



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1468/7/7/22

BETWEEN:

JUSTIN GUTMANN

Applicant /

Proposed Class Representative

- v -

(1) APPLE INC.

(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED

(3) APPLE RETAIL UK LIMITED

Respondents /

Proposed Defendants

ORDER

UPON the Tribunal establishing a confidentiality ring by order of 19 December 2022, consisting of an **“Inner Confidentiality Ring”** and **“Outer Confidentiality Ring”**

AND UPON the Class Representative having filed a draft amended Claim Form dated 24 April 2023 (**“the Draft Amended Claim Form”**)

AND UPON reading the amended application filed by the Proposed Class Representative (the **“PCR”**) on 30 May 2023 for pre-certification disclosure pursuant to Rules 53(2)(d) and (1), 53(3)(c) and/or 89(1)(a) of the Tribunal Rules, and/or an order for further information or clarification pursuant to Rules 19(2)(e) and/or 53(2)(d) of the Tribunal Rules (**“the Application”**) together with the accompanying revised schedule of disclosure requests (the **“Schedule”**)

AND UPON reading the Second Witness Statement of Sinead McLaughlin dated 7 June 2023 (**“McLaughlin 2”**), including the proposals for the searches and disclosure of documents at paragraph 17 thereof and the production of a written document at paragraphs 18-19 thereof

AND UPON written submissions of the parties ahead of a case management conference (**“CMC”**) on 28 June 2023

AND UPON hearing Anneli Howard KC, leading counsel for the PCR, and Daniel Piccinin KC, leading counsel for the Proposed Defendants/Respondents (“**Apple**”), at the CMC

AND HAVING REGARD TO the Tribunal’s judgment handed down on 25 May 2023 ([2023] CAT 35)

IT IS ORDERED THAT:

Disclosure

1. By 10am on 12 July 2023, Apple shall disclose into the Outer Confidentiality Ring:
 - (a) In accordance with the review process set out at paragraph 17.3 of *McLaughlin 2*, non-privileged documents comprising technical reports and/or key summaries (including where in the form of slide presentations) created by Apple in the ordinary course of business¹ and disclosed in the US civil proceedings, with case reference “*Re Apple Inc Device Performance Litigation No. 5:18-md-02827-EJD (N.D. Cal.)*” (“**US Production**”) relating to the initial and ongoing impact of the Performance Management Feature (“**PMF**”) (as implemented in iOS 10.2.1 and 11.2) on (i) the performance of the Central Processing Unit, Graphics Processing Unit, other components and other metrics of performance² of the relevant iPhones³ (“**Substantive Performance**”); and/or (ii) the experience of users of the relevant iPhones (“**User Experience**”).
 - (b) The specific document requested at A2 of the Schedule and a certified translation of this document.
 - (c) Pre-existing non-privileged documents created by Apple in the ordinary course of business⁴ and/or witness statements submitted by Apple to regulators in Italy (the IAA) and France (DGCCRF) responsive to A4 of the Schedule which relate to the initial and ongoing impact of the PMF on (i) Substantive Performance

¹ As distinct from documents created for the purpose of the various investigations/proceedings.

² Such metrics include but are not limited to app launch times, frame rate, scrolling speed, display brightness or flash.

³ The relevant iPhones are iPhones 6, 6 Plus, 6s, 6s Plus, SE, 7 and 7 Plus.

⁴ As distinct from documents created for the purpose of the various investigations/proceedings.

and/or (ii) User Experience, whether in their original language and/or (where available) in English.

- (d) Any technical reports and/or key summaries (including where in the form of slide presentations) that Mr Alex Crumlin knows or otherwise is aware of, which relate to the matters referred to in paragraphs 12, 16, 41, 47, 51 and 55 of his First Witness Statement, insofar as they relate to the initial and ongoing impact of the PMF (as implemented in iOS 10.2.1 and 11.2) on Substantive Performance and/or User Experience. For the avoidance of any doubt Mr Crumlin will not be required to conduct any searches to identify such documents.

2. Apple shall disclose, into the Outer Confidentiality Ring, the following documents pertaining to the CMA investigation *Apple iPhones: consumer protection case*:

- (a) By 10am on 12 July 2023, all pre-existing non-privileged documents or (where applicable) parts of documents created by Apple in the ordinary course of business⁵ submitted by Apple to the CMA in the CMA investigation which relate to the initial and ongoing impact of the PMF on (i) Substantive Performance and/or (ii) User Experience;
- (b) Pursuant to the procedure set out below, a copy of the consultation letter (or equivalent to a statement of objections) and/or accompanying annexes or exhibits produced by the CMA pursuant to s.214 of Part 8 Enterprise Act 2002 in the course of its investigation (the “**CMA Consultation**”):
 - (i) The PCR shall serve a sealed version of this Order promptly on the CMA as soon as it is made together with a version of the Application and an extract of Request A5 in the Schedule, in both cases incorporating redactions to protect confidential information. The PCR shall copy Apple on this and all of its correspondence with the CMA.

⁵ As distinct from documents created for the purpose of the various investigations/proceedings.

- (ii) The CMA shall have 14 days to respond to the Tribunal and (if so advised) make submissions and/or raise any objections to the disclosure of the intended CMA Consultation to the PCR. The CMA shall serve on the PCR and Apple any objections to disclosure at the same time as filing them with the Tribunal.
- (iii) If the CMA does not raise objections to disclosure in accordance with paragraph 2(b)(ii) of this Order, Apple shall provide the PCR with copies of the CMA Consultation within 3 days of the CMA confirming its position in writing to the parties.
- (iv) If the CMA does raise objections in accordance with paragraph 2(b)(ii) of this Order, the parties will submit any observations to the Tribunal, within 3 working days of the CMA confirming its position in writing to the PCR and Apple, for the Tribunal to determine on the papers.

Further Information

- 3. By 10am on 12 July 2023, Apple shall file and serve a written statement or statements (or other similar format to a response to a request for further information) from Mr Crumlin and/or another appropriate person within Apple with direct knowledge of the matters in question, verified by a statement of truth, which:
 - (a) addresses the impact of the PMF (as implemented in iOS 10.2.1 and 11.2) on (i) Substantive Performance and (ii) User Experience, where relevant, by reference to the documents disclosed pursuant to paragraph 1 above; and
 - (b) provides, as necessary, any further contextual information or explanation about any documents which have been disclosed pursuant to paragraphs 1(a)-(d) of this Order which are highly technical and/or include specialist engineering (or other) terminology and/or internal terminology specific to Apple.

Further directions

4. By 4pm on 3 August 2023, the PCR (if so advised) shall file and serve any application to amend the Draft Amended Claim Form in the light of the documents disclosed pursuant to this Order.
5. By 4pm on 18 August 2023, Apple shall file and serve any response to the application in paragraph 4 above, including, if so advised, any application made pursuant to rule 79(4) of the Tribunal Rules.
6. The adjourned hearing of the CPO Application and/or strike-out/summary judgment application shall take place on 11-13 September 2023 (“**the Relisted Certification Hearing**”).
7. The parties are to file and exchange skeleton arguments in respect of the Relisted Certification Hearing by 4pm on 6 September 2023.
8. The Parties shall file five hard copies and an electronic version of an agreed bundle (and an authorities bundle) for use at the Relisted Certification Hearing by 10am on 7 September 2023.

Miscellaneous

9. Costs relating to the Application be reserved to consequential matters following the Relisted Certification Hearing.
10. There shall be liberty to apply.

Justin Turner KC
Chair of the Competition Appeal Tribunal

Made: 4 July 2023
Drawn: 4 July 2023