



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AG2022/5615

s.225 - Application for termination of an enterprise agreement after its nominal expiry date

Application by Gusset
(AG2022/5615)

Apple Retail Enterprise Agreement 2014

9.00 AM, THURSDAY, 30 MARCH 2023

Continued from 24/02/2023

PN64

JUSTICE HATCHER: Good morning, everybody. I am going to call these matters on together. Ms Morgan-Cocks, you appear for Mr Gusset in the termination application, correct?

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MS G MORGAN-COCKS: I do, your Honour, thank you.

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JUSTICE HATCHER: Mr Bliss, you appear for the SDA in the section 240 matter?

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MR D BLISS: Yes, your Honour.

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JUSTICE HATCHER: Mr Robson, Ms Wells, you appear for the Australian Services Union in the bargaining orders now?

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MR M ROBSON: Yes, your Honour.

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JUSTICE HATCHER: Mr Shariff, you appear for Apple in all matters? Your microphone is off, Mr Shariff.

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MR Y SHARIFF: I still haven't learned. I appear for Apple, instructed by McCullough Robertson in the termination application brought by Mr Gusset.

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JUSTICE HATCHER: And, Mr Cullinan, you're appearing as a bargaining representative in respect of which matter?

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MR J CULLINAN: I'm appearing as an officer of the bargaining representative RAFFWU in the bargaining dispute matters, President.

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JUSTICE HATCHER: All right. We will start off with you, Ms Morgan-Cocks. I have received - - -

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MR SHARIFF: I'm sorry, your Honour, I should have indicated that Ms Robinson is instructed by Apple in the section 240 applications. So there's separate representation for Apple in those two separate proceedings.

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JUSTICE HATCHER: Ms Robinson, you appear for Apple in those two matters, do you?

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MS ROBINSON: That's correct, your Honour, with leave.

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JUSTICE HATCHER: All right, thank you. I will grant that leave. So, Ms Morgan-Cocks, we will start off with you. So as I understand it Mr Gusset has filed his material, and you've proposed a program for directions for the further progression of the matter and listing for hearing; is that correct?

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MS MORGAN-COCKS: That's right, your Honour, and we would be seeking a final hearing date around the beginning of May, 11 May.

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JUSTICE HATCHER: All right. Do you want to add anything else?

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MS MORGAN-COCKS: Yes, if you will indulge me. We would say that it's appropriate that the matter be set down for final hearing in circumstances where we understand that Apple will be seeking an adjournment again today. The application has been before the Commission for three months now. The applicant's materials are in. There's no apparent reason to us why there should be any further delay, particularly in circumstances where bargaining is going slowly.

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The bargaining disputes are now in. It exemplifies how bargaining is going, despite many resources dedicated to it. In any event we would say that the question is whether the matter is going to be dealt with quickly and efficiently rather than any concerns about bargaining. Mr Gusset deserves to have his application heard and any delay would be inappropriate in the circumstances.

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JUSTICE HATCHER: Thank you. What I might do is I might hear from the applicants in each matter and then I will hear from Apple and the other parties. Do you want to go next, Mr Robson?

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MR ROBSON: Yes, thank you, your Honour. The ASU hasn't formed a view about terminating the enterprise agreement. We have got no objection to the matter proceeding and we have no objections to RAFFWU's proposals about scheduling.

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JUSTICE HATCHER: Just excuse me for a second. So you've got no objection to the termination matter proceeding; is that right?

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MR ROBSON: That's quite right, but just to be clear we haven't formed a view about termination and we reserve our rights to make our own application or participate in proceedings if we need to.

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JUSTICE HATCHER: All right. And do you have any view about the progression of your bargaining orders application, vis-à-vis the SDA's section 240 application?

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MR ROBSON: Yes. We think that they can be advanced concurrently. I have been in discussions with Mr Bliss. I think what we're seeking is very similar. Certainly they're addressing the same issues that are arising in bargaining. We don't have any issues there.

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JUSTICE HATCHER: Would it be appropriate to list both those matters together for a conference before a member of the Commission?

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MR ROBSON: Yes, we would certainly say so, your Honour. I don't know if you want me to make any submissions to provide you some background on it or not, but certainly we would be open to a conciliation conference as a first step.

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JUSTICE HATCHER: All right. I don't need - I have read the application, so I think I understand what's motivating it. Mr Bliss, do you want to go next?

