings advanced primary facts which means it has realistic prospects of showing that the installation of the PMF has resulted in a substandard phone such that consumers, if they had been aware of its effect, would have had a legal claim against Apple for breach of warranty or statutory rights. We nevertheless consider that there is a reasonable prospect of the PCR showing at trial that the negative impact of the PMF on the performance of Affected iPhones was sufficiently material that, had it been disclosed to members of the class, it would have impacted the commercial balance between consumers and Apple. It is arguable that had Apple been transparent and warned consumers of the problem with UPOs, and that this problem was to be addressed by installing a PMF which impacted the performance of the Affected iPhones, then consumers would have reacted in such a way that Apple would have found it appropriate or necessary to compensate them. Keeping class members ignorant was arguably to the detriment of the class and consequently arguably an abuse upon which there is a reasonable prospect the PCR could succeed.
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> 42. We conclude that the application to strike out the claim fails and this matter should proceed to trial. Further, it can reasonably be expected that more evidence may be available at trial relating to the materiality of the negative impact of the PMF on consumers and its benefits in mitigating the problem of UPOs. It is apparent from at least footnotes 3-6 and 15 of the CMA Consultation Letter that Apple provided information to the CMA in relation to this matter which the PCR has not yet had the opportunity of reviewing.
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> 43. We do not consider it is appropriate, at this stage, to strike out only those allegations which suggest the Affected iPhones were "substandard" such that, had Apple been transparent, members of the class would have been able to

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

22. The CAT then dealt with Apple's contention that the claim was in any event bound to fail in so far as it related to the period after the announcement on Apple's website on 28 December 2017. Apple contended that since no-one had identified any information that was missing from that announcement, which was picked up by the press following publication, there could be no possible basis for an allegation of a lack of transparency after that date.

23. The CAT rejected that argument, stating, at [48]:

> "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."

24. After dealing with the question of eligibility and satisfaction of the *Microsoft* test, the CAT finally addressed the issue of Mr. Gutmann's suitability to act as class representative. Apple had made three points: first that Mr. Gutmann had never owned an iPhone and therefore was not a member of the class; second, that he had brought a claim which he had abandoned in part; and third, that he was a professional litigant. The CAT rejected all three, pointing out, first, that CAT Rule 78(1)(a) made it clear that the class representative need not be a class member and there was nothing to suggest that Mr. Gutmann was acting improperly in bringing the Claim; second that it was not inappropriate to refine a claim at an early stage by abandoning points in light of facts that emerged; and third that Apple had not pressed the point that Mr. Gutmann was a professional litigant, and that there was nothing in the conduct of other collective proceedings that he had brought to suggest that he was not a suitable class representative.

25. The CAT returned to the question of case management at the end of its Judgment. After referring to the observations of Green LJ concerning the need for proactive case

management of large-scale collective proceedings in Mark McLaren v MOL [2022] EWCA Civ 1701 ("McLaren") at [45] the CAT continued, at [70]-[73]:

> "70. There remains a lack of clarity and specificity in the PCR's case … [on] both the questions of the existence of abuse and the manner in which loss to the class is to be assessed. We consider this to be precisely the type of case where active case management, to which Green LJ referred, will be important.
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> 71. We are sensitive to the submission that there is an inequality in information at this stage of proceedings and that the PCR has had access only to limited disclosure. We are of the provisional view that once certification is in place, this matter should proceed to disclosure on the current pleadings. The question of abuse should be determined at a first trial on the assumption Apple is dominant in the relevant market.
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> 72. We consider that the question of dominance and quantum should be heard at a second trial. We invite further submissions as to whether aspects of causation should form part of the first trial or be held over to the second trial.
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> 73. Once disclosure has been reviewed, we expect the PCR to refine and narrow his pleaded case. Insofar as he is maintaining aspects of his case, he will be required to provide further particulars in relation to abuse and causation. In the context of those further particulars, we shall actively review whether certification continues to be appropriate."

The Appeal

26. Apple seeks permission to appeal on four Grounds.

27. In Ground 1, Apple contends that in [43] the CAT erred in failing to strike out the PCR's primary case given that it had found, at [33] and in the first sentence of [41] of its Judgment, that that case had no realistic prospect of success at trial. In essence Apple contends that (especially since disclosure has essentially already been given on this issue), an unsubstantiated claim that Affected iPhones were sufficiently "substandard" that consumers would have warranty or statutory rights to redress should not remain in the pleadings.

