



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1403/7/7/21

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LTD

Defendants

- and -

THE COMPETITION AND MARKETS AUTHORITY

Intervener

REASONED ORDER

UPON reading the Application by the Class Representative for disclosure of documents dated 16 December 2022 and the Defendants' response dated 19 December 2022

IT IS ORDERED THAT:

1. The Defendants should provide disclosure to the Class Representative by 4 pm on 20 January 2023 of those documents in the CMA Investigation Documents (as defined in the Defendants' response of 19 December) which are relevant to any of the issues set out in paragraph 9 of the CMA's Replacement Written Submissions for the CMC on 12 and 13 September 2022.

REASONS

1. The Class Representative has applied for an order that the Defendants disclose, by 23 December 2022, the CMA Investigation Documents, which are documents that the Defendants have provided to the Competition and Markets Authority (the “CMA”) in relation to an investigation by the CMA into suspected breaches of competition law by the Defendants, to the extent they are relevant to these proceedings.
2. The Defendants resist the application on the basis that the Class Representative has not engaged with the Defendants in relation to the Defendants’ Disclosure Report, served on 18 November 2022, which is said to be a necessary precondition to the Defendants identifying the relevant material in the CMA Investigation Documents.
3. At the CMC on 12 and 13 September 2022, the Tribunal urged the parties to agree a basis on which the CMA Investigation Documents could be provided to the Class Representative by way of early disclosure. Under rule 4(7) of The Competition Appeal Tribunal Rules, the parties are required to cooperate with the Tribunal to ensure the just and proportionate disposition of this case in accordance with rule 4(1).
4. The Tribunal’s practice is to confine disclosure to relevant documents, with relevance to be determined by the issues in the case, derived in general by reference to the pleadings - see *Ryder Limited and another v Man SE and others* [2020] CAT 3 at 35. The need for a review of relevance was identified by the Defendants’ counsel at the September CMC (see transcript, 13 September 2022 at page 15, line 23 to page 16, line 18). The Class Representative should not have been surprised that the Disclosure Report repeated that position and that further engagement between the parties was required in order to agree an approach.
5. However, the position taken by the Defendants in seeking agreement of document categories as a precondition for a review of relevance of the CMA Investigation Documents seems unhelpful. It is obvious that the documents

should, at least in the first instance, be assessed for relevance by reference to the apparent overlap between the matters which the CMA is investigating and the issues in these proceedings. This overlap is conveniently defined in written submissions which the CMA provided to the Tribunal at the September CMC, in the following terms:

“9. In broad terms, the CMA considers that the following issues in these proceedings are similar to those arising in the CMA’s Mobile Ecosystems market study and/or its ongoing investigation into Apple’s conduct in relation to the matters noted above:

- a. how to define the market(s) for the distribution of apps for mobile devices and processing of payments for purchases of digital content within apps: see the ReAmended Claim Form (RACF) §§76-84; and the Defence (Def) §§55-86;*
- b. whether Apple holds a dominant position in the relevant market(s): RACF §§85-86 and §104; and Def §§87-95 and §121;*
- c. whether Apple is unfairly restricting competition from alternative app stores and other distribution channels for apps to iOS consumers: RACF §§87-92, §96 and §§112-113; and Def §§96-101, §§108-113 and §§128-129;*
- d. whether Apple is unlawfully tying the App Store Payment Processing System to the App Store: RACF §§97-113; and Def §§114-129;*
- e. whether Apple is unlawfully reserving to itself the sole payment processing mechanism for purchasers of in-app content by consumers who have obtained their apps from the Apple App Store: RACF §§87-90, §§93-96 and §§112-113; and Def §§96-99, §§102-107, §§108-113 and §§128-129; and*
- f. whether Apple is directly or indirectly imposing unfair purchase or selling prices: RACF §§114-130; and Def §§130-145.”*

6. While the letter from the Class Representative’s solicitors of 20 October 2022 referred to the CMA written submissions and the overlap, that point seems to have become lost in correspondence following service of the Disclosure Report. As a result, the Tribunal has been faced with an application made on 16 December 2022 seeking an order for compliance by 23 December 2022, when,

consistent with the guidance in *Ryder*, there is an obvious basis on which the parties ought sensibly to have agreed to move matters forward well before that time.

7. It would have been open to the Class Representative to refer directly to specific paragraphs in the Re-Amended Claim Form in order to establish the principles for the review for relevance, or to the CMA's written submissions (which conveniently identify both the overlap and the Class Representative's pleaded case). This order prefers the latter approach.
8. However, once the Defendants have provided the documents referred to in this order and they have been inspected by the Class Representative, it remains open to the Class Representative to revisit the approach for determining relevance if inspection of the documents suggests that the CMA's formulation is not sufficiently wide.

Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 23 December 2022
Drawn: 04 January 2023