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MR BLISS: Yes, your Honour, thank you. The SDA submits that given the inefficiency and unproductivity of the bargaining to date we do not object to the scheduling of reply evidence and submissions for the termination application. If the Commission is minded to schedule further evidence and submissions we would seek a period of 14 days after Apple has filed its evidence and submissions before the SDA's reply to respond. In all other respects we would support the submissions of Mr Robson. We do believe that conciliation would be appropriate, and any assistance the Commission can provide the parties at this point in time would be appreciated.

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JUSTICE HATCHER: Just remind me, what's the SDA's position about the termination application?

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MR ROBSON: We haven't finalised a position at this point if we would be in favour or against. On the last occasion you would recall the SDA's position was that we thought the application was premature. We do believe that it's appropriate for bargaining to have precedence, but given the unproductivity to date we have no objection to the matter now proceeding to the filing of evidence and reply.

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JUSTICE HATCHER: Thank you. Mr Shariff?

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MR SHARIFF: Yes, thank you, your Honour. Obviously Apple is now in a position where it's met with a multiplicity of proceedings. I will let Ms Robinson speak to the response to the bargaining applications. Ms Robinson has been acting as Apple's representative in the bargaining.

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In relation to the termination application, your Honour, we were served with, I think it was seven statements last week. We were informed that there was a further statement to be filed and served shortly. I haven't seen that and I don't know whether that has occurred or not. I'm not saying it hasn't, I just haven't been updated about whether that has now occurred.

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Obviously, your Honour, Apple's position is that the bargaining should take precedence. If there's a replacement agreement then the termination application is otiose. Apple hasn't as yet, especially given the wealth of material that's now been filed, formed a view on the termination application.

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What Apple seeks is a period of time that's greater than the period of time that's been put forward by Ms Morgan-Cocks to inform the Commission and the other parties about its position on termination, and if its position is to oppose then it needs further time to put on evidence, but the time that we have sought is until 25 May to put on our evidence. We can inform the position to the other parties some time before then.

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But I should tell your Honour that the material that has now been filed goes beyond that which had initially been filed in support of the application by Mr Gusset. I have seen it. It requires fairly detailed analysis in response. It's going to take us some time, and the difficulty that Apple has is that the relevant officers and employees that would be engaged in putting on responsive material are caught up in bargaining at the moment, and I will let Ms Robinson speak about that, but there are impending bargaining meetings.

PN101

And as she will likely convey to you I don't think there's going to be an opposition to participation in conciliation, and in fact a likely encouragement of it. But perhaps I will let Ms Robinson update your Honour on where Apple is at in terms of bargaining before we get to scheduling of the termination application.

PN102

JUSTICE HATCHER: Just to be clear I think Ms Morgan-Cocks was anticipating that you would be seeking a further adjournment of Mr Gusset's application, but I am not hearing that, am I?

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MR SHARIFF: I think formally we would oppose it because it just seems to us that focus should be placed on the replacement agreement. I can understand what's being put, that the Commission has got a duty to get on with an application that's been properly brought, and if the matter is to be progressed by way of

timetabling then what we're saying is that we're going to need more time, and I have indicated that we need to 25 May to put on our evidence and reply and that gives everyone sufficient time to progress bargaining in the meantime. We're not going to stand in the way of an orderly timetabling of it, but we do want more time.

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JUSTICE HATCHER: Yes, all right. Thank you. All right, Ms Robinson?

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MS ROBINSON: Thanks, your Honour. Look, I am conscious of time and I note that Mr Robson and Mr Bliss haven't gone into detail in terms of the content of the application. The things we wanted to bring to your attention, your Honour, is the fact that we are dealing with an unprecedented set of circumstances with bargaining. Apple disputes quite a lot of the content of the SDA and the ASU's application, but there's 115 bargaining reps, over 400 claims. But Apple agrees that bargaining isn't progressing in an orderly and normal fashion. It is doing the best that it can in the circumstances.

PN106

So Apple is absolutely open and would embrace the assistance of the Commission in terms of setting out a way forward that suits the parties. So we are amenable to the matter being listed for conference before a member of the Commission so that the matters can be unpacked, but we have looked to the unions to chair the meetings and have other opportunities to have input into the way that the meetings have been conducted. But we accept that it isn't a straightforward ordinary bargaining process that we're dealing with due to the factors that are beyond Apple's control.