28. In Ground 2, Apple contends that the CAT was wrong to permit the PCR to pursue an alternative case that if Apple had informed consumers in an accurate and timely manner that the introduction of the PMF might have a material impact on performance, albeit not one that rendered the phones legally "substandard" so as to justify a legal claim for breach of warranty or statutory rights, then Apple would nevertheless have been forced by commercial pressures to provide some form of compensation to consumers by way of *ex gratia* payments or free replacement batteries.

29. Apple's main point in this regard is that the CAT had no evidence before it, and no prospect of any more evidence arising from further disclosure, to support an arguable

case on causation. Apple contends that the PCR has produced no evidence to support an argument that in the counterfactual in which Apple had made consumers aware of the UPOs and had explained both that it intended to introduce a PMF to address the issue, and its potential effects on the performance of the Affected iPhones, Apple would have been forced by commercial pressures to provide consumers with compensation on an *ex gratia* basis. Apple contends that its position in this respect is supported by the fact that when Apple did reveal that it had introduced the PMF in its website announcement on 28 December 2017, it was not forced to provide any such compensation.

30. Ground 3 is that the CAT was wrong not to have struck out the Claim in so far as it related to events after 28 December 2017. It is said that the CAT was wrong to think that any further disclosure, evidence or inquiry could be relevant to the question of whether Apple was still abusing its dominant position after its announcement on 28 December 2017, because no-one had identified any material fact that had been omitted from that announcement.

31. Ground 4 is that the CAT should have refused to authorise Mr. Gutmann as the class representative. Although Apple accepts that it is possible, as a matter of jurisdiction, for Mr. Gutmann to be the class representative even though he is not a member of the class, it contends that there must be some principled limits to the exercise of that jurisdiction. It contends that the CAT failed to address the point that because the claim was based upon contentions as to the personal experiences and likely behaviour of the users of Affected iPhones, it was not just nor reasonable for a person with no such experience, and hence no interest in common with the class members, to be the class representative.

Analysis

32. At this stage, the only question we have to answer is whether Apple has a realistic prospect of success on appeal.

33. In deciding that question, we are particularly mindful of the desirability that the CAT should have a proactive role from the outset in managing large-scale collective proceedings so that they proceed efficiently to trial; and that in the exercise of this role, the CAT should be accorded significant latitude by this Court in its decisions on matters of case management: see e.g. McLaren (ibid) at [45]-[46]; and Visa and Mastercard v CICC [2024] EWCA Civ 218 at [46]-[47].

34. We are also mindful of the fact that in many collective proceedings of this type, there may well be an inequality of information at an early stage between the class representative and the defendant. It may thus be appropriate for the CAT, when considering whether or not to permit a particular pleaded case to proceed, to be particularly alert to the type of evidence that might reasonably be expected to become available by the time of trial, e.g. from disclosure: see Easyair v Opal Telecom [2009] EWHC 339 (Ch) at [15(v) and (vi)].

35. However, in McLaren at [46], this Court indicated that:

> "There are clearly established strong public interest benefits in the CAT performing an active elucidatory role which includes

> ensuring that large scale litigation is run efficiently; ensuring that defendants are not confronted with baseless claims; and ensuring that potentially sprawling cases do not absorb an unfair amount of judicial resource."

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.

Ground 1

37. We consider that Apple has a realistic prospect of success on appeal on Ground 1.

38. In argument, Mr. Moser KC could not identify any relevant *technical* standard below which the PCR contended that the Affected iPhones fell so that their performance amounted to a breach of warranty or statutory rights.

39. Instead, as he had done before the CAT, Mr. Moser KC explained that the PCR's case did not depend on an allegation that consumers *actually* had such rights or that they would necessarily have succeeded in any breach of warranty or statutory rights claims. Rather, he said that because Apple was not transparent about the UPOs and the introduction of the PMF, consumers were deprived of the opportunity of "testing" whether there was a breach of warranty or consumer law. His claim was based more upon the loss of a chance. Mr. Moser likened this to the provisional conclusion in the Consultation Letter (which was phrased by reference to regulation 5(2)(b) of The Consumer Protection from Unfair Trading Regulations 2008), that the effect of Apple's lack of transparency was to cause the average consumer to take a transactional decision that they would not otherwise have taken - e.g. in choosing whether or not *to seek* to exercise their warranty or statutory rights (our emphasis). Mr. Moser further explained that the PCR's case was that if Apple had been transparent, there would have been general consumer dissatisfaction and that attempts to bring warranty or statutory claims would simply have been part of the overall consumer pressure that would have led Apple to react by offering reimbursement or compensation.

40. We agree with the CAT that the PCR's pleading, supplemented by Mr. Moser KC's explanation, appears to encompass two different allegations.

