Neutral citation [2023] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 March 2023

Before:

BEN TIDSWELL
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

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

Defendants

- and –

THE COMPEITITION AND MARKETS AUTHORITY

Intervener

Heard at Salisbury Square House on 20 and 21 March 2023

RULING (DISCLOSURE)

APPREARANCES

Ms Ronit Kreisberger KC, Ms Anotnia Fitzpatrick and Mr Matthew Kennedy (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Ms Marie Demetriou KC and Mr Hugo Leith (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Defendants.

Mr Nicholas Gibson (instructed by the Competition and Markets Authority) appeared on behalf of the Intervener.

1. This Ruling concerns a dispute between the parties about the appropriate way to manage the disclosure of documents by the Defendants, referred to in this Ruling as "Apple", to the Class Representative.

(1) The Proceedings

2. These are collective proceedings, in which the Class Representative alleges that Apple has contravened the Chapter II prohibition contained in section 18 of the Competition Act 1998, and Article 102 of the Treaty on the Functioning of the European Union, by engaging in exclusionary and exploitative abuses of dominant positions in the market for the distribution of individual software applications and the associated payment processing market.

(2) The Documents

3. The documents in question are the output of disclosure exercises which Apple has carried out previously, in proceedings in the United States and Australia. I will refer to these documents, in aggregate, as the Repositories, as that is how they have been described by Apple.

4. The proceedings in the US comprise a claim against Apple by Epic Games, Inc. and two class actions against Apple. The Australian proceedings also involve a claim by Epic Games against Apple. As described in a witness statement from Mr Watson, a partner at Apple's solicitors Gibson, Dunn & Crutcher UK LLP, Apple received 226 requests for production of documents from the plaintiffs in the US proceedings. In response to those requests, something in the order of 11 million documents in the claim by Epic Games and 12 million documents in the class actions were collected from 24 custodians and were reviewed for relevance to the issues in the US proceedings. The review involved a combination of technology assisted review methods and manual (that is, conducted by a human) review. After the review, the population of relevant documents was reduced to some 6 million documents.

5. These 6 million documents were then disclosed in the US proceedings and, subsequently, in the Australian proceedings. In addition, Apple conducted

further searches of documents for the purposes of the Australian proceedings, which led to further disclosure of approximately 7,600 documents, of which about 2,000 documents relate only to Apple's operations in Australia. Apple has already agreed to produce the remaining 5,700 documents to the Class Representative without reviewing them further.

(3) The Agreed Process

6. In its Disclosure Report, prepared pursuant to Rule 60 of the Competition Appeal Tribunal Rules, Apple has proposed that its obligations to make disclosure in these proceedings should be discharged substantially by the production of documents from the Repositories. The Class Representative agrees with that approach, at least as a starting point.

7. The parties are also agreed that the appropriate process for production of documents from the Repositories is as follows:

   (a) The Class Representative will formulate a list of issues in the case (which is prepared for this purpose, so is not intended to be a definitive list of issues for other purposes in the proceedings). Apple will be able to comment on this list.

   (b) Once the list of issues is agreed, each party will formulate proposals for search terms to be applied to the Repositories (or relevant parts of them) in order to identify documents relating to the issues. These searches are described as "search strings", reflecting the likelihood that a number of permutations of key words may be linked in a single search.

   (c) Apple will report on the outcome of applying the search strings to the Repositories (that is, the number and nature of documents that are responsive to each agreed search).

   (d) The parties will then meet to finalise the appropriate search strings to determine the production of documents to the Class Representative, and

will apply those search strings to the Repositories, resulting in a universe of "Responsive Documents" for production to the Class Representative.

(4) The Dispute

8. The dispute between the parties is whether Apple should be required to conduct a relevance review of the documents in 7(d) above (that is, the Responsive Documents) prior to the production of those documents to the Class Representative. The Class Representative says that this is not only established practice, but also necessary, as she will otherwise need to review large volumes of irrelevant documents in order to process the Responsive Documents produced to her. That would be oppressive and inefficient, given the relatively greater knowledge which Apple has of: the documents; the US and Australian proceedings; and the nature of the Repositories themselves. Ms Kreisberger KC, for the Class Representative, put it as being a choice between whether the Class Representative, with limited knowledge and resources, or Apple, with much greater knowledge and resources, should undertake the necessary review of the Responsive Documents.