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JUSTICE HATCHER: Yes, all right. What's your assessment of the progress of bargaining to date, that is - - -

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MS ROBINSON: Your Honour - - -

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JUSTICE HATCHER: I don't get any impression that an agreement is imminent. Is that fair?

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MS ROBINSON: I think that's a fair assessment, your Honour. We sent through to your chambers and the parties a quick snapshot of the change in bargaining positions just as a reference point, because Apple does dispute that it's not bargaining. There's been many concessions that have been made and improvements to the offering are contentious, both the status quo as well as the enterprise agreement that was voted down last year. But the very nature of the meetings we are dealing with are very active, vocal, employees (indistinct) we want to hear what Apple has to say and also want us to hear what they have to say about the various matters. It is a much more time consuming process navigating that.

PN111

Last year also there was some criticism of Apple that it didn't have subject matter experts explaining certain aspects, so we have adopted an approach where those people have been flown into the US to talk to staff, but it has been going more slowly than we would have liked as well.

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JUSTICE HATCHER: So, Ms Robinson, just so I understand the document that you've sent in. So national enterprise agreement 1 is that the document that went for a vote last year, is it?

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MS ROBINSON: That's correct, your Honour.

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JUSTICE HATCHER: And what's the national enterprise agreement 2, that's Apple's current position, is it?

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MS ROBINSON: That's correct. So national enterprise agreement 2 is the state of play in terms of the proposals that have been put to the employees and the union. The light green demonstrates those that are locked in, and the dark green demonstrates the positions that are still subject to bargaining. So as you can see 1 versus 2. That column there demonstrates whether it's equal to or better than the position that was put to a vote last year, and then everything that is green is an improvement on the status quo. So there's both retail which the SDA and (indistinct) represent, and then on the second page there's AppleCare which are the employees that the ASU have coverage of.

PN116

We just wanted to represent that because there has been 400 claims of a consolidated (indistinct) that responds to all of the ASU and SDA claims to the extent that they're not subject to ongoing bargaining, but it is an unwieldy process by its very nature of the number of claims. But we do dispute that those claims haven't been responded to either last year or this year.

PN117

JUSTICE HATCHER: All right. I might just go back to you, Mr Robson, and Mr Bliss. I am now alarmed about the practicalities of a conciliation conference if there's 115 bargaining representatives, that is there may be difficulty working out who we're trying to get an outcome with. Do you have any suggestions in that respect?

PN118

MR ROBSON: Look, your Honour, it's not something that we have been able to find an easier solution to. We certainly don't want to be the organisation that says anyone who wants to participate in bargaining can't do so. Our thought is that this could be one of the things that could be discussed with the Commissioner present. I think we're really seeking your assistance because it is a problem in bargaining that there are many voices at the table. We don't want to diminish

those voices, but we do need some assistance making the hearing of those voices more orderly. That's our view.

PN119

JUSTICE HATCHER: Mr Bliss, do you want to add anything to that?

PN120

MR BLISS: Your Honour, we would share Mr Robson's view regarding the orderly process. I think it's illustrative to talk about how we have spent the last three days of bargaining talking about hours and scheduling, and yet some of the matters which Ms Robinson characterises as locked in haven't even been discussed. From the SDA's perspective we would share the view that we don't wish to eliminate or to prevent people from participating, but getting through all of the content and giving an opportunity for us to actually talk about claims has not been successful.

PN121

I think a good example is that there were 16 items of discussion which the parties were meant to get through over the course of three days, and we got through two, and we are yet to be heard on many of those matters. Some of Apple's offers appear to be quite attractive, but until we can get a normal bargaining sense, tease out the detail and discuss them, there is no way we can possibly agree to many of the things which have been characterised as locked in.

PN122

JUSTICE HATCHER: So presumably if there's a conciliation conference the Commission will need to be notified of the details of all bargaining representatives so that they can be given an opportunity to participate. Does anyone disagree with that? Ms Robinson, are you in a position to provide that list to the Commission?

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MS ROBINSON: We can, yes, your Honour.

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JUSTICE HATCHER: Yes, all right. Mr Cullinan, do you want to say anything about the bargaining matters?

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MR CULLINAN: Yes, thank you, your Honour. To provide some context RAFFWU was an active participant in all the bargaining and bargaining processes since 19 August. We're a large bargaining rep that represents well over 100 members who are engaged in protected industrial action. We're a participant on the new drafting committee. I would take a slightly divergent approach and maybe speak quite directly that a Commissioner convening some kind of conference where everyone is involved is likely to have well over 100 people on the call.