41. The first allegation – which is plainly contained in the wording of paragraphs 7(f) and (g) of the draft Re-Amended Claim Form (see paragraph 15 above) - raises a hard-edged issue of whether the Affected iPhones actually failed to meet an applicable product or other standard so as to breach consumers' legal rights under warranty or statute. To be substantiated, such an allegation would require detailed technical

pleading, disclosure and ultimately expert evidence focussed on compliance with the relevant standard(s).

42. The second allegation is not focussed on such technicalities, but concerns, in more general terms, the potential effects of installing the PMF on the performance of the Affected iPhones, the likely consumer reaction to such effects on performance if Apple had been fully transparent about the UPO issue and the introduction of the PMF, and what steps Apple would have taken in that regard. As Mr. Moser KC accepted, this case does not depend upon whether the Affected iPhones actually complied with any specific legal or technical standards.

43. The CAT held that no evidence had been provided by the PCR to support the first allegation notwithstanding that the disclosure order that had been made was primarily directed at the technical impact of the PMF on the performance of the Affected iPhones. Nor did the CAT suggest that any further relevant evidence on this case would be likely to be obtained by more disclosure. We also note that any relevant legal standards or the terms of Apple's warranty and consumers' statutory rights are a matter of public record, and the specific respects in which the Affected Phones allegedly failed to meet them would be ascertainable by the PCR and his advisers and experts.

44. As such, we consider that it is arguable with a realistic prospect of success that having ordered disclosure to be given, having reached the conclusion at [33] and [41] that the PCR had not pleaded any primary facts to support its first case, and in circumstances where the PCR does not persist in the allegation, the CAT erred in the exercise of its case management function to which we have referred in not insisting that this allegation be excised from the various places in which it appeared in the PCR's pleading <u>before</u> certification or the taking of further steps in the proceedings.

45. We are therefore minded to give permission to appeal on this point. That said, we recognise that we would be granting permission in relation to an issue that, as the claim has now been explained, is not live. We would therefore encourage the PCR and his advisers to consider whether to apply to make further deletions and amendments to the draft Re-Amended Claim Form to improve its precision and to ensure that it conforms with the way in which Mr. Moser KC indicated in argument that the case is actually intended to be put. To allow for that possibility, we shall defer making an order on Ground 1 for 21 days from the date of the hand-down of this judgment to enable the PCR (if so advised) to apply to us for permission to amend the draft Re-Amended Claim Form. Apple should have 7 days from receipt of any such application to comment (briefly) upon the draft. If a satisfactory amendment is proposed, then we would intend to deal with the matter on paper, grant permission to amend and refuse permission to appeal. If no such application is made, or the proposed amendment does not deal satisfactorily with the point, then we will grant permission to appeal on Ground 1.

Ground 2

46. We do not consider that Ground 2 has any realistic prospect of success on appeal.

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.

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.

Ground 3

53. We do not consider that Ground 3 has any realistic prospect of success on appeal.

54. On the hypothesis that there was an arguable case of abusive behaviour by Apple in introducing the PMF in a non-transparent way, the burden of showing that such abuse (and its effects) must necessarily have ceased as a consequence of the announcement on 28 December 2017 lay squarely on Apple.

55. The CAT took the view, at [48], that it could not be satisfied that this burden had been discharged at this preliminary stage given, in particular, that there was no evidence to show when or how members of the class might have seen the announcement or understood it. We consider that this was a conclusion that the CAT was plainly entitled to reach.

56. Although Apple points to the fact that neither the PCR nor the CAT identified any specific information that was omitted from the announcement on 28 December 2017, that cannot be a complete answer. It is not just the content, but the form of the announcement and its dissemination that is relevant. Moreover, (as indicated above) there has not been full disclosure in relation to Apple's decision to make the announcement, or as to the form which it took and the manner of its publication. Nor do we consider that the fact that the announcement was picked up by certain media outlets can be determinative. Whether, and if so when, that was sufficient to bring an end to the alleged abusive practices will be a matter for evaluation by the CAT in light of all the evidence at a full hearing.

Ground 4

57. We do not consider that Ground 4 has any realistic prospect of success on appeal.

58. As a matter of jurisdiction, a person can be authorised to act as the class representative whether or not they are a class member: CAT Rule 78(1)(a). The only limiting factor is that the CAT should consider that it is "just and reasonable" for the person to act as the class representative in the collective proceedings: CAT Rule 78(1)(b).