9. Ms Kreisberger also pointed to another set of documents, which Apple has previously supplied to the European Commission as a result of the application of a search string formulated by the Commission. Apple has proposed to review these documents for relevance before producing them to the Class Representative. That review exercise has already been undertaken for a subset of the document population, which has demonstrated that around 80% of the documents are irrelevant to the issues in these proceedings.[1] The Class Representative says this outcome illustrates the extent of the problem with which she might be faced in relation to the Responsive Documents.

10. For Apple, Ms Demetriou KC argues that no review for relevance is required. The documents in the Repositories have already been the subject of a detailed review for relevance in relation to the issues in the US and Australian

[1] This subset comprises documents relating to one of the Commission's search strings which was subsequently provided to the Competition and Markets Authority in the UK.

proceedings, which are sufficiently similar to these proceedings to be confident that there will not be large numbers of irrelevant documents. That is an important distinction between the Repositories and the documents provided to the Commission. The process of conducting searches based on the agreed search strings provides comfort that the Responsive Documents will largely be relevant. For Apple to be required to review the Responsive Documents creates an unnecessary layer of cost and some duplication, given that the Class Representative's team will need to review all the documents that are produced in any event.

(5) Assessment of the Relevance Problem

11. The problem identified by the Class Representative only arises to the extent of divergence between these proceedings and the US proceedings in the approach for determining relevance. That might arise to some extent as a result of the test for relevance being different (for example, requiring a broader or narrower search). It is more likely to arise, and to be a problem, if the proceedings are dealing with different issues. Put another way, the greater the overlap of similar issues between the US proceedings and these proceedings, the less likelihood there is that the Repositories contain material which is irrelevant to these proceedings.

12. Apple has asserted in paragraph 11 of its Disclosure Report that the "requests for production from the U.S. Proceedings … show the extensive overlap between the disclosure requests in the U.S. Proceedings and the issues in these proceedings". However, little time was spent in argument about the similarities and differences of the US proceedings and these proceedings.

13. It is apparent that the US proceedings do concern subject matter which is similar to the issues in these proceedings. Indeed, the Class Representative relies on all of the US proceedings (and the Australian proceedings) in paragraphs 135 to 137 of her Re-Amended Claim, asserting that Apple's conduct already forms the subject matter of a number of high-profile regulatory investigations and private claims in a variety of jurisdictions around the globe. Indeed, in referring

to the level of cover required for potential adverse costs awards, the Class Representative says, at paragraph 154(d) of the Re-Amended Claim Form:

> "This level of cover is adequate and appropriate given that Apple will already have substantial knowledge of the factual and legal issues that will arise for determination in the present proceedings, which overlap substantially with the issues arising in respect of the proceedings which are the subject of the ongoing investigations and legal proceedings in the UK, Europe and around the world (see paras 134-137 above)"

14. A relatively cursory review of pleadings and judgments in the US proceedings relied on by the Class Representative[2] has satisfied me that the risk of there being a significant amount of irrelevant material in the Repositories, as a result of a lack of overlap between the US proceedings and these proceedings, ought not to be very high.

15. This conclusion is not affected by the approach taken by Apple to the Commission documents and the outcome of the partial review of those documents for relevance. The Commission documents are the result of a different process altogether, being a search designed and imposed by the Commission on Apple. The documents responding to the Commission's request were not reviewed for relevance by Apple before they were handed over to the Commission. The experience of reviewing these documents now provides little insight into the likely relevance of documents in the Repositories.

16. I have therefore concluded that the risk identified by the Class Representative, of being overwhelmed by irrelevant documents which are produced as a result of agreed search terms, is unlikely to arise. If I am wrong about that, and it turns out that there are large tracts of irrelevant material in the documents once they are produced, then the position can be revisited.

[2] See the US Supreme Court decision in Apple Inc. v Pepper et al. No. 17-204, 587 U.S. (2019); the Complaint in Cameron and Pure Sweat Basketball Inc v Apple Inc., Case 5:19-cv-03074, filed 4 June 2019; and the Rule 52 Order made by Judge Yvonne Gonzalez Rogers on 10 September 2021 in Epic Games, Inc. v Apple Inc., Case 4:20-cv-05640, filed on 13 August 2020.