PN126

I think that there is some benefit in the three unions and apple meeting with a Commissioner to discuss how those others should be involved. The practical

situation is the Commissioner has certain powers to assist bargaining occurring in an efficient way, and at least a first discussion about how bargaining might occur at future conferences might be of assistance, because I am concerned that that first conference will be derailed by 100 people wanting to have their view heard by a Commissioner, which is the problem we're facing in bargaining. So I just pose that there might be utility in the three unions and Apple having a conversation with a Commissioner first and then implement a process to involve others.

PN127

JUSTICE HATCHER: All right. So I think that covers the bargaining matters. Ms Morgan-Cocks, do you want to respond in respect to - I'm sorry, Mr Shariff?

PN128

MR SHARIFF: I'm sorry, your Honour. Could I just make some observations in light of what's been said about the bargaining issues, and just to try to identify the administrative complexity of this. My client's employees and officers are engaged in the various bargaining issues that are emerging with an inordinate number of bargaining representatives. I think everyone is agreeing to embracing in a process of facilitative conciliation in the most efficient way.

PN129

Having looked at the material that's been filed in support of Mr Gusset's application I cannot say at this stage that if it's all to be opposed that the matter would be heard and completed within a day, which is I think what Ms Morgan-Cocks is seeking from your Honour. My instructions are at the moment that if every matter was to be opposed and every aspect of Mr Gusset's application be addressed we would have at least 10 witnesses in our side, and that is to deal with matters of practice, but also matters of mathematics. Those officers who are to be involved in at least some of them in giving that evidence will be engaged in the bargaining issues.

PN130

The practicality of this is that whilst the concurrent timetabling orders are occurring if the matter is heard some time later this year if bargaining has reached a conclusion then all of that time and effort would be redundant. If the application succeeds or it's not opposed by all the various parties then the dynamic of bargaining changes. These are all matters that need to be carefully considered. As I say we don't oppose in a sense the matter being timetabled, but we do need until 25 May so that we can properly consider the materials and put on the evidence in reply, and at this stage if it's to be opposed as I say I am informed that given the various matters raised in Mr Gusset's material that there will be at least 10 witnesses in our camp.

PN131

JUSTICE HATCHER: I hear you, Mr Shariff, but the fact is that the application has been filed for some months and your client hasn't even yet formed a position about whether it opposes the application, which makes it a bit difficult to give those matters due weight.

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MR SHARIFF: But, your Honour, can I just indicate this; the application was filed in circumstances where Mr Gusset wasn't an affected individual. He came along and said, 'I'm raising these issues, but they don't affect me.' So when - - -

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MS MORGAN-COCKS: Your Honour, sorry, I might - - -

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JUSTICE HATCHER: Don't interrupt, Ms Morgan-Cocks.

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MS MORGAN-COCKS: It's simply not the case - - -

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JUSTICE HATCHER: Ms Morgan-Cocks, can you be quiet, please. Sorry, Mr Shariff.

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MR SHARIFF: The very fact that Ms Morgan-Cocks wants to put rival views indicates that we have very opposed views and how this matter has been brought about. So the detail of these particular matters, you will recall - I forget the gentleman's name who put on additional material, Mr Murtagh I think, to indicate problems with Mr Gusset's calculations. And as I understand it, and we don't know the identity of the person, there was one affected employee within Apple's enterprise who indicates an opposition to the termination application.

PN138

With respect to everything that position that Mr Gusset had put forward has now found some detail in seven statements with one to come as I understand it. So whilst I accept the application was filed in December the first time we have seen the meat on the bone to the content of the application by way of evidence, such as it is, has been last week. We need time. We're not opposing the matter being timetabled, but bear in mind whatever colour is put on the identity of Apple and all the like it's still an organisation that people, and those people are committed to a bargaining process, irrespective of the rival views that have been expressed this morning about the state of play there's a human element, there's only so much people can do. That's all I will say.

PN139

JUSTICE HATCHER: Ms Morgan-Cocks?

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MS MORGAN-COCKS: May it please. I suppose firstly we would say that we are all unequivocally dedicated to bargaining. We all want to see a suitable agreement go through, but the simple fact is that it has been taking precedence the last few months. We have been putting quite a bit of effort into bargaining, and it's simply not the case that it's proceeding as smoothly as we would want, and as we say it needs to be proceeded.