59. In determining whether that is so, the main requirements are that the person will "fairly and adequately act in the interests of the class members" and that they should not have, in relation to the common issues, a material conflict of interest: CAT Rules 78(2)(a) and (b). And in determining whether the person will "act fairly and adequately in the interests of the class members" the CAT is directed to take into account "all the circumstances", including (if the proposed class representative is not a member of the class) "whether it is a pre-existing body and the nature and functions of that body": CAT Rule 78(3)(b).

60. It is apparent from the manner in which CAT Rules 78(1)(b) and (2) are framed (i.e. in broad terms and referring to what "the [CAT] considers"), that the legislative intention was that the determination of the suitability of a class representative should very much be left to the discretionary judgment of the CAT having regard to all the particular circumstances of the case in question.

61. In that regard, we do not accept that there is any presumption against special purpose vehicles or so-called "professional litigants" being authorised to act as a class representative. Although, during the consultation stages which led to the introduction of the collective proceedings regime, the government expressed an intention that there should be a presumption against "non-genuinely representative bodies" bringing

collective proceedings, that was dropped in the final stages of consultation in favour of the more neutral requirement that a class representative be someone who can "fairly and adequately act in the interests of the class members". That formulation focusses attention on the quality of the future conduct of the litigation which a proposed class representative can offer to the members of the class, rather than any pre-existing relationship which the proposed representative might have with the members of the class. Moreover, even CAT Rule 78(3)(b), which requires the CAT to consider, in a case of a body that is not a member of the class, whether it is a pre-existing body and the nature and functions of that body, is carefully drafted so as not to create a presumption or preference in favour of such a body.

62. Structured in this way, CAT Rule 78 permits the CAT to have regard, for example, to the possibility that, depending on the circumstances, even if willing, a pre-existing trade or consumer body might not be suitable to represent the members of a class. That might, for example, be the case if the body has other business activities to perform for a wider membership that could be a distraction from representing the interests of the class members in the collective proceedings, or if the body is simply not accustomed to engaging in heavy commercial litigation against well-resourced and formidable defendants of the type typically encountered in collective proceedings. In such cases the CAT might instead take the view that the person most able fairly and adequately to act in the interests of the class members will be a person who is suitably incentivised to focus on the litigation and has experience of having done so in other cases.

63. In the instant case, Apple's main basis for seeking permission to appeal is that the CAT failed to give any consideration to a contention that because the claim "turns on disputed allegations about the practical experiences of class members, it is essential that the representative is someone who has a genuine interest in the claim" in the sense of having a "real connection with the matters in dispute".

64. Linked with that, Apple seeks to portray Mr. Gutmann as a person who "merely has professional experience of consumer protection" and is "a professional litigant who seeks to bring multiple collective proceedings on behalf of millions of persons with whom he has no connection". It raises the spectre that this gives rise to a risk that the case might be "used to advance claims based on allegations of fact that have been dreamt up by funders and lawyers, even though the relevant issues of fact are within the knowledge of the persons that the PCR purports to represent".

65. We do not consider that these contentions have any merit. Although the perceptions and likely response of users of the Affected iPhones if they had been told of the introduction of the PMF will be an important issue in this case, the concepts of UPOs and the effect of introducing the PMF are not difficult to grasp, and certainly can be understood and assimilated by someone who has not owned an iPhone. Moreover, it is the likely collective response of consumers and Apple's attitude towards it, rather than any individual's personal experience, that will be significant. There is no reason whatever to think that Mr. Gutmann is unable to grapple effectively with those issues.

66. We also reject Apple's assertions that Mr. Gutmann's status as a "professional litigator" renders him unsuitable to be a class representative or gave rise to risks that the collective proceedings might be abused. In deciding to authorise Mr. Gutmann, the CAT expressly considered whether the claim which he had put forward had a proper basis in fact or had been improperly invented. In that regard, the CAT expressly reminded itself

(at [64]) of the detailed scrutiny that it had given the merits of the claim in the earlier parts of its Judgment. It found nothing in the case advanced by Mr. Gutmann that was improper. In that regard it is also worth repeating that the CAT had seen and given some weight to the provisional views of the CMA as to Apple's commercial practices and lack of transparency in relation to the introduction of the PMF, as referred to in the Consultation Letter. The CAT also expressly considered (at [65]) the fact that Mr. Gutmann had abandoned his original contention that the batteries in the Affected iPhones were themselves defective. It determined that there was nothing out of the ordinary in that, as the facts had emerged on disclosure. We consider that these were legitimate parts of a wider assessment of Mr. Gutmann's suitability that was well within the broad scope of the CAT's discretion.