(6) Manual Review versus Technology

17. It was not entirely clear whether the Class Representative was suggesting that any review of a large document population which her team had to conduct would be done by way of manual review, or by using technology. A witness statement from Ms Hannah of Hausfeld & Co. LLP, the Class Representative's solicitors, seemed to suggest that it might be necessary to conduct a manual review of several million documents. I will therefore make some observations about the appropriateness of such an approach.

18. I am sceptical that it would be necessary or proportionate for there to be a manual review of such a magnitude of documents from the Repositories, either prior to or after production of the Responsive Documents. Where the parties are faced with very large document populations, the starting point should be how the thoughtful use of technology can reduce the numbers to a sensible size before a manual review takes place. Ms Kreisberger referred to the use of search strings as crude, and that may indeed be the case for the example which was before the Tribunal in relation to the Commission documents. However, I do not accept that the technology available to the parties for managing large document populations is at all crude – on the contrary, it is increasingly sophisticated, so much so that it is sometimes said to be more accurate than manual review by a human.

19. It is also not the case that a manual review is the only course open to the Class Representative in the event of an agreed search term producing a large document population. As a first step, it may be sensible for the parties to review the search terms to narrow the request. Once the documents are produced to the Class Representative, it will also be open to her to manipulate the document population using technology, including the straightforward application of further targeted searches, such as searching by reference to date ranges, individual authors or recipients or other key words, all of which ought to serve to isolate smaller pools of documents relevant to particular issues.

20. That is why it is essential for the documents to be produced by Apple in a format that is fully searchable by the Class Representative. I would also expect Apple

to provide prompt assistance to the Class Representative in relation to any reasonable requests for technical assistance in managing electronically disclosed documents.

21. More generally in relation to this exercise, I have emphasised already to the parties that constructive and proactive co-operation is necessary if there is to be an efficient and proportionate approach to accessing these documents. There is an inherent imbalance between the parties in this case because Apple is providing all of the disclosure and the Class Representative knows little about the documents themselves or how they are stored.

22. However, in any case, one party will know more about their own documents than the other. If a party is not co-operative, and instead treats processes such as agreeing search terms as an exercise in litigation tactics, then problems will arise. In all such cases, the Tribunal expects the parties to comply with the spirit of Rule 4 (and especially Rule 4(7)):

> "4.—(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
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> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) saving expense;
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> (c) dealing with the case in ways which are proportionate—
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> (i) to the amount of money involved;
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> (ii) to the importance of the case;
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> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
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> (d) ensuring that it is dealt with expeditiously and fairly;
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> (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal.
>
> …

(4) The Tribunal shall actively manage cases.

…

(6) The Tribunal may—

…

(c) use technology actively to manage cases.

(7) The parties (together with their representatives and any experts) are required to co-operate with the Tribunal to give effect to the principles in this rule."

23. If a party refuses to comply with this requirement then the Tribunal will be forced to find other ways to approach disclosure, which are likely to be less efficient and proportionate. For example, should Apple not engage co-operatively and constructively with the process agreed by the parties, then it may be necessary to require it to provide considerably more granularity about the documents in the Repositories (in effect, to list them), or to take other steps which are likely to lead to materially increased costs and time spent. I would hope that could be avoided and I was encouraged by Ms Demetriou's assurances about Apple's intentions, but it is the likely direction of travel if those assurances are not matched by Apple's actions.

24. Similarly, the Class Representative needs to be proactive, co-operative and constructive. It may be the case that the information her team has about the Repositories falls short of what is ideal for the purposes of constructing search terms, but there is information about custodians, and the requests that caused the original production in the US proceedings, which I would expect to be of use in that exercise.

25. The agreed process makes provision for the parties to return to the Tribunal in the event that the process does not deliver the required outcomes and the process can be revisited if need be (whether that results from a failure by a party to comply with its obligations, or other circumstances which become apparent as the process proceeds).

(7) Decision

26. I have declined the Class Representative's invitation to require Apple to conduct a relevance review of the Responsive Documents in the Repositories prior to their production. The documents in the Repositories have been subject to a relevance review which ought, given the apparent similarities between the US proceedings and these proceedings, to be sufficient for present purposes. The parties are to proceed to co-operate with each other to progress the agreed process and should notify the Tribunal if difficulties are encountered.

Ben Tidswell
Chair

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

Date: 29 March 2023