PN141

It's not the case that Mr Gusset has said that he is not affected by the enterprise agreement. In fact he had been quite clear that the terms of the enterprise agreement have a serious adverse effect on his daily life, and particularly regarding the rostering system, the lack of consecutive days off, the lack of restrictions on the amount of days he can work. That had been his position from the start, and we say that those matters are just as important as pay.

PN142

Regarding what we understand is the 25 May filing date that Apple would be seeking it's nine weeks. It is not clear on what basis that they would need nine weeks. Now, we understand that they need some time to go through the materials. Nine weeks is a very long time. The Commission rightly is interested in having the matter resolved quickly. It's not clear on what basis nine weeks is sought apart from the fact that that is the period of time that the applicant had from the first directions hearing in January. We would say that three weeks is appropriate to at least provide a view. Apple has had some time now to provide a view.

PN143

To that end we do not suggest that it only will need one day. We are not in a position to say how long the hearing will be because we simply don't know the volume of evidence that's going to be coming out, because we don't know if for example Apple will be opposing the application, and as you said will put on 10 evidence statements or will not. In those circumstances we are trying to keep the matter open and be flexible, because it's in the applicant's interest to have the matter set down.

PN144

JUSTICE HATCHER: Does that suggest that the Commission should defer listing the hearing dates until the material has been filed, because at one extreme Apple may oppose it and have the 10 witnesses or whatever referred to by Mr Shariff. At the other alternative it may turn out that nobody files any material in opposition to the application, in which case it might be a very quick and short hearing.

PN145

MS MORGAN-COCKS: Your Honour, I think that it would not be appropriate to do that. What I would suggest is to set the matter down for perhaps one or two days. At this stage lock a date in, because people are busy, the Commission is very busy, if we set those two days down. If it is the case that Apple wants to oppose and put on a large volume of evidence, or many employees want to get involved, I think it would be appropriate to seek a further few days for however long we need down the track once the position is clear. But what is most important is that we get a final date down.

PN146

JUSTICE HATCHER: All right. Thank you, everybody. I will consider what's been put and you can anticipate some directions and perhaps listings can be issued before the end of the week. We will now adjourn.

PN147

MS MORGAN-COCKS: Your Honour, if I may - apologies - - -

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MR SHARIFF: I'm sorry, your Honour. I will let Ms Morgan-Cocks speak and then I have got an issue to raise.

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JUSTICE HATCHER: All right.

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MS MORGAN-COCKS: Thank you, your Honour. I should flag with the parties and the Commission that I have a serious period of unavailability after 12 May up until the middle of June, and then we have some witness availability issues up until the beginning of July. So we would ask that any directions be made with those dates in mind, subject to also the availability of the other parties.

PN151

JUSTICE HATCHER: I am a bit confused. When can't you attend? Perhaps I won't ask you. Can you send my chambers a note of the dates that you have unavailability and I will try to take that into account.

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MS MORGAN-COCKS: Thank you, your Honour, I will.

PN153

JUSTICE HATCHER: Sorry, Mr Shariff.

PN154

MR SHARIFF: Yes, your Honour. It's going to be like herding cats to get dates available to everyone, but can I just indicate this, that I hadn't been clear about this earlier. When we said we needed until 25 May to put on our evidence and reply I should have been clearer. Apple has started considering the material that has now been filed by Mr Gusset. I am hopeful that Apple will be in a position on advice to indicate whether it opposes or consents to the termination application, and I am just getting clarification on that, but I think that can be done within four weeks.

PN155

My suggestion would be that whatever timetable is made that the matter be brought back for a report back. It can be done through the facilitated conciliation process, but that the listing of the hearing should be deferred until that is known. No opposition to a timetable being made taking into account what we seek by way of time for reply evidence. I have now had it confirmed that Apple can indicate its position, whether it opposes or consents to a termination application, in the next three to four weeks.

PN156

JUSTICE HATCHER: All right. I think the appropriate course would be that if Apple - and if we set a program - if Apple then decides that it's not going to oppose the application then I will bring the matter back on to appropriately modify the directions. Yes, all right.

PN157

MR SHARIFF: May it please your Honour.

PN158

JUSTICE HATCHER: We will now adjourn.

ADJOURNED TO A DATE TO BE FIXED

[9.45 AM]