67. In passing, we should mention that the PCR contended that Ground 4 was not in any event a legitimate ground of appeal, because the decision to certify Mr. Gutmann as the class representative was not one "as to the award of damages" so that this Court had no jurisdiction to entertain the appeal under section 49(1A) of the Act.

68. We incline to the view that this is not correct, for the reasons explored by Green LJ in O'Higgins v Barclays Bank plc [2023] EWCA Civ 876, [2024] Bus LR 366 at [48]-[60], explaining why it is desirable to give a broad interpretation to section 49(1A). In particular, at [56], Green LJ indicated that following Mastercard v Merricks [2020] UKSC 51, [2021] Bus LR 25, decisions which affect how claims are to be run should be regarded as being "as to damages", even where the decision does not bring the claim to an end.

69. However, since, for the reasons we have given, we would refuse permission to appeal on Ground 4 on the merits in any event, we do not consider that we need to express a final view on this point. We leave this to be decided in a case in which it matters.

Disposal

70. For the reasons we have given, we will defer making a final decision on Ground 1 for 21 days to give the PCR the opportunity to deal with the matter by proposing a suitable amendment. We refuse permission to appeal on Grounds 2, 3 and 4.

Confidentiality

71. As we have noted above, the CAT placed an extract from the CMA's Consultation Letter into a confidential annex to its Judgment. As the CAT indicated in its Judgment at [40], it did so without having heard argument on the point. We understand that the request that the CAT take that approach came from Apple, and was not opposed by the PCR.

72. The Consultation Letter had been disclosed by Apple to the PCR pursuant to the CAT's order for disclosure made on 4 July 2023 to which we have referred. The CMA had indicated in response to that order that it had no objections to disclosure, and that in particular it did not consider that there was any third-party information in that letter that should be withheld from disclosure on the grounds of confidentiality or public interest. Upon disclosure, the Consultation Letter was, however, treated as subject to a wider confidentiality order which the CAT had made in the proceedings on 19 December 2022.

73. Prior to the hearing before us, Snowden LJ made an interim order pursuant to CPR 5.4C(4)(d) and/or 5.4D(2) on 12 April 2024 that a non-party seeking access to a number of specified documents, including the confidential annex to the CAT's Judgment, should make an application to the Court on no less than seven days' notice to Apple. At the hearing before us, that order was continued until further order, and modified to include a copy (among other documents) of the full Consultation Letter that was provided to us at the hearing. After the hearing we received a letter from the CMA setting out the position that it had adopted in 2023 as regards disclosure of the Consultation Letter.

74. At the hearing before us, we raised the question of whether, in light of the importance of transparency and open justice in courts and tribunals, the confidentiality in the Consultation Letter (and the other documents referring to it) should still be maintained, either in further proceedings before this Court or in the collective proceedings before the CAT. Our concerns arose because some weight was clearly placed on the Consultation Letter by the CAT. As we have indicated, it has also formed a part of our consideration of the issues that we have addressed in this judgment. We also have in mind that the Consultation Letter set out the CMA's provisional views and concerns on 28 November 2018 – well over five years ago – at the start of a consultation process that ended with the giving of undertakings by Apple that were published on the CMA website.

75. For Apple, Mr. Piccinin KC referred to the decision of the Court of First Instance of the European Communities in Case T-47/04 Pergan Hilfsstoffe für industrielle Prozesse GmbH v European Commission ECLI:EU:T:2007:306. He contended that that case established an absolute right to protection of provisional findings by a regulator in competition cases, and he contended that a similar protection should be extended, by analogy to provisional findings by a regulator in a consumer case. We have substantial doubts that such contention is correct, not least because we fail to see how any such protection could be absolute; we also do not understand why there should be read-across between an EU competition case and a consumer case in the UK; and (in contrast to the position of the applicant in Pergan, who was not an addressee of the Commission's decision but was simply mentioned in the body of the decision), the Consultation Letter was addressed to Apple; and finally, if Apple disputed the CMA's provisional findings, it had the opportunity to contest them in enforcement proceedings (rather than give undertakings to the CMA as to its future conduct in lieu). We are also sceptical that the argument that disclosure might be reputationally embarrassing to an undertaking (here Apple) is relevant.

76. However, the parties were not equipped to address argument on these matters at the hearing for permission to appeal, and no notice of the possibility that the Consultation Letter might be made public had been given to the CMA or to any representatives of the media who might have wished to address argument on it. 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.

77. The Consultation Letter relates more obviously to the continuation of the collective proceedings in the CAT in relation to which we have refused permission to appeal, and has less obvious relevance to Ground 1 for which we have given permission to appeal. 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 light of the CAT's decision.